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The Case for International Criminal Law and Civil Resistance

The Right to Assist

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University of San Francisco

March 2022

Master of Arts in International Studies

**THE INTERNATIONAL CRIMINAL COURT AND CIVIL RESISTANCE**

In Partial Fulfillment of the Requirements for the Degree

MASTER OF ARTS

In

INTERNATIONAL STUDIES

By **ANNE YAMAMOTO**

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UNIVERSITY OF SAN FRANCISCO

Under the guidance and approval of the committee, and approval by all the members, this thesis project has been accepted in partial fulfillment of the requirements for the degree.

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## ABSTRACT

There has long been work and research on international criminal justice in the face of great and tragic atrocities. One mechanism established to confront these atrocities and create international criminal justice is the International Criminal Court. Since its inception the court has drawn criticism both for its infringement on state sovereignty and its focus on Africa. My research looks at how the International Criminal Court can best work to address these critiques and continue to provide international criminal justice. I believe one facet of this can be found in the adoption of the normative framework of a Right to Assist local civil resistance movements. To examine this, I am primarily looking at the case against the former head of state of Sudan Omar Al-Bashir.

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## TABLE OF CONTENTS

Acknowledgements

Chapter 1: Introduction

Chapter 2: Methodology

*Case Study*

*Secondary Analysis of Fieldwork*

*Secondary Analysis of Academic and Media*

*Challenges and Limitations*

Chapter 3: Literature Review

*Criminal Tribunals*

*1. Normative Approach*

*2. Decolonial Approach*

*Politicization of the International Criminal Court*

*1. Imposition on Sovereignty*

*2. Tool of Hegemony*

*3. Court for Africa*

*4. Defense of the International Criminal Court*

*Darfur Conflict – The Role of Al-Bashir*

*1. Human Rights Regime: Al-Bashir as a Criminal*

*2. Critical Theory: Issue of International Intervention*

*Civil Resistance*

*Right to Assist*

*1. Issue of International Intervention*

*2. Alternative Framework: Right to Assist*

Chapter 4: Public Argument

*Proposal*

*Importance of the International Criminal Court*

*Mutually Beneficial Solution*

*Case of Sudan*

*Implementation of the Right to Assist*

Chapter 5: Conclusion

References

## INTRODUCTION

My current research question is examining the extent to which criminal tribunals can be an effective mechanism of justice. This is borne from the changing discourse and development around international criminal justice. With its origins in the Nuremberg trials to the various ad hoc tribunals established these international criminal tribunals have been a fundamental part of the human rights regime and have begun to emerge as their own regime of international criminal justice. The creation of the International Criminal Court through the Rome Statute in 2002, was also a prominent milestone in this regime because it is the first permanent truly international criminal tribunal. However, critique of the court grew and culminated in the charges brought against Omar Al-Bashir of Sudan in 2009 causing an issue of legitimacy. Similarly, amidst the critiques, there emerged a desire to decolonize human rights, and this included criminal tribunals such as the ICC. This drew upon the inequality in application of the court and international law and the roots the international organizations have in colonialism and hegemonic power.

However truly how do we prevent the occurrence of mass atrocities? How do we hold the perpetrators of these mass atrocities accountable when they do occur? Ultimately the International Criminal Court can serve as a deterrence mechanism for these atrocities, however the court must address some of these criticisms against it to continue to fulfill its mission. I am arguing that the answer to this can lie in the incorporation of the International Criminal Court as a support for nonviolent civil resistance movements in their fight against authoritarian regimes and state violence. This proposal situates itself in the normative framework put forth by Peter Ackerman and Hardy Merriman the Right to Assist as a way in which international society can assist civil resistance movements. I looked at Sudan's civil resistance under head of state Omar Al-Bashir as a concrete example and as a case for its efficacy.

This research and question have much larger implications for the potential of international criminal justice and civil resistance movements. Tragedies and atrocities are occurring across the globe, and many are being led and perpetrated by those in power. This case and the potential for justice for these types of crimes is incredibly important to examine now as an increasingly connected and transparent global community. The potential of international criminal law to assist in civil resistance and empower peoples to fight against injustice and suppression, presents a strong solution to these atrocities and a strong solution to many of the criticisms levied against the court.

## METHODOLOGY

### **Case Study**

The primary method I used in my research is a case study of the case against Omar Al-Bashir by the International Criminal Court. I chose this case as a means of assessing the larger picture of international criminal justice because of the importance of the case and the way in which it changed discourse and attitudes around the ICC. First it embodies the salient criticisms against the ICC specifically but also about international criminal justice as a whole. A sitting head of state was charged directly threatening state sovereignty in a case referred to the ICC by the UN Security Council (arguably the hegemony) and it was an African country while similar crimes were being committed elsewhere. This case sparked a lot of criticism against the ICC and this international criminal framework and changed a lot of the discourse. This case because of the position it holds and the way in which it embodies and represents these larger criticisms, allows an assessment of it to address the issue of international criminal justice more broadly. In other words, focus and analysis of this case can inform our views of future cases and the subject.



