

SITUATION IN SUDAN AFTER THE EVENTUAL ISSUANCE OF ARREST WARRANTS

Summary

Following the Security Council (SC) referral and the Prosecutor's preliminary investigation, the Prosecutor formally opened an investigation into crimes in Darfur in June 2005. The ICC investigation follows several UN attempts to end the violence in Sudan. In January 2004, the UN Commission of Inquiry (COI), mandated to investigate the situation in Darfur, concluded that crimes against humanity and war crimes occurred and that the perpetrators should be brought to justice. The SC passed several resolutions as a response to the COI findings, imposing a travel ban on senior Sudanese officials and a freeze of assets for such officials.

The ICC investigation has moved forward despite limited cooperation from the Sudanese government and continuing violence in Darfur. The Prosecutor's teams have gathered evidence through interviews with refugees in Chad and other countries. The Prosecutor will now focus on a select number of criminal incidents and on those persons bearing the greatest responsibility. Following a through investigation, the Court is likely to issue arrest warrants for high-ranking government officials and leaders of the Janjaweed militia.

The situation on the ground remains volatile: the ceasefire has been broken several times and the Janjaweed militia continues to commit mass crimes and the government refuses to disarm them. In recent months, humanitarian workers and the African Union (AU) forces have come under attack. Two AU soldiers were killed and several troops and humanitarian workers were taken hostage and later released. This paper examines likely scenarios that may occur in Sudan after arrest warrants are issued for the alleged perpetrators of atrocities in Darfur.

Background

Sudan, the largest country in Africa, has been engaged in a civil war since 1983. The North-South conflict, which pitted Muslims in the north against Christians in the south, lasted over 20 years. In January 2005, the government and southern Sudanese rebels signed a Comprehensive Peace Agreement (CPA) which provides for a ceasefire and security arrangements, wealth and power sharing accords, the adoption of a new constitution and the creation of a government of national unity.¹

As the North-South conflict was nearing its end, a rebellion erupted in the western part of Sudan in February 2003. Two rebel movements, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), accused the government of neglecting Darfur and its people. The government responded by calling on local tribes to assist in fighting the rebels. Arab militias known as the Janjaweed² led the government's counterinsurgency. The militias are

¹ Comprehensive Peace Agreement, http://www.usip.org/library/pa/sudan/cpa01092005/cpa_toc.html.

² "Janjaweed" is a Darfurian term for an armed bandit on a horse or a camel.

responsible for attacking and burning villages, mass killings and rape. The two-year conflict has left over two million people displaced and killed an estimated 200,000 people.³

Negotiations between the rebels and the government of Sudan have failed to bring peace to Darfur. Despite a subsequent ceasefire agreement signed on April 8, 2004,⁴ the talks have achieved little and insecurity and attacks on civilians and humanitarian workers continues. The peace talks were further threatened by the disunity among rebel groups. The International Crisis Group stated that the success of the AU sponsored peace talks depends on the unity of rebel movements. In November 2005, SLM/A held a Unity Congress to resolve differences between its two factions. However, the highly anticipated gathering failed to unite the rebels.

The seventh round of peace talks resumed in late November in Abuja. The two SLM/A factions decided to put their differences aside and unite. On December 14, 2005, the government delegation and the rebel movements agreed on the first clause regarding the wealth-sharing network. It discusses issues concerning development, the displaced, refugees and victims of war and how to create a suitable atmosphere for them to return to their region.⁵

The ICC Investigation in Darfur

On June 6, 2005, the Prosecutor opened a formal investigation into the Darfur situation.⁶ The Prosecutor reached his decision after reviewing evidence submitted by the UN Commission of Inquiry, NGOs and the Prosecutor's own findings.

Under the Rome Statute, admissibility is determined through certain factors, namely whether the information available provides a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed; the crimes have not been investigated or prosecuted by the countries involved;⁷ and taking into account the gravity of the crimes and the interests of the victims.⁸ The Prosecutor's staff studied Sudanese institutions, laws and procedures and ad hoc mechanisms created in the context of the conflict in Darfur.⁹ The Prosecutor decided that cases in Darfur fall within the jurisdiction of the Court because he concluded that Sudan's national trials do not meet the standards for complementarity.

