



THE CURRENT INVESTIGATION BY THE ICC OF THE SITUATION IN DARFUR

Summary

On March 31, 2005, the United States abstained on a United Nations Security Council (UNSC) resolution that referred atrocities committed in Darfur, Sudan, to the International Criminal Court (ICC). This referral triggered a formal investigation by the Office of the Prosecutor (OTP) and an application for summonses to appear. On May 2, 2007, the International Criminal Court (ICC) issued arrest warrants for Ahmad Muhammad Harun, Sudan's current Minister of State for Humanitarian Affairs, and Ali Muhammad Al Abd-Al-Rahman, also known as Ali Kushayb, a Janjaweed militia leader. The warrants, which are based on allegations of war crimes and crimes against humanity, are the first to be issued by the permanent court since it began its investigation of the Darfur situation in 2005. The warrants will likely lead to the indictment and possible trial of Harun and Kushayb as well as other senior officials of the Sudanese government and the Sudanese army for atrocity crimes committed in the course of the conflict between the Arab-dominated government and an African minority in the western region of Sudan.

After recalling the background of the Darfur conflict, this paper looks at UN actions with regard to the crisis. It then explains how the ICC investigation began and analyzes a series of questions relating to the proceedings before the Court. This paper finally assesses the current situation on the ground as well as past peace processes.

Background

Sudan is the largest country in Africa; its population is composed of a large number of tribes. It is a republic with a federal system of government. Its current president, General Omar Hassan al-Bashir, assumed power in June 1989, following a military *coup d'état* organized in cooperation with the Muslim Brotherhood.¹ The country was affected by a civil war that pitted the Muslim North against Christians and animists in the South between 1983 and 2005. In January 2005, the government and southern Sudan's rebel movement, the Sudan's Peoples Liberation Movement/Army (SPLM/A), signed a Comprehensive Peace Agreement (CPA). This accord provides for a ceasefire and security arrangements, as well as for wealth and power-sharing accords, including the adoption of a new constitution and the setting of a government of national unity.²

The Darfur region in the western part of Sudan is a geographically large area, approximately the size of Texas, which is inhabited by different tribal groups. The Darfur conflict began in February 2003 when two African rebel movements, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), revolted claiming that the government had been neglecting Darfur and its people. Because the government did not have sufficient military resources, it called upon local tribes to assist in fighting the rebels. This exploited existing tribal tensions in Darfur. An Arab militia, frequently referred to as "Janjaweed,"³ led the government's counter-insurgency campaign. As a result of the fighting between the rebels on the one hand and

¹ The National Islamic Front, which is the current Sudanese ruling party, was created by this brotherhood. The Muslim Brotherhood is an organization which seeks to institutionalize Islamic Law throughout Darfur. See Sudan.Net, *Major Sudanese Political Parties*, <http://www.sudan.net/government/parties.html>.

² The text of the Comprehensive Peace Agreement can be found at: http://www.usip.org/library/pa/sudan/cpa01092005/cpa_toc.html.

³ "Janjaweed" is a Darfurian term for an armed bandit on a horse or camel.





the government and the Janjaweed on the other, attacks on civilians, as well as destruction and burning of villages, became widespread. As of May 2007, at least 200,000 people were estimated to have been killed, while over 2 million others have been displaced.⁴

The conflicts in southern Sudan and Darfur are distinct from each other. However, rebel groups in both areas accuse the government of favoring the ruling Arab elite and demand a greater share of Sudan's power and wealth. While African Christians and animist groups in the South revolted in opposition to the introduction of Islamic law, Muslim rebels in Darfur claim that as non-Arabs they also suffer discrimination.⁵

UN Action

During 2004, the UNSC passed several resolutions deploring the crimes that were being perpetrated, and calling on the government to disarm the Janjaweed militia and engage in peace negotiations.⁶ However, none of these contributed significantly to the improvement of the situation on the ground.

UNSC resolution 1564, adopted on September 8, 2004, established an international Commission of Inquiry (COI) to look into the violations that had been committed. The Commission's report, released in January 2005, revealed that crimes against humanity and war crimes had been committed in Darfur.⁷ However, the COI did not conclude that the Government of Sudan (GOS) had pursued a policy of genocide. According to the COI's findings, the GOS had not acted with the intent to destroy "in whole or in part [...] an ethnical group [...]"⁸ Its goal was rather to relocate the uprooted black African tribes of the Darfur region in camps where they could be kept under government control. Despite this conclusion, the COI reported that some individuals might have acted with genocidal intent; a competent court could therefore charge them with genocide. Nevertheless, the Commission made it clear that crimes against humanity and war crimes meet a similar gravity threshold as the crime of genocide. The COI strongly recommended that the UNSC refer the situation in Darfur to the ICC.

