

TRANSCRIPT OF DEVELOPMENT DRUMS EPISODE 12 – THE HAGUE

Host: Owen Barder. Guests: Amanda Taub & Kate Cronin-Furman

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Owen Barder

Thanks for downloading Development Drums Number 12. I'm Owen Barder in Ethiopia. Development isn't just about aid. So today's Development Drums focuses on International Law. I'll be talking to the authors of the successful blog, [Wronging Rights](#). So if you've never really understood the difference between the International Criminal Court and The International Court of Justice, this episode is for you. We'll also be talking about the pros and cons of the arrest warrant that has been issued for President al-Bashir of Sudan.

But before we get onto that, I would like to make an appeal for anyone out there listening to Development Drums. It'll be really good to have some feedback about the podcast. What do you like and what don't you like? Is it too long? Is it too short? Is it too technical or is it too simple? What issues would you like to hear discussed in the future? And are there any particular guests that you'd like me to invite on the show?

Your feedback will help me to improve the podcast and make it more interesting and useful. So please go to developmentdrums.org and leave your comments there or you can join our new Facebook group. You can find that by searching Development Drums in Facebook.

Many thanks to the people on Facebook who've already given the suggestions for questions for the next episode which is going to be about philanthrocapitalism. So please take a few minutes to visit the website or visit the Facebook group and let me know what you think.

One of the themes that's emerged in recent editions of Development Drums has been that development policy is about much more than aid and [Paul Collier talked in episode 10](#) about the need for the international community to provide standards of governance and to ensure security for countries too small or poor to provide security for themselves. And in the last episode, [in episode 11, Simon Maxwell and Nancy Birdsall](#) both talked about the need for more effective global institutions that would protect the interests both of poor nations and the citizens of those countries. And Nancy Birdsall talked at last week's Poverty Summit in London about the need for a global policy to underpin these institutions.

So in this edition of Development Drums, we're going to focus on one particular aspect of international institutions and that's International Criminal Law. We'll be looking at the work of the International Criminal Court and particularly of the indictment by the ICC of the Sudanese President, Omar al-Bashir and the future of International Law more generally.

I am joined today by Amanda Taub and Kate Cronin-Furman who are lawyers with an interest in International Human Rights and you may know them because they blog at Wronging Rights; and if you've never visited Wronging Rights, I suggest you press pause right now and go take a look and you'll find it at wrongingrights.blogspot.com and it's passionate, well informed, topical and most surprisingly it's funny and it's quite unusual to be funny about genocide and human rights pieces and stuff like that. So let me introduce you in turn Kate, welcome to Development Drums.

Kate Cronin-Furman

Thank you so much for having us.

Owen Barder

Now did I read somewhere in your blog that you have a B.A. in Genocide.



Kate Cronin-Furman

I do in fact have a B.A. in Genocide.

Owen Barder

And does that mean having a B.A being against genocide or how to do it – or what is genocide?

Kate Cronin-Furman

Yeah, so it's really a *how to* degree. I have a degree from New York University's Gallatin School of Individualized Study and you're allowed to study pretty much whatever you like.

Owen Barder

Cool.

Kate Cronin-Furman

So my work was in sort of kind of historical overview of genocide.

Owen Barder

And now you're working at the International Court of Justice. Is that right?

Kate Cronin-Furman

Yes, which is not the ICC.

Owen Barder

Okay.

Kate Cronin-Furman

As it turns out.

Owen Barder

I'm going to ask you to explain that in a second but first let's introduce...

Kate Cronin-Furman

Absolutely.

Owen Barder

Amanda, big welcome to you too.

Amanda Taub

Hello.

Owen Barder

Now you are educated, I think, I saw in British universities.

Amanda Taub

Yes, for a little while at least. I did my undergrad degree at Edinburgh University in Scotland and then the masters at SOAS at the University of London.

Owen Barder

And you are now a hotshot lawyer in New York City?

Amanda Taub

That's the idea.

Owen Barder

Okay.



Amanda Taub

I am a lawyer at least.

Owen Barder

And you've both got passports and you've worked outside the United States? Amanda, you worked in Ecuador, is that right?

Amanda Taub

Yeah, I did some work with Colombian refugees so in Ecuador and also Costa Rica.

Owen Barder

Oh cool, and Kate you worked in Cambodia?

Kate Cronin-Furman

Yes, I was in Cambodia monitoring the Khmer Rouge Tribunal.

Owen Barder

Cool.

Kate Cronin-Furman

About two years ago.