³ *Death Tolls in Darfur Tops 100,000 since UN Directive*, Sudan Tribune, October 23, 2005, http://www.sudantribune.com/article.php3?id_article=12209.

⁴ *Agreement on Humanitarian Ceasefire on the Conflict in Darfur*, <http://www.issafrica.org/AF/profiles/Sudan/darfur.pdf>.

⁵ *Sudan, Darfur Rebels Agree on Wealth Sharing Framework*, Sudan Tribune, December 14, 2005, http://www.sudantribune.com/article.php3?id_article=13041

⁶ ICC Press Release: *The Prosecutor of the ICC opens investigation into Darfur*, June 6, 2005, http://www.icc-cpi.int/pressrelease_details&id=107.html.

⁷ Under article 17 of the Rome Statute, the Court cannot initiate an investigation if a state that has jurisdiction over the case claims in good faith that it has conducted an investigation or are conducting one effectively. The Court can only proceed with investigations if state is unable or unwilling to investigate or prosecute the alleged perpetrators.

⁸ Statement of the Prosecutor of the International Criminal Court, Luis Moreno Ocampo, to the Security Council on 29 June 2005 pursuant the UNSCR 1593, <http://www.un.org/News/Press/docs/2005sc8429.dochtm6/30/05>.

⁹ *Id.*

Since the beginning of the investigation on June 1, 2005, the Office of the Prosecutor (OTP) has collected evidence related to crimes alleged to have taken place in Darfur and groups and individuals responsible for those crimes. The initial fact-finding mission was conducted outside Sudan due to security concerns. The mission helped the OTP develop a full understanding of the situation in Darfur and the context in which the alleged crimes took place. The OTP has conducted interviews with victims and witness primarily in refugee camps inside Chad. Over a hundred potential witnesses have been screened and a number of formal statements have been taken.¹⁰

Efficient investigation may require the Prosecutor to collect evidence inside Sudan, which will entail consent from the government. SC resolution 1593 requires the Sudanese government to fully cooperate with the Court. However, Sudan has opposed the referral, claiming that as a non-state party to the ICC, the Court has no jurisdiction over its citizens and that the country has a capable judicial system that is willing and able to prosecute the perpetrators of crimes committed in Darfur.¹¹ The Prosecutor requested cooperation during a visit of the OTP's representatives to Sudan in November. The Sudanese government agreed to organize a visit to Sudan by the end of February 2006 for the representatives of the OTP to meet with the Special Court and other relevant judicial bodies to assess national proceeding in relation to alleged crimes committed in Darfur.¹² In addition, the Ministry of Defence would cooperate with other officials to prepare a comprehensive report by March 2006 on matters to be identified in advance by the OTP.¹³

Despite some cooperation, the Sudanese government maintains that Sudanese judicial system is capable of investigating and prosecuting the perpetrators of alleged crimes in Darfur. Sudanese authorities established the Special Court for Darfur in June 2005 and two additional Special Courts in the cities of Geneian and Nyala in November. The Courts are to prosecute crimes in Darfur, including violations of international humanitarian law.

Persons Most Likely to be Indicted by the ICC

The Commission of Inquiry identified 51 individuals who they believe are the most responsible for the atrocities in Darfur. This list serves solely as advice for the Prosecutor, who will decide after the completion of his own investigation, which individuals should be held accountable. Due to limited resources, the Court will likely prosecute only persons who bear the greatest responsibility for the violence.

¹⁰ Statement of the Prosecutor of the International Criminal Court, Luis Moreno Ocampo, to the Security Council on 13 December, 2005 pursuant the UNSCR 1593, <http://www.un.org/News/Press/docs/2005/sc8578.doc.htm>.

¹¹ *Sudan Reiterates Opposition to Try Darfur Suspects before ICC*, Sept. 18, 2005, <http://www.globalpolicy.org/intljustice/icc/2005/1018opposition.htm>.

¹² Statement of the Prosecutor of the International Criminal Court, Luis Moreno Ocampo, to the Security Council on 13 December 2005 pursuant the UNSCR 1593, http://www.icc-cpi.int/library/organs/otp/LMO_UNSC_ReportB_En.pdf.

