

AMICC

U.S. COOPERATION WITH THE ICC ON DARFUR

SUMMARY

Following the United Nations' (UN) Security Council (SC) referral of March 31, 2005¹ the Prosecutor of the International Criminal Court (ICC) opened an investigation into the situation in Darfur on June 1, 2005.² His office is currently collecting evidence in order to select particular cases for prosecution. Because this is a SC referral, all UN member states are required to cooperate fully with the Court on this investigation. In September 2004, the Bush administration qualified the atrocities that were being committed in Darfur as genocide,³ thus invoking special responsibilities to take action to prevent further crimes and punish the perpetrators.⁴ Yet, the US government has been heavily criticized for failing to act accordingly.⁵ The US government is probably in possession of significant intelligence information on crimes committed in the Darfur region of Sudan that it should share with the Court. Cooperating with the ICC on Darfur would be consistent with US leadership in international criminal law and support for international tribunals, and the commitment to fight against impunity in Darfur that led the US to abstain in the referral resolution.⁶

US COOPERATION WITH INTERNATIONAL TRIBUNALS

The US has traditionally been one of the most fervent supporters of international courts and trials to bring to justice the perpetrators of the most serious international atrocity crimes. Not only has it promoted the creation of tribunals in Nuremberg and Tokyo, as well as the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), but it has also extensively and effectively cooperated with these international criminal tribunals, especially the ICTY and the ICTR. Moreover, the US was very active in the negotiation of the Rome Statute that created the ICC. All this demonstrates that the current US policy of disengagement from the ICC contradicts US leadership in the establishment and support of international courts.

¹ UN Doc. S/RES/1593 (2005),

<http://daccessdds.un.org/doc/UNDOC/GEN/N05/292/73/PDF/N0529273.pdf?OpenElement>.

² ICC Press release: *The Prosecutor of the ICC opens investigation in Darfur*, June 6, 2005, <http://www.icc-cpi.int/press/pressreleases/107.html>.

³ BBC News, *Powel declares genocide in Sudan*, September 9, 2004, <http://news.bbc.co.uk/2/hi/africa/3641820.stm>.

⁴ Convention on the Prevention and Punishment of Genocide (1948), article 1.

⁵ Sudan Tribune, *Chronology of a Failure to Stop Genocide*, September 10, 2005, http://www.sudantribune.com/article_impr.php3?id_article=115639/21/05.

⁶ "We strongly support bringing to justice those responsible for the crimes and atrocities that have occurred in Darfur and ending the climate of impunity there [...] By adopting this resolution the international community has established an accountability mechanism for perpetrators of crimes and atrocities in Darfur [...] it is important that the international community speak with one voice in order to help promote effective accountability..." Ms. Patterson, US representative before the SC, explanation of vote pursuant to adoption of resolution 1593, Verbatim of the 5158th session of the SC, UN Doc. S/PV.5158, <http://daccessdds.un.org/doc/UNDOC/PRO/N05/292/47/PDF/N0529247.pdf?OpenElement>.

The US has assisted the ICTY extensively in the gathering of documentary and other physical evidence and by providing intelligence information, including overhead photos of suspected mass grave sites.⁷ In fact, ICTY's indictments have regularly been built upon intelligence information provided by the US. Further, the US government made especially great efforts to turn over evidence to the tribunal to help with war crimes charges against Slobodan Milosevic. Moreover, the US has been the ICTY's strongest financial supporter through total UN assessments and voluntary contributions. According to the tribunal's reports, voluntary contributions by the US amount to approximately \$ 17 million.⁸ Additionally, the US has provided several million dollars worth of computer and other equipment to both the ICTY and the ICTR. Cooperation has also included the arrest and extradition of one person accused of genocide and crimes against humanity to the ICTR.⁹ The US has also assisted both tribunals by seconding personnel, including investigators, prosecutors, political and intelligence analysts, logistical management experts and information management specialists.¹⁰ Finally, as part of its efforts to support international criminal justice, the US encouraged the handover of war crimes suspects by other countries by making this a condition of receiving aid.