Owen Barder

And you said that when you grow up you want to be human rights action figures?

Kate Cronin-Furman

Yeah, we think with some cool outfits that could be a pretty good gig definitely.

Owen Barder

Now, so let's talk about the International Criminal Court and some of the people who listen to this podcast are kind of development economists rather than international lawyers.

Kate Cronin-Furman

Of course.

Owen Barder

And may not have been paying attention when all this was set up. So who set it up and when, explain the background?

Kate Cronin-Furman

Okay, so the International Criminal Court is a permanent war crimes tribunal in The Hague that's set up to prosecute individuals for a very short list of crimes against International Law which are genocide, crimes against humanity, war crimes and the crime of aggression, and it's only been around since 2002, and they're only, right now, in the process of having the first trial, which is Thomas Lubanga, a warlord from the Congo.

Owen Barder

Were they the people who were prosecuting Milosevic until he died?

Kate Cronin-Furman

No that was The International Criminal Tribunal for Yugoslavia.

Owen Barder

And what's the relationship between these, because there's an International Criminal Tribunal for Sierra Leone, isn't there? What's the relationship between those Tribunals and the ICC?



Kate Cronin-Furman

That is kind of the million dollar question, because there's a number of ad hoc tribunals, such as Sierra Leone Tribunal that you mentioned, the Tribunal for Rwanda, the one that's operating in Cambodia now, in addition to this permanent court in The Hague. And International Law, at this point, is non-hierarchical, so basically, you've just got all of these courts operating within their respective jurisdictions.

Owen Barder

So who sets up things like the Special Court for Sierra Leone or the Special Tribunal for Lebanon or the Khmer Rouge Tribunal? Who – I mean – where did they come from? Are they nationally created by...

Kate Cronin-Furman

They – it depends, the Sierra Leone and Cambodian tribunals are hybrid courts, so they are, kind of, partially situated within the country's domestic system and partially U.N. operated.

Owen Barder

Right.

Kate Cronin-Furman

Versus the International Criminal Tribunals for Rwanda and Yugoslavia, which were set up, wholly by the U.N., under a Security Council mandate.

Owen Barder

So all these, all these different tribunals and special courts have all got some kind of blessing from a Security Council?

Kate Cronin-Furman

Yes, yes.

Owen Barder

Okay, okay. And, and, and – Kate, you work at The International Court of Justice, so...

Kate Cronin-Furman

I do.

Owen Barder

What's the difference between the – where does that fit in all of this?

Kate Cronin-Furman

The International Court of Justice is the court where states sue each other, it has no jurisdiction over individuals accused of crimes. And it's where states go to sue over treaty violations, invasions.

Owen Barder

Okay.

Kate Cronin-Furman

Basically, it's the court of the United Nations System, it's the successor court to the Permanent Court of International Justice, which was part of The League of Nations, it's been around for a while and...

Owen Barder

If you lose a case at the ICJ, you're a nation, what – do you get fined or do you get invaded or what?

Kate Cronin-Furman

Well, it's – states have agreed to ICJ jurisdiction, so it's in treaty clauses that a disagreement over something arising out of the treaty will be referred to the ICJ, so they show up, the ICJ settles the dispute, and whatever...



Owen Barder

And the country then implements whatever they are told to do?

Kate Cronin-Furman

Most countries have some sort of system within their domestic law for how they will implement the decisions of treaty bodies that they are a part of. So I mean, the U.S. currently has the rules within its domestic law, we're not going to do it very much, but usually, there are some system that people know about, ahead of time.

Owen Barder

Okay, for implementing an ICJ decision?

Kate Cronin-Furman

Right. Yes.

Owen Barder

Okay, so let's move in that direction by talking about the ICC. This is the court, as you said, set up in 2002, and which the United States has not ratified, is that right? Is that – is this the organization that the ICC has not signed up to because they are worried that Americans might get prosecuted by it?

Kate Cronin-Furman

Correct. Yes, we are not members.

Amanda Taub

Yes, we've signed the treaty, didn't ratify it, and then Bush said he unsigned it.

Owen Barder

I didn't know that you could unsigned treaties. And Sudan relevantly, is also not a signatory?

Kate Cronin-Furman

Correct.

Amanda Taub

Right.

Owen Barder

Okay. And is there a long list of countries that are – is this one of those lists like people who do a lot of capital punishments, it's, of a list you wouldn't like to be on like the United States and Iran and Sudan and...

Amanda Taub

China and Russia are also on this list.