¹³ *Id.*

Those indicted will likely include the highest-ranking officials within the Sudanese government and leaders of Janjaweed militia. These may include:

- President Lt. General Umar Hassan al-Bashir
- Second Vice-President Ali Osman Taha
- Head of Sudanese Security Saleh Gosh
- Minister of Defense General Bakri Hassan Sale
- Former Governor of Darfur and Security Advisor to the President Ataiab Ibrahim Mohamed Khair
- Janjaweed leader Musa Hilal¹⁴

Due to the large numbers of atrocities occurring in the region, the criterion for the selection of incidents will be gravity. While rebel forces have engaged in violence against both civilians and humanitarian workers, the gravity of their crimes is lower than crimes committed by the Janjaweed militia. High-ranking government officials and leaders of the Janjaweed may be the first charged with committing atrocities. Once initial warrants are issued, the Prosecutor will continue to investigate atrocities in Darfur. If he determines that crimes committed by rebels may amount to the same gravity as crimes committed by the Janjaweed militia and GOS, the Court may decide to prosecute the highest-ranking officials within the rebel movements as well.

Execution of Arrest Warrants

Following an extensive investigation, if the Prosecutor concludes that he has enough evidence to indict specific individuals, he can request Pre-Trial Chamber I (PTC I) to issue arrest warrants. The ICC does not have its own police force to carry out arrests but relies on state cooperation. Under article 59, State parties agree to use their respective national forces to arrest such individuals and transfer them to the Court in The Hague.

Arresting individuals responsible for the atrocities in Darfur may be difficult as the Prosecutor is likely to indict high-ranking officials within the Sudanese government. Sudan is also not a party to the Rome Statute. However, resolutions passed by the Security Council are legally binding on all members of the United Nations. SC resolution 1593 states that the government and all other parties to the conflict in Darfur must fully cooperate with and provide any necessary assistance to the Court and the Prosecutor. The resolution also urged concerned regional and international organizations and all states, including states not party to the Rome Statute, to cooperate fully with the Court.¹⁵ Despite the legal obligation, it is unlikely that the Sudanese government will arrest and send any individuals charged with committing crimes within the Court's jurisdiction.

If any arrests were to happen, they would likely have to be carried out inside Sudan. Security Council resolution 1591 imposed a travel ban and a freeze on all assets of individuals who

¹⁴ Human Rights Watch, *Darfur: Militia Leader Implicates Khartoum*, March 2, 2005, <http://hrw.org/english/docs/2005/03/02/darfur10228.htm>

¹⁵ UN Doc. S/RES/1593 (2005).

commit atrocities, impede the peace process or constitute a threat to stability in Darfur.¹⁶ The ICC will have to rely on cooperation of the African Union and the United Nations peacekeeping forces to carry out the warrants of arrest.¹⁷

Possible Effects Following Issuance of Arrest Warrants

After arrest warrants are issued, the individuals under arrest will become among the most wanted persons by the international community. Travel bans and freezing of assets will make it difficult for the Sudanese government to function. This section will explore the likely effects of arrest warrants on the situation in Sudan.

Coup d'etat

The issuance of arrest warrants may diminish the authority of the government. The warrants will make it harder for officials to function and can serve as a catalyst for their replacement. An already volatile situation may also lead to the overthrow of President El-Bashir and the National Congress Party. Since independence in 1959, successive Sudanese governments have often been replaced through coup d'etat. Even the present government came to power after a bloodless coup on June 30, 1989.¹⁸ The international community will need to monitor the situation on the ground and decide what action is required.

If President El-Bashir is removed peacefully, the international community should support the new government, assist to stabilize the situation in Sudan and begin negotiations to turn over individuals sought by the ICC. The negotiations can be similar to the ones that occurred with Serbia following the arrest of former President Slobodan Milosevic.¹⁹ Threats of more sanctions, withdrawal of aid and positive incentives can be used to negotiate the handover of the alleged perpetrators.

