

CRS Report for Congress

International Criminal Court Cases in Africa: Status and Policy Issues

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Summary

The International Criminal Court (ICC), which was established in 2002, has to-date initiated investigations exclusively in Sub-Saharan Africa. The ICC Prosecutor has opened cases against 12 individuals for alleged crimes in northern Uganda, the Democratic Republic of Congo, the Central African Republic, and the Darfur region of Sudan. In addition, the Prosecutor is analyzing situations — a preliminary step toward initiating a full investigation — in Côte d'Ivoire, Kenya, and Chad, as well as in Colombia, Afghanistan, and Georgia. Recent congressional interest in the work of the ICC in Africa has arisen from concern over gross human rights violations on the continent. Legislation before the 110th Congress references the ICC with respect to several ongoing African conflicts, including those in northern Uganda, the Democratic Republic of Congo, and the Darfur region of Sudan.

On July 14, 2008, the ICC Prosecutor requested a warrant for the arrest of Sudanese President Omar Hassan al-Bashir, accusing him of genocide, crimes against humanity, and war crimes in Darfur. The request, which awaits a decision by a panel of ICC judges, represents the first attempt by the ICC to prosecute a sitting head of state, and the first ICC case to cite the crime of genocide. Although the Prosecutor's action has drawn praise from human rights advocates, it also has raised fears that ICC actions in Sudan could threaten ongoing peace processes in Darfur and southern Sudan or endanger international humanitarian and peacekeeping operations. Unlike the three other African countries under ICC investigation, Sudan is not a party to the ICC. Instead, the ICC was granted jurisdiction over Darfur through a United Nations Security Council resolution in March 2005. The United States, as a member of the Security Council, can influence the ICC's actions. The Bush Administration, which holds the Sudanese government responsible for genocide, has sought to balance its strong opposition to the ICC with its policy on alleged crimes in Darfur.

Four suspects in other ICC investigations are currently in ICC custody, pending trial. Three are alleged leaders of Congolese militias, and the fourth is a former Congolese vice president, senator, and former rebel leader who is accused of crimes committed in neighboring Central African Republic. This report provides background on ICC investigations in Africa and gives an overview of cases currently before the Court. The report also examines issues raised by the ICC's actions in Africa, including the ICC's possible role in deterring future abuses and the potential impact of international criminal prosecutions on peace processes, ongoing in many countries on the continent.

In-depth background on U.S. policy toward the ICC can be found in CRS Report RL31495, *U.S. Policy Regarding the International Criminal Court*, by Jennifer K. Elsea. Further background on Sudan and an analysis of U.S. policy options can be found in CRS Report RL33574, *Sudan: The Crisis in Darfur and Status of the North-South Peace Agreement*, by Ted Dagne. This report may be updated as events warrant.

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International Criminal Court Cases in Africa: Status and Policy Issues

Introduction

The International Criminal Court (ICC) has to-date initiated investigations exclusively in Sub-Saharan Africa. Recent congressional interest in the work of the ICC in Africa has focused on the role that the ICC may play in addressing gross human rights violations on the continent. While many Members of Congress remain opposed to the Court, several pieces of legislation before the 110th Congress reference the ICC with respect to ongoing African conflicts, including those in northern Uganda, the Democratic Republic of Congo, and the Darfur region of Sudan.

Congress and the Bush Administration have each stated that genocide is occurring in Darfur.¹ On July 14, 2008, the ICC Prosecutor requested a warrant for the arrest of Sudanese President Omar Hassan al-Bashir for genocide, crimes against humanity, and war crimes in the Darfur region of Sudan. This represents the first time the ICC Prosecutor has named a sitting head of state, and the first time he has accused a suspect of genocide. While the attempt to prosecute of the Sudanese president has drawn praise from human rights advocates, the European Union, and others, it also has raised concerns that ICC actions in Sudan could threaten ongoing peace processes in Darfur and southern Sudan or endanger international humanitarian and peacekeeping operations.

This report provides background on ICC investigations in Africa and gives an overview of cases before the Court. The report also examines issues raised by the ICC's actions in Africa, including the ICC's possible role in deterring future abuses and the potential effect of international criminal prosecutions on peace processes.

Background

Overview of the International Criminal Court

The Statute of the ICC, also known as the Rome Statute, entered into force on July 1, 2002, and established a permanent, independent Court to investigate and bring to justice individuals who commit the most heinous violations of international law

¹ Concurrent Resolution Declaring Genocide in Darfur, Sudan (H.Con.Res. 467 [108th]), agreed to by the House of Representatives and the Senate on July 22, 2004; White House Press Release, "President's Statement on Violence in Darfur, Sudan," September 9, 2004.

and human rights, namely war crimes, crimes against humanity, and genocide.² The ICC's jurisdiction extends only over crimes committed since the entry into force of the Statute. The ICC is headquartered in The Hague, Netherlands. As of June 1, 2008, 106 countries were parties to the Statute.³ The United States is not a party to the ICC. The Assembly of States Parties (the body made up of the 106 parties) provides administrative oversight and other support for the Court, including adoption of the budget and election of 18 judges, the Prosecutor (currently Luis Moreno-Ocampo from Argentina), and the Registrar (currently Bruno Cathala from France).⁴

Situations⁵ may be referred to the ICC in one of three ways as outlined in the articles of the Statute: by a state party to the Statute, the ICC Prosecutor, or the United Nations (U.N.) Security Council. Currently, four situations have been publicly referred to the Prosecutor. The governments of three countries (all parties to the ICC) — Uganda, the Democratic Republic of Congo, and the Central African Republic — each have referred situations to the Prosecutor. The U.N. Security Council has referred one situation (Darfur, Sudan) to the Prosecutor.⁶ At least two

² The ICC began operating at its inauguration on March 11, 2003. The ICC plans to define and determine its jurisdiction over Crimes of Aggression in 2009. The Statute also established a second independent institution, the Trust Fund for Victims, to help victims of these crimes. The Trust Fund for Victims can only act in situations where the ICC has jurisdiction.

³ For the current status of signatures, ratifications, and reservations, see the ICC's website, [<http://www.icc-cpi.int/asp/statesparties.html>].

⁴ For background information on the International Criminal Court, see CRS Report RL31437, *International Criminal Court: Overview and Selected Issues*, by Jennifer Elsea.

⁵ Articles 13 and 14 (1) of the Rome Statute provide for both States Parties and U.N. Security Council referral of "situations" to the Court. During the negotiations, the question arose of whether individual "cases" or "situations" should be referred to the ICC Prosecutor. According to one author, writing on the jurisdiction of the ICC, "it was suggested that States Parties should not be able to make complaints about individual crimes or cases: it would be more appropriate, and less political, if 'situations' were instead referred to the Court." (Elizabeth Wilmshurst, "Jurisdiction of the Court," Chapter 3, in Roy S. Lee, editor, *The International Criminal Court. The Making of the Rome Statute: Issues, Negotiations, Results* [Boston: Kluwer Law International, 1999], p. 131.) Another author, writing on the role of the Prosecutor, noted that the "powers of the Prosecutor could also be broadened in the context of a State's complaint to the Court, if the complaint referred to 'situations' rather than to individual 'cases.'" A proposal to this effect, introduced by the U.S. delegation in 1996, was "very soon supported by a large majority of States," many of whom had been "uneasy" with allowing a party to "select individual cases of violations and lodge complaints...with respect to such cases. This could...encourage politicization of the complaint procedure." The Prosecutor, after referral of the situation, could "initiate a case against the individual or individuals concerned." (Silvia A. Fernandez de Gurmendi, "The Role of the International Prosecutor," Chapter 6, in Lee, *The International Criminal Court*, p. 180.)

⁶ See press releases on each referral at the ICC's website, [<http://www.icc-cpi.int>].

potential situations were dismissed following preliminary analysis, and at least six others remain under consideration.⁷

The ICC is considered a court of last resort — it will only investigate or prosecute cases of the most serious crimes perpetrated by individuals (not organizations or governments), and then, only when national judicial systems are unwilling or unable to handle them. This principle of admissibility before the Court is known as “complementarity.”⁸ Although many domestic legal systems grant sitting heads of state immunity from criminal prosecution, the Rome Statute grants the ICC jurisdiction over any individual, regardless of official capacity.⁹

The U.S. Position on the ICC. The United States is not a party to the Rome Statute. The Bush Administration firmly opposes the Court and has renounced any U.S. obligations under the treaty.¹⁰ It objects to the Court on a number of grounds, including:

- the Court’s assertion of jurisdiction (in certain circumstances) over citizens, including military personnel, of countries that are not parties to the treaty¹¹;
- the perceived lack of adequate checks and balances on the powers of the ICC prosecutors and judges;
- the perceived dilution of the role of the U.N. Security Council in maintaining peace and security; and
- the ICC’s potentially chilling effect on America’s willingness to project power in the defense of its interests.

⁷ Reportedly, the ICC has received 1,700 communications about alleged crimes in 139 countries, but 80 percent have been found to be outside the jurisdiction of the court. The Prosecutor has received self referrals only from African countries. See Stephanie Hanson, Global Policy Forum, “Africa and the International Criminal Court,” *Council on Foreign Relations*, July 24, 2008.

⁸ The bar for proving complementarity has been set very high. In the ICC case against Congolese suspect Thomas Lubanga Dyilo, the Pre-Trial Chamber ruled that in order for a case to be inadmissible, national proceedings must encompass “both the person and the conduct which is the subject of the case before the Court” (ICC Pre-Trial Chamber I, *The Prosecutor Vs. Thomas Lubanga Dyilo, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 38*, February 10, 2006). This language suggests that a domestic prosecution must essentially duplicate the ICC prosecution in order for admissibility to be challenged. Even in such a case, the ICC may retain jurisdiction if domestic proceedings are not conducted impartially or independently (Rome Statute, Article 17).

⁹ Article 27 of the Rome Statute.

¹⁰ The United States signed the Rome Statute under the Clinton Administration, on December 31, 2000, but the Statute was never ratified by the Senate. In May 2002, the Bush Administration notified the United Nations that it did not intend to become a party to the ICC, and that there were therefore no legal obligations arising from the signature.

¹¹ The United States had supported a version of the Rome Statute that would have allowed the U.N. Security Council to refer cases involving non-states parties to the ICC, but would not have allowed other states or the Prosecutor to refer cases.

The Administration has sought to conclude bilateral immunity agreements (BIAs), known as “Article 98 agreements,” with most states parties to exempt U.S. citizens from possible surrender to the ICC.¹² These agreements are named for Article 98(2) of the Statute, which bars the ICC from asking for surrender of persons from a state party that would require it to act contrary to its international obligations.