Owen Barder

Okay. So this is kind of a European conspiracy, the ICC, is that right?

Amanda Taub

It's European and a large part of the developing world as well.

Owen Barder

Okay, I mean, how does it have a jurisdiction? I mean, is this just a group of people who set themselves up and call themselves a court, or is it – does it come from The United Nations, or how does it – or where does it get its legitimacy from?



Amanda Taub

Well, at its basis, there is a treaty, so it gets its legitimacy from the fact that the countries that are members of this treaty have signed up for it, and you can sign up to that sort of agreement under International Law, and then the treaty will have force.

And then, its secondary source of authority is the U.N. Security Council.

Owen Barder

Okay, and so although the U.S. hasn't ratified the treaty, and has indeed unsigned it, it didn't veto the Security Council resolution approving the ICC?

Kate Cronin-Furman

Well, the U.S. was very involved in the drafting of the Rome Statute, which is the treaty that, kind of, instantiates the International Criminal Court, so initially, the U.S. was quite on-board and was very involved in the creation of the court.

Owen Barder

Okay. And do you think that the Obama administration might take a different view on this than the Bush administration?

Kate Cronin-Furman

They might, but I probably wouldn't hold your breath.

Owen Barder

Okay.

Amanda Taub

Yes, I wouldn't count on it either.

Owen Barder

Okay, so probably no change here, and Amanda, you've written somewhere, that a problem with this court is that it's skimming criminal law off the top of what ought to be kind of deeper system of justice. Explain what you meant by that and what the problem is?

Amanda Taub

Well, this goes to some more complicated issues that I think we'll probably get into in more detail but basically I think the issue with the ICC that hasn't gotten very much attention is we are expecting the Court to do what is usually the work of an entire criminal justice system. So usually, criminal justice systems are the sort of tip of what I described as a very large pyramid where underlying them you have everything from social norms to strong system of policing and community protection to other civil courts and prosecutors and investigations and all kinds of things. And the ICC just doesn't have the benefit of most of that and so is sort of unmoored and people are expecting it to do all of these amazing things like put an end to ongoing atrocities that it has essentially very little capacity to do. And so the point I was trying to make there is that it's just not really going to happen.

Owen Barder

Okay. I mean you wrote that I think in the context of the President of Sudan, Omar al-Bashir. Let's follow through what happened in this case so that we can see your point in a practical example. So al-Bashir was indicted by the ICC for war crimes and crimes against humanity on March 4 this year. So let's start by looking at what's the process that got us to this point? Who decided to look into al-Bashir in the first place? What kind of evidence is needed for the Court to issue indictment? How does it work?

Kate Cronin-Furman

So there are a couple of ways that an issue can get to the ICC. One way is that the country itself can refer a conflict on the suspicion that there is crimes under the ICC's jurisdiction occurring. They can kick it over to the Prosecutor's Office to investigate. Sudan is not a member state of the ICC. So that's not what happened



here. What happened was that this came from the Security Council which has the power to refer conflicts to the Prosecutor's Office as well. So the Prosecutor began an investigation, determined that he felt like there was enough evidence to issue an arrest warrant and so that goes to the judges and this is, I believe, I forget which pre-trial chamber but it goes to pre-trial judges and they decide whether or not to issue a warrant.

Owen Barder

So when you say the Security Council referred it, this is the act – this is the thing you see on the television with them all sitting around and this isn't a bit of bureaucracy in the U.N.

Kate Cronin-Furman

Absolutely. Right

Owen Barder

This is the members themselves passing a resolution like a U.N. Security Council resolution that Bashir is a bad man and ought to be looked into by the ICC. Is that roughly what happens?

Kate Cronin-Furman

Yes. So they pass it not that he is a bad man - I don't think those words came up - but they pass a resolutions which refers it to the ICC and also direct other states to cooperate with the investigation in varying degrees including Sudan. And that resolution passed because the members of the Security Council that were not members of the ICC essentially sat the vote out.

Owen Barder

And then what's the evidentiary hurdle? You said the prosecutor had decided that there was a – as it were a case to answer. This is on the balance of probability that there's a chance this guy is guilty or what is it that the prosecutor is – what's the question that the prosecutor is trying to answer?

Amanda Taub

That's something that there is a little bit of debate about right now actually. My reading of the law says that they really just have to have some evidence so that there is a credible case. But on the genocide charge, they essentially helped the prosecutor to a higher standard, said that they needed a substantial enough weight of evidence to show essentially that it was more likely than not that genocide had taken place and Bashir had been responsible for it. And so they are currently appealing that issue and it's not clear what's going to happen.