Amnesty law

The issuance of arrest warrants may prompt the Sudanese government to negotiate a peace agreement with rebel forces in Darfur. President El-Bashir and other high-ranking government officials may want to negotiate an agreement that would provide amnesty to anyone who participated in violence in Darfur. If the President and others are granted amnesty, the Court will have to decide whether the amnesty satisfies the principle of complementarity. The Rome Statute does not address the issue of amnesty but article 17 states that the Court shall determine a case inadmissible if it has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the

¹⁶ UN Doc. S/RES/1591 (2005).

¹⁷ SC resolution 1590 established the United Nations Mission in Sudan (UNMIS) and determined UNMIS should support the African Union mission (AMIS) in its efforts to foster peace in Darfur.

¹⁸ U.S. Department of State, Background Note: Sudan, <http://www.state.gov/r/pa/ei/bgn/5424.htm>.

¹⁹ President Milosevic was arrested and transferred to the Court in The Hague following a threat by the United States and other donors to cut off aid to Yugoslavia.

unwillingness or inability of the State to prosecute.²⁰ The amnesty is unlikely to shield the worst perpetrators from prosecution. As the referral reflects the thinking of the international community that perpetrators of crimes that shock the conscience of humanity need to be punished, a blanket amnesty for the President and other government officials may not be acceptable.

United Nations engagement in Sudan

The issuance of arrest warrants may prompt the international community to pressure the Sudanese government to end the fighting and turn the alleged perpetrators to the Court. The UN can threaten the Sudanese government with suspension of their membership if they fail to comply with the Court's orders. The SC can adopt more sanctions targeting the alleged perpetrators and the oil sector as the money from oil revenues may be used to buy arms and other military equipment.

The UN Mission in Sudan (UNMIS) can cooperate with the ICC to gather evidence and execute eventual arrest warrants. SC resolution 1590 established UNMIS to monitor implementation of the Comprehensive Peace Agreement in Southern Sudan and provide support to the AU forces operating in Darfur. UNMIS's success will not only help to stabilize the frail peace in southern Sudan but may also help to the outcome of the crisis in Darfur.

The UN can also consider a military operation for Darfur. The current AU mission is unable to stop the violence due to its weak mandate and lack of financial and technical resources. The UN mission should have greater financial and technical resources and a stronger mandate of peacemaking rather than peacekeeping. A stronger stance from the international community and the presence of the UN forces can be helpful in restoring law and peace in Sudan.

The African Union involvement in Sudan

The African Union can put more pressure on the Sudanese government and rebels to negotiate a long lasting ceasefire agreement and to cooperate with the Court. The AU can introduce sanctions targeting the government and alleged perpetrators identified by the ICC. In November 2005, the AU Peace and Security Council threatened to impose sanctions on any party that would undermine or pose an obstacle to the peace process in Darfur.

The limited mandate of the AMIS force is not sufficient to protect civilians and stop the ongoing violence. The AU should not bow to the Sudanese government's demands; rather the AU should push the government to accept a broader mandate for its forces in Darfur. The broader mandate should authorize the AU to use force to protect civilians and IDPs from attacks, increase the number of the AU forces on the ground and establish new rules of engagement that would allow the AU forces to move in Darfur without restriction.

²⁰ Rome Statute, Article 17(1)(b).

Sudan hosted the annual AU summit in January 2006. The agenda for the summit included the election of a new AU president. Sudanese President Umar El-Bashir, who was one of the candidates for the AU presidency, was not elected. The AU chose the president of Republic of Congo as its new president, thus sending a strong signal that the AU would not support a government that commits serious human rights violations against its own people.

Spill of violence into the neighboring countries

The deteriorating situation in Sudan, with increased violence and lawlessness and the presence of foreign rebel groups, all pose a threat to regional security. The east African region may descend into anarchy if the situation in Sudan is not resolved.

Sudan-Chad relations

Relations between Sudan and Chad have been strained due to Janjaweed attacks on refugees living in camps inside eastern Chad and the Sudanese government's harboring of opposition rebels, including the Rally for Democracy and Liberty (RDL), and army deserters from Chad. The rebels, demanding the resignation of President Idriss Deby, have engaged in various attacks inside Chad. The attack on the city of Adre in December 2005 prompted the government of Chad to call on the Security Council to help prevent the conflict from spreading.²¹ The African Union, in a bid to defuse tensions, sent delegations to both Chad and Sudan to try to normalize relations between both countries and prevent the further escalation of the conflict.