The Bush administration initially proposed that potential Darfur prosecutions be sent to a new tribunal that would be run jointly by the African Union (AU) and the UN, and would be based at the International Criminal Tribunal for Rwanda, in Arusha, Tanzania. However, other members of the UNSC did not favor this option. On March 31, 2005, the Council adopted resolution 1593 which referred the Darfur situation to the ICC.⁹ The US abstained on the resolution, thus making the referral possible. Following the referral, the UN Secretary-General handed over a sealed envelope including a list of 51 suspects identified by the COI to the ICC's OTP. In addition, nine boxes of evidence collected by the Commission were transferred to the OTP in The Hague.¹⁰

⁴ UN Daily News: *International Criminal Court Issues Warrants for First Darfur War Crimes Suspects*, May 2, 2007, <http://www.un.org/apps/news/story.asp?NewsID=22422&Cr=sudan&Cr1=>

⁵ BBC News, Sudan: A Nation Divided, *Q&A: Peace in Sudan*, July 8, 2005, <http://news.bbc.co.uk/1/hi/world/africa/3211002.stm>.

⁶ UN Doc. S/RES/1547 (2004), UN Doc. S/RES/1556 (2004) and UN Doc. S/RES/1564(2004).

⁷ Report of the International Commission of Inquiry on Darfur to the Secretary-General, UN Doc. S/2002/60 [hereinafter Report of the COI].

⁸ Convention on the Prevention and Punishment of the Crime of Genocide (1948), article 2.

⁹ UN Doc. S/RES/1593 (2005).

¹⁰ ICC press release: *Prosecutor receives list prepared by Commission of Inquiry on Darfur*, April 5, 2005, <http://www.icc-cpi.int/press/pressreleases/99.html>.





The referral is one of several actions that the UN has taken to address the crisis in Darfur. Before adopting resolution 1593, the UNSC passed two other resolutions on sanctions and peacekeeping forces. Resolution 1591 of March 29, 2005, ordered a travel ban and a freeze on all assets of individuals who commit atrocities, impede the peace process or constitute a threat to stability in Darfur.¹¹ Resolution 1590 of March 24, 2005, renewed the mandate of the United Nations Mission in Sudan (UNMIS),¹² and determined that it should support the African Union Mission in Sudan (AMIS) in its efforts to foster peace in Darfur.¹³ Following the Secretary-General's recommendation,¹⁴ resolution 1627 of September 23, 2005 extended UNMIS' mandate for another six months.¹⁵ On July 31, 2007, the Security Council adopted Resolution 1769 authorizing the creation of a 26,000-strong hybrid United Nations-African Union peacekeeping force to suppress the violence and attacks on civilians in Darfur.¹⁶ The resolution authorizes peacekeepers to take the necessary action, including force if necessary, to protect its personnel, humanitarian workers, and civilians and to support effective implementation of the Darfur Peace Agreement. The hybrid operation, known as UNAMID (the United Nations African Union Mission in Darfur), will incorporate the existing AMIS mission and ultimately assume authority from AMIS. In Resolution 1769, the Security Council also urged Khartoum and rebel groups to commit to a permanent ceasefire and to join peace talks under AU-UN mediation. The resolution does not authorize the peacekeepers to arrest individual suspects against whom the ICC has issued arrest warrants. On August 1, 2007, the Government of Sudan accepted the resolution and approved the deployment of the joint UN-AU peacekeeping force in Darfur.

The UNSC remains seized of the matter. The referral has drawn great regional and international attention to Darfur. The Court's investigation, the two arrest warrants, the presentation of evidence and any future trials will continue to demonstrate the dimension of the atrocities committed in the Darfur region, thereby exerting pressure on the international community to continue to act in order to stop and prevent further commission of crimes.

ICC Action

Upon taking office in 2003, ICC Chief Prosecutor Luis Moreno Ocampo reviewed materials on Darfur submitted by non-governmental organizations (NGOs). Thereafter, a working group within his office examined further submissions and continued to monitor the situation in Darfur. As Sudan is not a State Party to the Rome Statute of the ICC, the Court's governing treaty, and would not consent to the Court's jurisdiction, a UNSC referral was the only way for the ICC to exercise jurisdiction over the situation.¹⁷ The March 31, 2005 referral led to a preliminary examination by the OTP which sought to determine whether there was a reasonable basis to proceed with an investigation.

¹¹ UN Doc. S/RES/1591(2005). A sanctions committee was established pursuant to this resolution, on May 6, 2005.

¹² UNMIS was set up by UNSC resolution 1547 of June 11, 2004, UN Doc. S/RES/1547(2004). Resolution 1590 extended its mandate for an initial period of six months.

¹³ UN Doc. S/RES/1590(2005).

¹⁴ Report of the Secretary-General on the Sudan, September 12, 2005 UN Doc. S/2005/579, [hereinafter Report of on the Sudan, September 12, 2005], at 19.

¹⁵ UN Doc. S/RES/1627 (2005).

¹⁶ UN Doc. S/RES/1769 (2007).

¹⁷ Rome Statute, articles 12 and 13.





On June 6, 2005, the Prosecutor announced the opening of a formal investigation into the Darfur situation.¹⁸ In order to make this decision, the Prosecutor contacted members of the COI and reviewed the archive of the Commission,¹⁹ as well as further evidence which was collected from a variety of sources, including NGOs and the OTP itself. This examination showed that grave crimes within the jurisdiction of the Court – including killing of thousands of civilians and the widespread destruction and looting of villages – had been committed in Darfur. According to the Prosecutor’s assessment, the gravity of such crimes warranted an ICC investigation.²⁰ The OTP analysis also demonstrated that the Sudanese judicial system had not investigated nor was investigating any of the cases that the office might select for prosecution.²¹

As stipulated in resolution 1593, the UNSC invited the Prosecutor to report regularly on the investigation. The Prosecutor first addressed the UNSC regarding the situation in Darfur on June 29, 2005.²² The Prosecutor’s report made it clear that the investigation would focus on the persons bearing the greatest responsibility for the crimes. The report also indicated that ICC efforts could be complemented by traditional African methods for justice and reconciliation. In his address to the UNSC, the Prosecutor called upon the support and cooperation of both States Parties to the ICC and non-States Parties, and pointed out that such assistance would be essential for the success of the investigation into atrocities committed in Darfur. The Prosecutor has since reported to the UNSC two times per year on his investigation of the Darfur situation.