Kate Cronin-Furman

Yes, just to clarify. The language is that they need reasonable grounds to believe that the crimes are occurring and there is now, as Amanda just mentioned, quite a bit of debate about what that actually means in terms of a legal standard.

Owen Barder

And when we say the prosecutor's decided there is enough evidence, has he done a Google search of this guy or has he got an army of policemen who go out and collect evidence? What is the process by which he does this?

Amanda Taub

Something in between those two. They have investigators affiliated with the Office of the Prosecutor, and basically...

Owen Barder

They do a Google search.

Amanda Taub

They do the Google search. One of them shows up to the Darfur and asks around hey, anybody been genocided lately?



Owen Barder

Okay, okay. So we've got this arrest warrant been issued and the consequence of that is that if – who now has an obligation to do something? Does – this means that all the members of the ICC, the signatories of the Rome Statute or not the signatories, those who've ratified the Rome Statute have an obligation to arrest this guy if he shows up on their soil?

Amanda Taub

That's where it gets tricky.

Owen Barder

Okay, explain what's going on?

Amanda Taub

So the Rome Statute itself actually has what is essentially an exception for the enforcement of warrants against people entitled to impunity under International Law. So that includes heads of state which Bashir currently is, because under International Law if one country arrests another country's Head of State or another person entitled to official impunity as a part of that government then it's an offense against the country who sent the diplomatic official, so in this case Sudan.

And so where that gets tricky is that the warrant has been issued and countries are required to enforce the warrant except that if it would be a violation of International Law then they first have to get permission from the country that has sent the head or diplomat.

Owen Barder

That might be quite hard.

Kate Cronin-Furman

Which in this case is Sudan.

Owen Barder

Right.

Kate Cronin-Furman

Yeah.

Amanda Taub

So essentially they would have to knock on Bashir's hotel room door and say hello we've got this warrant.

Kate Cronin-Furman

Can we arrest you?

Amanda Taub

Would you please give us permission to arrest you and he'll say no and they'll say how about now, he'll say still no and then...

Owen Barder

Okay. And that's the end of that. And so what you are saying is to make sure I understand this right, is that not only do they – the countries not have an obligation to arrest him they have an obligation not to arrest him because he is a serving Head of State?

Amanda Taub

Well, it's kind of more that they have an obligation to arrest him and they have an obligation not to arrest him.



Owen Barder

Okay. So if he showed up in say the Netherlands tomorrow, what would the Netherlands government do, would they arrest him or not?

Amanda Taub

Well, the tricky thing is – there are essentially – there are more than one way that somebody can end up in The Hague. So the first one is that there is the actual warrant; they get arrested on the actual warrant and then get surrendered officially through the official ICC processors. That can't really happen because not only can they not arrest a sitting Head of State validly under the warrant, another element of the Rome Statute requires that as soon as somebody is arrested under an ICC warrant they immediately have to be brought before a court, a national court where they can challenge their detention and challenge whether their rights were violated during the arrest and other similar things like that.

So it would be pretty unlikely that an arrest under the ICC warrant could survive that challenge because he's got a pretty good defense in that, it's not really valid unless it's Sudan who's given permission.

But then the other thing that could happen is that the – he could be arrested under a different law, a national statute for instance giving domestic jurisdiction over international crimes which several European countries do have.

Kate Cronin-Furman

Including Belgium which is very new.

Amanda Taub

And that's where it gets a little more tricky.

Owen Barder

Okay.

Amanda Taub

Right. That's where it gets a little bit more tricky because it's not really clear what would happen if he was arrested under a statute like that and then surrendered to the ICC, because once he actually gets there, the ICC doesn't have to end the prosecution because of his Head of State immunity.

Owen Barder

It seems fairly unlikely that he is going to be arrested any time soon . Let's come to the question of whether this was even a good idea to issue a warrant for his arrest in the first place. So there's been a lot of chatter on the internet about this; there's been people like Nicholas Kristof in the The New York Times saying this is good, this is the beginning of the end of impunity for homicidal leaders and that's good. And then there've been a bunch of people such as Alex De Waal who is a long-time Sudan expert at Harvard saying actually this is catastrophically bad because it means that it will leave the people of Darfur without support and this is kind of grandstanding by the ICC.

Amanda Taub

Right.

Owen Barder

And I think Amanda you wrote a piece on the Wronging Rights blog saying that you were seriously unimpressed by this.