Beyond a focus on the criminal case against Omar Al-Bashir, I will also be focusing on the history of nonviolent resistance in Sudan. Civil resistance has played a significant role in Sudan in fighting oppressive regimes that characterized it and led to the eventual overthrow of Al-Bashir's regime. The focus on the civil resistance efforts in this case are essential to this research looking at the intersection of criminal legal mechanisms and civil resistance movements. For this case study I conducted secondary analysis of interviews and fieldwork conducted in Sudan and on the Darfur conflict.

### **Secondary Analysis of Fieldwork**

A portion of my research is secondary analysis of interviews and field research previously completed by larger organizations. This is focused on field research done on the Darfur conflict and specifically the role of Omar Al-Bashir. These are larger reports by large international organizations such as Human Rights Watch and the United Nations. Many of these were conducted and compiled in 2005 in order to call international attention to the crisis and issue at hand. This research is vital and also provides a framework for a more longitudinal study as attitudes and conditions have changed since Omar Al-Bashir is now in custody in Sudan under charges of corruption.

### **Secondary Analysis of Academic and Media Reporting**

Additionally, my research also encompassed a secondary analysis of academic and media reporting on the Darfur Conflict and the role of Omar Al-Bashir. As evidenced in my literature review this literature is separated into two bodies, the first being international criminal tribunals specifically the International Criminal Court and the second being civil resistance movements. Both bodies of literature are essential to my research because it is a new topic of research that lacks its own body of literature thus far. The academic literature provides a good base of research

on Sudan and the Darfur conflict from 2005 to present day. However, the unrest and legacy of this conflict continues on to present day. Thus, the media reporting is also an essential portion of my research, charting the case against Al-Bashir and the state of civil resistance to the current military takeover in Sudan.

### **Challenges and Limitations**

There are several challenges and limitations to this research. The limitations of utilizing a case study are of course the limits to generalization and future implications. Each case does have its own complexities and contexts so the use of this to assess international criminal justice is limited. I would like for my research to have implications for the future of the ICC and civil resistance, though the case of Sudan has its own specificities that will not be present in every case.

Secondly, my research is primarily secondary analysis of academic, media and field research. This is nonexperimental research and there is no primary data source because this is a new topic and because of the fluidity of the case. The limitation to this is that I could only utilize existing research and was not able to conduct my own fieldwork. The conflict in Sudan is happening in real time, prohibiting travel to the area to conduct research and my research question is relatively new making it a bit more challenging to build upon from prior research.

### **LITERATURE REVIEW**

My research is situated between two overarching bodies of literature and their subgroups. The first body of literature looks at international criminal tribunals including a more general discourse of international criminal tribunals, the politicization of the International Criminal Court, and the ICC's case against Omar Al-Bashir. The second body of literature looks at civil resistance and nonviolent resistance movements, including a focus on the right to assist and the

history of civil resistance in Sudan. The overlap of these bodies is where my research question primarily lies though my exact research question is rather new and there is a lack of research and literature that covers it.

### **Criminal Tribunals**

Literature on criminal tribunals as a function of global governance falls predominantly into two categories of thought: the normative approach with a more liberal perspective, and what I will call a decolonizing approach with a more realist and critical perspective. Both perspectives I believe add to my own research however I find a departure from this particular binary to be most relevant.

#### *Normative Approach: Liberalism*

To begin with, the normative approach follows the idea that international criminal tribunals are a beneficial and essential part of the international legal development. The criminal tribunals themselves are borne of this more liberal approach in that they are a feature of the liberal international order. The international organizations emerged from this liberal international order and the criminal tribunals emerged as a portion of this human rights agenda and mandate (Chimni, 2016). A large portion of this literature follows the idea that human rights as laid out in these declarations are universal. Thomas Franck (2001) highlights that these essential human rights are not simply a Western conception but rather translate across cultures and peoples. Therefore, as Geert-Jan Alexander Knoops (2014) highlights, criminal tribunals are a key feature and aspect of global justice.

Both Franck and Knoops acknowledge the critique of international justice and these criminal tribunals as partial or biased, however find these claims to not be detrimental to their existence and do not take away from their importance. William Slomanson (2007) and Knoops

lay out the emergence of these differing types of criminal tribunals for the different locations and situations causing their establishment. However, in the detailing of the development of different types of tribunals, the basic underlying theory remains the same: that these and the goal of international criminal justice are crucial and a beneficial addition to international law and the human rights regime.

### *Decolonial Approach – Realist and Critical*

The other larger category of literature on criminal tribunals follows what I will label a more decolonizing approach following more realist and critical theories. A realist perspective highlights many of the criticisms held for criminal tribunals. A major figure in realist theory John Mearsheimer (1994) critiques the international organizations as a whole as a tool of hegemony. The states utilize the international organizations as a way in which to maintain their power and their own interests. This is a critique made in critical theories as well, that international organizations and international criminal law are tools of hegemony.

The Third World Approach is a critical theory that follows this realist thinking and combats many of the normative assumptions held about international organizations. It outlines that third world people had little to no role in shaping these post World War II institutions such as the Universal Declaration of Human Rights that serves as the basis for international criminal law. Similarly, these international organizations are seen as problematic in that they are rooted in colonial ideas and in particular facilitate a neocolonial project under United States hegemony in the name of human rights. Furthermore, the international criminal tribunals are seen as biased against the third world, further maintaining this power dynamic (Chimni, 2016).

