

Humanitarian aid and the International Criminal Court Grounds for divorce

Fabrice Weissman

2009

Le *Centre de réflexion sur l'action et les savoirs humanitaires* (CRASH) a été créé par Médecins sans frontières en 1999. Sa vocation : stimuler la réflexion critique sur les pratiques de l'association afin d'en améliorer l'action.

Le Crash réalise des études et analyses portant sur l'action de MSF dans son environnement immédiat. Elaborées à partir des cadres et de l'expérience de l'association, ces textes ne représentent pas la « ligne du parti » MSF, pas plus qu'ils ne cherchent à défendre une conception du « vrai humanitaire ». Leur ambition est au contraire de contribuer au débat sur les enjeux, contraintes, limites – et par conséquent dilemmes – de l'action humanitaire. Les critiques, remarques et suggestions sont plus que bienvenues, elles sont attendues.

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The Crash carries out in-depth studies and analyses of MSF's activities. This work is based on the framework and experience of the association. In no way, however, do these texts lay down the 'MSF party line', nor do they seek to defend the idea of 'true humanitarianism'. On the contrary, the objective is to contribute to debate on the challenges, constraints and limits –as well as the subsequent dilemmas- of humanitarian action. Any criticisms, remarks or suggestions are most welcome.

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Introduction

Officially, the thirteen NGOs expelled from Sudan after an international arrest warrant was issued against Sudanese president Omar al-Bashir were being punished for their “*violations to the laws of the humanitarian work*” in cooperating with the “*so-called International Criminal Court.*”¹ By all appearance, this explanation reflects only some of the regime’s motivations. Yet, the accusation of collaboration between the ICC and the humanitarian NGOs puts the latter in an awkward position. To be convinced of this, one need look no further than their convoluted denials about their supposed or real ties to the Court.²

Indeed, many humanitarian organizations lobbied in the 1990s for an International Criminal Court, then considered “*a necessary response to the trivialization of mass crimes.*”³ To this day, most NGOs believe that the ICC “*can play a vital role in the effective protection of civilians, the consolidation of long-term peace, and the prevention of future atrocities and renewed conflict.*”⁴

During the last few years, humanitarian NGOs have certainly come to recognize that active participation in criminal investigations was likely to hinder their aid mission. It is difficult to get through a military checkpoint in a war zone while you’re denouncing the people who control it to the International Criminal Court. But except for the International Committee of the Red Cross⁵ and, more recently, Médecins Sans Frontières (MSF)⁶, few organizations have drawn the logical conclusion that only a clear, transparent policy of non-cooperation with the ICC is compatible with the goal of helping, with total impartiality, the victims of war. The vast majority of NGOs have rejected such a commitment, preferring to choose on a case-by-case basis between humanitarian action and collaborating with the ICC to fight impunity.

¹ “Sudan says decision to expel aid groups is irrevocable,” Sudan Tribune, 8 March 2009

² See, for example, “NGO expelled from Darfur considered ICC cooperation,” Reuters, 16 March 2009.

³ Coppens, T. and Saulnier, F. (1998) MSF souhaite que la Cour criminelle internationale accorde aux victimes et aux témoins les garanties d’une justice indépendante et effective. MSF, Paris, Bruxelles (memo issued by MSF in June 1998 to the Rome Treaty negotiators instituting the ICC).

⁴ Oxfam International Policy Compendium (2007) Note on the International Criminal Court. http://www.oxfam.ca/what-we-do/emergencies/oxfam-international-humanitarian-policy-notes/oi_hum_policy_icc.pdf, consulted on 9 April 2009.

⁵ See La Rosa, A.M., (2009) ICRC and ICC: Two separate but complementary approaches to ensuring respect for international humanitarian law. Interview on ICRC website, 3 March, <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/international-criminal-court-interview-101008>, consulted on 9 April 2009.

⁶ Bouchet-Saulnier, F. and Dubuet F. (2007) Legal or Humanitarian Testimony? History of MSF’s Interactions with Investigations and Judicial Proceedings. Fondation MSF/Crash, Paris.