The U.S. government is prohibited by law from assisting the ICC in its investigations, arrests, detentions, extraditions, or prosecutions of war crimes, under the American Servicemembers’ Protection Act of 2002, or ASPA (P.L. 107-206, Title II). The prohibition is extensive, covering, among other things, the obligation of appropriated funds, assistance in investigations on U.S. territory, participation in U.N. peacekeeping operations unless certain protections from ICC actions are provided to specific categories of people, and the sharing of classified and law enforcement information.¹³

The ICC and Other International Courts and Tribunals. The post-World War II Nuremberg and Tokyo tribunals to prosecute Nazi and Japanese leaders for crimes against peace, war crimes, and crimes against humanity established precedent for the ICC. Other international courts and tribunals, such as the International Criminal Tribunals for the former Yugoslavia and for Rwanda, also built on these precedents. However, there are some important distinctions between the work of the ICC and that of courts created with limited jurisdiction. The ICC was established through a multilateral treaty and is a permanent, international criminal tribunal.¹⁴ It is not a U.N. body. By contrast, the tribunals for the former Yugoslavia¹⁵ and Rwanda,¹⁶ which were created under separate U.N. Security

¹² Each state party to an Article 98 agreement promises that it will not surrender citizens of the other state party to international tribunals or the ICC, unless both parties agree in advance. An Article 98 agreement would prevent the surrender of certain persons to the ICC by parties to the agreement, but would not bind the ICC if it were to obtain custody of the accused through other means. See Appendix A for a list of states parties to the ICC and Article 98 agreements in Africa.

¹³ These prohibitions do not apply to cooperation with an *ad hoc* international criminal tribunal established by the U.N. Security Council such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR). See 22 U.S.C. 7423(a)(1). In the case of Darfur, the *Darfur Accountability and Divestment Act of 2007* (H.R. 180), passed by the House on August 3, 2007, would offer U.S. support to the ICC's efforts to prosecute those responsible for acts of genocide in Darfur.

¹⁴ The creation of the ICC is the culmination of a decades-long effort to establish an international court with the jurisdiction to try individuals for the commission of crimes against humanity. For a general background and discussion of the ICC, see CRS Report RL30020, *The International Criminal Court Treaty: Description, Policy Issues, and Congressional Concerns*, by Ellen Grigorian; CRS Report RL31437, *International Criminal Court: Overview and Selected Legal Issues*, by Jennifer K. Elsea; and CRS Report RL32605, *Genocide: Legal Precedents Surrounding the Definition of the Crime*, by Judith Derenzo and Michael John Garcia.

¹⁵ On May 25, 1993, U.N. Security Council Resolution 827 (1993) established the International Criminal Tribunal for the former Yugoslavia (ICTY). It had its precursors in
(continued...)

Council resolutions to address the allegations of crimes against humanity in those countries, are case specific, limited in jurisdiction, and temporary. The Security Council may establish international criminal tribunals on a case-by-case basis.

Numerous regional and other international courts and tribunals also have been created, some on an *ad hoc* basis, to address particular issues.¹⁷ For example, there are options for mixed courts, which may consist of both international judges and prosecutors as well as judges and prosecutors having the nationality of the state in which the trial takes place. Moreover, a mixed court may draw on domestic as well as international law. The mixed court may be part of the judicial organ of the state, as in Kosovo, Cambodia, or Timor-Leste, or it may be more international in the form of a special court, such as the one established for Sierra Leone.¹⁸ These courts and tribunals are distinct from the ICC.

International Court of Justice. The International Court of Justice (ICJ), also located in The Hague, is the principal judicial organ of the United Nations. The ICJ does not prosecute individuals; its role is to settle, in accordance with international law, legal disputes submitted to it by states. Only states may submit cases for consideration, although the ICJ also will give advisory opinions on legal questions when requested to do so by authorized international organizations.¹⁹

¹⁵ (...continued)

U.N. Security Council Resolution 752, which asked parties to respect humanitarian law; U.N. Security Council Resolution 771, which condemned ethnic cleansing and demanded access by international observers; and U.N. Security Council Resolution 780, which requested the U.N. Secretary-General to establish a Commission of Experts to investigate alleged violations of humanitarian law.

¹⁶ U.N. Security Council Resolution 935 (2004) asked the Secretary-General to establish a Commission of Experts to examine the allegations of genocide and grave violations of international humanitarian law in Rwanda. After its investigation, the Commission recommended that an international tribunal be established to address the crimes. On November 8, 2004, the Security Council, in Resolution 955, established the International Criminal Tribunal for Rwanda (ICTR).

¹⁷ See, for example, “African International Courts and Tribunals” website, at [<http://www.aict-cita.org>].

¹⁸ The Special Court for Sierra Leone (SCSL), a hybrid international-domestic court based in Sierra Leone’s capital, Freetown, was set up jointly by the Government of Sierra Leone and the United Nations under Security Council Resolution 1315 (2000). It is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone after November 30, 1996. While most suspects have been tried in Freetown, former President Charles Taylor of Liberia is in custody in the Hague, where he is being tried by the SCSL for crimes against humanity and other violations of international humanitarian law.

¹⁹ See U.S. Department of State, *United States Participation in the United Nations—2006*, p. 130.

Congressional Interest in the ICC in Africa

Members of Congress have taken a range of positions on the ICC with regard to Africa. On the one hand, many in Congress are concerned about massive human rights violations on the continent, and some see the ICC as a possible means of redress for these crimes. On the other hand, many oppose the ICC on jurisdictional grounds. Congressional support remains for some restrictions on U.S. assistance to countries that are parties to the ICC and that have not signed bilateral immunity agreements with the United States. However, restrictions on military assistance to ICC members under the American Servicemembers' Protection Act of 2002, or ASPA (P.L. 107-206, Title II), were repealed under the National Defense Authorization Acts for FY2007 and FY2008. Overall, a combination of presidential waivers and changes to the law have effectively nullified restrictions on U.S. assistance to African parties to the ICC.

Atrocities in African Conflicts. There has been particular congressional interest in the ICC's work related to Darfur. Recent legislation also has referenced the ICC in connection with ongoing conflicts in Uganda and the Democratic Republic of Congo. Examples during the 110th Congress include

- H.R. 6416, *The Just and Lasting Peace in Sudan Act of 2008*, introduced on June 26, 2008, which would make Sudanese compliance with ICC arrest warrants a condition for lifting existing sanctions on Sudan (referred to the House Committee on Foreign Affairs);
- H.Res. 1227, *Condemning sexual violence in the Democratic Republic of the Congo and calling on the international community to take immediate actions to respond to the violence*, introduced on May 22, 2008 (referred to the House Committee on Foreign Affairs);
- H.R. 180, *The Darfur Accountability and Divestment Act of 2007*, which would offer U.S. support to the ICC's efforts to prosecute those responsible for acts of genocide in Darfur, passed by the House on August 3, 2007 (referred to the Senate Committee on Banking, Housing, and Urban Affairs);
- H.Con.Res. 80, *Calling on the Government of Uganda and the Lord's Resistance Army (LRA) to recommit to a political solution to the conflict in northern Uganda by engaging in good-faith negotiations*, passed by the House on June 19, 2007 (referred to the Senate Committee on Foreign Relations).

Restrictions on U.S. Assistance to African Parties to the ICC. Observers have raised concerns over the possible assertion of ICC jurisdiction over U.S. military personnel in connection with U.S. participation in U.N. peacekeeping missions in Africa, and with respect to the new U.S. Combatant Command for Africa, AFRICOM.²⁰ Jurisdictional and other concerns led Congress to pass the

²⁰ See CRS Report RL34003, *Africa Command: U.S. Strategic Interests and the Role of the U.S. Military in Africa*, by Lauren Ploch. The Defense Department has signaled its intention (continued...)

American Servicemembers' Protection Act of 2002, or ASPA (P.L. 107-206, Title II), which was signed into law on August 2, 2002. Section 2007 of ASPA prohibited U.S. military assistance to ICC member-states, except for NATO countries, major non-NATO allies, and countries subject to various other waiver provisions. Permanent waivers were granted to countries that ratified Article 98 agreements promising not to surrender U.S. nationals to the Court.

In Sub-Saharan Africa, ASPA effectively froze International Military Education and Training (IMET), Foreign Military Financing (FMF), and Excess Defense Articles (EDA) accounts for Kenya, Mali, Namibia, Niger, South Africa, and Tanzania. However, President Bush waived the prohibition on IMET assistance to 21 countries, including these six, on September 29, 2006, due to concerns that the restrictions could preclude valuable military-to-military ties.²¹ Congress repealed the ASPA restriction on IMET funding in the National Defense Authorization Act for FY2007 (P.L. 109-364), which was signed into law on October 17, 2006. The National Defense Authorization Act for FY2008 (P.L. 110-181), signed into law on January 28, 2008, repealed Section 2007 of ASPA entirely, ending remaining prohibitions on FMF and EDA assistance.

Separately, the Nethercutt Amendment to the FY2005 Consolidated Appropriations Act (P.L. 108-447), signed into law December 8, 2004, prohibited Economic Support Fund (ESF) assistance to members of the ICC that had not entered into an Article 98 agreement with the United States, with certain waiver provisions. This prohibition was included as part of the FY2006 Consolidated Appropriations Act (P.L. 109-102, Section 574), which was signed into law on November 14, 2005. The prohibition was subsequently carried over via continuing resolutions on February 15, 2007 (P.L. 110-5) and September 29, 2007 (P.L. 110-92). A substantially identical restriction was included in the Consolidated Appropriations Act of 2008 (P.L. 110-161, Section 671), signed into law December 26, 2007. President Bush has twice waived this restriction with respect to 14 countries, including, in Africa, Kenya, Mali, Namibia, Niger, South Africa, and Tanzania.²²

²⁰ (...continued)

to locate an AFRICOM staff presence on the continent, either in the form of a headquarters or regional offices. Depending on the country, the United States may or may not have a Status of Forces Agreement (SOFA) that appropriately covers military personnel not detailed to the Embassy. The United States also has a semi-permanent troop presence known as Combined Joint Task Force-Horn of Africa (CJTF-HOA), in Djibouti. Personnel associated with CJTF-HOA conduct activities throughout the region. The command authority for CJTF-HOA, currently under Central Command (CENTCOM), will be transferred to AFRICOM in late 2008.

²¹ Presidential Determination No. 2006-27 of September 29, 2006; CRS interview with State Department official, September 4, 2008.

²² Presidential Determination No. 2007-5 of November 27, 2006, waives restrictions on FY2006 ESF assistance; Presidential Determination No. 2008-21 of June 20, 2008, does not specify a fiscal year.