Issues Before the ICC

Complementarity

The ICC is complementary to national jurisdictions, and thus a case is inadmissible before it when a state which has jurisdiction over the case and is conducting or has conducted genuine investigations and/or prosecutions in relation to the relevant person and criminal conduct.²³ When the Prosecutor decided to open an investigation into the Darfur situation, he had to consider whether any relevant Sudanese proceedings had been initiated.²⁴

In early June 2005, in an attempt to preempt possible ICC prosecutions and avoid the Court’s investigation into the atrocities in the western region of Sudan, the GOS announced the creation of a special court to try perpetrators of alleged crimes committed in Darfur. However, since its creation, this special tribunal has been criticized by human rights organizations²⁵ and UN experts for only convicting low-level members of the

¹⁸ ICC press release: *The Prosecutor of the ICC opens investigation in Darfur*, June 6, 2005, <http://www.icc-cpi.int/press/pressreleases/107.html>.

¹⁹ This archive contains material used to document crimes, including photographs and videos of weapons, ammunition and war damage as well as hundreds of statements from military officers, rebels, prisoners and witnesses to atrocities.

²⁰ The ICC only has jurisdiction over the most serious cases and systematic violations of international atrocity law. Rome Statute, article 1.

²¹ See *infra* section on complementarity.

²² See Statement of the Prosecutor of the International Criminal Court, Luis Moreno Ocampo, to the Security Council on 29 June 2005 Pursuant to UNSCR 1593 and Report of the Prosecutor of the International Criminal Court, Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005) [hereinafter Report of the Prosecutor on Darfur].

²³ Rome Statute, articles 1 and 17(1).

²⁴ Rome Statute, article 53(1)(b).

²⁵ Human Rights Watch: Human Rights News, *Sudan: No Justice for Darfur Victims*, June 8, 2006, <http://www.hrw.org/english/docs/2006/06/08/sudan13516.htm>.





Sudanese army – often resulting in sentences not exceeding five years in prison.²⁶ In Sudan’s Special Court for Darfur, the criminal responsibility of high-ranking officials is not addressed. Furthermore, procedures before the Special Court do not meet international fair trial standards nor provide protection to victims.²⁷ A similar attempt by the GOS to show that it is able and willing to investigate the crimes committed in Darfur was the creation of a special Attorney Office for Crimes against Humanity in September 2005.²⁸ However, the mandate and progress of that office remains unclear.

The COI determined that the Sudanese judicial system lacked adequate structures, authority, credibility, and willingness to effectively prosecute and punish the perpetrators of the alleged crimes.²⁹ The OTP reached the same conclusion, and selected cases that were not being brought in Sudanese courts. The OTP found that current domestic proceedings would not prevent admissibility of the cases concerning those most responsible for the crimes the office is focusing on. In a 2005 report to the Security Council, the Prosecutor stated that as the OTP selects future cases for prosecution, it will continue to analyze the existence and genuineness of any relevant national proceedings.³⁰

According to the Rome Statute, a state which has jurisdiction over a case that is being investigated by the ICC can present a challenge to its admissibility by showing that the relevant criminal act is being investigated at the domestic level.³¹ This is known as the doctrine of complementarity.

Even if Sudanese officials have indicated that they are against any trial outside Sudan, the GOS has not yet presented any formal claim before the Court. It is difficult to predict whether the Sudanese government plans to challenge to the admissibility of particular cases before the ICC. In addition to its opposition to the Court’s jurisdiction, it may try to show that senior officials are being investigated or prosecuted by national courts. The presentation of such a challenge could expose Sudan to a ruling by the ICC’s judges showing the inadequacies of the Sudanese legal system.

Interests of justice

One of the issues considered by the Prosecutor when deciding to investigate the Darfur situation and to pursue individual prosecutions was whether the investigation or prosecution serves the interest of justice.³²

A considerable challenge for the ICC is the interface of peace and justice in situations like Darfur, where the conflict is in progress at the time of the investigation. Some fear that OTP inquiries might interfere with peace negotiations and, therefore, urge the Prosecutor to use the “interests of justice” provision to halt investigations

²⁶ Damanga Coalition for Freedom and Democracy, *Show Trials are not substitutes for International Criminal Courts*, August 24, 2005, http://www.damanga.org/sudan_show_trials.html.

²⁷ Monthly report of the Secretary-General on Darfur, August, 11 2005, UN Doc. S/2005/523 [hereinafter Monthly report on Darfur, August 11, 2005], at 2.

²⁸ Sudan Tribune, *Sudan sets up Attorney Office for Crimes against Humanity*, September 19, 2005, http://www.sudantribune.com/article_impr.php3?id_article=116779/19/05.