This reluctance – which also exists at MSF, where the policy of non-cooperation with the Court has sparked internal resistance – can be explained by the inherent support of the humanitarian world for the idea of an international criminal justice system. Borrowing the discourse of human rights organizations, international jurists and liberal internationalists⁷, more generally, most aid actors credit the ICC with three major virtues: it would offer “effective protection” to civilian populations and relief workers; it would contribute to the pacification and reconciliation of societies at war; and finally, it would be the seed for a more just international public order.

These assertions rest on very debatable foundations. This essay hopes to point out the fragility of the arguments most often used by humanitarian organizations to justify their support for an international criminal court, in particular by drawing on the work of magistrate and essayist Antoine Garapon, journalist Pierre Hazan, and international law professor Martti Koskeniemi.

Protection

DETERRING CRIMINALS

To begin with, what does the statement “the ICC protects civilian populations and humanitarian workers” mean? It would seem the expression often reflects a purely idealistic view of justice, triumphing over violence by virtue of its judgments alone. The Court need only pronounce judgment in keeping with the law and reason for justice to be done.⁸

Thus, explains Amnesty International Secretary-General Irene Khan, the announcement of an arrest warrant for the Sudanese president “*is an important signal – both for Darfur and the rest of the world – that suspected human rights violators will face trial, no matter how powerful they are.*”⁹ And how will they be surrendered to their judges? By turning themselves in to the Court: “*The law is clear. President al Bashir must appear before the ICC to defend himself. If he refuses to do so, the Sudanese authorities must ensure that he is arrested and surrendered immediately to the ICC.*”

To the question “*What will the effect of the warrant [against President al-Bashir] be on humanitarian agencies [threatened by government reprisal],*” Human Rights Watch responds: “*The warrant does not change Khartoum's obligation to abide by international law,*” which “*requires the government to ensure the full, safe, and unhindered access of relief personnel to all those in need in Darfur.*”¹⁰

More pragmatically, ICC advocates maintain that it would protect civilian populations by virtue of its deterrent qualities. The threat of sanctions would restrain criminals from committing mass

⁷ For a critical introduction to liberal internationalism and its influence on US foreign policy decisions, see Smith, T. (2007) *A Pact with the Devil Washington's Bid for World Supremacy and the Betrayal of the American Promise*. Routledge, New York, Oxon.

⁸ See Garapon, A. (2002) *Des crimes qu'on ne peut ni punir ni pardonner. Pour une justice internationale*. Odile Jacob, Paris. p. 65.

⁹ Amnesty International (2009) Sudan: Amnesty International calls for arrest of President al Bashir, 4 March, Press release.

¹⁰ Human Rights Watch (2009) Q & A: International Criminal Court's Decision on al-Bashir's Arrest Warrant. 4 March, <http://www.hrw.org/fr/news/2009/03/04/q-international-criminal-court-s-decision-al-bashir-s-arrest-warrant> accessed on May 15, 2009.

crimes. *"The principle objective in creating the ICC is to deter those individuals intent on using crimes against humanity to further their political aims,"*¹¹ asserted Médecins sans Frontières in 1998.

Such reasoning assumes that extreme violence results from a lack of effective judicial mechanisms for punishing the perpetrators. According to this reading, mass murder and deportation can be explained by the deviant behavior of leaders *"intent on using crimes against humanity to further their political aims."* This discourse bears a troubling resemblance to the authoritarian rhetoric of domestic policies calling for stern repression to contain "the rising tide of insecurity" resulting from the "impunity" enjoyed by potential criminals (whether they belong to the dangerous classes or are destined for crime by nature!)

But beyond this repressive approach (questionable, though not totally absurd), what is misleading is the use of the ordinary crime paradigm to address mass atrocities.¹² The extreme violence that the ICC is being called upon to judge is not a collection of isolated incidents attributable to a handful of sociopaths unacquainted with international law and standards of moral behavior, but rather the fruit of political agendas, requiring the collaboration of large segments of society, if not the entire State apparatus, and the complicity of a legal system in itself criminal. The collective and political dimension of the crimes prosecuted by the ICC raises specific questions on its deterrent function.