Antony Anghie (2005) has also written extensively on the roots and perpetuation of colonialism in international law and international criminal law. There is a persistence of

colonialism in the civilizing mission that was utilized to justify colonialism. Anghie sees the human rights mission of the liberal international order to be a contemporary manifestation of the civilizing mission. This is further achieved through the “dynamic of difference” created in which one culture is seen as universal and civilized and the other as particular and uncivilized. This justification of colonialism through the civilizing mission and dynamic of difference is central to the development of international law. This as the foundation of international criminal law allows colonialism to remain central to it and allows Western countries to still be favored over previously colonized countries. The bias and partiality in these criminal tribunals is seen as a result of a difference between third world sovereignty and western sovereignty. These factors are the very foundation of the international tribunals that claim to uphold international justice and human rights (Anghie, 2005).

Ultimately my own research situates itself between these two schools of thought on criminal tribunals. The basis and foundation within colonialism and the liberal international order cannot be ignored. Yet similarly the merit of international criminal justice cannot be abandoned for its roots alone and has brought about important contributions.

### **Politicization of the International Criminal Court**

While there is broader discourse on criminal tribunals and international criminal law as a whole, the International Criminal Court (ICC) has gained significant attention since its installment through the Rome Statute. While the discourse on the ICC follows similar major categories of thought labeled above, there is more specific literature written on this criminal tribunal and its efficacy. The literature falls into three major categories of critiques lodged against the ICC: its imposition on sovereignty, it being a tool of hegemony, and it being a court

for Africa. The last category this politicization follows is one that acknowledges the above critiques and yet stands in defense of the ICC as an important mechanism.

### *Imposition on Sovereignty*

The first portion of literature critiques the International Criminal Court as an imposition on state sovereignty. The discourse in itself falls into two separate positions on it that contain the same common critique. The first Marlene Wind (2009) states as the position held by the United States of America that this court is illegitimate in that its reach is too wide and is an imposition on state sovereignty. The United States has opposed the ICC and its wide reach since its inception and refused to ratify it despite clauses of complementarity. The US has also gone further to refuse the members of the ICC entrance into the US after investigation launched into alleged criminal activity in Iraq (Wind, 2009).

### *Tool of Hegemony*

The second main critical literature on the ICC that labels it a tool of hegemony. This critique is situated in critical and realist theories of criminal tribunals in which this international tribunal is a tool utilized by the superpowers to maintain the hegemony. Mahmood Mamdani is a significant contributor to critical literature on the ICC and the human rights regime more largely. Mamdani (2010) details the court as a tool for the larger powers in the international sphere to maintain their power and assert greater control over less powerful states. Mamdani points to the United States, and the way in which they have utilized the court to their advantage, as a classic example of this. As laid out in the previous section the United States has refused to ratify the Rome Statute and become party to the ICC because of its imposition on state sovereignty. At the same time, it has assisted in the court's efforts of international justice by referring cases through the United Nations Security Council and in handing Dominic Ongwen over to the court.

Mamdani further instills that the entire new humanitarian order draws from colonialism and is a way for the colonial powers to further maintain their hegemonic status (Mamdani, 2010).

Oumar Ba is another major contributor to critical literature on the ICC and has most recently contributed a new angle to the criticism of the court as a political tool. Ba (2020) instead posits that the court is a political tool used by weaker states in the international arena to gain further status and pursue their own political interests. In particular Ba looks at the way in which African states have used international criminal law to their advantage instead of the other way around. This perspective on the court as a tool of hegemony fits less clearly with the broader categories of thought but poses an insightful challenge to the current discourse on it.

### *Court for Africa*

More common is the criticism that the International Criminal Court is a Western court for Africa. The efficacy of the court has been questioned because of its seeming partiality towards African countries. Some contributors on the subject suggest the focus on Africa to be a result of larger international inequalities creating what James Nyawo (2017) labels “selective enforcement.” This selective enforcement is the culmination of several factors but regardless there has been bias and focus put on African countries.

While some like Nyawo point to this as being a result of larger inequalities, Amy Niang (2017) points to a more intentional and structural factors contributing to this discriminatory focus. This perspective points to an explicit discrimination towards Africa as a form of neocolonialism. The court has also suffered a loss of legitimacy because of this focus on Africa and falls short on its mission of establishing global justice. Rather it works within a larger global context of Northern hegemony. Niang lastly puts forward that the overwhelming majority of

cases have been African leaders which further perpetuates the image of African as other and as criminal or uncivilized.

Furthermore, Manisuli Ssenyonjo (2013) highlights that this criticism is posited by scholars but has been equally voiced from the African Union (AU). The AU has come out in opposition of the International Criminal Court based upon its double standards in investigation and prosecution of cases. This objection emerges in particular to the referrals to the court from the United Nations Security Council both in Sudan and Libya. Further objection relates to the issue of sovereignty, in which sitting head of state Omar Al-Bashir was investigated and charged by the ICC. In the majority of international law heads of state are given immunity and while this differs from the mandate laid out in the Rome Statute, the AU opposition to the ICC culminated with this case.