²⁹ Report of the COI, see *supra* note 7, at 144.

³⁰ Report of the Prosecutor on Darfur, *supra* note 21, at 4.

³¹ Rome Statute, article 19.

³² Rome Statute, article 53(1)(c).





that harm peace processes. However, while some believe that justice should give way to peace, others maintain that prosecutions could help achieve peace and stability.³³ The UNSC likely had this in mind when it referred the Darfur situation to the ICC as it considered that it constituted a threat to international peace. Therefore, the UNSC hoped that by ending impunity and holding perpetrators accountable, peace could be reestablished.

The “interests of justice” provision suggests that the Prosecutor may make discretionary decisions to prevent the investigation from interfering with the peace negotiations; for example, choosing not to prosecute certain rebel movement leaders or government officials who might play a decisive role in a peace settlement. However, the provision remains controversial. Some NGOs have voiced concern that, by getting involved in political judgments, the OTP could be subject to political pressure by governments and rebel groups³⁴ and believe that the “interests of justice” provision should be narrowly construed.³⁵

The UNSC may also defer an ICC investigation or prosecution for renewable periods of one year.³⁶ Since it referred the Darfur situation to the ICC, the UNSC would be the proper political body to make a decision as to whether to defer an investigation or prosecution in the event of an “interests of justice” dilemma.

At the time of initiating the investigation, the Prosecutor did not find any substantial reason to believe that the investigation would not serve the interests of justice. The OTP will, however, continue to watch for changes in this regard.³⁷

Collection of evidence and selection of cases

The start of a formal investigation in June 2005 gave the Prosecutor full investigative powers.³⁸ Since that time, his office has collected evidence in order to identify the persons who bear the greatest responsibility for the crimes and selected specific cases for prosecution.

The OTP has received many documents, photographs and videotapes from a variety of sources, including NGOs, international organizations and the African Union (AU) ceasefire monitoring force. In order for the Prosecutor to conduct investigations on the territory of a state, he needs to have its consent and cooperation. Although Sudan is not a party to the Rome Statute, it is obligated to assist the Court in its investigations; mandatory cooperation by all parties to the conflict is stipulated in the UNSC referral resolution.³⁹ Between June 2005 and February 2007, the Prosecutor conducted 70 missions to 17 countries, collected 100 formal witness statements and reviewed 8,800 pieces of documentary evidence. His office has also sent five missions to Khartoum but has been unable to investigate in the Darfur region. The OTP remains concerned about the

³³ Human Rights Watch Policy Paper: *The Meaning of the “The Interests of Justice” in Article 53 of the Rome Statute*, June 2005, at 15.

³⁴ *Id.* at 14.

³⁵ *Id.* at 2.

³⁶ Rome Statute, article 16.

³⁷ Report of the Prosecutor on Darfur, *supra* note 21, at 5.

³⁸ G. Turone, “Powers and Duties of the Prosecutor”, in A. Cassese, P. Gaeta & J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 1137, at 1150/1151.

³⁹ See *infra* section on Sudan’s cooperation.





security situation in Darfur, both for its investigators and for the victims and witnesses that participate in local investigations. It is the Court's responsibility to protect victims and witnesses.⁴⁰

Arrest warrants and confirmation of charges

The list of 51 suspects given to the OTP by the COI is neither binding nor exhaustive. It is not a final judgment as to criminal guilt and is simply aimed to pave the way for further investigations by the Prosecutor. In accordance with the Rome Statute,⁴¹ the Prosecutor has investigated the gravest crimes and has identified some of the initial suspects he believes are most responsible for those crimes. The Prosecutor filed an application for summonses appear with Pre-Trial Chamber I (PTC I) on February 27, 2007.⁴² After reviewing the submitted evidence and requests for summonses, PTC I issued the first Darfur warrants on May 2, 2007 for Ahmad Muhammad Harun, Sudan's current Minister of State for Humanitarian Affairs, and Ali Muhammad Al Abd-Al-Rahman, also known as Ali Kushayb, a Janjaweed militia leader. The warrants require the arrest and surrender of the named persons by the state on whose territory the alleged criminal may be found. The two named suspects are believed to be on Sudanese territory, and Ali Kushayb is in the government's custody on other charges. Sudan is obliged to hand suspects over to the ICC. If it does not, peacekeeping missions on the ground could in the future be authorized to arrest and transfer suspects to the Court. If the suspects travel abroad, they could be arrested in the territory of an ICC State Party or a non-State Party pursuant to UNSC resolution 1593.⁴³ If the suspects cannot be apprehended, the Court could still proceed by confirming charges in their absence.⁴⁴ In this case, during a hearing in which the suspect may be represented by counsel, the judges would review the evidence concerning the charges the Prosecutor intends to bring against the person concerned. A hearing *in absentia* may be detailed and extensive in order to preserve evidence and testimony and create, as completely as possible, a record of events and alleged criminal acts. By producing an extensive judicial record and disclosing to the public the enormity of the criminal acts committed by the alleged perpetrators, the Court would exert further pressure on states to capture the suspects.

