

Sudan in the dock

Taking on a sitting head of state is a bold move by the the International Criminal Court, writes CHRIS GALLAVIN and KENNEDY GRAHAM.

The significance of the arrest warrant issued last week against the President of Sudan by the International Criminal Court cannot be underestimated.

It is the most important step towards upholding the rule of law since the court was established in 2002. Indeed, perhaps long before that. Even the seizure this week of Bosnian Serb leader, Radovan Karadzic, is of less significance.

Just six years old this month, the ICC, having cut its prosecutorial teeth with rebel leaders in three sub-Saharan countries, has finally decided to take on a sitting head of state.

While Slobodan Milosevic and Charles Taylor had committed alleged "core crimes" during their tenures in office, their arrests were issued subsequently. And both were subject to ad hoc tribunals established by the UN Security Council. As such, these tribunals fell within the political grip of the Security Council.

Is the ICC any different? It would appear so. Born of a multinational treaty in 1998, the Court operates independently of the United Nations. The UN Secretary-General has emphasised to the Sudanese leader that he has no authority in the matter.

The ability to hold a sitting head of state responsible for international crimes was already a hot international topic. In this context the ICC's decision will have far-reaching international consequences. The actions of the court and the subsequent hand-wringing of some members of the Security Council highlight the fast-moving interface between law and politics at the global level.

Politics has often been an obstacle to the international rule of law. In 1919 the Versailles Treaty envisaged prosecution of the German Kaiser for the "supreme offence against international morality and the sanctity of treaties". But Holland refused to extradite him.

International criminal liability for individuals emerged in 1945. The victorious allies created the offences of "crimes against peace", "war crimes" and "crimes against humanity" in the Nuremberg Charter. One year later the fledgling UN

General Assembly retroactively legitimised the Nuremberg principles and, somewhat gratuitously, the tribunal's "judgement".

The UN also began, in the early 1950s, writing a code of offences against mankind and a statute for a permanent criminal court. Cold War divisions stayed progress for four decades. The fresh optimism of the early '90s, along with the shame of the Balkans conflict and the Rwandan genocide prompted some fast re-furbishing of the earlier work. The ICC, in force since July 2002, now boasts 106 States Parties.

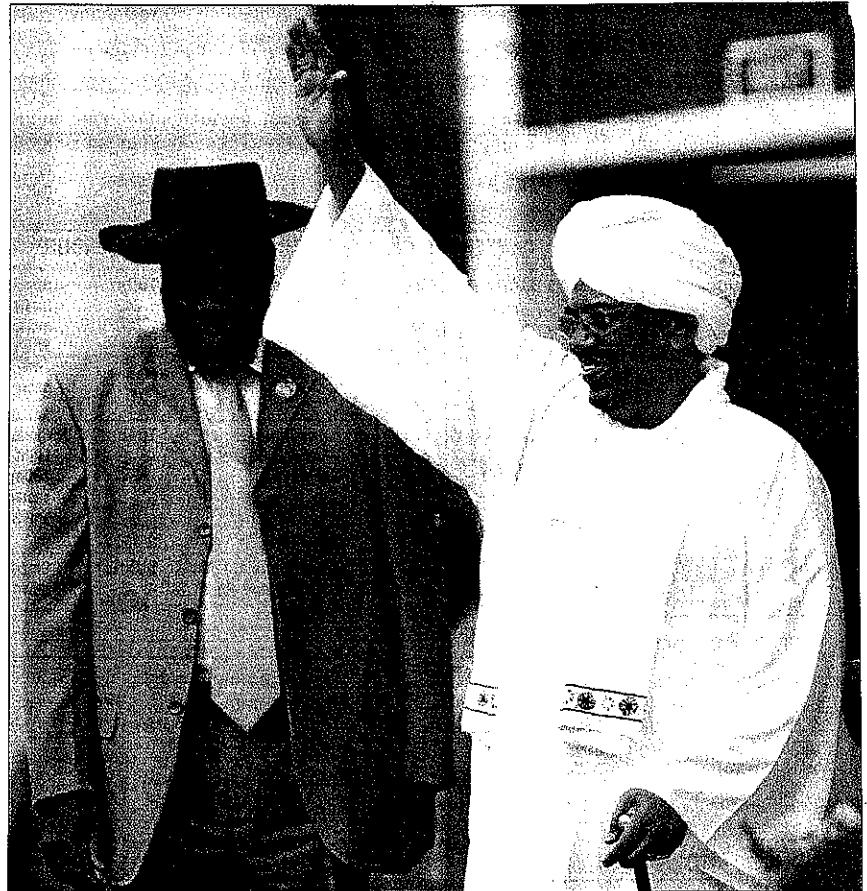
As a party, NZ now accepts that its troops are individually liable before the ICC for war crimes or crimes against humanity when serving overseas (in Afghanistan, Iraq, East Timor or Solomon Islands). Our military and political leaders are individually liable for any crime of ordering or inciting the same. Where such crimes occur, states are expected to initiate domestic prosecution. But if they are unwilling or unable to do so, the ICC Prosecutor may step in and investigate.