Amanda Taub

Yes

Owen Barder

Is that still your view?



Amanda Taub

It is still my view. I think that this was not a good idea because of all of the reasons that we essentially knew it wouldn't be. We knew that Bashir was going to retaliate against the people of Darfur; we knew exactly the way in which they are vulnerable which is that they're extremely reliant on humanitarian aid. We knew that that would give him a great deal of leverage when it came to retribution against them. And that's exactly what happened.

He's kicked out 13 international aid agencies and shut down three Sudanese ones, and there is already serious humanitarian distress there and the potential for an absolutely huge disaster.

Owen Barder

Okay so one point is that bad things will happen – this will lead to the people of Darfur not getting the kind of humanitarian support that they desperately need. There's also people have said, well, if he goes actually his successor is going to be just as bad. That the people around him are unpleasant characters, so it won't do any good to, even if he was hold off the course, it wouldn't do any good.

Amanda Taub

Well, that's something that...

Owen Barder

That's the main case against the arrest warrant, isn't it?

Amanda Taub

Well, I'm not sure that second point it's the case against the arrest warrant at all.

Owen Barder

Okay.

Amanda Taub

I mean, just because it maybe true that the next person who takes power will also commit war crimes doesn't mean that Bashir should be let off the hook for the crimes he's committed.

Owen Barder

Right, so you think that just because he will do very bad and wicked things to the people of Darfur that doesn't mean that he should be let off the hook?

Amanda Taub

Well, I would backtrack for just a second. So on the issue of if he goes his place will be filled by somebody who is sort of also a bad person. I think that what that – that sort of brings up two issues. One is kind of what we're supposed to be doing in the first place. I certainly don't think that just because you can't do all of the good things, doesn't mean you can do any of them and that goes for criminal prosecutions as much as anything else. I think saying that we can't prosecute everyone isn't a good reason to say we can't prosecute anyone.

But at the same time, if we're saying – where this gets fuzzy is people saying we have to put a stop to impunity because that is somehow going to improve the situation in Darfur because we'll have taken a hard line and shown that this is unacceptable and that you know if you commit genocide you are a pariah for the international community. I think that argument is seriously undermined, if our best case scenario is that somebody who has been as much or more involved in the genocide is going to get to be President of Sudan.

Owen Barder

But there is something in this argument about impunities. I mean, I'm kind of surprised to hear lawyers saying that we need to weigh up the utilitarian consequences of arresting someone and prosecuting them for a crime. I mean we generally take the view that there are rules and the law should be allowed to take its course. It should be applied impartially and fairly and that we shouldn't say, well, we shouldn't really prosecute someone because their family will suffer or something else. We tend to take a view that rules are



rules and ought to be enforced. And I think the Kristof argument that – I’m guessing would be well, maybe bad things will happen in Darfur and that’s deeply regrettable but that would be the fault of Bashir and his henchmen and not the fault of the criminal court. And we’re living in a world where genocidal or homicidal dictators reckon they might be punished for it would probably be a better thing than people feeling that they’re going to get away with it. I mean, isn’t there a case for applying the law anyway, even if ...?

Kate Cronin-Furman

Sure, yeah, of course, there is. But I think this gets back to Amanda’s point about skimming the top off of criminal law which is that it’s a little bit disingenuous to say that this is fair and impartial and just and so we just need to apply it uniformly across the board without any consideration of the consequences or of what’s missing from the process.

Amanda Taub

And I think also that’s you bring up a really interesting point which is kind of the perception of how criminal courts work within domestic systems and it’s not as if we prosecute all of the crimes that happen in our domestic court system. There are everything from cases where we have insufficient evidence to go forward to cases where we’ve taken a plea bargain, allowed somebody to plea to very low charges or nothing at all in exchange for information against somebody more important. There are cases where the courts themselves often will be sort of squeamish about certain issues and certain cases. There is really a pretty broad spectrum of how things are handled and I think part of the...

Owen Barder

I think in the U.K. the Director of Public Prosecutions has a discretion to say that it’s actually just not in the public interest to prosecute someone. Is that right?

Kate Cronin-Furman

Sure.

Amanda Taub

Right.

Owen Barder

Is that true in the States as well that there’s some...?

Amanda Taub

It is true in the States.

Owen Barder

Okay. So there is normally a discretion within a society to not apply the criminal law as it stands. That’s what you’re saying?

Amanda Taub

Right.

Owen Barder

And there isn’t one in the ICC, they just decide?