The ICC and Sudan

Sudan is a unique case because of the circumstances of ICC involvement, and because of whom the ICC Prosecutor has chosen to pursue. ICC jurisdiction in Sudan was referred by the U.N. Security Council, as Sudan is not a party to the Court. In September 2004, the Security Council established an International Commission of Inquiry on Darfur under Resolution 1564, citing concern that the Sudanese government had not met its obligations under previous Resolutions.²³ In January 2005, the Commission reported that it had compiled a confidential list of potential war crimes suspects, and “strongly recommend[ed]” that the Security Council refer the situation in Darfur to the ICC.²⁴ On March 31, 2005, U.N. Security Council Resolution 1593 referred the situation in Darfur to the ICC Prosecutor. Following the referral, the ICC Prosecutor received the document archive of the Commission of Inquiry. The Office of the Prosecutor initiated its own investigation in June 2005.

In May 2007, the ICC issued arrest warrants for a former Sudanese Cabinet Minister and an alleged former leader of the Janjaweed militia in Darfur. The Sudanese government has refused to comply with the warrants, and both suspects remain at large. The Prosecutor is also investigating alleged attacks on peacekeepers by rebels in Darfur.

On July 14, 2008, the ICC Prosecutor applied for a warrant for the arrest of Sudanese President Omar Hassan al-Bashir for genocide, crimes against humanity, and war crimes. The application for a warrant is the first time the ICC Prosecutor has named a sitting head of state, and the first time he has accused a suspect of genocide. The request has provoked condemnation in Sudan and controversy in the region. Several African and Middle Eastern governments and regional organizations have called for a U.N. Security Council deferral of the prosecution in the interest of peace and security. This section concludes with an analysis of Security Council deliberations in July 2008, including discussion of a possible deferral under Article 16 of the ICC Statute.

U.N. Security Council Resolution 1593

On March 31, 2005, the U.N. Security Council, acting under Chapter VII of the U.N. Charter, adopted Resolution 1593 (2005), which refers reports about the situation in Darfur, Sudan (dating back to July 1, 2002) to the ICC Prosecutor.²⁵ The Resolution was adopted by a vote of 11 in favor, none against, and with four

²³ S/RES/1564 (2004), September 18, 2004.

²⁴ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, S/2005/60, January 25, 2005.

²⁵ See U.N. Press Release, “Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court,” SC/8351; and U.N. Press Release, “Secretary-General Welcomes Adoption of Security Council Resolution Referring Situation in Darfur, Sudan to International Criminal Court Prosecutor,” March 31, 2005, SG/SM/9797-
AFR/1132.

abstentions — the United States, China, Algeria, and Brazil.²⁶ While Sudan is not a party to the ICC and has not consented to its jurisdiction, the case can be referred to the ICC by the U.N. Security Council under Chapter VII. The Resolution is binding on all U.N. member states, including Sudan. Under the ICC Statute, the ICC is authorized, but not required, to accept the case.²⁷

The U.S. Position on U.N. Security Council Resolution 1593. In statements made in July and September 2004, respectively, Congress and the Bush Administration declared that genocide was taking place in Darfur. The Administration supported the formation of the International Commission of Inquiry for Darfur.²⁸ However, the Bush Administration preferred a special tribunal in Africa to be the mechanism of accountability for those who committed crimes in Darfur. It objected to the U.N. Security Council referral to the ICC because of its stated objections to the ICC's jurisdiction over nationals of states not party to the Rome Statute.²⁹ However, the United States had supported a version of the Rome Statute that would have allowed the U.N. Security Council to refer cases involving non-states parties to the ICC, but would not have allowed other states or the Prosecutor to refer cases. The United States abstained on Resolution 1593 (which is not equivalent to a veto in the Security Council) because the Resolution included language that dealt with the sovereignty questions of concern and essentially protected U.S. nationals and other persons of non-party States other than Sudan from prosecution.³⁰ The abstention did not change the fundamental objections of the Bush Administration to the ICC.

At the same time, the Bush Administration has supported the need for the international community to come together and take action on the atrocities occurring in Darfur.³¹ The Administration and Congress have expressed support for bringing to justice those who perpetrate genocide, war crimes, and crimes against humanity in the region. However, U.S. legal restrictions on providing assistance to the ICC present an obstacle to the use of the ICC for that purpose.

²⁶ U.N. Security Council Resolution 1593 (2005), March 31, 2005.

²⁷ Frederic L. Kirgis, "U.N. Commission's Report on Violations of International Humanitarian Law in Darfur: Security Council Referral to the International Criminal Court," *American Society of International Law Insight Addendum*, April 5, 2005.

²⁸ U.N. Press Release, "Security Council Declares Intention to Consider Sanctions to Obtain Sudan's Full Compliance with Security, Disarmament Obligations on Darfur," SC/8191, September 18, 2004.

²⁹ U.S. Mission to the United Nations (USUN) Press Release #055, "Explanation of Vote on the Sudan Accountability Resolution," Ambassador Ann W. Patterson, March 31, 2005.

³⁰ See Paragraph 6 of Security Council Resolution 1593; also see Kirgis, *Op. Cit.*

³¹ USUN Press Release #055, *Op. Cit.*; USUN Press Release #229, "Statement on the Report of the International Criminal Court," Carolyn Willson, Minister Counselor for International Legal Affairs, November 23, 2005.

ICC Warrants

In May 2007, the ICC issued arrest warrants for Ahmad Muhammad Harun, who had served as Interior Minister from 2003 and 2005, and Ali Muhammad Ali Abd-Al-Rahman (known as Ali Kushayb), who had allegedly acted as leader of the Janjaweed in the Wadi Salih area of Darfur.³² They were each accused of over 40 counts of war crimes and crimes against humanity in connection with abuses allegedly committed in Darfur in 2003 and 2004.³³

The Sudanese government has refused to comply with the ICC warrants, and neither suspect is in ICC custody. Reports suggest Kushayb was in Sudanese detention when the arrest warrant was issued, but has since been released, while Harun was promoted to Minister of Humanitarian Affairs and co-president of a committee to investigate human rights violations in Sudan.³⁴ In 2005, following the initiation of the ICC's investigation, the Sudanese government created its own special courts for Darfur in an apparent effort to stave off the ICC's jurisdiction under the principle of complementarity. However, the courts' efforts were widely criticized as insufficient.³⁵ They have reportedly been largely dormant since 2007.³⁶

Investigation of Rebel Crimes

In December 2007, the ICC Prosecutor announced the opening of a new investigation into the targeting of peacekeepers and aid workers in Darfur. In June 2008, the Prosecutor stated that the investigation was focusing on the September 29, 2007, attack on the town of Haskanita in which ten peacekeepers — then serving under the African Union Mission in Sudan (AMIS) — were killed. The Prosecutor said the Haskanita attack appeared to have been committed by rebel forces, but he has not yet named the accused.³⁷

³² The Sudanese government has denied having control over the Janjaweed, a term for ethnic Arab militias accused of perpetrating human rights abuses in Darfur. However, consensus exists among human rights researchers, journalists, and others who have visited Darfur that the Janjaweed have received arms and support from the government.

³³ ICC Press Release, "Warrants of Arrest for the Minister of State for Humanitarian Affairs of Sudan, and a Leader of the Militia/Janjaweed," May 2, 2007.

³⁴ International Federation of Human Rights, "The International Criminal Court and Darfur: Questions and Answers," available online at [http://www.iccnw.org/documents/FIDH_QA_Darfur_ENG.pdf].

³⁵ See e.g. Human Rights Watch, *Lack of Conviction: The Special Criminal Court on the Events in Darfur*, June 2006; U.N. News, "Sudan's Special Court On Darfur Crimes Not Satisfactory, UN Genocide Expert Says," December 16, 2005.

³⁶ CRS interview with human rights researcher, September 10, 2008.

³⁷ ICC Office of the Prosecutor, *Seventh Report of the Prosecutor of the ICC to the UN Security Council pursuant to UNSC 1593 (2005)*, June 5, 2008.

The Case Against Bashir

Application for a Warrant. On July 14, 2008, ICC Prosecutor Moreno-Ocampo applied for a warrant for the arrest of Sudanese President Omar Hassan al-Bashir.³⁸ The application presented evidence implicating Bashir in three counts of genocide, five counts of crimes against humanity, and two counts of war crimes.³⁹ The accusations refer to alleged attacks by Sudanese troops and pro-government militias against civilians in the Darfur region of Sudan during the government's five-year counter-insurgency campaign. Moreno-Ocampo affirmed that while Bashir did not "physically or directly" carry out abuses, "he committed these crimes through members of the state apparatus, the army, and the Militia/Janjaweed" as president and commander-in-chief of the armed forces.⁴⁰ Although many domestic legal systems grant sitting heads of state immunity from criminal prosecution, the Rome Statute grants the ICC jurisdiction over any individual, regardless of official capacity.⁴¹

The application for a warrant is not an indictment; under ICC procedures, charges must be confirmed at a pre-trial hearing. Having received the application, a panel of ICC judges known as the Pre-Trial Chamber must decide whether to issue a warrant for Bashir's arrest. The decision is expected to take into account whether there are "reasonable grounds" to believe Bashir committed the alleged crimes, and whether a warrant is necessary to ensure Bashir's appearance in court. In response

³⁸ In a briefing to the Security Council on June 5, 2008, the ICC Prosecutor had indicated that he would present a second case on Darfur to ICC judges in July. ICC Office of the Prosecutor, *Seventh Report of the Prosecutor*, Op. Cit.

³⁹ The counts are: (1) Genocide by killing of members of each target group; (2) Genocide by causing serious bodily or mental harm to members of each target group; (3) Genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction; (4) Murder of civilians in Darfur, constituting a crime against humanity; (5) Extermination by inflicting conditions of life calculated to bring about the destruction of a part of the civilian population in Darfur, constituting a crime against humanity; (6) Forcible transfer of population in Darfur, constituting a crime against humanity; (7) Torture of civilians in Darfur, constituting a crime against humanity; (8) Rape of civilians in Darfur, constituting a crime against humanity; (9) Attacks against the civilian population in Darfur, constituting a war crime; and (10) Pillaging of towns and villages in Darfur, constituting a war crime (ICC Office of the Prosecutor, *Summary of Prosecutor's Application under Article 58*, July 14, 2008).

⁴⁰ ICC Office of the Prosecutor, *Summary of the Case: Prosecutor's Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad Al Bashir*.