Thus, although in our own constitutional system it is inconceivable that the Attorney-General would indict the PM or foreign or defence minister for ordering crimes against humanity, it is possible for any other State Party, or indeed any NGO or individual, to refer a situation to the ICC for investigation.

In 2004, over 200 NGOs in Britain alone lodged petitions with the ICC Prosecutor alleging war crimes committed by British troops in Iraq. The prosecutor decided not to prosecute, his quantitative priority, he explained, being on Africa at the time. But he affirmed his jurisdictional competence to investigate, and acknowledged the possibility of some 10 such British crimes having been committed.

While the prosecutor's legal reasoning was sound, the political message was clear. The ICC was not about to tackle a permanent member of the Security Council, quite so early in its infancy. Three years later, however, he has addressed an equally gargantuan task - indictment of a head of state.

Sudan is not a State Party to



In control: Sudan's President Omar Hassan al-Bashir, right, has said the International Criminal Court has no jurisdiction in Sudan and its charges against him were lies. Photo: Reuters

the ICC treaty, and so does not automatically fall within the ICC's jurisdiction. But Sudan has been the subject of an ICC investigation because it was referred to the Court by the Security Council in March 2005. In 2007, the prosecutor indicted a janjaweed militia leader and a government cabinet minister. Last week, he added the Sudanese president to his list of those wanted for genocide.

Unsurprisingly, Sudan's citizens-of-the-willing are loudly protesting the ICC's "criminal action". No criminal justice treaty, they claim, can erode the national sovereignty of Sudan which has not signed or ratified the ICC treaty. Yet Sudan ratified the UN Charter in 1956, which has always accorded the power to the Security Council to declare a situation such as that in Darfur a "threat to peace" and thus to intervene. Referring the country's situation to the ICC is the latest manifestation of that power.

China, too, expressed "serious concern" over the indictment. It may well ensure, through its power of veto, that no such referral will ever emerge from the UN Security Council again. In the ideal world, the law must remain blind to political concerns.

But the ICC treaty also accords the Security Council power to "defer" any investigation for one year (on a renewable basis) if it determines a situation to be a threat to peace. If the Security Council sought to defer the prosecution, it would in essence be arguing that the actions of the ICC in indicting a sitting head of state amounted to a threat to the peace. Whether the Security Council could do this and save face is essentially a political judgement.

It is the latest, clearest, case of "high noon" in the modern shoot-out between law and politics. On the point of evidentiary fact, one side must lose. Given the far-reaching significance of his move, the ICC prosecutor, a proven veteran of the trauma and legal complexities of the Argentinean junta days, must be confident of his evidence. But even if he is right on fact, the pressure from China and Russia, both non-ICC members, and the Arab world will be enormous. The stakes could not be higher.

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