#### *Defense of the ICC*

Apart from the three major bodies of criticism lodged against the International Criminal Court is a large body of works in response to the above critiques and in defense of the court. The various defenses posited by scholars differs, but all conclude with the court as an institution and feature of international criminal justice worth preserving. These defenses in their conclusion fit within a more normative approach in which the flaws in the ICC do not negate its broader mission and importance.

Adedokun Ogunfolu and Maria Assim (2012) acknowledge the large number of charges brought against African leaders however find it to be a larger product of international inequality that is evidenced in many of the institutions. There is rather a need for more equal enforcement and broader legitimacy of the court as it continues on. The seeming partiality is not detrimental



for the scholars because of the ways in which the ICC has contributed so significantly to international law and the human rights regime.

Hisham Aidi (2019) specifically addresses the criticism of the courts partiality and political strains yet addresses it with research drawn from African civil society particularly youth. Aidi explicitly labels the realist tendencies of international organizations and the lays out the opposition by the African Union. However, Aidi puts forth that African civil society does not share the same oppositional sentiment of the AU. Youth organizations and women's groups drafted a letter in support of the court and in opposition to the AU's refusal to cooperate. Aidi points to this as the true support among African states for the ICC and its efforts of international criminal justice. The AU sentiment that sitting heads of state should remain immune to the court violate the Rome Statute to which they became party. In addition, the majority of the charges brought against African leaders were self-referred by the state while only two cases have been referred through the UN Security Council.

In a similar defense of the ICC, Lyal S. Sunga (2015) addresses the question of whether or not the ICC has unfairly targeted Africa and further questions whether in fact Africa has unfairly targeted the ICC. Sunga ultimately concludes that neither is unfairly targeting the other and draws similar conclusions to Aidi that African countries have supported the ICC mission. This is evidenced in the self-referrals as well as the large number of African states that remain party to the ICC. Furthermore, the claims of targeting do not negate the atrocities committed and the victims of these crimes.

Lastly, Leslie Vinjamuri (2016) follows an entirely structural defense of the court. Vinjamuri outlines the lack of authority and legitimacy that the ICC holds as being an issue for its mission of international criminal justice. For a court that is intended for the gravest of

offenses and crimes authority is essential and the partiality does pose an issue. However, this issue of authority is not uncommon in global governance due to the anarchical nature of the international. Ultimately this is an issue that international institutions as a whole have to combat and often requires time and further state cooperation (Vinjamuri, 2016). These defenses provide substantial argumentation for the preservation of the ICC as a mechanism of international criminal justice.

### **Darfur Conflict – The Role of Al-Bashir**

My research is looking at the case against Al-Bashir more specifically rather than the entirety of the Darfur conflict and the larger number of actors involved in the human rights violations. The literature on the role of Al-Bashir in the Darfur conflict falls predominantly into two major categories. The first follows the more normative approach in the human rights regime in which Omar Al-Bashir is seen as a major player and perpetrator of the crimes. The second follows a more critical approach that highlights international intervention as salient issue in the case against Omar Al-Bashir.

#### *Human Rights Regime: Al-Bashir as a Criminal*

The majority of this first category is more investigative reports conducted prior to much of the opposition to the case and charges. Two preliminary sources on the Darfur conflict and the role Al-Bashir were reports conducted by Human Rights Watch and the United Nations. Human Rights Watch published a report in 2005 following an investigation into the conflict with the purpose of calling for action from the international institutions who purport a human rights mission. This report was prior to the charges brought against Al-Bashir by the ICC and in fact urged Sudan to cooperate with the ICC and allow an investigation into the perpetrators of the conflict. The report did not provide evidence of Al-Bashir's direct perpetration of the crimes but

rather called the ICC to further investigate his role. However, culpability was put on the government of Al-Bashir who held power at the time because of the lack of action and cooperation on their part. Human Rights Watch further alleged that Al-Bashir's government made no effort to protect its ethnic minorities in this case and was involved in a portion of the crimes as well (*Human Rights Watch, 2005*).

The United Nations also called for a report in 2004 on Darfur that went further in depth into the situation in Darfur drawing from on the ground investigation and non-governmental organization reports. This report asked the UN Security Council to refer the situation in Darfur to the ICC for further investigation into the role of Al-Bashir and how much of a role was played. It also found a similar conclusion to the above in that it explicitly highlighted the refusal of the Sudanese government and courts to protect their citizens or prosecute the perpetrators of the crimes effectively (*United Nations, 2005*).

The case was referred to the ICC who investigated the conflict and brought charges against several major actors in the conflict including Omar Al-Bashir who was the current head of state. The investigation resulted in ten charges against Al-Bashir, five counts of crimes against humanity, two counts of war crimes and three counts of genocide. Al-Bashir was found to have played a major role in a campaign by his government to combat insurgency in Sudan. This campaign in particular was found to have targeted three ethnic groups in particular: Fur, Masalit and Zaghawa. This report also found several other states to be in noncooperation with the court by refusing to turn Al-Bashir over to the ICC and hosting him for diplomatic events (*International Criminal Court, 2018*).