US CAPABILITY TO COOPERATE

The US Congress passed concurrent resolutions on July 22, 2004 condemning the atrocities in Darfur as genocide.¹¹ Former Secretary of State Collin Powell also concluded on September 9, 2004 that genocide had been committed in Darfur.¹² Furthermore, the US Department of State's Country Report on Human Rights Practices released on February 28, 2005 contains information on violations of international human rights law and humanitarian law in Sudan, attacks by the government-supported militias and by the rebels, as well as other incidents.¹³ Other fact sheets produced by the US Department of State also describe violence in Darfur.¹⁴ The US government must have data which supports these resolutions, statements and reports.

The US has extensive intelligence gathering capabilities, including monitoring of radio communications and satellite and aerial reconnaissance. American intelligence organizations regularly monitor communications overseas and keep conflict areas under close surveillance. In addition, as part of the US-Sudan counter-terrorism cooperation, the CIA has a big station in Khartoum, Sudan. Furthermore, The US Agency for International Development (USAID) runs several programs in Darfur

⁷ Amnesty International, *International Criminal Tribunals: Handbook for government cooperation*, August 1996, AI Index: IOR 40/07/96 [hereinafter Amnesty handbook on cooperation], at 12.

⁸ Voluntary contributions by the US amounted to \$ 16,910,298 as of July 31, 2003. See the Tenth Annual Report of the ICTY to the UN General Assembly and Security Council, UN Doc. A/59/215-S/2004/627, <http://www.un.org/icty/rappannu-e/2003/index.htm>, paragraph 293.

⁹ In 1994 and 1995 the US entered into executive agreements with the ICTY and ICTR for the purpose of arresting and surrendering to both tribunals indicted fugitives found in the US. Legislation to implement these agreements was enacted in 1996 (National Defense Authorization Act (1996), section 1342).

¹⁰ Amnesty handbook on cooperation, *supra* note 7, at 25/26.

¹¹ House Concurrent Resolution no. 467; Senate Concurrent Resolution no. 133.

¹² BBC News, *Powell declares genocide in Sudan*, *supra* note 3.

¹³ *Sudan: Country Reports on Human Rights Practices*, Bureau of Democracy, Human Rights and Labor, February 28, 2005, <http://www.state.gov/g/drl/rls/hrrpt/2004/41628.htm>.

¹⁴ Fact Sheet: *Sudan: Ethnic Cleansing in Darfur*, Bureau of Democracy, Human Rights and Labor, April 27, 2004, <http://www.state.gov/documents/organization/31952.pdf>; Fact Sheet: *Sudan: Darfur Policy*, Bureau of African Affairs, September 21, 2004, <http://www.state.gov/documents/organization/34594.pdf>.

and possesses a great range of photos on the situation on the ground, as well as satellite images on destruction of villages, refugee camps in Chad and internally displaced persons camps in Sudan.¹⁵ Thus the US has the means and capacity to cooperate with the Court. The US should provide this extremely valuable evidence to the Office of the Prosecutor. A survey conducted in May 2005 indicates the American people would support such cooperation; the relevant report actually revealed that 91% of Americans believe the US should assist the ICC on Darfur.¹⁶

APPLICABLE LAW

Domestic law

The US relationship with the ICC is governed by the Consolidated Appropriations Act for FY2000 and the American Servicemembers' Protection Act (ASPA). The Consolidated Appropriations Act for FY2000 prohibits the use of funds to support the ICC. ASPA restricts, but does not prohibit, cooperation with the Court. The Act is difficult to read, as the present text is the result of several amendments that provide for waivers and exceptions to the general provisions. However, section 2015 clearly states that "Nothing [...] shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Queda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity." This provision undoubtedly applies to the Darfur situation.