Cooperation by Non-States Parties and International Organizations

According to a general rule of international law, a treaty does not create either obligations or rights for third states without their consent.⁴⁵ In general, only states parties to the Rome Statute are under the obligation to cooperate with the ICC.⁴⁶ However, when the UNSC refers a situation under Chapter VII of the UN Charter, it may decide that members of the UN are under the obligation to assist the Court in the relevant investigation.⁴⁷ Refusal to cooperate in this case may constitute a violation of the country's obligations under the UN Charter.

⁴⁰ Report of the Prosecutor on Darfur, *supra* note 21, at 8.

⁴¹ Rome Statute, article 58.

⁴² ICC press release: *Pre-Trial Chamber I receives documents containing list of evidence in the situation of Darfur*, 27 February 2007, <http://www.icc-cpi.int/press/pressreleases/233.html>.

⁴³ See *infra* section on cooperation.

⁴⁴ Rome Statute, article 61(2)

⁴⁵ Vienna Convention on the Law of Treaties (1969), article 34.

⁴⁶ Rome Statute, Article 86.

⁴⁷ According to the UN Charter, all States are obligated to accept and carry out decisions of the UNSC under Chapter VII. See UN Charter, articles 25 and 48(1).





UNSC resolution 1593, which referred the Darfur situation to the ICC, called for the cooperation of the GOS and all other parties to the conflict in Darfur and required the assistance of all states and concerned regional and other international organizations. The Prosecutor has also stated on several occasions that cooperation of national and international authorities is essential for a successful investigation in Darfur.⁴⁸

Sudan's cooperation

The ICC's success depends on full cooperation of the GOS throughout the investigation, particularly to allow OTP investigators to collect evidence and to hand over the suspects named in the arrest warrants. According to Chief Prosecutor Luis Moreno Ocampo the GOS "has a legal duty" to arrest the two individuals named in the arrest warrants.⁴⁹ Through numerous statements to the media, however, GOS officials have dismissed the warrants and, on March 18, 2007, announced the suspension of its cooperation with the Court.⁵⁰ However, there has been some interaction between the Prosecutor and the Sudanese government. The GOS has provided the OTP with information on the Sudanese legal system and the establishment of a specialized tribunal for crimes committed in Darfur.⁵¹ The OTP has also had meetings with other parties to the conflict in Darfur in order to establish channels for communication and cooperation.⁵²

Given that a high-ranking Sudanese government official has been implicated in Darfur atrocities, GOS opposition to the ICC warrants is not surprising. If the GOS continues its refusal to cooperate, the Court can report such a refusal to the UNSC, which could, in turn, consider measures against Sudan.⁵³

On the day the Court issued its first Darfur arrest warrants, the White House press secretary voiced strong support for accountability in the region, stating that "we expect the government of Sudan to comply with the obligations under United Nations Security [Council resolution] 1593 to cooperate with the ICC."⁵⁴

US cooperation

The current US policy of disengaging from, campaigning against and refusing to cooperate with the Court contradicts historic US leadership in establishing and supporting international tribunals. However, the US abstention on the 2005 UNSC referral of the Darfur situation to the ICC is a dramatic break in its policy of hostility toward the Court.

Even though current US law governing the relationship with the ICC prohibits financial support to the Court, it does not prevent cooperation. The American Servicemembers' Protection Act (ASPA) states that "Nothing [...] shall prohibit the United States from rendering assistance to international efforts to bring to justice [...] foreign

⁴⁸ ICC press release: *Prosecutor receives list prepared by Commission of Inquiry on Darfur*, *supra* note 10; ICC press release: *The Prosecutor opens an investigation in Darfur*, *supra* note 17; Report of the Prosecutor on Darfur, *supra* note 21, at 5.

⁴⁹ UN Daily News, *supra* note 4.

⁵⁰ International Herald Tribune: *Sudan announces it will suspend cooperation with the ICC*, March 18, 2007,

<http://www.iht.com/articles/ap/2007/03/18/africa/AF-GEN-Sudan-ICC.php>.

⁵¹ Report of the Prosecutor on Darfur, *supra* note 21, at 5.

⁵² *Id.*

⁵³ Rome Statute, article 85(5)(b) and 85(7). See also the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, article 7.

⁵⁴ White House press briefing, May 2, 2007, <http://www.whitehouse.gov/news/releases/2007/05/20070502-5.html>.





national accused of genocide, war crimes or crimes against humanity.”⁵⁵ In May 2005, following the Security Council referral, US Deputy Secretary of State Robert Zoellick stated in a briefing on Sudan that the role of the ICC in Sudan sends “a signal about accountability” and is “a useful deterrence against others and allows us to emphasize a tool about the need to stop violence.” In November 2005, US Assistant Secretary of State for African Affairs Jendayi Frazer told the House International Relations Committee “that if the ICC requires assistance, the United States stands ready for any assistance ... because we don’t want to see impunity for any of these actors.”

US assistance to the Court is highly desirable as US intelligence agencies possess potentially valuable information to the OTP’s investigation. Moreover, the Bush administration may gain confidence in the Court and its work by cooperating with the ICC.

The US has established a formal channel of communication with the ICC for the purposes of cooperating on the Darfur investigation. However, the ICC has not formally requested US assistance. The US could, nevertheless, provide information and material on its own initiative. The Court has managed to collect evidence and carry out proceedings in Darfur without the US. However, US cooperation would certainly facilitate the Court’s work and help it achieve results more rapidly.