These reports are published by major international institutions and hence are part of the larger structural issue highlighted by a decolonizing approach. However, these institutions are

also the few with the resources to conduct these types of investigations and gather this type of empirical data. For the purposes of my research this aids in outlining the nature of the crimes as well as the political development of this case within the UN and the ICC.

*Critical Theory: The Issue of International Intervention*

The other category of literature on the Darfur conflict and Al-Bashir's role emerges in reaction to the investigations and charges by the ICC and the UN. This literature points to international intervention as the main issue in this case rather than the role Al-Bashir played in the Darfur conflict. The opposition and critique emerging from this literature encompasses many of the criticisms against the ICC as a whole. This case in particular brought to culmination the opposition because the charges were brought against a sitting head of state which are usually granted immunity in international law and because the referral came through the UN Security Council.

Mahmood Mamdani (2009) also contributed a significant amount of literature on this case brought against Al-Bashir in particular. Mamdani's critique of this is the lack of understanding from the ICC on the root cause of the Darfur conflict and the plethora of factors other than Al-Bashir. While the ICC and international institutions would like to place blame upon Al-Bashir, the conflict significantly predates Al-Bashir and he is not the cause of the conflict. Rather the conflict involves tribal conflict largely caused by colonial restructuring (Mamdani, 2009).

Mamdani (2008) also finds this case against Al-Bashir to be another example of neocolonial domination masked as humanitarian order and intervention. The United States continually criticized the ICC for being an imposition on state sovereignty yet referred the case to the ICC on the UN Security Council. Furthermore, the US was committing similar atrocities in

Iraq while criticizing Sudan and Al-Bashir for their actions. Mamdani further drives this point with a look at the language around genocide. The language of genocide is inherently biased and politically utilized. Al-Bashir is the first with charges of genocide brought against him, which is considered one of the gravest of crimes because of its intent factor. However, Mamdani highlights that Al-Bashir's campaign was labeled a genocide while the United States committed similar things, but it was labeled a "War on Terror." Ultimately Mamdani finds this case to encompass the neocolonial nature of international criminal justice (Mamdani, 2008).

There is also a portion of literature critical of this prosecution against Al-Bashir from a legal perspective in the doctrines and theories it is relying upon. Theresa Giamanco (2011) critiques the theory upon which the prosecutor of the ICC relies on to make these charges. The reach required for the usage of a "perpetration by means" for the charges highlights an over exertion of the ICC to charge Al-Bashir. In this critique, examining so closely the legal nature of the charges allows for a critique of the larger court attempting to force this case (Giamanco, 2011). While this critique differs a bit in nature to the more socio-political critiques, it is worth including because of the implications it can have for the political intent.

This particular body of literature is of importance to my research in anticipation of an evolving discourse on the case. At the time of the charges a lot of opposition culminated, however it has been over a decade since the charges and Al-Bashir is now in custody in his own state of Sudan, and Sudan is in discussion with the ICC on prosecution. Furthermore, the opposition and criticism of the ICC as a political and neocolonial tool allowed Al-Bashir to claim innocence despite the calls for his accountability and justice in Darfur.

## **Civil Resistance**

Civil resistance or nonviolent resistance as a field is still in its early stages, but there is a long history of civil resistance being used in various contexts around the world (ICNC). Jorgen Johansen outlines the field in broad terms citing nonviolence not as the absence of violence or passive but rather the antithesis of violence. Furthermore, there are two overlapping traditions in the field of nonviolence, the pacifist and the pragmatic traditions. The pacifist tradition tends to align with religious traditions and emphasizes nonviolence as a moral imperative. The pragmatic tradition finds its roots in those who have focused on nonviolence as a tool for fighting for freedom and democracy for example civil resistance and nonviolent protests (Johansen, 2007). For the purposes of my research, I will be focusing on the pragmatic tradition, looking at nonviolence not as a question of morality but rather as an effective strategy or way to bring people to the negotiation table. It is not a moral judgement but rather about creating conditions where those in power find it in their self-interest to negotiate and change. Most notably in this field are the contributions of Gene Sharp who outlined methods and strategies of effective nonviolent action. Sharp charts suggested methods or techniques ranging from formal statements to drama and music (Sharp, 2013).

Civil resistance and people power has succeeded in ways that are shocking and powerful. There has been a trend of protest movements in Africa that have garnered attention in that they have been successful and peaceful. Notably, Africa's nonviolent uprisings have had the most success in the world with 58% of uprisings aimed at toppling dictatorships having succeeded while the world rate of success is 44% (Marks et al., 2019). These movements are succeeding where global arrest warrants and international intervention have failed. The reason for the efficacy of these movements is that they consist of certain key factors or winning ingredients, coupled with the fact that Africa has a long history of resistance to colonial and neocolonial rule.