Amanda Taub

That’s a matter of some debate. Their statute says that they don’t have discretion. That if they have a case they’re supposed to go forward with it.

Owen Barder

Okay.

Kate Cronin-Furman

But it’s on the basis of sufficient gravity to proceed and it’s not totally clear what that means.



Owen Barder

So this is an example of the point you're making that the court is kind of disconnected from any kind of social structure below it, any kind of polity that could make a decision on the interest of society about whether it's a good idea to prosecute or not.

Amanda Taub

Right and I think it's worth remembering that there were several decisions made here. It's not just if to prosecute, there is also when, how, all of those things are discretionary decisions on some level and it's – I think it's not really reasonable to make it into this black and white binary decision between yes, now, everything and no, never, anything.

Kate Cronin-Furman

And on that point the prosecutor has the option of releasing a sealed warrant rather than doing this public – a huge thing, with, oh my god we're going to end impunity by indicting a sitting Head of State – sorry, issuing a warrant for a sitting Head of State.

Owen Barder

So this is why people say that the prosecutor is grandstanding. That's I mean, because it seems like a kind of big political statement but we're ending in...

Kate Cronin-Furman

It's a huge political statement. Yes.

Amanda Taub

It's a huge political statement.

Owen Barder

And what's going on there? Is this the court trying to assert itself in the International system? Is it the prosecutor, what's your take on why this is happening?

Amanda Taub

Well, there is a very cynical view that the prosecutor may be trying to distract attention from some other issues currently occurring but...

Owen Barder

Like what?

Kate Cronin-Furman

They have been having some significant problems with their handling of an ongoing trial, the Lubanga trial. Essentially the way they handled their evidence has made it more or less impossible to proceed with the trial as they had originally planned to. They had promised some of their – the people who provided evidence that their identities would remain secret and that the evidence itself would not be directly provided to the defense, but that's not actually allowed within the context of the trial and so it has hit roadblocks many times.

Owen Barder

I guess it is. So that's – so one story is this may be to divert attention from a bit of a cook up somewhere else.

Kate Cronin-Furman

Yeah.

Owen Barder

Okay.



Kate Cronin-Furman

Yeah. I mean that trial eventually has started to go forward but on the opening day of hearings one of – the first witness recanted his testimony three hours after giving it. So that’s a poor showing for a court that everybody has been waiting for seven years to start trial.

Owen Barder

And you said earlier that this is the first and only trial now underway for the ICC itself?

Kate Cronin-Furman

The Lubanga trial, which is the one we’re just discussing. Right, yeah.

Owen Barder

Okay. Okay. So that’s your take on Omar al-Bashir. That it was a mistake that it’s grandstanding that the harm that will be done and what do you think that they should have issued a sealed warrant or they should have come to it later when he leaves office or what, what would you have done?

Kate Cronin-Furman

There is a defensible position to be made that this is going to cause tremendous suffering and it’s worth it anyway.

Owen Barder

Right.

Kate Cronin-Furman

In this particular case, like, I happen to not come down on that side. I think that this was a bad idea even though as a general rule like I’m committed to the idea of international criminal justice. I think that I am not committed in a situation such as this one. I think it should have been done at a different time and in a different way.

Owen Barder

So in a sense you are just saying that suffering is so great that although there are these kind of benefits to reducing impunity, that the price being paid by the people of Darfur for that is too high in this case. But that’s not the kind of general principle; it’s just in this particular weighing up of the pros and cons it just seems that the cons are too big.

Amanda Taub

I think that’s part of it. I do think that the cons are too big but I think there is also another issue going on in Darfur which hasn’t really been addressed with this particular case, which is that we are asking the ICC to do something here that is not really what it does. People are treating this as if it’s going to be somehow a kind of clean and easy way to put an end to the suffering in Darfur and so that that one fell swoop, bring in accountability and justice and change the incentives of the people who are involved in this conflict so that it ends and people are made safe and happy and that’s been the way that it’s sort of presented in a lot of the debates over it and I think that that is just not a reasonable way to do it. That’s not what this court is for and it’s not work that it’s designed to do and it’s not really work that it’s able to do. And so I think that that is also a big problem with this particular warrant because it’s not only a sitting Head of State, it’s a conflict that hasn’t yet been resolved to which Bashir is not the only party.