Cooperation by other states and international organizations

The ICC particularly requires cooperation on the Darfur situation from African states not party to the ICC. The Court also requires assistance from international and regional organizations.⁵⁶ A relationship agreement between the ICC and the UN provides for a framework of cooperation between the Court, applicable not only to the Darfur investigation, but also to other situations and general matters as they arise. In particular, the OTP has strived to develop contacts with organizations which have been playing a role in seeking an end to the conflict in Darfur, such as the African Union (AU). For this reason, the Court is negotiating a relationship agreement with the AU.⁵⁷ UNSC resolution 1593 invited the Court and the AU to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region.⁵⁸ The ICC would benefit from a stronger relationship with the AU, which has been making efforts to seek peace in Darfur, both as a mediator in the peace negotiations and through the deployment of its peacekeeping forces. Furthermore, an ICC-AU agreement would help strengthen ICC partnership with African countries.⁵⁹ The agreement currently under negotiation provides a framework and modalities for future cooperation between the AU and the Court on all ICC investigations in Africa. In the case of Darfur, AMIS assistance would, for example, be required to protect ICC investigators on the ground as well as victims and

⁵⁵ Section 2015.

⁵⁶ The provision of information or documents by international organizations is, in principle, voluntary. According to article 54(3) of the Rome Statute, the Prosecutor may seek the cooperation of any state or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate. Similarly, article 87(6) states that the Court may ask any intergovernmental organization to provide information or documents.

⁵⁷ Report of the International Criminal Court to the UN General Assembly, UN Doc. A/61/217 (2006), 3 August 2006.

⁵⁸ The Court can decide to hold trials in a place other than the seat of Court. See Rome Statute, article 62.

⁵⁹ Report of the Prosecutor on Darfur, *supra* note 21, at 6.





witnesses that are ready to talk to them,⁶⁰ and to arrest and surrender suspects if the Sudanese government fails to do so.

The Impact of the ICC Investigation

By referring the situation to the ICC, the UNSC sought not only to bring accountability to Darfur but also to stop the perpetration of atrocities. It was hoped that ICC investigations would have a deterrent effect on further commission of crimes. However, possibly because the ICC is a new institution, it has not yet provided deterrence through the intimidation of criminals. Sudanese efforts to avoid an ICC investigation demonstrate that governmental officials fear the ICC. Hopefully the Court's deterrent effect will become more evident as it continues investigations, the indictment process and eventually progresses to trials.

It should be noted that the ICC referral is only one of several measures designed by the UNSC to handle the crisis in Darfur. The ICC investigation represents an effort to end the violence and improve the security situation on the ground. In order to achieve this result, it must be complemented by other international and regional efforts which ensure, for example, the provision of humanitarian assistance and the creation of conditions for the return of refugees and internally displaced persons. For this reason, it is essential that the ICC establishes a partnership with other actors in the region, including the African Union, African states and NGOs working in Darfur.

National efforts toward accountability

Since the ICC is a single institution with limited resources, it can only try a limited number of people. A complete strategy to end impunity requires that its efforts be supplemented by national trials of lower-level offenders. In the future, it is hoped that the Sudanese judicial system will play a vital role in ensuring that ICC efforts on the situation in Darfur are complemented at the national level. Tribal or traditional justice systems, which promote dispute resolution through mechanisms other than prosecution, could be part of a comprehensive approach to achieve peace, justice and reconciliation.⁶¹

In an effort to bring peace and confidence to the population in Darfur, the GOS has put in place a process of tribal reconciliation and conflict resolution that has brought together a number of tribes in talks and negotiations.⁶² This is a commendable initiative but it should be only one of the various components of a

⁶⁰ “The OTP will have to ensure safety and security of its team members through liaison with appropriate persons in the field. In this regard, as the ad hoc Tribunals’ experience shows, the OTP will rely on the assistance and co-operation of international bodies, such as peacekeeping forces...”. ICC Office of the Prosecutor, *Informal expert paper: Fact-finding and investigative functions of the office of the Prosecutor, including international co-operation*, at 10.

⁶¹ In the referral resolution, the UNSC “emphasize[d] the need to promote healing and reconciliation and encourage[d] in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace [...]”. UN Doc. S/RES/1593 (2005), paragraph 6.

⁶² Monthly report of the Secretary-General on Darfur, July 18, 2005, S/2005/467 [hereinafter Monthly Report on Darfur, July 18, 2005], at 4.





broader effort to restore peace. It is essential that it be accompanied by a political settlement and some kind of accountability mechanism.

The situation on the ground

Violence

Although security in Darfur has improved since 2005, mainly due to the presence of AMIS and pressure from the international community,⁶³ the situation remains highly volatile. The large-scale killing, massive displacement and direct attacks against the civilian population that characterized the first two years of the conflict have decreased.⁶⁴ However, civilians continue to be at serious risk.