Primarily a movement must inspire mass participation that cuts across boundaries. This mobilization succeeds when identities are transcended to unite in participation. Specifically, this includes the incorporation of women and youth who may not traditionally occupy these leadership roles (Marks et al., 2019). In Sudan women played an essential role in the success of their revolution. A second factor is the support from military and security services. Ultimately, movements need the eventual support or protection from the security forces however it runs the risk of the military holding onto power for themselves. Again, Sudan provides an excellent example of this in that the military shifted from the bottom up and security began to protect the protesters from the militia and opposing security forces. Additionally, Sudan was proactive in insisting a civilian transitional leadership be instituted as soon as possible to avoid the military holding power (Marks et al., 2019). Lastly regional and international actors can play a role in facilitating peaceful transitions, for example the African Union has begun supporting citizen movements to maintain peace and assist in their efforts. Civil resistance does not always succeed however there is hope to be had in their high rate of success overall. This framework also sets a place for international actors to play a role in supporting these movements. There is an important place for these international and regional actors to play a role that is not simply co-opting or controlling of movements for their own personal gain (Marks et al., 2019).

## **The Right to Assist**

### *Issue of International Intervention*

The question of the efficacy and ethics of international intervention is nuanced and complex. The question becomes even further problematized when issues of mass atrocities and violence are factors in the equation. While the United Nations Charter and nationhood itself is founded upon the idea of sovereignty and nonintervention has long played a role in international

relations, the atrocities following the Cold War prompted the discourse and apparent need for international response and intervention in order to prevent the repetition of these atrocities (Ackerman, 2019). The official institutionalization of this was the doctrine adopted by the United Nations in 2005, the Responsibility to Protect. It put forth that it was the responsibility of the state to protect its citizens from these atrocities and it was the responsibility of the international community to assist in this if the state fails to do so (Ackerman, 2019). While in theory this doctrine creates an important protection for citizens around the world from atrocities internally and externally in practice the results are mixed and potentially consequential. The most notable example of this was the implementation of the Responsibility to Protect in the Libya intervention, which while the scholarship on it lacks consensus undoubtedly did not stop the violent conflict and still resulted in a grave death toll (Ackerman, 2019).

More critical literature points to the Responsibility to Protect as a form neocolonial domination. Mahmood Mamdani points to RtoP as an element of the new humanitarian order which maintains a bifurcated system in which one side is given state sovereignty while the other is granted only a sort of trusteeship or wardship. He finds this order to be a manifestation of neocolonialism, which grants insertion into the latter if deemed a humanitarian crisis in which vulnerable populations must be protected. Essentially, Mamdani finds RtoP to be a hegemonic tool. While this is a very critical approach the general sentiment of negative misguided intervention is a common one (Mamdani, 2008).

#### *Alternative Framework: Right to Assist*

Dr. Peter Ackerman and Hardy Merriman put forth an alternative theory or proposal known as the Right to Assist. They find RtoP to be most ineffective due to the state-centered box it is constrained to and believe that solutions must go beyond this state-centered framework to



address the issue of global mass atrocities. This new framework that they propose consists of “international support for populations that are waging nonviolent civil resistance to win rights, freedom and justice against non-democratic rule” (Ackerman, 2019:3). This is founded upon the idea that the main way to prevent mass atrocities is to “prevent violent conflict as a response to intrastate disputes” (Ackerman, 2019:3). Furthermore, a salient mechanism in conflict resolution and violence prevention is civil resistance or non-violent campaigns which have had increasing popularity and success in fighting against authoritarian rule. The importance of nonviolent civil resistance as a mechanism is three-fold. Compared to violent resistance, nonviolent civil resistance is more likely to lead to political transitions and is more likely to achieve lasting democratic gains. It is also proven to have success against powerful and oppressive authoritarian regimes. The authors additionally put forth several types of assistance to these methods that are particularly important. These include public education about civil resistance and capacity building for specific campaigns which could come in the form of workshops or distribution of materials. International actors can most easily play a role when it comes to raising the cost of repression. This can include sanctions, naming and shaming, or publicly supporting civil resistance movements as international institutional actors such as diplomats or state leaders. This is most effective when accomplished in tandem with an on the ground civil resistance movement and is meant to be a support of that people power rather than an alternative to it. This alternative framework of the Right to Assist, addresses and provides solutions to the critiques raised to RtoP and its relative failures.

## PUBLIC ARGUMENT

### **Importance of the International Criminal Court**

There are significant criticisms levied against the court, however the importance of this mechanism is also significant. Kofi Annan stated that “the establishment of the Court is a gift of hope to future generations and a giant step forward in the march towards universal human rights and the rule of law” (Bosco 2014:2). International law is key component of global governance and the international system and a newer facet of it is international criminal law. The International Criminal Court is the newest addition to international law and is considered the court of last resort. As outlined above, the ICC is the newest mechanism and the only truly international criminal tribunal as well as the only mechanism that applies to individuals rather than states. All these features and the mission of it make it an important mechanism as well as one with very large potential. This court is intended to be the court of last resort, only hearing cases of the four highest crimes in the human rights regime. The mission of this court is significant to the human rights regime because of its ability to create justice internationally (Felter 2020). Human rights are not a western concept though those Western influences and roots may pervade the court, it is a mission that the majority of the international community has become party to. Many of these cases are referred to the ICC by countries because of the agreed mission and hope for the court to create justice for these mass atrocities (Franck 2020).