Owen Barder

Let’s turn to the Lord’s Resistance Army, because there’s a parallel with that conflict, this is the conflict in Northern Uganda. Joseph Kony is the leader of the Lord’s Resistance Army and he too has an arrest warrant issued by the ICC. And the consensus used to be that when the ICC first issued an arrest warrant against Kony that he – that rather galvanized him to get stuck into a peace process. I mean that seems to have – I was just going to say put the fear of God into him, but that’s not the right phrase in this case. And then when he realized that actually there was no way that he could get out of the warrant, it had the opposite effect which is he disappeared back into the – back away from the peace process and it seems like



it's now seen as an obstacle to the agreement. So I mean is this an example of where the ICC has got involved in an existing onset of conflict and had an impact on the dynamics of it that's perhaps not helpful?

Kate Cronin-Furman

Well I think this is kind of the classic like peace versus justice issue. The people on the ground may just want to like get rid of Kony and are not too terribly concerned about who is facing trial for what, but meanwhile, the international community is saying it's important that he face trials and – if it's going to push him back into the bush for 10 years then effectively, fine....

Owen Barder

So be it.

Kate Cronin-Furman

Yeah, we're not. Yeah.

Owen Barder

Right.

Amanda Taub

Right. I mean I think that that's also a good example of how an ICC warrant can fit within a kind of existing power struggle, because the government of Uganda was very much in favor of this warrant when it was first issued because they saw it as something that was going to give them kind of added bargaining power and essentially have the international community on their side and unfortunately it's essentially had the opposite effect to the extent that they are now opposed to a prosecution of him because it's really...

Kate Cronin-Furman

They have no power to get it first.

Amanda Taub

Right.

Owen Barder

Am I right in thinking that there is no way once a warrant has been issued, there is no way to rescind it, there's no way to back away from that?

Kate Cronin-Furman

There is a way to have it suspended for a year through the Security Council, but there is no way to get it wiped.

Amanda Taub

Right.

Owen Barder

And so the government in Uganda basically is now taking the view that this is an obstacle to a peace agreement with the Lord's Resistance Army, the LRA?

Kate Cronin-Furman

Right

Owen Barder

And the ICC's reaction to that is well that's just tough. This guy is – there is evidence that this man has done bad things and therefore he should stand trial?

Kate Cronin-Furman

I mean, the reaction is we have issued a warrant.



Owen Barder

Okay.

Kate Cronin-Furman

Like, end of story.

Owen Barder

I mean, there is a general feeling isn't there, particularly in Africa and we saw this at the Africa Union Summit that the ICC is a kind of European invention and a bit of European interventionism that's focusing particularly on Africans and is intervening in various unhelpful ways in conflicts and making it harder to reach peaceful resolution. Is that fair?

Kate Cronin-Furman

There is that, but there's also a concern that certain governments in Africa are able to manipulate the ICC for domestic political benefit also.

Owen Barder

So that's the Uganda example is it?

Kate Cronin-Furman

Well, no, I would say that that's an example from the Congo where Joseph Kabila has had a lot of luck at getting rid of political opponents by referring cases to the ICC and then an arrest warrant appears for Bemba who's Kabila's major rival and suddenly Bemba is off at The Hague and not running for election again.

Owen Barder

Okay, so part of the worry is that if you are in – it's a kind of victors' justice that if you're the winner – if you are in power you get to decide who to refer?

Kate Cronin-Furman

Yes.

Amanda Taub

I mean, I think, yeah part of the frustration for people is that it's not even victors' justice it's sort of nominal Heads of State's justice, which...

Kate Cronin-Furman

And there's really obvious practical reason for that which is that the ICC can do its job a lot better if the sitting government is not obstructing its investigation.

Owen Barder

But also presumably because to get nations to sign up to something like the ICC there needs to be some acknowledgement of the power and rights of the National Government that it would be hard to get agreement to without that kind of protection.

Amanda Taub

Right.

Owen Barder

What about the notion that this is too focused on Africa that, is there any chance that George W. Bush will be prosecuted or the Burmese junta? What kind of people – why hasn't Robert Mugabe been indicted? Or I don't understand what decides who's up in front of it and who isn't?

Kate Cronin-Furman

Well, again it has jurisdiction over a very narrow number of crimes. So it's genocide, it's crimes against humanity, it's war crimes and it's aggression. It would be pretty difficult to fit Mugabe's actions into any of



the categories. For Bush, while there may well be a case for war crimes or possibly even crimes against humanity, the U.S. is again not a state party, so it's not going to get there that way. And the U.S. has a veto power in the Security Council, it's pretty unlikely that...

Owen Barder

They probably wouldn't sit that one out, do you reckon?