First question: who should be judged, and who deterred? Should the ICC target high-ranking political and military leaders, or the middle levels of the hierarchy, or even the people who are simply carrying out orders? The practical impossibility of judging everyone involved in the realization of mass crimes means having to arbitrarily choose who should be charged. Not all the guilty will be brought to justice. From the standpoint of the punitive paradigm itself, this weakens the deterrent power of the punishment – not to mention the court's legitimacy, which derives, at least in part, from the equality of all before the law.

Next, to what degree does fear of punishment deter criminals who are acting on behalf of some grand collective utopia aimed at transforming man, society and the world? The history of the 20th century, writes Martti Koskenniemi¹³, shows that all too often the politics of mass murder *"have not emerged from criminal intent but as offshoots from a desire to do good"*:

"This is most evident in regard to the crimes of communism, the Gulag, the Ukraine famine, liquidation of the 'Kulaks'. But even the worst Nazi nightmares were connected to a project to create a better world. Commenting upon the speeches of Heinrich Himmler to the SS in 1942, Alain Besançon concluded that even the death camps were operated 'au nom du Bien, sous le couvert d'une certaine morale'. But if the acts do not evidence criminal intent, and instead come about as aspects of ideological programmes that strive for the good life, however far in the future, or to save the world from a present danger, then the deterrence argument seems beside the point. In such case, criminal law itself will come to seem a part of the world which must be set aside, an aspect of the 'evil' that the ideology seeks to eradicate."

The deterrence argument is equally weak for those who interpret mass crime from Hannah Arendt's perspective – by rejecting the hypothesis of "radical evil" and looking instead at the role of

¹¹ MSF (1998) MSF recommendations for the future ICC. Press Release, 16 June.

¹² See Garapon (2002). p. 12.

¹³ Koskenniemi, M. (2002) *Between Impunity and Show Trials*. Max Planck Yearbook of United Nations Law. Vol. 6. pp. 1-35.

“ordinary men” in carrying out administrative mass murder. In this view, it is submission to authority, conformity, and dissociation from reality – when the latter is seen only through the prism of bureaucratic organization and language – that make extermination policies possible.

Can the International Criminal Court deter people involved in policies of mass murder from conforming to the expectations of their colleagues, their hierarchy, their groups, their government and their society? Under what conditions can “praise for disobedience”¹⁴ be understood by Darfur militiamen, young Sudanese Army recruits, or rebel combatants? *A priori*, it seems unlikely that an international court can teach people to be heroes, particularly when the meaning of heroism is at the heart of the conflict between the political system that’s on trial and the international system that’s organizing the proceedings.¹⁵

Finally, we should point out that it is the threat of punishment, rather than punishment itself, that might potentially have a deterrent effect. Once the latter has been handed down, the criminal has nothing left to lose. Within a week of the ICC’s arrest warrant for the Sudanese head of state, the Khartoum government committed a new series of war crimes, ranging from blocking humanitarian aid to kidnapping humanitarian workers, including the looting and use by Sudanese security forces of MSF’s vehicles, communications devices, and personal identification. So while the threat of charges could act as an incentive in negotiations between the international community and the Sudanese government, the announcement of charges against the Sudanese president drove him into a corner.

Ultimately, the deterrence argument is relatively weak. It’s not a matter of challenging the argument as a whole, or of denying that under certain conditions international criminal sanctions may have the power to restrain political leaders or their subordinates. But these effects are by no means guaranteed, and are largely determined by circumstance and the political strategies governing the use or threat of sanctions. As far as relying on the fear of international criminal charges to protect humanitarian relief efforts is concerned, we can only stress that it is a risky bet. Should the Security Council drop the charges against the president in exchange for allowing the thirteen expelled NGOs back into Sudan, the latter would find themselves more than ever in the position of hostages, dependent on a “judicial corridor” likely to close off again at the slightest diplomatic bump.