Furthermore, while an entirely apolitical court is very idealistic, the court does have mechanisms to protect from this, and is outside of the United Nations in an attempt to create a more objective and effective mechanism. While there is still work to be done to make the court more effective and immune to political and power relations, the court being outside of the UN creates for a more effective mechanism. The one exception to this is the ability for the UN Security Council to refer a case for investigation to the court, however the case must be dire for

the members to agree on this and ultimately this has only happened twice in the cases of Libya and Sudan (Felter 2020).

Thirdly, this court is unique to international law in that it applies to actors other than states: individuals (Felter 2020). This is important because in the realm of international criminal law it is very difficult to attribute crimes to the state itself hence making it very difficult to bring charges. With a mechanism where individuals can be the actors in international law, it is much easier for a court to bring about charges since the actions and crimes need to be linked to one person not an entire state. This makes it a compelling mechanism and one with huge potential. For example, in considering the Darfur conflict, a large number of human rights violations and atrocious crimes were committed largely by those in power in Sudan at the time. It would be very difficult to bring about charges against Sudan as a whole in a court such as the International Court of Justice, however with the ICC charges were brought against many of the individuals in power at the time of the crimes.

This in turn leads me to the last important aspect of the court and that is its ability and potential to provide hope for individuals and civil societies. In the instance mentioned above of the Darfur conflict, the international community was pushing for intervention and justice, but the civil society of Sudan was as well. While the African Union has often spoken out against the court African civil society has been a strong advocate for the court namely women and youth (Aidi 2019). To have an international court that is able to hold individuals accountable for these atrocious crimes that civilians are often the victims of, provides an avenue for hope and justice.

### **Mutually Beneficial Solution**

I am proposing that international criminal legal mechanisms namely the International Criminal Court can fit into this framework as a support to civil resistance movements to render

both mechanisms more effective and address the critiques to the court. The International Criminal Court has faced criticism for being a court for Africa and a tool of hegemony, critiques similar to that of other international intervention. This is in part empty criticism, the majority of the cases in Africa were self-referred by the home country and the mechanism is separate from the United Nations and is meant to be separate from the political tool. Additionally, many of these criticisms were raised by those angered by facing charges from the court, including Omar Al-Bashir who stated he won against the court and won against the West. However, these criticisms are also characteristic of many international interventions. Ackerman and Merriman charted the criticism about Responsibility to Protect that allowed for outside international intervention as being weak and losing credibility, however it has also garnered criticism as being a neocolonial tool allowing for outside invasion of sovereign powers. The International Criminal Court and international intervention as a whole are important mechanisms specifically in regard to mass atrocities and the prevention of them however there is validity in the claims that it needs to be improved. The way in which this can happen is cooperation with and assistance of local civil resistance movements internationally fighting against authoritarian and oppressive regimes. Likewise civil resistance movements and nonviolent resistance as a discipline raises concerns about having enough power to enact the change they are fighting for. The International Criminal Court in turn provides a more powerful deterrence mechanism and its assistance is important.

### **Case of Sudan**

Sudan's 2019 revolution is a clear example of one of the successful civil resistance campaigns outlined in the previous section. There had been a number of unarmed protest movements in Sudan, which carved out a space for this struggle to build. In December 2018 protests grew across the regime ignited by anger at rising costs, while the protests grew the

government became more restrictive, there were curfews, closures, and all social media access was taken down. The restrictions encouraged the protests even more, and this in turn led to further repression. Al-Bashir declared a state of emergency and instituted further suppression and censorship. This forced the resistance to take place at a localized level with neighbors resisting together, they “were resisting this regime everywhere” (Zunes 2021:5). The leaders strategically escalated the nonviolent resistance and took advantage of the divisions forming in the regime. These divisions infiltrated the security forces, and the armed forces refused to cooperate with the regime and protected the protesters instead (Zunes, 2021). In April, Omar Al-Bashir and his administration were successfully overthrown by the military through this strategic civil resistance. The military formed the Transitional Military Council (TMC) which negotiated with the Forces of Freedom and Change (FFC) to establish a transitional civilian government (Hassan, 2019). “The scenes for millions of Sudanese out on the streets during waves of protests...demonstrate a triumph not just of the human spirit, but of some of the most brilliant strategic thinking by any social movement in history” (Zunes 2021:1).

This civil resistance movement succeeded in ending a regime of extreme violence and repression where global arrest warrants could not. March 2005 the UN Security Council referred the case to the International Criminal Court who opened investigation in June 2005. These investigations posited that Al-Bashir conspired to combat the insurgency against his government through a campaign against three specific ethnic groups: Fur, Masalit and Zaghawa groups. This campaign included unlawful attack on civilians, pillaging of towns, murder and extermination, rape, forcible transfer, torture and the contamination of water sources. In March 2009 the court issued an arrest warrant for sitting head of state Omar Al-Bashir with charges of war crime and crimes against humanity in the Darfur conflict. In July of 2010 the arrest warrant was extended

to include the charge of genocide. However, the court lacks an enforcement mechanism and multiple states were found to be in noncooperation by refusing to hand Al-Bashir over to the court and continuing to invite him to diplomatic events. Now that he has been ousted and a transitional government has come to power, Al-Bashir is imprisoned in Sudan on charges of corruption and Sudan is in conversation with the International Criminal Court discussing cooperation (ICC, 2020). While this civil resistance movement is undoubtedly a success, in October 2021 the Sudanese military has seized power once again forcing out the civilian transitional government. While external and international response to this is limited and indeed should be limited, they have the power to influence and support the civilian movement (Gavin, 2021).