⁴¹ Rome Statute, Article 27. International legal experts are, however, divided as to whether the Rome Statute waives "procedural" immunity for sitting heads of state — i.e., protection from arrest while traveling to a foreign country in official capacity — under customary international law. For further discussion, see Marko Milanovic, "ICC Prosecutor Charges the President of Sudan with Genocide, Crimes Against Humanity and War Crimes in Darfur," *American Society of International Law Insight*, July 28, 2008; Dapo Akande, "The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?," *Oxford Transitional Justice Research Working Paper Series*, July 30, 2008; and Pondai Bamu, "Head of State Immunity and the ICC: Can Bashir be Prosecuted?," *Oxford Transitional Justice Research Working Paper Series*, August 1, 2008.

to the request for a warrant, several European governments, including France and Great Britain, have called on the Sudanese government to comply with ICC actions. Reactions by regional governments have been more critical, with many calling for a deferral of the prosecution. The governments of Russia and China have voiced opposition to the prosecution attempt. An analysis in the *Chicago Tribune* noted that if a warrant is issued, “Sudan is unlikely to hand over the president, but the warrant would mean that Bashir could be arrested by international authorities if he left his country.”⁴²

Genocide.⁴³ Bashir is the first individual to be accused of genocide by the ICC Prosecutor. The request for a warrant alleges that Bashir “intends to destroy in substantial part the Fur, Masalit and Zaghawa ethnic groups as such” through coordinated attacks by government troops and Janjaweed militia members on civilian targets, including villages, towns, and camps for internally displaced persons.⁴⁴ The prosecution’s case states that 35,000 people in Darfur have been killed outright, at least 2,700,000 displaced, and thousands raped in such attacks, and that most victims are members of the targeted groups.⁴⁵ The case is based on the Prosecutor’s own investigation, which was initiated in June 2005, as well as on thousands of documents, video footage, and interview transcripts received from the U.N. International Commission of Inquiry on Darfur. The Prosecutor also received the Commission’s sealed list of individuals suspected of committing serious abuses in Darfur, though this list is not binding on the selection of suspects.

Human rights organizations and Darfur advocacy groups have welcomed the prosecution of Bashir for genocide.⁴⁶ However, the formulation of the Prosecutor’s accusation has drawn some criticism. The Commission of Inquiry concluded in its January 2005 report that the violence in Darfur did not amount to genocide, but that “international offences such as the crimes against humanity and war crimes that have

⁴² Maggie Farley and Edmund Sanders, “Darfur Genocide Laid at Sudan President’s Door,” *The Chicago Tribune*, July 15, 2008. In late August, Bashir traveled to and from Turkey, which is not a party to the ICC.

⁴³ See CRS Report RL32605, *Genocide: Legal Precedent Surrounding the Definition of the Crime*, by Judith Derenzo and Michael John Garcia, for a discussion of the legal elements of genocide under the Rome Statute and under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

⁴⁴ Darfur’s main rebel groups are associated with these ethnicities; the Prosecutor’s case against Bashir alleges that military and militia attacks specifically targeted civilians even where rebel locations were spatially separate and well-known.

⁴⁵ ICC Office of the Prosecutor, “Summary of the Case.” The application for a warrant references reprisals against other, smaller ethnic groups in connection with alleged war crimes and crimes against humanity. The estimate of 35,000 killed is much lower than the figure of 200,000-400,000 referenced by some non-governmental organizations and researchers, though many of these estimates include deaths indirectly caused by the conflict.

⁴⁶ See e.g. Human Rights Watch, “Darfur: ICC Moves Against Sudan’s Leader; Charges Against al-Bashir a Major Step to Ending Impunity,” July 14, 2008; Amnesty International, “President Of Sudan Could Face Arrest Over Darfur War Crimes,” July 18, 2008.

been committed in Darfur may be no less serious and heinous than genocide.”⁴⁷ Many Darfur activists have accused the Commission of allowing political considerations to affect its conclusions.⁴⁸ Other analysts, such as the scholar Alex de Waal, argue that while the Sudanese government is responsible for serious crimes in Darfur, the charge of genocide will be “extraordinarily difficult” to prove.⁴⁹

Sudanese Reactions. The Sudanese government has rejected ICC jurisdiction over Darfur as a violation of its sovereignty and accused the Court of being part of a Western plot against a sovereign African and Muslim state.⁵⁰ Other reactions have focused on the potential impact of an arrest warrant on ongoing peace processes, peacekeeping operations, and humanitarian relief, and on the potential impact on national elections scheduled for 2009.

The Bashir Administration. Reports suggest that Bashir’s administration sees the ICC as an instrument of Western pressure for regime change in Sudan, and not as an independent institution.⁵¹ The Sudanese president has repeatedly denied that genocide or ethnic cleansing is taking place in Darfur and has rejected ICC jurisdiction as an infringement on Sudanese sovereignty.⁵² The last mission to Sudan by ICC prosecutorial staff was in January-February 2007, after which the government announced it would no longer allow ICC personnel to speak to Sudanese officials.⁵³

⁴⁷ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, January 25, 2005.

⁴⁸ E.g., Eric Reeves, “Report of the International Commission of Inquiry on Darfur: A critical analysis (Part II),” *Sudanreeves.org*, February 6, 2005.

⁴⁹ Alex de Waal, “Darfur, the Court and Khartoum: The Politics of State Non-Cooperation,” in Nicholas Waddell and Phil Clark, eds., *Courting Conflict? Justice, Peace and the ICC in Africa* (London: The Royal Africa Society, March 2008). Another critical response is presented by Rony Brauman, “The ICC’s Bashir Indictment: Law Against Peace,” *World Politics Review*, July 23, 2008. For further background, see Human Rights Watch, *Entrenching Impunity: Government Responsibility for International Crimes in Darfur*, December 2005.

⁵⁰ E.g., BBC Monitoring, “Sudanese Leader Calls International Court ‘Tool of Imperialist Forces,’” [State-owned] Suna News Agency, August 20, 2008.

⁵¹ See e.g. *Al-Sahafah* [Khartoum], “Sudanese Aide Accuses West of Striving to Replace Al-Bashir,” via BBC Monitoring, August 21, 2008; *Sudan Tribune*, “Sudan Warns UN Chief Over ICC,” via BBC Monitoring, August 18, 2008; and de Waal, Op. Cit.

⁵² The Sudanese government signed the Rome Statute on September 8, 2000, but did not ratify it. On August 26, 2008, Sudan notified the Secretary-General of the United Nations, as depositary of Rome Statute of the International Criminal Court, that Sudan “does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000.” (Reference: C.N.612.2008.TREATIES-6 [Depositary Notification], Rome Statute of the International Criminal Court, “Sudan: Notification.”)

⁵³ CRS interview with ICC Office of the Prosecutor official, September 3, 2008. ICC prosecutorial staff have conducted extensive interviews with witnesses outside of Sudan, including in neighboring countries.

Days before the request for a warrant against Bashir was announced, a presidential spokesman reportedly called the Prosecutor a “terrorist” whose investigation was based on testimony by rebel leaders and spies posing as humanitarian workers.⁵⁴ The ruling National Congress Party (NCP) has used state-controlled media and public demonstrations to rally domestic support and emphasize that ICC actions are “aimed at core national values and strategic interests.”⁵⁵ Shortly after the request for a warrant was announced, Bashir undertook a good-will tour to Darfur, where he reportedly promised new development initiatives for the region and was greeted by thousands of supporters. At the regional level, the Sudanese government launched a diplomatic campaign to lobby for a U.N. Security Council deferral of the case (see section below). According to press reports, in mid-August 2008, government troops launched a new offensive in northern Darfur to seize control of rebel strongholds.

In a further effort to preclude prosecution, Bashir has argued that Sudan has the capacity to investigate and try perpetrators of violence in Darfur domestically.⁵⁶ In early August 2008, the government appointed a special prosecutor, Nimer Ibrahim Mohamed, to investigate alleged crimes in Darfur. The appointment is in addition to the special courts created after ICC warrants were issued for Harun and Kushayb. While Mohamed is reportedly a respected lawyer, observers suggest that his efforts will be limited by political pressures, and that Sudanese law does not contain provisions for genocide, war crimes, or crimes against humanity.⁵⁷

While the ICC is institutionally independent from the United Nations, Sudanese officials have reportedly on multiple occasions threatened the safety of U.N. personnel in Sudan if an arrest warrant is issued, including those serving the U.N. Mission in Sudan (UNMIS, in the South) and the African Union-United Nations Hybrid Operation in Darfur (UNAMID).⁵⁸ At the same time, at least one official denied that the government was threatening U.N. staff.⁵⁹ Seven peacekeepers were

⁵⁴ *The Associated Press* (hereafter, *AP*), “Sudan Dismisses ICC Proceedings on Darfur, Reiterates Refusal to Hand Over Any Suspects,” July 11, 2008.

⁵⁵ Suliman Baldo, “The Politics of an Arrest Warrant,” *Making Sense of Darfur* [online forum published by the Social Science Research Council], July 23, 2008.

⁵⁶ See e.g., transcript of Bashir’s press conference in Istanbul, Turkey, on August 20, 2008, via the Open Source Center.

⁵⁷ Abdelmoniem Abu Edries Ali, “Sudan Appoints Darfur Prosecutor,” *Agence France-Presse* (hereafter, *AFP*), August 6, 2008.

⁵⁸ See e.g., *AP*, “Sudan: ICC Case Could Provoke Violence,” July 13, 2008; *AP*, “Sudan Rejects Genocide Charges Against President, Lawmaker Says Sudan Can’t Ensure U.N. Safety,” July 14, 2008; Katharine Houreld, “Official: Aid workers might not be safe in Sudan if ICC issues arrest warrant for president,” *AP*, July 22, 2008; BBC News Online, “Sudanese Warning on Peacekeepers,” July 25, 2008; Daniel Bases, “Sudan Warns ‘Consequences’ Over Warrant - UN,” *Reuters*, August 19, 2008; *AP*, “Sudan’s President Says Ready To Go To War,” August 20, 2008; *Akhbar al Yawm* [pro-government Sudanese newspaper], “Political Parties Support President’s Decision on ‘Expelling’ UNAMID,” via BBC Monitoring, August 24, 2008.