Kate Cronin-Furman

Yeah.

Amanda Taub

Yeah.

Kate Cronin-Furman

Yeah, I am thinking Susan Rice is not going to leave the room while they're debating that.

Owen Barder

Okay, so but then there is a sense, isn't that, that this is – I mean, that's quite a lot of political interference in the process of justice. I mean, isn't it? I mean that feels like as the people might be right to think that this is – that only a particular kinds of case are coming up to the ICC. And the big powerful state who's a representative on the Security Council get to be protected from it.

Kate Cronin-Furman

Well if they are not members of the ICC. If they are then they don't have the same Security Council protection.

Owen Barder

Okay, so Tony Blair could be prosecuted because Britain's a member of the ICC?

Kate Cronin-Furman

Yes, and actually there was a British case under investigation by the prosecutor's office. He ultimately declined to proceed with the case but certainly that was referred there.

Owen Barder

Okay, so that's not impossible at some point. Your point that's being underlying all this...

Amanda Taub

Oh sorry, I just have one more point to make on the last issue which is there is one other way that cases can be prevented from reaching the ICC which is if the person has already been tried in a domestic court for the crime. So the ICC won't retry them at that point. And so that is something else that hasn't become too much of an issue so far but if in the instance that Tony Blair say we're somehow to be referred if Great Britain ended up trying him for the crimes that he was accused of, then that would be most likely...

Owen Barder

That would mean he wouldn't go to the ICC?

Amanda Taub

No, barring procedural irregularities or something like that of sort of a obviously fake trial then that would also divest the ICC off jurisdiction.

Kate Cronin-Furman

And Sudan has tried really hard to do at with a number of their potential indictees.

Owen Barder

But in a way that's a good thing, right, if it provokes Sudan into having domestic legal – I mean, that's a success.



Kate Cronin-Furman

Well...

Amanda Taub

It's a good thing if they're real.

Kate Cronin-Furman

But if they're kangaroo courts it's not really doing anyone much good.

Owen Barder

Right, then not so good. Okay. The theme here is this idea that the court needs to be better situated as part of a more comprehensive system of justice. And from what I'm hearing you say is that it's good that there is some kind of international criminal. You guys are international criminal lawyers, you believe in this stuff. But you want it to be more linked in. I mean, doesn't that require some kind of global policy making mechanism, some kind of global policy that enables this court to be partial? I mean, are we talking about an international police force, lower-level international courts, courts that try other kinds of criminal law? What is it that you – how is it you think this – what is it this court should be linked in to in your view?

Kate Cronin-Furman

Well, I think that on that particular issue, part of the problem is that in some of the places it's acting war zones that have been war zones for years and years and years. There is not only not an international polity and system of police and all of that; there isn't much of the national one either. And so to be operating in so much of an official vacuum of that sort of institution is really difficult and it is a hurdle that people haven't really addressed much or given the ICC kind of credit or criticism for having to deal with.

Owen Barder

But it's not your position, is it, that in those circumstances you just can't do international criminal law? Or perhaps, it is that your view. Perhaps you know you were saying it's so bad that you can't do it there.

Kate Cronin-Furman

My view of the circumstances is that we should seriously consider what we're trying to get out of this courts and on a case-by-case basis, but it's true that for me personally most of those cases come down in the no column at the moment, because I think part of it is we have this idea in those of us who come from countries where courts are stable and developed and have been around for a long time and we know what they do, we have this idea that they are particularly sort of legitimate neutral arbiters of justice. And I am not sure that it's good for the ICC itself to be operating in cases where it's impossible to do that, in cases where it's having to sort of cut corners in ways that are fundamentally illegitimate and that will cause problems. I mean we've seen that with the Lubanga trial; it just isn't really working institutionally for the court much less for any of the ideals that it's supposed to be upholding.

And I think that, that's something as well that is feeding into that issue that you mentioned of people finding it illegitimate that this is looking like a court used by Europeans against Africans. There is a sort of underlying issue there of we think courts are neutral and in many of the cases that these are that are being investigated or tried right now. The country is involved, the courts are not neutral. Courts are tools of the governments or corrupt or something like that and I don't – I think for people there this isn't seen as some sort of wonderful international clean justice thing.

Owen Barder

Amanda Taub, Kate Cronin-Furman both bloggers at wrongingrights.blogspot.com, go check it out. Thanks very much for taking us through the intricacies of International Law.

Kate Cronin-Furman

Thank you very much.



Amanda Taub
Thank you so much.

[Music]