The failure to contain the fighting in Sudan and eastern Chad, further accelerating tensions between the two countries, not only poses a serious threat to regional security, but also to the ongoing relief operations and could trigger a massive humanitarian crisis.

Lord's Resistance Army

The presence of the Lord's Resistance Army (LRA) in southern Sudan further complicates the security situation. Leaders of the LRA, a rebel group from Uganda, are believed to be in southern Sudan, escaping arrest warrants issued by the ICC. They are attacking local civilians, refugees, and humanitarian workers, making it difficult to distribute aid and contributing to the slow return of refugees from other countries. The Sudanese government, which signed an agreement with Ugandan government to help capture the LRA, should increase the presence of its security forces in southern Sudan. Failure to capture LRA rebels may continue to hinder progress in southern Sudan and can further destabilize the fragile peace situation.

Status quo

²¹ *Armed Attack in Chad Prompts Security Council Condemnation*, UN News Service, Dec. 21, 2005, <http://www.un.org/apps/news/story.asp?NewsID=17010&Cr=Chad&Cr1=Sudan>.

Arrest warrants may not influence the political situation in Sudan. President El-Bashir and his National Congress Party could remain in power. Pressure from the international community may however have a deep impact on the situation in Darfur and other parts of Sudan. The inability of the government to provide for its people, and the possibility of more sanctions if Sudan does not hand over suspects, may cause greater hardship for the Sudanese people and lead to greater difficulties for the Court to arrest the alleged perpetrators. However, the ICC is a permanent court and unlike previous international tribunals, its investigation is not time limited. The ICC will continue its investigation until either the alleged perpetrators die, the Prosecutor determines that national courts have effectively investigated and prosecuted the indicted individuals, or the perpetrators are turned over to the ICC for prosecution.

Peace Process

Darfur Peace Process

Peace talks between the GOS and Darfur rebel groups started in August 2004 under the auspices of the African Union. The seventh round of talks started at the end of November 2005. The rebels, in a show of unity, expressed hope that the seventh round of talks would be decisive in bringing peace to Darfur. The talks have yielded some positive results but the progress has been slow and the talks are likely to continue into 2006.

Prior to the elections of the new AU President, peace talks sponsored by the AU were threatened as the Sudanese government was poised to become mediator and party to the discussions. The JEM stated that it would pull out of the AU mediated talks if President El-Bashir became the AU chairperson.²² To avoid negative impact on the peace talks, the Sudanese government expressed its desire for the current AU President Obasanjo from Nigeria to continue presiding over the peace talks even if Sudan took over the AU presidency.²³ This became moot once the new president from the Republic of the Congo was elected.

Arrest warrants may negatively influence the peace talks. Both the rebels and the government may be reluctant to negotiate peace accords if it means that all parties will be held criminally responsible for atrocities committed in Darfur.

North-South Peace Agreement

The Comprehensive Peace Agreement (CPA), signed on January 9, 2005, ended the North-South war that raged in Sudan for over 20 years. The agreement addresses various issues, including the division of Sudan's national wealth, power sharing and questions of autonomy for the South. While the conflict in Southern Sudan and the one in Darfur are not directly linked,

²² *Darfur Rebel JEM Threatens to Quit Peace Talks*, Sudan Tribune, Nov. 3, 2005, http://www.sudantribune.com/article_impr.php3?id_article=12268.

²³ *Sudan's Darfur Talks Headed for 2006, Progress Slow*, Reuters Alert Net, Dec. 19, 2005, <http://www.alnet.org/thenews/newsdesk/L19216047.htm>.

implementation of the CPA is important to the overall stability in Sudan and the crisis in Darfur. It will institute changes to the composition of the government and increase prospects of a peaceful solution in Darfur. The accord, hailed as a major achievement, resulted from international pressure and the direct involvement of the United States in negotiations. If violence follows the issuance of arrest warrants and the potential for a civil war across Sudan emerges, the international community may need to increase its engagement in Sudan and step up its pressure on the government.