ENLIGHTENING FUTURE GENERATIONS

Aware of these limitations, ICC advocates maintain that the Court’s function is actually more pedagogical than deterrent. By testifying to the reality of crimes and unmasking the mechanisms by which they are carried out, the International Criminal Court would be contributing to the moral and political enlightenment of present and future generations. By “telling the truth” and “establishing an accurate historical record”, the ICC would contribute to raise awareness and to prevent the return of political processes leading to genocide and mass murder.¹⁶

While the International Criminal Court can potentially help document and publicize extreme violence, it does not necessarily help people understand it. According to Antoine Garapon, by

¹⁴ Brauman, R. and Sivan E. (1999) *Eloge de la désobéissance. A propos d’un « spécialiste », Adolf Eichmann.* Editions Le Pommier, Paris.

¹⁵ Koskenniemi, M. (2002). pp. 8-9.

¹⁶ See for instance, Grono N. (2008) *The role of the international justice in preventing and resolving deadly conflict.* ICG Presentation to the Oxford Transitional Justice Research Program, Oxford University, 13 October.

reducing political crime to the immorality of a few leaders (“bad men do bad things”), the punitive justice paradigm gives up on “*understanding the causes of the evil it wants to combat, and doesn’t attempt to fathom the mechanisms in order to find how best to prevent them.*”¹⁷

Interpreting the massacres and deportations perpetrated in Darfur as the product of the political ambitions of a single man willing to commit crimes against humanity to stay in power does little to shed light on or contest the logic of Sudanese violence. Omar al-Bashir’s greed and lack of scruples fail to explain why every successive Sudanese regime since the 1980s (whether socialist, Islamist, or military-financial opportunist) has employed the same counterinsurgency terror tactics against the armed opposition movements protesting the flagrant social, economic and political injustice in Sudan. The brutality of the Khartoum elite’s domination over Sudan’s outlying regions, the racism of a post-slavery society that dares not confront its past, the truly existential struggles between nomadic and agrarian societies for access to land and political representation, and the ties of hostility, cooperation and dependence between Sudan and its neighbors (Chad, Libya, Eritrea, etc.) and the rest of the international community are just some of the elements at the root of the extreme violence that the language of the criminal court is incapable of grasping.

The discourse of criminal justice understands historical events strictly in terms of the crimes they have engendered. Its view of conflicts is that of chaos and generalized crime. It offers no analysis of the causes of violence, but only judgment and condemnation of its perpetrators – an ahistorical judgment based only on the objective rationality of the law.

As Garapon points out, there is something religious about this rejection of the political, and he concludes: “*Unlike political action, which is necessarily impure, legal judgment presents itself as a pure action, perhaps the only one imaginable in a world debased and corrupted by violence. What gives the enthusiasm for the International Criminal Court its gnostic flavor is the [refusal] to confront the complexity of historical relationships, to come to terms with the inherent violence of politics – in short, [the desire] to forget about the political condition of humanity.*”¹⁸

Pacification

“NO PEACE WITHOUT JUSTICE”

The second main argument used in support of the International Criminal Court is that there can be “no peace without justice.” This argument is summed up perfectly in this 6 March 2009 editorial in *Le Monde*:

“Justice and the pursuit of peace go hand in hand. There is no contradiction between them, notwithstanding those who advocate a realpolitik based on questionable reasoning. Louise Arbour, the former prosecutor for the International Criminal Tribunal for ex-Yugoslavia who, in 1999, charged Slobodan Milosevic with the crimes in Kosovo, said it often: to obey the imperative of justice is to contribute to peace, not scuttle it. (...) Nothing should be conceded to the Sudanese tyrant on the basis of gestures or promises that thus far have done nothing to change the reality of a murderous policy. Justice is not negotiable.”

¹⁷ Garapon (2002), p. 61ff.

¹⁸ Garapon (2002), pp. 63-4.

The expression “no peace without justice” does not, however, reflect historical reality. All of human history gives lie to the assertion that judging war criminals is a necessary condition for peace. To take only a few recent examples, from Mozambique to Northern Ireland, from the Basque country to Angola and South Africa, it has been policies of amnesty, pardon or forgetting that have accompanied in the end of war.