⁵⁹ Peter Clotey, “Sudan Denies Threatening U.N. Staff Over ICC Arrest Warrants,” *Voice* (continued...)

killed and 22 injured in an ambush in Darfur on July 8, 2008, deepening fears of reprisals.⁶⁰

Other Sudanese Reactions. Some Sudanese opposition parties have displayed public support for the president, reportedly due in part to concerns that an ICC arrest warrant could derail elections scheduled for 2009, while privately acknowledging mixed reactions.⁶¹ Spokesmen for the two largest Darfur rebel factions, the Sudan Liberation Movement-Unity (SLM-U) and the Justice and Equality Movement (JEM), have reportedly welcomed the request for a warrant against Bashir.⁶²

Media reports suggest southern Sudanese are ambivalent about the attempt to prosecute Bashir.⁶³ The Sudan People's Liberation Movement (SPLM) — the former southern rebel group and partner in the Government of National Unity under the 2005 Comprehensive Peace Agreement (CPA) — called on the Government of National Unity “to forge an understanding with the international community and to cooperate with [the] ICC on the legal processes.”⁶⁴ The SPLM also expressed concern that the ICC's move could threaten “peace and stability” in Sudan, and affirmed that the situation in Darfur “requires a negotiated and peaceful settlement.”⁶⁵ Some SPLM officials are reportedly concerned that ICC attempts to prosecute Bashir could undo the CPA, while others have reportedly expressed hope that prosecution could leverage international pressure on Khartoum.⁶⁶ Following the request for a warrant,

⁵⁹ (...continued)

of America, August 19, 2008; see also Mohamed Osman, “Darfur Peacekeepers' Chief: Sudan Cooperating,” *AP*, August 21, 2008.

⁶⁰ U.N. Security Council, *Report of the Secretary-General on the Deployment of the African Union-United Nations Hybrid Operation in Darfur*, S/2008/558, August 18, 2008. The report states that the United Nations is investigating who was behind the attack, and documents several other “direct attacks” on UNAMID personnel in July 2008.

⁶¹ Lydia Polgreen and Jeffrey Gettleman, “Sudan Rallies Behind Leader Reviled Abroad,” *The New York Times*, July 28, 2008; Sarah El Deeb, “Indicted Sudanese President Seeks Help From Rivals,” *AP*, August 6, 2008. Bashir has stated that elections will take place as scheduled (Jennie Matthew, “Beshir Vows Sudan Elections on Time,” *AFP*, August 3, 2008).

⁶² *Reuters*, “Instant View: ICC Prosecutor Seeks Warrant for Sudan's Bashir,” July 14, 2008; *AFP*, “‘Delighted’ Darfur Rebels Offer to Help Bring Beshir In,” July 14, 2008.

⁶³ See e.g. “Sudan: Saving Omer,” *Africa Confidential*, August 1, 2008; and Naseem Badiy, “Ocampo v Bashir: The Perspective from Juba,” *Oxford Transitional Justice Research Working Paper Series*, July 18, 2008.

⁶⁴ SPLM Press Release, “SPLM Position On ICC Indictment,” July 21, 2008; see also Wasil Ali, “SPLM Official Calls on Sudan to ‘Deal Legally’ With ICC,” *Sudan Tribune*, August 15, 2008.

⁶⁵ SPLM Press Release, “SPLM Position On ICC Indictment”; SPLM Press Release, “SPLM Reviews ICC Indictment as 2nd PB Meeting Opens,” July 26, 2008; Najum Mushtaq, “ICC Indictment Sparks Hope, Fear,” *Inter Press Service*, July 18, 2008.

⁶⁶ Opheera McDoom, “Analysis-Justice Clashes With Peace on Darfur Bashir Warrant,” (continued...)

Bashir appointed the SPLM's Salva Kiir, the President of south Sudan and first Vice President in the Government of National Unity, to head a government commission to coordinate Sudan's response to the ICC. Kiir reportedly traveled to Uganda in late July and urged the country's leadership to support a delay in the proceedings against Bashir.⁶⁷ The ruling party has averred that "the position of the SPLM... is based on full solidarity with the president," according to local media, though observers dispute this assertion.⁶⁸

Regional Reactions. The Sudanese government has rallied support for a deferral of Bashir's potential prosecution among Arab and African leaders, as well as among regional organizations such as the African Union (AU), the Arab League, and the Organization of the Islamic Conference (OIC).⁶⁹ In a written statement on July 11, 2008, the AU Peace and Security Council "expressed its strong conviction that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting a lasting peace" and "reiterated [the] AU's concern with the misuse of indictments against African leaders."⁷⁰ On July 21 and July 22, respectively, the AU Peace and Security Council and the OIC's Group in New York requested that the U.N. Security Council suspend ICC proceedings in the interests of peace and stability.⁷¹ The AU also called on the Sudanese government to investigate human rights violations in Darfur, and is reportedly planning its own investigation in the region, with Sudanese cooperation.⁷² The President of the AU Commission, Jean Ping, and the joint U.N.-AU mediator for Darfur, Djibril Bassolet, have raised concerns that the ICC is jeopardizing peace efforts.⁷³ On July 31, the Non-Aligned Movement of 120 developing countries expressed "deep concern" that the prosecution of Bashir could destabilize Sudan.⁷⁴

⁶⁶ (...continued)

Reuters, July 14, 2008; Mushtaq, Op. Cit.

⁶⁷ Milton Olupot, "Delay Arrest of Bashir — Kiir," *New Vision* [Kampala], July 23, 2008.

⁶⁸ United Nations Mission in Sudan (UNMIS) press review, July 15, 2008; see also *Sudan Tribune*, "Interview: Sudan FM expresses frustration with the ruling NCP over Darfur crisis," September 8, 2008.

⁶⁹ The OIC is an inter-governmental organization of 57 states that aims to "project the interests of the Muslim world" (OIC website, at [http://www.oic-oci.org/oicnew/page_detail.asp?p_id=52]).

⁷⁰ African Union, *Letter Dated 14 July 2008 from the Permanent Observer of the African Union to the United Nations Addressed to the President of the Security Council, S/2008/465*.

⁷¹ Security Council Report, "Update Report: Sudan," July 28, 2008. While some see these statements as evidence of regional support for Bashir, others point out that the option of a deferral could serve as leverage over Khartoum.

⁷² Jennie Matthew, "AU Recruiting Top Lawyers Over Sudan War Crimes Probe," *AFP*, August 5, 2008.

⁷³ *Reuters*, "Darfour - La CPI Complique les Choses, Selon le Médiateur Onu-UA," July 31, 2008; *AFP*, "Soudan: Ping rencontre Béchir, critique la procédure de la CPI," August 4, 2008.

⁷⁴ *Reuters*, "Developing States Worried by Sudan Indictment," July 31, 2008.

Many African and Middle Eastern governments have expressed concern over the attempt to prosecute Bashir, including those of South Africa, Nigeria, Kenya, Rwanda, Tanzania, Benin, Eritrea, Egypt, Iran, Syria, Libya, Algeria, and Morocco. President Yoweri Museveni of Uganda, on the other hand, has taken a public stance in favor of ICC involvement in Darfur, a position that appears to stem in part from the ICC's prosecutions of rebel leaders in Uganda.⁷⁵ Some African and Middle Eastern commentators have praised the ICC Prosecutor's decision to pursue Bashir as an important step against impunity in the region, while others wondered whether the move displayed bias against African countries.⁷⁶

Security Council Considerations in July 2008

The July 14, 2008, ICC Prosecutor's request for an arrest warrant for Bashir occurred during the time that the U.N. Security Council was considering extension of the Council mandate for the African Union-United Nations Hybrid Operation in Darfur (UNAMID). The Council had before it the report of the U.N. Secretary-General on the deployment of the operation, dated July 7 and covering the period April to June 2008.⁷⁷ It was expected that this mandate, which was to expire July 31, would be extended, albeit with some discussion of UNAMID-related issues.

Council considerations were significantly impacted by the ICC Prosecutor's announcement. In the light of reactions to this request (see previous section) and in view of the fact that the Council had sent the case to the ICC for investigation, protracted consultations within the Council on the content of a resolution extending the UNAMID mandate delayed Council action until nearly the final hour.⁷⁸

Among the possible issues engaging Council members after the July 14 action was the oft-made suggestion that the Council include in its resolution a request, under Article 16 of the ICC Statute, for a deferral or suspension of further ICC action on the case for up to 12 months for the purpose of, among other things, facilitating efforts toward a peaceful settlement of the situations in Darfur and south Sudan. Some governments also expressed concerns that a positive ICC response to the request for an arrest warrant would exacerbate the situation on the ground in Darfur, making both peacekeepers and humanitarian workers subject to further attacks.

⁷⁵ Rodney Muhumuza, "We Can't Condemn ICC Over Bashir — Museveni," *The Monitor* [Kampala], August 4, 2008.

⁷⁶ See e.g., *The Daily Champion* [Lagos, Nigeria], "Al-Bashir's Indictment [editorial]," August 6, 2008; Paul Ejime, "Before Al-Bashir Goes on Trial," *The Guardian* [Lagos], July 28, 2008; Al-Jazeera, "The Opposite Direction," presented by Faysal al-Qasim, August 12, 2008, via the Open Source Center; *AFP*, "Praise and Criticism for ICC From African Rights Organizations," July 16, 2008.

⁷⁷ The U.N. Security Council requested that the Secretary-General report every 90 days on progress made in implementation of UNAMID and the status of the political process.

⁷⁸ Security Council Report, "Update Report, Sudan," July 28, 2008, available at [<http://www.securitycouncilreport.org>].

Article 16 of the ICC Statute is entitled *Deferral of investigation or prosecution* and provides that

No investigation or prosecution can be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Thus, if the U.N. Security Council, acting under Chapter VII of the Charter, adopts a resolution requesting the ICC to suspend or defer any further investigation or prosecution of the case against Bashir, the ICC, including the Prosecutor, would be obliged to cease its investigation in that particular situation and the Pre-Trial Chamber, before which the warrant request is pending, would have to suspend its considerations. The Council request would be applicable for 12 months and would be renewable.

David Scheffer, who headed the U.S. delegation to the conference that drafted the ICC Statute, in an August 20, 2008, Op-ed in *Jurist*, noted that the “negotiating history of Article 16 should be instructive to how the Council currently examines the Darfur situation.”⁷⁹ Scheffer pointed out that Article 16 was drafted and adopted to enable the U.N. Security Council to suspend or defer an ICC investigation or prosecution of a situation “*before either is launched* if priorities of peace and security compelled a delay of international justice.” He stated that “the original intent behind Article 16 was for the Security Council to act pre-emptively to delay the application of international justice for atrocity crimes in a particular situation in order to focus exclusively on performing the Council’s mandated responsibilities for international peace and security objectives.” This was a tool to be employed by the Council in instances of “premature State Party or Prosecutor referrals.” In addition, Scheffer observed that if the current proposals for Council suspension of further ICC action on a situation referred to the ICC by the Council had been foreseen, “Article 16 never would have been approved by the...majority of governments attending the U.N. talks on the Rome Statute for it would have been viewed as creating rights for the Security Council far beyond the original intent of the Singapore compromise.”