Sexual violence

Sexual violence and physical abuse by armed men have been particularly prevalent throughout Darfur.⁶⁵ The majority of victims are women and girls who live in camps for internally displaced persons, some of which are guarded by forces allied with those responsible for the original displacement. Gang rape and collective rape of a number of women and girls are common. Most incidents take place when victims go out of the camps to collect firewood or grass.⁶⁶ In the vast majority of cases, perpetrators have been identified as members of the government armed forces, law enforcement agencies or pro-government militias.⁶⁷ Rape and sexual violence committed as part of a systematic attack or in the conduct of armed conflicts constitute crimes against humanity or war crimes that the ICC can try.⁶⁸

The victims' situation has been further aggravated by lack of medical treatment for those who have suffered from sexual violence.⁶⁹ Another concern is the major obstacles that prevent survivors of sexual abuse from seeking redress. Many incidents are not reported for fear of reprisals. When complaints are made, police are reluctant to undertake appropriate investigations. Moreover, the authorities normally re-victimize and humiliate rape survivors. Because of discriminatory judicial and enforcement practices, female victims of sexual crimes may be charged with adultery if they do not meet the high evidentiary requirements necessary to prove rape and other abuses.⁷⁰

Harassment of humanitarian personnel

Harassment of humanitarian staff and activities has become increasingly common during the last six months. Hostile action against the UN and other elements of international presence in Darfur followed the publication of the COI's report and the adoption of the UNSC resolutions of March 2005.

⁶³ *Id.*, at 2.

⁶⁴ According to survey conducted by WHO in June 2005, the mortality rate dropped from 2.4 in June 2004 to 0.8 in June 2005. United Nations Mission in Sudan (UNMIS), *Darfur mortality rate declines, but remains "extremely fragile" – Survey*, 28 June 2005, <http://www.reliefweb.int/rw/RWB.NSF/db9000SID/EVOD-6DTJ6S?OpenDocumtn9/19/05>.

⁶⁵ Monthly report on Darfur, August 11, 2005, *supra* note 26, at 3.

⁶⁶ Monthly report of the Secretary-General on Darfur, May 10, 2005, UN Doc. S/2005/305, at 4.

⁶⁷ Report of the United Nations High Commissioner for Human Rights: Access to Justice for Victims of Sexual Violence, July 29, 2005 [hereinafter Report on Sexual Violence], at 10.

⁶⁸ Rome Statute, articles 7 and 8.

⁶⁹ Monthly report on Darfur, August 11 2005, *supra* note 26, at 3.

⁷⁰ Report on Sexual Violence, *supra* note 66, at 16.





An example of this operation against aid workers was the arrest of two officials of the NGO Médecins sans Frontières (MSF) in late May 2005. They were accused of crimes against the state on the grounds that an MSF report on rape in Darfur contained false information on the government's complicity with militias responsible for mass human rights abuses.⁷¹ Charges were dropped a few weeks later, mainly due to growing international pressure.

During July, August and September 2005 especially, members of the JEM, the SLM/A and the militia have been responsible for jeopardizing humanitarian activities through abduction and harassment of humanitarian personnel and direct attacks against elements associated with humanitarian assistance, such as UN or NGO convoys or offices. Burglaries against UN and NGOs centers and vehicles operating in Darfur became commonplace.⁷²

In early 2007, twenty foreign humanitarian aid personnel and AU peacekeepers were detained, beaten and jailed after Sudanese police raided a private residence in the town of Nyala, Darfur. The group of nongovernmental relief workers included several UN employees and prompted Secretary General Ban Ki-moon to contact Sudanese President Omar Hassan al-Bashir. In a private letter, Ban referred to the incident as "unacceptable".⁷³

Peacekeeping forces

Due to lack of sufficient material and human resources, AMIS was unable to provide the protection which civilians desperately needed throughout Darfur. At the end of April 2005, the AU decided to augment the number of troops in Darfur, from approximately 2,300 to 7,000 by the end of September 2005.⁷⁴ To meet this goal, AMIS requested assistance from the international community. NATO and the EU provided the AU with logistics support and military equipment in order to support expansion of its mission, and in May 2005, donors pledged \$300 million to support reinforcement of AU forces.⁷⁵ UNMIS has also worked in close cooperation with AMIS by offering technical assistance and training support.⁷⁶ Despite the AU commitment to increase its forces to over 7,000 before the end of September 2005, there were around 5,300 personnel in Darfur by this date.⁷⁷ AMIS deployment of more soldiers and police has contributed to a slight improvement of security in and around internally displaced persons camps.⁷⁸ However, AMIS has generally lacked the resources and

⁷¹ BBC News, *Sudan charges MSF man over report*, May 30, 2005, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4593443.stm>; MSF press release: *Second Arrest in Sudan; Dutch Coordinator for MSN in Darfur Held This Morning*, May 31, 2005, <http://doctorswithoughtborders.org/pr/2005/05-31-2005.htm>.

⁷² Monthly report on Darfur, August 2005 11, *supra* note 26, at 1-2.

⁷³ The Washington Post, *Sudanese Police Attack on Aid Workers Tests UN Chief's Diplomacy*, May 20, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/05/19/AR2007051901127_pf.html.

⁷⁴ UN press release: *Security Council stresses the importance of increased coordinated international assistance for African Union effort in Sudan*, May 12, 2005, <http://un.org/News/Press/docs/2005/sc8383.doc.htm>.

⁷⁵ UN News Service, *\$300 million in pledges 'good beginning' towards assisting Africa Union in Darfur – Annan*, May 31, 2005, <http://www.globalsecurity.org/military/library/news/2005/05/mil-050531-unnews01.htm>.