Halting the Investigation

One of the challenges the Court faces is the need to balance the interests of reconciliation, peace and justice. The Security Council referral recognized that the circumstances in Darfur constituted a threat to international peace and security²⁴ and signaled a desire of the international community to end impunity and punish the perpetrators of serious violations of humanitarian and human rights law. However, in certain situations, prosecution may hinder a possible peace settlement or may prejudice the outcome of a peace agreement.

Under article 53, the Prosecutor can stop prosecution if it is in the interests of justice to do so.²⁵ Under article 16, the Security Council can request the postponement of investigations or prosecutions for a period of 12 months.²⁶ Since the Security Council referred the Darfur crisis to the ICC, article 16 may be particularly relevant. If a peace accord develops, the Security Council may feel that justice should give way to peace and postpone the Court's work.

Cooperation by International Community

Cooperation from the international community is essential for an effective investigation in Darfur. SC resolution 1593 calls for the cooperation of the Sudanese government and all parties to the conflict to the Court's work, and requires the assistance of all other states, international and regional organizations. In the first stage of the investigation, the Prosecutor gathered evidence from outside Sudan. His team interviewed victims and witnesses in Chad and several other countries. The OTP made a request for cooperation during its visit to Sudan to discuss the assistance with respect to the LRA arrest warrants. The Sudanese government agreed to organize a meeting in February 2006, between the OTP and representatives of Sudanese judicial bodies, including the Special Courts created for Darfur. The meeting will provide an opportunity for the GOS to explain working of its Court and how it relates to the principle of complementarity outlined in the Rome Statute.

Despite this positive development in cooperation, the Sudanese government persists in claiming that it will never hand over Sudanese nationals to the Court and will not allow the ICC

²⁴ United Nations Charter, Articles 39 & 41.

²⁵ Rome Statute, Article 53(2)(c).

²⁶ Rome Statute, Article 16.

investigators to enter Darfur to probe suspected crimes committed during the conflict.²⁷ The cooperation in relation to the process of fact-finding and evidence gathering is essential. However, if the Sudanese government refuses to assist in the investigation after requested, the Prosecutor may ask other nations to assist or submit evidence they may possess with regard to crimes in Darfur.

The Prosecutor can also request the Security Council to enforce cooperation from Sudan. The situation in Sudan was referred to the Court by Security Council Resolution 1593. SC resolutions passed under Chapter VII of the UN Charter are legally binding on all UN member states. If Sudan fails to obey with its obligations, the SC can decide to impose further sanctions or suspend Sudan's membership at the UN.

In addition, cooperation with the African Union is vital to address the security situation on the ground, to assist with victims and witnesses, and apprehend the perpetrators. Currently, the African Union Mission in Sudan (AMIS) has 6,600 troops²⁸ covering approximately the territory size of France, short of over a thousand soldiers of the 7,731 authorized, and with limited supplies. The international community should put more pressure on the Sudanese government to stop hindering the AMIS operation and allow immediate delivery of equipment provided by donors.

Conclusion

It remains unclear what will happen in Sudan once arrest warrants are issued. The international community needs to monitor the situation closely and decide on appropriate measures. Instability in Sudan is a threat to regional security and requires an effective solution.

The ICC continues to investigate the situation in Darfur. The length of the investigation and time of arrest warrants is unpredictable mainly because the main suspects are likely to be senior ranking officials within the Sudanese government. Continuing violence and insecurity further hamper the investigation and make it harder for the Court to investigate inside Sudan and establish an effective system for protecting victims and witnesses. Despite these limitations, the Court concluded the first phase of its investigation and started the second phase in which they will focus on specific cases and investigate those responsible for such crimes.

It is hoped that the issuance of warrants will exert pressure on the parties and deter more atrocities. The international community should support the Court's efforts to bring justice to Darfur and find a political solution to the crisis. The combination of justice, peace and reconciliation are essential to establish a lasting peace in Darfur.

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²⁷ *Sudan Bars ICC Investigators from Darfur*, Sudan Tribune, Dec. 14, 2005, http://www.sudantribune.com/article_impr.php3?id_article=13032.

²⁸ *AU Call for Peacekeeper's Killers to Face Justice Janjaweed*, Sudan Tribune, Oct. 12, 2005, http://www.sudantribune.com/article.php3?id_article=12050.