The expression “no peace without justice” is therefore prescriptive. It means that only peace agreements signed by non-war criminals are worthy of being reached. Louise Arbour’s predecessor, Richard Goldstone, is every bit as explicit as his colleague: “*A peace masterminded by and in order to accommodate the concerns of vicious war criminals defiant of all fundamental international law prescriptions or norms is no such effective or enduring peace.*”¹⁹

This theory of just peace confers upon the Court the legitimacy of deciding who is and is not worthy of bringing hostilities to an end. Luis Moreno-Ocampo, Chief Prosecutor of the ICC, told the press in February, “*Mr. Bashir could not be an option for [negotiations on] Darfur, or, in fact, for the South. I believe negotiators have to learn how to adjust to the reality. The court is a reality.*”²⁰

By maintaining that certain leaders could under no circumstances be considered political partners for peace, the Court and its supporters are in effect recommending waging war with them. ICC activists who promise the Sudanese president the same fate as Slobodan Milosevic or Charles Taylor are saying the same thing. Indeed, these two heads of state were finally brought before the courts only after international military operations helped drive them from power.²¹ So a theory of peace through justice is above all a theory of just war.

In practice, the exercise of international criminal justice in wartime has a greater tendency to radicalize conflicts than to pacify them. In the case of Darfur, the prospect of ending his days behind bars if defeated will only encourage President al-Bashir to use the most radical means possible to stay in power. Reciprocally, designating the Sudanese president as an “enemy of humanity” justifies the intransigence of the armed opposition, which sees itself supported in its refusal to negotiate with an acknowledged “criminal” unsuited to sign an “effective or enduring” peace.

We should stress, however, that such radicalization is not necessarily a bad thing. One way to end conflicts and their atrocities is to lead one of the warring parties to rapid victory. Making outlaws of political leaders can help do this, as long as it’s accompanied by a military and diplomatic effort to oust them from power – in other words, to bring about regime change. That is what the ICC and its supporters in Darfur are asking for, though not in so many words. They are asking foreign governments to place police and *military* resources at the Court’s disposal to arrest the president of Sudan. Apprehending a leader who commands an army and a domestic security force, and who has numerous allies both within his own country and internationally, is no simple police operation.

So “no peace without justice” is not a peacemaking slogan, but a call to war. What makes it unique is that it is being proffered by a Court (and its advocates) in defense of the idea of a “*republic of judges, or more precisely a republic of prosecutors,*”²² authorized to designate which political

¹⁹ Goldstone, R. (1998) Bringing war criminals to justice during an ongoing war. In J. Moore (eds), *Hard Choices, Moral Dilemmas in Humanitarian Intervention*. Rowman and Littlefield Publishers.

²⁰ Ocampo, L. M. (2009) *Prosecuting Sudan*. In *Foreign Policy*. February. http://www.foreignpolicy.com/story/cms.php?story_id=4698 accessed on May 15, 2009.

²¹ see Jézéquel, J.H. (2004) *Liberia: Orchestrated Chaos*. In Weissman, F. (eds) *In the Shadow of ‘Just Wars’: Violence, Politics and Humanitarian Action*. C. Hurst & Co., London.

²² Hazan, P. (2007) *Juger la guerre, juger l’histoire*. Presses Universitaires de France, Paris p. 205.

leaders should be fought with weapons, judged, and condemned as enemies of humanity, and which can be considered respectable partners for peace. In so doing, ICC advocates are again injecting a spiritual element into war – "just" war, *par excellence*, since it is fought in the name of an absolute Justice – and thereby encouraging that it be taken to extremes.

“HEALING THE WOUNDS”

A gentler version of the ICC’s peacemaking function portrays it as part of the process of societal reconciliation when hostilities are over. It’s no longer a matter of containing the violence of a war in progress, but to prevent its resurgence. The International Criminal Court is seen as one possible instrument of this reparative and calming “transitional justice.”