Scheffer noted, “Nonetheless, one plausibly may argue that the language of Article 16 of the Rome Statute technically empowers the Security Council to intervene at this late date and block approval of an arrest warrant against President Bashir or even suspend its execution following any approval of it by the judges.”⁸⁰

⁷⁹ David Scheffer, “The Security Council’s Struggle over Darfur and International Justice,” *Jurist* — Forum (Jurist, University of Pittsburgh School of Law), online at [<http://jurist.law.pitt/foruny/2008/08/security-councils-struggle-over-darfur.php>].

⁸⁰ Scheffer, Op. Cit. A more academic commentary on Article 16 may be found in Luigi Condorelli and Santiago Villalpando, *Referral and Deferral by the Security Council*, Chapter 17.2, in *The International Criminal Court: A Commentary*, edited by Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (New York: Oxford University Press, 2002), vol. I, pp. 644-654.

U.N. Security Council Resolution 1828 (2008), adopted on July 31, 2008, by a vote of 14 in favor and with the United States abstaining, extended UNAMID for a further 12 months; the meeting, incidentally, ended at 10:45 pm.⁸¹ In abstaining on the vote rather than voting against it, the United States supported renewal of the UNAMID mandate but noted that the language in preambular paragraph 9 “would send the wrong signal to President Bashir and undermine efforts to bring him and others to justice.”⁸² In remarks with the press following the vote, U.S. Deputy Permanent Representative Alejandro Wolff stated:

The reason for our abstention...had to do with one paragraph that would send the wrong signal at a very important time when we are trying to eliminate the climate of impunity, to deal with justice, and to address crimes in Darfur, by suggesting that there might be a way out. There is no compromise on the issue of justice. The ... United States felt it was time to stand up on this point of moral clarity and make clear that this Permanent Member of the Security Council will not compromise on the issue of justice.⁸³

Other ICC Cases in Africa

The ICC Prosecutor has opened five cases in connection with northern Uganda, four in connection with the Democratic Republic of Congo (DRC), and one in connection with the Central African Republic (CAR). In contrast to Sudan, which has resisted ICC jurisdiction, these three countries are states parties to the ICC; all three and referred situations in their countries to the Prosecutor. Four suspects are currently in ICC custody, all Africans: Jean-Pierre Bemba, Thomas Lubanga, Germain Katanga, and Mathieu Ngudjolo. No one has yet been convicted by the ICC.

⁸¹ See S/PV.5947 for verbatim record of the meeting and U.N. Press Release S/9412 for an unofficial summary of the statements made and the text of the adopted resolution. For links to both items, see under July 31 at [<http://www.un.org/Depts/dhl/resguide/scact2008.htm>]. A U.S. vote against the resolution would have defeated the resolution since that “no” vote would have been a veto.

⁸² Explanation of vote by Ambassador Alejandro Wolff, U.S. Deputy Permanent Representative, USUN Press Release # 209 (08), July 31, 2008. The text of preambular paragraph 9 follows: “Taking note of the African Union (AU) communiqué of the 142nd [AU] Peace and Security Council (PSC) Meeting dated 21 July (S/2008/481, annex), having in mind concerns raised by members of the Council regarding potential developments subsequent to the application by the Prosecutor of the International Criminal Court of 14 July 2008, and taking note of their intention to consider these matters further.”

⁸³ Remarks by Ambassador Alejandro Wolff, U.S. Deputy Permanent Representative, at the Security Council Stakeout [with the press], USUN Press Release #210 (08), July 31, 2008.

Uganda⁸⁴

The government of Uganda, a party to the ICC, referred “the situation concerning the Lord’s Resistance Army” to the Court in 2003.⁸⁵ The Lord’s Resistance Army (LRA) is a rebel group that has fought for over two decades in northern Uganda. In October 2005, the ICC unsealed arrest warrants — the first issued by the Court — for LRA leader Joseph Kony and LRA commanders Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya. The Prosecutor accused the LRA of establishing “a pattern of brutalization of civilians,” including murder, forced abduction, sexual enslavement, and mutilation, amounting to crimes against humanity and war crimes.⁸⁶ None of the suspects are in custody; Lukwiya and Otti have reportedly been killed since the warrants were issued, while other LRA commanders are reportedly in hiding in eastern Democratic Republic of Congo. While Uganda’s referral specifically mentioned the Lord’s Resistance Army, the Prosecutor also is investigating alleged crimes committed by the Ugandan military in northern Uganda.

Despite widespread documentation of LRA abuses, the ICC’s actions in Uganda have met with some strong domestic and international opposition due to debates over what would constitute justice for the war-torn communities of northern Uganda and whether the ICC has helped or hindered the pursuit of a peace agreement.⁸⁷ Some observers argue that ICC arrest warrants were a crucial factor in bringing the LRA to the negotiating table in 2006 for peace talks brokered by the Government of South Sudan. In August 2006, rebel and government representatives signed a landmark cessation of hostilities agreement; in February 2008, the government and the LRA reached several significant further agreements, including a permanent cease-fire. However, threats of ICC prosecution are considered by some to be a stumbling block to achieving an elusive final peace deal. The LRA has reportedly demanded that ICC arrest warrants be annulled as a prerequisite to a final agreement. The Ugandan

⁸⁴ See CRS Report RL33701, *Uganda: Current Conditions and the Crisis in North Uganda*, by Ted Dagne and Hannah Reeves.

⁸⁵ ICC Office of the Prosecutor Press Release, “President of Uganda Refers Situation Concerning the Lord’s Resistance Army (LRA) to the ICC,” January 29, 2004. According to an Office of the Prosecutor official, referrals by the governments of Uganda and DRC followed moves by the Office of the Prosecutor to open investigations under its discretionary power (CRS interview, September 3, 2008); see also Payam Akhavan, “The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court,” *The American Journal of International Law*, 99, 2 (April 2005), pp. 405-406.

⁸⁶ ICC Press Release, “Warrant of Arrest Unsealed Against Five LRA Commanders,” October 14, 2005. Kony is wanted for 12 counts of crimes against humanity, including murder, enslavement, sexual enslavement, rape, and “inhumane acts,” and 21 counts of war crimes, including murder, cruel treatment of civilians, directing an attack against a civilian population, pillaging, inducing rape, and the forced enlistment of children; the other LRA commanders are accused of crimes against humanity and war crimes, ranging from four to 32 counts.

⁸⁷ See Tim Allen, *Trial Justice: The International Criminal Court and the Lord’s Resistance Army* (London: Zed Books, 2006).

government has offered a combination of amnesty and domestic prosecutions for lower- and mid-ranking LRA fighters, and is reportedly willing to prosecute LRA leaders in domestic courts if the rebels accept a peace agreement. This could entail challenging the LRA cases' admissibility before the ICC under the principle of complementarity. However, only the ICC's Pre-Trial Chamber has the authority to make a decision on admissibility. The ICC Prosecutor has reportedly stated that he will fight any move to drop the LRA prosecutions.⁸⁸

Democratic Republic of Congo (DRC)

The DRC government referred "the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC" to the Prosecutor in April 2004.⁸⁹ Despite the end of a five-year nationwide civil war in 2003 and the conduct of national elections in 2006, the DRC has continued to suffer from armed conflict, particularly in the volatile eastern regions bordering Rwanda, Uganda, and Burundi. The ICC has issued four arrest warrants in its first DRC investigation, which focuses on the eastern Congolese district of Ituri, where an inter-ethnic war erupted in June 2003 with reported involvement by neighboring governments.⁹⁰ Three suspects are in custody, while a fourth remains at large. The Prosecutor has stated that a second investigation in the DRC will focus on sexual crimes committed in the eastern provinces of North and South Kivu, while a third will look into "the role of those who organized and financed" armed groups throughout the country.⁹¹ The latter investigation could potentially target officials from neighboring countries as well as members of the Congolese government and armed forces.⁹²

Thomas Lubanga Dyilo. The ICC issued a sealed arrest warrant in February 2006 for Thomas Lubanga Dyilo, the alleged founder and leader of the *Union des Patriotes Congolais* (UPC) in Ituri and its military wing, the *Forces Patriotiques pour la Libération du Congo* (FPLC). At the time, Lubanga was in Congolese

⁸⁸ CRS interview with ICC Office of the Prosecutor official, September 3, 2008. According to the official, the Ugandan government has expressed continued commitment to arresting the LRA leaders in discussions with the ICC.

⁸⁹ ICC Office of the Prosecutor Press Release, "Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo," April 19, 2004.

⁹⁰ Ituri's armed groups did not participate in the peace process between DRC's major rebel movements that brought the country's nationwide civil war to an end in 2003. While U.N. peacekeepers and DRC government troops have succeeded in staunching much of the violence in Ituri, many of the groups have not disarmed, and the area is still considered unstable. See International Crisis Group, *Congo: Four Priorities for Sustainable Peace in Ituri*, Africa Report No. 140, May 13, 2008.

⁹¹ ICC Press Release, "DRC: ICC Warrant of Arrest Unsealed Against Bosco Ntaganda," April 29, 2008.

⁹² CRS interview with Office of the Prosecutor official, September 3, 2008. Nationals of non-member states are subject to ICC jurisdiction for crimes committed on the territory of a member state.

custody and had been charged in the domestic justice system.⁹³ After a determination of admissibility by the ICC, Lubanga was transferred to ICC custody in March 2006. The ICC has charged Lubanga with three counts of war crimes related to the recruitment and use of child soldiers.⁹⁴ Despite anticipation that the case would lead to a straightforward conviction, in June 2008, prior to trial, the ICC Trial Chamber stayed the proceedings against Lubanga because the Prosecutor had allegedly failed to disclose exculpatory evidence.⁹⁵ On July 2, Lubanga was ordered released. A preliminary application by the Prosecutor to lift the stay of proceedings was rejected by the ICC Trial Chamber in early September 2008. A final decision on whether to proceed with Lubanga's trial is pending, during which time the accused is to remain in custody.⁹⁶

Germain Katanga and Mathieu Ngudjolo Chui. Germain Katanga, the alleged highest-ranking commander of the *Force de Résistance Patriotique en Ituri* (FRPI) and Ngudjolo, the alleged highest-ranking commander of the *Front des Nationalistes et Intégrationnistes* (FNI), are being prosecuted as co-perpetrators for allegedly having “acted in concert to mount an attack targeted mainly at Hema civilians” in Ituri in 2003.⁹⁷ The ICC issued sealed arrest warrants for Katanga and Ngudjolo in July 2007, and they were transferred by Congolese authorities to ICC custody in October 2007 and February 2008, respectively. The Prosecutor has accused them jointly of four counts of crimes against humanity and nine counts of war crimes related to murder, “inhumane acts,” sexual crimes, the use of child soldiers, rape, and other abuses.⁹⁸ The case is in the pre-trial phase.