### **Implementation of The Right to Assist**

The Right to Assist offers an alternative framework to how we approach prevention of mass atrocities. This approach advocates for “international support for populations that are waging nonviolent civil resistance to win rights, freedom and justice against non-democratic rule” (Ackerman and Merriman 2019: 3). There has been a general shift towards civil resistance as a mechanism for resisting oppressive regimes and it is this civil resistance that often makes the change by making oppressive systems too hard to maintain. Therefore, the international community should find ways to incentivize and further support civil resistance. Violent resistance comes at a much higher risk making the chances of larger mass atrocities more likely. Research found that “violent campaigns were subject to mass killings nearly three times as often as nonviolent campaigns were 68% vs. 23%” (Ackerman and Merriman 2019: 5). Civil resistance is also more likely to lead to democratic political transition than other efforts. Studies by Erica Chenoweth and Maria J. Stephan found that nonviolent resistance is twice as likely to

achieve political transitions and successful civil resistance campaigns are more likely to have lasting democracy than alternatives, finding a strong relationship between civil resistance and stability. Lastly and most relevant in our case study of Sudan, civil resistance campaigns can succeed even against repressive and authoritarian regimes (Chenoweth and Stephan 2011). This is highlighted in the literature review in the findings that the local civil resistance movement succeeded against Omar Al-Bashir where arrest warrants could not. While local civil resistance movements are the catalyst for this change and an important mechanism, international actors can assist these movements in a variety of ways. This can take on several forms: support for public education, capacity building, mitigation of repression impact, raising the cost of repression or fostering a stable transition (Ackerman and Merriman 2019). This is where international actors such as the International Criminal Court can play a role and assist civil resistance movements and in doing so prevent mass atrocities.

The International Criminal Court serves as a court of last resort for only the gravest of crimes reserved for individuals who have played a major role in the perpetration of them. This court can serve as a deterrence for those in power and one way this mission can be furthered is by giving assistance to civil resistance movements on the ground. There are a couple ways this can be envisioned. Two forms of assistance put forth by the Ackerman and Merriman are the mitigation of impact of repression and raising the cost of repression. The International Criminal Court can assist in both of these ways. The first in launching investigations and bringing charges against individuals who are playing a major role in the repression which would create visibility and awareness making it a wide problem and giving the atrocities a wider audience. This in turn can also serve as a sort of raising the cost of repression. A large reason for success in civil resistance movements is they raise the cost of the repression so much that it is not worth it or

they are forced to come to the negotiation table, this can happen with the international human rights community naming and shaming and documenting the atrocities eventually to pursue legal accountability.

The framework put forth in the Right to Assist contains a crucial warning to the international community that takes on this approach and that is to not co-opt movements or insert their own agendas. There is always the risk that external support will have a harmful impact on a civil resistance campaign however the authors put forth some tenets for external actors to consider: support local ownership and empowerment, listen to the needs of the mobilized communities and to do no harm (Ackerman and Merriman 2019). These same tenets can be extended to the International Criminal Court to a degree as well. The claim of external actors doing harms has been levied against the court already and whether the critiques are founded or not it is still an important aspect to consider. In concrete terms, the International Criminal Court should consider starting investigations into conflicts where they are being called in either by local authorities or human rights organizations and focus on coming alongside the local movements to bring about justice and change.

In the instance of Sudan, the outstanding charges against the leaders of Omar Al-Bashir's administration and the current military takeover leaves a space for international or external actors to support the people power. Rather than a Responsibility to Protect framework that characterized the Libya intervention, a Right to Assist may prove effective and beneficial in this instance. International tribunals can act as a deterrence for these oppressive regimes but also may be a support to the Sudanese people in their pursuit of justice and accountability.

CONCLUSION



We live in an increasingly globalized and interconnected world, when mass atrocities occur, we see it and we feel the impact and we bear responsibility to act and prevent them. There has been consensus built that the international community bears a responsibility to intervene in the cases of mass atrocities however these have continued to occur and be witnessed on a world stage. Prior to Responsibility to Protect in 2005 the international community watched atrocities in Bosnia, Rwanda and Kosovo. Post RtoP we have watched atrocities occur in Syria, Central African Republic, South Sudan and Myanmar with no prospect for RtoP to play a role. In present time in 2022 we are watching on a world stage as Russia commit mass atrocities in Ukraine. It is time to find a new approach to handling and preventing mass atrocities as an external actor. The International Criminal Court can play a huge role in this prevention of atrocities. This court is an innovative feature of international criminal law with a mission to address mass atrocities just like these. Since its inception it has faced criticism, chief of which is its impartiality or its role as a tool for the powerful. The framework of the Right to Assist provides a way to reimagine the bounds of international intervention and the International Criminal Court.

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