The conditions that would allow a society broken by mass violence to rebuild an internal democratic order is a topic for a vast debate. Suffice it to emphasize here, though, that the functions attributed to the ICC by transitional justice often resemble a form of collective psychotherapy (judicial “catharsis”) or exorcism (naming the evil and rooting it out of society).²³

More modestly, it is sometimes asked to symbolically condemn a small number of criminals in order to reaffirm a few founding principles of the political body as moral community. While the idea makes some sense, only local courts are potentially capable of doing it successfully – that’s the whole point of “show trials.” On the other hand, as Martti Koskenniemi points out, “*When trials are conducted by a foreign prosecutor, and before foreign judges, no moral community is being affirmed beyond the elusive and self-congratulatory ‘international community.’*”²⁴ Studies on how trials brought by the *ad hoc* tribunals for Rwanda, Yugoslavia and Sierra Leone have been received by the societies in question often reveal their incomprehension of, or even hostility to, the international legal proceedings.

In the case of Rwanda for example, an ICG report concluded in 2001 that “*For the majority of Rwandans, the ICTR is a useless institution, an expedient mechanism for the international community to absolve itself of its responsibilities for the genocide and its tolerance of the crimes of the RPF [Rwandan Patriotic Front]. The Rwandan government complains of the squandering of money and resources while 130 000 prisoners fill its jails and its courts have tried more than 4000 suspects; the survivors of the genocide find the tribunal distant and indifferent to their lot, and the victims of the crimes of the RPF denounce it as an instrument of the Kigali regime, seeing the ICTR as a symbol of victor’s justice.*”²⁵

Unification

As a matter of facts, what advocates of the International Criminal Court aspire to, above all, is the creation of a universal moral and judicial community. When MSF joined the Coalition for the International Criminal Court in 1998, the intention was to construct a supranational legal system independent of the arbitrary discretion of states.²⁶ Extraterritorial, relying directly on the victims and the NGOs, the ICC envisioned by MSF would subject states to the rule of law. Having signed international commitments regarding fundamental human rights, they would have to respect them.

²³ Hazan, P. (2007). p. 45ff.

²⁴ Koskenniemi, M. (2002). p. 11.

²⁵ International Crisis Group (2001) International Criminal Tribunal for Rwanda: Justice Delayed. Africa Report n°30, 7 June. p. iii.

²⁶ Coppens, T. and Saulnier, F. (1998).

The Court would ensure that by punishing leaders who violated international law. The ICC thus envisioned would be the primary institution of a world government ensuring “a more just international public order,” making humanitarian law and human rights enforceable. This vision is reminiscent of the legalist utopia of late 19th century international jurists, who saw the State as a temporary step on the path to the complete emancipation of the individual within a global federation subject to the rule of law.²⁷

The ICC statutes adopted in Rome on 17 July 1998 did not meet those expectations. The Court’s jurisdiction is not universal. It may initiate proceedings only when crimes have been committed within the territory of a State party to the Rome Statute (108 out of 192), or when those charged are nationals of one of these States. In other cases, the court can launch investigations only on condition of express Security Council resolution in accordance with Chapter VII of the United Nations Charter. That’s the procedure that was used to refer the Darfur situation to the ICC. Indeed, Sudan did not ratify the Rome Statute, and told the UN that it did not consider itself bound by its provisions. The Court’s jurisdiction was therefore imposed on it by the Security Council. There is little chance that this will ever happen to the United States, Israel, China or Russia.

The Security Council also has the power to suspend ongoing proceedings for a period of one year, renewable indefinitely. Finally, when it comes to arresting and handing criminals over, obtaining officials’ testimony or investigative means, the Court is totally dependent on the goodwill of national governments. In short, contrary to the wishes expressed by numerous NGOs, the ICC is not above nations, but remains captive to the power relationships that define the international stage.