Bosco Ntaganda. The ICC issued a sealed warrant for the arrest of Bosco Ntaganda, the alleged former Deputy Chief of General Staff for Military Operations in Lubanga's FPLC, in August 2006. In April 2008, the ICC unsealed the warrant, having determined that public knowledge of ICC proceedings would neither endanger witnesses nor further obstruct attempts to bring Ntaganda into custody.⁹⁹ The ICC

⁹³ According to Human Rights Watch, Lubanga was arrested by Congolese authorities after the killing of nine U.N. peacekeepers in Ituri in February 2005. He and other Ituri militia members had been charged with genocide, war crimes, and crimes against humanity, but had not been brought to trial when the ICC warrant was issued. (Human Rights Watch, “D.R. Congo: ICC Arrest First Step to Justice,” March 17, 2006.)

⁹⁴ ICC, The Prosecutor Vs. Thomas Lubanga Dyilo, *Document Containing the Charges, Article 61(3)(a) (Public Redacted Version)*, August 28, 2006.

⁹⁵ For more information on the decision to stay proceedings, see Human Rights Watch, “International Criminal Court's Trial of Thomas Lubanga ‘Stayed’: Questions and Answers,” at [<http://hrw.org/english/docs/2008/06/19/congo19163.htm>].

⁹⁶ ICC Press Release, “Trial Chamber I Maintains Stay of Proceedings in the Thomas Lubanga Dyilo Case,” September 4, 2008.

⁹⁷ ICC, *Combined Factsheet: Situation in the Democratic Republic of the Congo, Germain Katanga and Mathieu Ngudjolo Chui*, June 27, 2008. Their cases were joined in March 2008.

⁹⁸ ICC, *Combined Factsheet*, Op. Cit.

⁹⁹ ICC Press Release, “Warrant of Arrest Against Bosco Ntaganda Unsealed,” April 29, (continued...)

Prosecutor has accused Ntaganda of three counts of war crimes related to the alleged recruitment and use of child soldiers in 2002 and 2003.¹⁰⁰ Attempts to arrest Ntaganda have been complicated by the fact that he is reportedly currently serving as second-in-command in another rebel group, the *Congrès National pour la Défense du Peuple* (CNDP), in the DRC's North Kivu province. The CNDP, currently the DRC's most significant rebel organization, is led by Laurent Nkunda, a dissident military general.¹⁰¹ Ntaganda remains at large.¹⁰²

Central African Republic (CAR)

The government of CAR, a party to the ICC, referred “the situation of crimes within the jurisdiction of the Court committed anywhere on [CAR] territory” to the ICC Prosecutor in January 2005.¹⁰³ In May 2008, the ICC issued a sealed warrant of arrest for Jean-Pierre Bemba Gombo, a former DRC rebel leader. The warrant alleged that as commander of the *Movement de Libération du Congo* (MLC), one of two main DRC rebel groups during that country's civil war, Bemba had overseen systematic attacks on civilians in CAR territory between October 2002 and March 2003.¹⁰⁴ The Prosecutor accused Bemba of five counts of war crimes and three counts of crimes against humanity for alleged rape, torture, pillaging, and other abuses.¹⁰⁵ Bemba, who had been in exile in Europe since 2007, was arrested by Belgian authorities in May 2008 and turned over to the ICC in July 2008.

Bemba's prosecution by the ICC has been controversial in the DRC, where the MLC is now the largest opposition party.¹⁰⁶ After serving as one of four vice-presidents in the DRC transitional government from July 2003 to December 2006, Bemba came in second in the DRC's 2006 presidential election with 42% of

⁹⁹ (...continued)
2008.

¹⁰⁰ ICC Pre-Trial Chamber, *The Prosecutor Vs. Bosco Ntaganda, Warrant of Arrest*, August 22, 2006. The warrant states that Ntaganda is “believed to be” a Rwandan national.

¹⁰¹ A peace deal was signed by Nkunda and other armed groups in North Kivu in January 2008, though reports indicate that sporadic fighting continues. For background on the conflict, see International Crisis Group, *Congo: Bringing Peace to North Kivu*, Africa Report No. 133, October 31, 2007.

¹⁰² Jacques Kahorha, “Nkunda Rebuffs ICC Over Indictée,” *Institute for War and Peace Reporting*, June 16, 2008.

¹⁰³ ICC Office of the Prosecutor Press Release, “Prosecutor Receives Referral Concerning Central African Republic,” January 7, 2005.

¹⁰⁴ Bemba's MLC, based in the DRC's north, was reportedly invited into CAR by then-President Ange-Félix Patassé to help quell a rebellion led by François Bozizé. Bozizé took power in a coup in 2003 and is the current president of CAR.

¹⁰⁵ ICC Press Release, “Surrender of Jean-Pierre Bemba to the International Criminal Court,” July 3, 2008. The counts as listed in this document appear to have changed slightly from those listed in the original arrest warrant.

¹⁰⁶ The MLC converted itself into a political party following the end of the DRC civil war in 2003.

the vote, behind the incumbent president, Joseph Kabila; Bemba's supporters accused the president of electoral fraud. Bemba won a Senate seat in January 2007, but he went into exile the following April after relations with Kabila continued to deteriorate. Some observers consider Bemba's prosecution by the ICC to be politically expeditious for President Kabila, whose main rival is now in international custody. The Office of the Prosecutor has strenuously denied that political considerations played a role in the decision to pursue Bemba.¹⁰⁷

Issues Raised by the ICC's Actions in Africa

Many observers have praised the ICC's investigations in Africa as a crucial step against widespread impunity on the continent. Nevertheless, the ICC's actions have provoked debates over the court's potential impact, its perceived prioritization of Africa over other regions, its selection of cases, and the effect of international prosecutions on peace processes. Most persistently, critics have accused the ICC of potentially jeopardizing the settlement of long-running civil wars in the pursuit of an often abstract "justice." Supporters of the Court reject these criticisms, and hope that ICC investigations will build accountability for the world's gravest atrocities and contribute to Africa's long-term peace and stability.

Potential Impact

Many hope that the ICC will usher in a new period of international accountability for the gravest human rights abuses by ensuring that perpetrators are brought to justice. The ICC's founders anticipated that by ending impunity, the ICC would deter future atrocities.¹⁰⁸ Indeed, some observers have argued that the ICC's success should be evaluated not just based on the punishment of past atrocities, but also in terms of "the effect its investigations have on reducing abysmal conduct in the present and future."¹⁰⁹ (The Office of the Prosecutor maintains that the choice of cases is not based on calculations of deterrent effect, though the Office acknowledges that strategic communications related to ICC prosecutions may play a role in deterrence.¹¹⁰)

The goal of deterrence has been particularly salient in the ICC's investigations in Africa, which have focused to-date on regions where conflict is ongoing or only recently settled.¹¹¹ However, difficulties in enforcing ICC arrest warrants and the fact that the Court has yet to convict any suspects have led some to question whether the

¹⁰⁷ CRS interview with Office of the Prosecutor official, September 3, 2008.

¹⁰⁸ Preamble of the Rome Statute; see also International Criminal Court Assembly of States Parties, "Court Adopts Agreements to Launch Court's Operation," United Nations Press Release L/3013, September 9, 2002.

¹⁰⁹ Waddell and Clark, "Introduction," in *Courting Conflict?*

¹¹⁰ CRS interview, September 3, 2008.

¹¹¹ The ICC's temporal jurisdiction, which limits prosecution to crimes committed after the entry into force of the Rome Statute, has contributed to this phenomenon.

threat of ICC prosecution is credible. Some observers suggest that the Court's failure to apprehend suspects in Darfur in particular has bared tensions between the ICC's universal mandate and its reliance on the enforcement power of states.¹¹² Others maintain that deterrence is difficult to evaluate and that changes in perpetrators' behavior may be visible only over the long-run. Some argue that the Court's compilation of evidence, including transcribed interviews with witnesses, may serve future prosecutions or reconciliation processes even if they do not immediately lead to convictions.

Accusations of Bias

The ICC's investigations in Sub-Saharan Africa have stirred concerns over African sovereignty and the long history of foreign intervention on the continent. For example, President Paul Kagame of Rwanda, which is not a state party to the Court, has portrayed the ICC as a new form of "imperialism" that seeks to "undermine people from poor and African countries, and other powerless countries in terms of economic development and politics."¹¹³ Other commentators have alleged that the Prosecutor has limited investigations to Africa because of geopolitical pressures, either out of a desire to avoid confrontation with major powers or as a tool of Western foreign policy.¹¹⁴ The attempt to prosecute Bashir has been particularly controversial, drawing rebuke from African governments and regional organizations. Supporters of the Court respond that investigations to-date have been determined by referrals, either by African states or the Security Council, and that the Prosecutor is analyzing situations in countries outside of Africa. In addition, observers have pointed out that national legal systems in Africa are particularly weak, which has allowed the ICC to assert its jurisdiction under the principle of complementarity.¹¹⁵ The Office of the Prosecutor maintains that its choice of cases is based on the relative gravity of abuses, and that crimes committed in Sub-Saharan Africa are among the world's most serious.¹¹⁶

The Prosecutor's selection of cases also has proven controversial. ICC prosecutions in Sudan had, prior to the request for a warrant against President Bashir, drawn criticism for targeting mid-level officials rather than those with alleged higher-order responsibility for abuses in Darfur. Some have criticized ICC prosecutions in Uganda, the DRC, and CAR for focusing on alleged abuses committed by rebel fighters to the exclusion of those reportedly committed by government troops. In Uganda, some observers suggest that the ICC is seen locally

¹¹² See e.g. Kenneth A. Rodman, "Darfur and the Limits of Legal Deterrence," *Human Rights Quarterly*, 30, 3, August 2008.

¹¹³ *AFP*, "Rwanda's Kagame says ICC Targeting Poor, African Countries," July 31, 2008; Rwanda Radio via BBC Monitoring, "Rwandan President Dismisses ICC as Court Meant to 'Undermine' Africa," August 1, 2008.

¹¹⁴ See e.g. Oraib Al Rantawi, "A Step Forward or Backward?" *Bitter Lemons*, 32, 6, August 14, 2008.

¹¹⁵ See e.g. Stephanie Hanson, "Africa and the International Criminal Court," *Council on Foreign Relations*, July 24, 2008.