⁷⁶ Report on Sudan, 23 June 2005, at 13. Monthly Report on Darfur, 18 July 2005, at 10-11.

⁷⁷ Monthly report of the Secretary-General on Darfur, September 19, 2005, UN Doc. S/2005/592 [hereinafter Monthly report on Darfur, September 19, 2005], at 5.

⁷⁸ Monthly report of the Secretary-General on Darfur, June 9, 2005, UN Doc. S/2005/378, at 1. See also Report of the Secretary-General on United Nations assistance to the African Union Mission in the Sudan, UN Doc. S/2005/285.





manpower necessary to manage the violence in the region. Thus, in response to continued violence and security threats in the region, on July 31, 2007, the Security Council authorized the creation of a hybrid UN-AU force, UNAMID, to take-over peacekeeping operations in the region.⁷⁹ This peacekeeping force, which has been approved by the Government of Sudan, is scheduled to take-over command from AMIS by December 31, 2007 and will include nearly 20,000 military personnel and more than 6,000 police officers. The peacekeeping mission will be run jointly by the UN and the African Union but will be of “predominantly African character”⁸⁰ and led by African political and military leaders.

Peace Process

Implementation of the Comprehensive Peace Agreement

An interim national constitution was adopted in early July 2005.⁸¹ This document is the first Sudanese charter to lay out provisions on human rights.⁸² At the same time, Mr. John Garang, former leader of the SPLM, was sworn in First Vice-President. This step constituted the establishment of a caretaker government, pending the constitution of the government of national unity for which the CPA provides.⁸³ The death of First Vice-President Garang, a charismatic leader who was committed to working for Sudanese unity, in a helicopter crash on July 30, 2005, led to delays in the implementation of the North-South peace agreement. Mr. Salva Kiir, new SPLM/A chairman, was sworn in as new First Vice-President a few days later. At the time, Mr. Kiir stated that the SPLM/A fully supports the Darfur peace talks.⁸⁴ Since 2005, however, ceasefire agreements have proven unreliable and the CPA is widely considered to no longer be in effect.

Darfur Peace Process

Peace talks between the GOS and Darfur rebel movements’ leaders started in August 2004 under mediation of the AU. Negotiations were stalled for several months after the fourth round of talks in December 2004. A fifth round of talks in June 2005 resulted in the signature of a Declaration of Principles on July 5, 2005.⁸⁵ The parties were able to agree on the principle of Darfurian equitable share of the national budget and representation in all levels of the government. However, this document failed to address how this power and wealth-sharing would be implemented. A more detailed agreement on these issues was the subject of the sixth round of talks held in September and October 2005.⁸⁶

Progress through peace negotiations takes place gradually. Although the GOS wishes to reach a settlement, difficulties with the rebel movements seem to be posing a serious threat to the success of the negotiations. The SLM/A has since split into two factions, one which favors the peace talks and another which believes that the SLM/A should convene an internal conference before it is ready to negotiate with the government. As a result

⁷⁹ UN Doc. S/RES/1769 (2007).

⁸⁰ UN Doc. S/RES/1769 (2007).

⁸¹ Report of the Secretary-General on the Sudan, September 12, 2005, *supra* note 14.

⁸² The Guardian, *Sudan’s Legislature Passes Constitution*, July 6, 2005, <http://www.guardian.co.uk/world/latest/story/0,1280,-5122087.html>.

⁸³ For details on the provisions of the CPA, see *supra* note 2.

⁸⁴ Monthly report on Darfur, September 19, 2005, *supra* note 76, at 5.

⁸⁵ Text of the Declaration of Principles can be found at: <http://www.iss.co.za/AF/profiles/Sudan/darfur/declprinciplesjul05.pdf>.

⁸⁶ *Sudan: Deteriorating Situation in Darfur*, AfricaFocus, October 5, 2005, <http://www.africafocus.org/docs05/sud0510.php>.





of these clashes, one of the factions attended the negotiations in Abuja, Nigeria, while the other seeks to undermine the peace talks by conducting attacks in Darfur.

Conclusion

Despite widespread violence and other obstacles, the ICC has conducted an extensive investigation into the situation in Darfur. In addition to the investigation, ICC Registrar Bruno Cathala conducted informational meetings with displaced Darfurians in several refugee camps in Eastern Chad. The purpose of the meetings – which took place during the days following the Court’s issuance of arrest warrants – was to explain the mandate and activities of the ICC.⁸⁷ Lack of cooperation by the Sudanese government makes other states’ assistance – particularly that of the US government – highly indispensable in all future ICC investigations in the region.

The arrest warrants issued by the Court in May 2007 are a major step providing justice and redress to victims through an international court. Despite continuing defiance of the Court by the Sudanese government, the ICC is establishing itself as a key institution in the ongoing effort to end to impunity in the region.

*Researched and drafted by Gideon Copple and Amitis Khojasteh
Previous update by Katherine Scovner
Original paper by Mariana Pena
Updated August 2, 2007*

⁸⁷ ICC press release, Visit of the Registrar to Refugee Camps in Eastern Chad, May 3, 2007, <http://www.icc-cpi.int/press/pressreleases/243.html>.