ICC advocates regard this as a temporary flaw that will disappear with the progressive establishment of a world order based on respect for law and justice. In the west, legal systems have extended their jurisdiction by stages and by the progressive unification of territories and society. In addition, perfect equality before the law is an unattainable ideal, including in liberal democracies, where the rich and powerful are less likely to incur the wrath of the legal system than are the poor and weak. And while the ICC’s jurisdiction is limited for now to weak states, as Human Rights Watch puts it, “*justice should not be denied where it can be achieved simply because it is politically impossible to ensure justice for all.*”²⁸

Nevertheless, the selectivity of international prosecution is inconsistent with the very idea of justice. The law’s strength resides in the way it applies to everyone equally, and that of the justice system in the impartiality of its judgments. To the Sudanese government, understandably, and to a majority of Arab and African countries, there is a flagrant contradiction between the principle of justice touted by the ICC and the reality of the political power relationships that shape its field of action. Or as President al-Bashir ask, “*Where was international justice during the invasions of Iraq and Afghanistan, the bombing of Gaza, and the crimes committed in the prisons of Guantanamo and Abu Ghraib?*”²⁹

President al-Bashir’s posturing as a nationalist hero of the Sudanese people he has massacred, pillaged and despised for twenty years is not fooling anyone, any more than the “anti-imperialist” solidarity shown him by certain heads of state who fear above all being called to account for their own base actions. The hostility from some Arab and African quarters to the charges against Sudan’s president is nonetheless real, and is less a reflection of “collective solidarity” than a disagreement with the purpose and priorities of the International Criminal Court. Where liberal

²⁷ Koskenniemi, M. (2002).

²⁸ Human Rights Watch (2009) Darfur and the ICC, Myths versus reality. Press Release, 9 march.

²⁹ AFP (2009) Beshir rallies Sudanese ahead of warrant decision. 2 march.

internationalists see the seed of universal justice, some portion of the intellectual and public opinion in poor countries (that is, two thirds of humanity) sees an irresponsible and contemptuous justice system at the bidding of the dominant powers.

Diplomats from the African Union – whose troops are deployed in Darfur, and which is in charge of peace negotiations in collaboration with the UN – are among the most critical. They justifiably point out that the charges against al-Bashir have helped radicalize the positions of both sides, and destroyed any prospects for peace. Many share the criticisms aimed in 2005 against the ICC by anthropologist and human rights activist in Uganda Adam Branch, who accused the Court of being an obstacle to the signing of a peace accord between LRA rebels and the Ugandan government:

*“Whether as the subject for risky medical procedures, unconventional weapons, or aggressive economic restructuring, Africa has for over a century been the unwilling, and often unwitting, subject of experimentation by the West, the place where scientists, strategists, and technocrats can try untried techniques without being accountable to those experimented upon. The most recent experiment is not being carried out by shadowy CIA operatives or ruthless scientists, but by the organisation that is supposed to usher in a new regime of accountability, an end to impunity, and a global rule of law: the International Criminal Court.”*³⁰

If the hope for justice is universal, adherence to the ICC is not – and neither is its jurisdiction. The three main arguments supporting the involvement of humanitarian organizations on the ICC’s behalf are therefore weak. The Court may have its virtues, but they aren’t those attributed to it by the dominant discourse of aid actors. At this stage in its history, the ICC’s ability to prevent, enlighten, pacify, reconcile and be truly universal is extremely open to doubt.

On the other hand, the ICC is a new international actor for regulating conflicts – a half-political, half-judicial hybrid. And though it has no police or military capacity, it possesses the not-insignificant symbolic power to declare high-ranking political leaders enemies of (democratic, liberal) humanity. The emergence of this new actor – shaped by international power relationships, yet endowed with real independence – is likely to produce unanticipated political consequences. These may, in individual cases, help thwart mass crimes, in the same way that peacekeeping operations do.

Nevertheless, NGOs’ infatuation with punitive justice and, more generally, the use of force – like military intervention in the name of the “responsibility to protect” – is puzzling. Foreign military intervention and the punishment of criminals are not necessarily the best ways to contain the violence of war. While politics of aid and mediation have many limitations, they also have their virtues. The job of humanitarian organizations, to my mind, is to foster the latter, and not to advocate for a global moral order based on judicial punishment and just war.

³⁰ Branch, A. (2005) The ICC should stop its African experimental investigations now. *The Monitor*, Kampala. 13 January.