¹¹⁶ CRS interview with Office of the Prosecutor official, September 3, 2008.

as closely associated with the administration of President Museveni, as only LRA commanders have been targeted since the Prosecutor's investigation in northern Uganda began despite reported abuses by government troops.¹¹⁷ The decision to pursue DRC opposition leader Jean-Pierre Bemba Gombo has provoked accusations that the Prosecutor was swayed by political bias or excessive pragmatism. As one pair of authors has written, "perceptions of the ICC on the ground have at times been damaged by insufficient efforts by the Court to make clear the basis on which individuals have been the subject of warrants and of particular charges, while those of apparently equal culpability have not."¹¹⁸ ICC supporters have responded that the Prosecutor is mandated to focus on a limited number of particularly serious cases, and that investigations are ongoing and could lead to prosecutions against members of opposing sides in the future.

Justice vs. Peace?

One of the most persistent criticisms of the ICC's actions in Africa has been that by prosecuting active participants in ongoing or recently settled conflicts, the Court risks prolonging violence or endangering fragile peace processes. By removing the bargaining chip of amnesty from the negotiating table, critics allege, the ICC may remove incentives for peace settlements while encouraging perpetrators to remain in power in order to shield themselves from prosecution. Some observe that in such cases, "it is difficult to tell victims of these conflicts that the prosecution of a small number of people should take precedence over a peace deal that may end the appalling conditions they endure and the daily risks they face."¹¹⁹

Concerns that the aims of "justice" and "peace" may conflict have been particularly prominent in Uganda and Sudan. In Uganda, some observers argue that ICC arrest warrants against LRA commanders have acted as an impediment to achieving a final peace agreement. However, others counter that the threat of ICC prosecution, on top of other shifts in the conflict, was a decisive factor in bringing the LRA to the negotiating table in 2006. This observation has led some to see the ICC in Uganda as "an important ingredient in a political solution" for the conflict-plagued north.¹²⁰ In Sudan, some observers have argued that the attempt to prosecute President Bashir could endanger the Comprehensive Peace Agreement for southern Sudan and the peace process in Darfur, or provide an incentive to the ruling party to cling to power ahead of elections scheduled for 2009. For example, according to former U.S. envoy to Sudan Andrew Natsios, "the regime will now avoid any compromise or anything that would weaken their already weakened position, because

¹¹⁷ Michael Otim and Marieke Wierda, "Justice at Juba: International Obligations and Local Demands in Northern Uganda," in *Courting Conflict?* See also Tim Allen, *Op. Cit.* The Prosecutor is investigating alleged abuses by the Ugandan military. Observers agree, however, that alleged abuses by government troops are not equal in gravity to those reportedly committed by the LRA.

¹¹⁸ Waddell and Clark, *Op. Cit.*

¹¹⁹ Nick Grono and Adam O'Brien, "Justice in Conflict? The ICC and Peace Processes," in *Courting Conflict?*

¹²⁰ Akhavan, "The Lord's Resistance Army Case," *Op. Cit.*

if they are forced from office they face trials before the ICC... [An ICC warrant for Bashir] may well shut off the last remaining hope for a peaceful settlement for the country.”¹²¹ U.N. Secretary-General Ban Ki-moon, who has maintained a neutral position on the ICC’s actions in Sudan, has nonetheless argued that the international community must seek to balance “peace” and “justice” in dealing with the conflict in Darfur.¹²² On the other hand, some argue the ICC request for a warrant against Bashir has opened up new opportunities to secure a just peace in Darfur. Indeed, several see progress in the Sudanese ruling party’s decision to reach out to its domestic political rivals, for example by appointing south Sudan’s Vice President Kiir to head a government commission to coordinate the government’s response to the ICC.¹²³ Moreover, U.S. officials, Darfur advocacy groups, and others have stated that justice and accountability are paramount aims in Sudan.

Supporters of international prosecutions maintain that the pursuits of peace and justice are complementary, rather than opposed, as a credible threat of prosecution may serve as an important lever of pressure on actors in a conflict.¹²⁴ For example, Priscilla Hayner of the International Center for Transitional Justice writes, “it would be wrong to suggest that pragmatism always trumps principle in matters of life and death, and thus that one must ease up on justice in order to achieve peace. In some cases, the interest of peace has been well served by strong, forthright efforts to advance justice.”¹²⁵ Many observers have pointed out that discerning the effect of ICC actions on complex processes is extremely difficult. As Nick Grono and Adam O’Brien of the International Crisis Group observe, “peace deals that sacrifice justice often fail to produce peace” in the long-run.¹²⁶

¹²¹ Quoted in Ophera McDoom, “Analysis: Justice Clashes With Peace on Darfur Bashir Warrant,” *Reuters*, July 14, 2008.

¹²² U.N. Security Council, *Report of the Secretary-General on the deployment of the African Union-United Nations Hybrid Operation in Darfur*, S/2008/558, August 18, 2008. Ban Ki-moon stated on August 28, 2008, that the Prosecutor’s request for a warrant had “altered the political landscape, although it is too early to assess the impact it will have on the peace process” (Louis Charbonneau, “Peace in Sudan as Important as Justice — UN’s Ban,” *Reuters*, August 28, 2008).

¹²³ In early August 2008, the government withdrew troops from the town of Abyei, a flashpoint in the north-south conflict, a move that some see as proof that the NCP has chosen conciliation over confrontation in response to the arrest warrant request. In late August, Bashir visited Juba, the capital of South Sudan, for the first time in nearly two years. See *Oxford Analytica*, “International/Sudan: ICC Pursues Calculated Risk,” August 6, 2008.

¹²⁴ E.g., Caroline Flintoft [International Crisis Group], “Our Silence on Sudan Shames Us,” *The Globe and Mail*, June 16, 2008; Sara Darehshori [Human Rights Watch], “Doing the Right Thing for Darfur: An ICC indictment of Sudan’s president serves peace and justice,” *The Los Angeles Times*, July 15, 2008.

¹²⁵ Priscilla Hayner, “Seeking Justice as War Crimes Rage On,” *The Chicago Tribune*, July 16, 2008.

¹²⁶ Grono and O’Brien, Op. Cit.

Implications for Future U.S. Policy on the ICC

It is unclear whether U.S. views on the acceptability of the ICC have changed as a result of events since July 14, 2008. The United States abstained on Council Resolution 1828 (2008), extending the UNAMID mandate, pointing to the language in a preambular paragraph that referred to the July 14 application by the ICC prosecutor and the possibility of a Council request for deferral of further consideration of ICC consideration of that case as the reason for the abstention. The United States also had abstained on Council Resolution 1593 (2005), by which the Council sent the situation in Darfur to the ICC for investigation. While the Bush Administration would have preferred a different venue for consideration of the genocide conditions in Darfur, it did not halt referral to the ICC by vetoing the resolution.

Some observers have suggested that the U.S. position in the past would not have permitted abstention on the two Council resolutions. Thus, they maintain that the United States has moved to a policy that recognizes that under certain circumstances, the ICC may have a role.¹²⁷ Others have pointed out, however, that any perceived moderation in U.S. views toward the Court has not affected its overall position not to become a party to the ICC Statute.

Current U.S. efforts, as reflected by U.S. abstentions in the Council appear to be driven by non-ICC foreign policy issues that are perceived as more important. The need to support the U.S. policy against genocide in Darfur was perceived as more important than overall U.S. opposition to the ICC. This broader policy drove the U.S. abstention on Council referral of the situation to the ICC in 2005. Moreover, the need to ensure that the UNAMID mandate, on the brink of expiring, was extended for another 12 months was perceived as more important and drove the U.S. abstention in July 2008.

John Bellinger, the Legal Advisor to the Secretary of State, in a speech in April on the United States and the ICC, noted,

Now it may strike some as a bit ironic that a senior U.S. Government official would speak at a conference “celebrating” the tenth anniversary of the International Criminal Court, given that the U.S. Government’s concerns about the Court are so well known. But I welcome this opportunity to appear to share the U.S. Government’s views. Indeed, I will tell you up front that one of my main themes is that even if we disagree over the means chosen by the Rome Statute — and I believe that this is a disagreement that is likely to continue under future U.S. Administrations unless U.S. concerns are addressed — nevertheless

¹²⁷ See, for example, *Council on Foreign Relations*, “Bellinger Says International Court Flawed But Deserving of Help in Some Cases,” Interview, July 10, 2007; *AP*, “U.S. Ambivalent on Genocide Charge Against Sudan’s President,” *International Herald Tribune*, July 15, 2008; Hanson, Op. Cit.; and *Council on Foreign Relations*, “The Dilemma of International Justice,” Interview, July 28, 2008.

we do not disagree over the Statute's end goals, and we are prepared to work with those who support the Court in appropriate circumstances.¹²⁸

¹²⁸ John B. Bellinger, "The United States and the International Criminal Court: Where We've Been and Where We're Going," Remarks to the DePaul University College of Law, Chicago, Illinois, April 25, 2008, available at [<http://www.state.gov/s/rls/104053.htm>].

Appendix A. List of African States Showing Whether They Are Parties to the ICC and Have Ratified The “Article 98 Agreement”

Country	Party to ICC	Ratified Article 98 Agreement
Algeria		X
Angola		X
Benin	X	X
Botswana	X	X
Burkina Faso	X	X
Burundi	X	X
Cameroon		X
Cape Verde		X
Central African Republic	X	X
Chad	X	X
Comoros	X	X
Congo, Republic of	X	X
Congo, Democratic Republic of	X	X
Côte d'Ivoire		X
Djibouti	X	X
Egypt		X
Equatorial Guinea		X
Eritrea		X
Ethiopia		
Gabon	X	X
Gambia, The	X	X
Ghana	X	X
Guinea	X	X
Guinea-Bissau		X
Kenya ^a	X	
Lesotho	X	X
Liberia	X	X
Libya		
Madagascar	X	X
Malawi	X	X
Mali ^a	X	
Mauritania		X
Mauritius	X	X
Morocco		X
Mozambique		X
Namibia ^a	X	
Niger ^a	X	
Nigeria	X	X
Rwanda		X
São Tomé and Príncipe		X
Senegal	X	X
Seychelles		X
Sierra Leone	X	X
Somalia		
South Africa ^a	X	
Sudan		
Swaziland		X

Country	Party to ICC	Ratified Article 98 Agreement
Tanzania ^a	X	
Togo		X
Tunisia		X
Uganda	X	X
Zambia	X	X
Zimbabwe		

Sources: International Criminal Court; U.S. Department of State, *Treaties in Force 2007*.

Note

a. Economic Support Fund (ESF) assistance to these countries, which are parties to the ICC but have not signed Article 98 agreements, remains restricted under the Nethercutt Amendment. However, the restriction was waived by President Bush in 2006 and 2008 (see report).