International law

In general, only states parties to the Rome Statute must cooperate with the ICC. However, non-party states might lend assistance to the Court and its Prosecutor on the basis of *ad hoc* arrangements.¹⁷ A non-party state might also choose to cooperate with the Court voluntarily without entering into an agreement.¹⁸

Where a SC referral leads to an investigation, all members of the UN might find themselves obliged to cooperate with the Court. This could happen because of the UN Charter powers of the SC. When the SC refers a situation to the ICC, it does so under Chapter VII of the UN Charter after determining that a particular situation constitutes a threat to international peace and security.¹⁹ UN member states are obliged to accept and carry out decisions of the Council under Chapter VII²⁰ and could thus have to cooperate with the ICC, especially if the SC referral resolution specifically requires that.

While resolution 1593, which referred the Darfur atrocities to the ICC, *decided* that the government of Sudan should provide any assistance to the Court, it simply *urged* all other member states to cooperate

¹⁵ USAID, *Sudan: Darfur Humanitarian Emergency*, http://www.usaid.gov/locations/sub-saharan_africa/sudan/darfur.html.

¹⁶ *Do Americans Care about Darfur?*, An International Crisis Group/Zogby International Opinion Survey, http://www.crisisgroup.org/library/documents/africa/horn_of_africa/b026_do_americans_care_about_darfur.pdf.

¹⁷ Rome Statute, articles 54(3)(d) and 87(5).

¹⁸ Although the Statute does not specifically contemplate such a situation, there would be no reason to prevent states that are willing to cooperate with the Court from doing so whenever they have not entered into any agreement.

¹⁹ UN Charter, articles 39 and 41.

²⁰ UN Charter, articles 2(5), 25, 48 and 49.

fully.²¹ This means that although the US is encouraged to cooperate, it is not obliged to do so under international law. However, should the Court consider that US cooperation is crucial, it might request the SC to make provision of assistance mandatory.²²

According to the Rome Statute, a country which is obliged to cooperate with the Court, may deny assistance if production of evidence would prejudice its national security interests.²³ US officials may want to take advantage of these Statute provisions. However, the US could provide sections or summaries of the documents without revealing their background or entire text. If the US government feels that the information it holds is confidential, it might conclude an agreement with the Court allowing for the confidential sharing and use of sensitive information. Following such an arrangement, the Prosecutor would not disclose, at any stage of the proceedings, the documents or information received. He would solely use these documents for the purpose of generating new evidence and its origin would not be disclosed without US consent.²⁴

IMPORTANCE OF COOPERATION

Cooperation of states is a key element for the work of the ICC. The ICC does not have at its disposal its own police force capable of executing its decisions or orders. It must then rely on states to carry out many functions. Both states parties and non-parties may assist the ICC at any time, and especially in particular circumstances, for instance, when they can produce evidence relevant to a situation being investigated.

The ICC will require the support and cooperation of states throughout the proceedings on Darfur, but at the investigation stage the Prosecutor particularly needs relevant information and evidence to support indictments and requests for arrest warrants. Another form of cooperation he needs now is logistical support for forensic teams, and translators and equipment that may assist ICC personnel in carrying out investigations.²⁵

Sudan's reluctance to cooperate with the Court makes assistance by other states essential. American cooperation is greatly desired, because US intelligence agencies have the most extensive surveillance and satellite photo capabilities available. The Court can manage to collect evidence and carry out proceedings in Darfur on its own. However, US cooperation with the ICC on Darfur would certainly facilitate the Court's work and help it achieve results more rapidly.

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²¹ UN Doc. S/RES/1593 (2005), *supra* note 1, paragraph 2.

²² Rome Statute, article 87(5) and (7). See also the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, article 7.

²³ Rome Statute, article 72 and 93(4).

²⁴ Rome Statute, article 54(3)(e).

²⁵ ICC Newsletter #4, Cooperation and Assistance to the ICC: A Collective Challenge, 3.