



International Criminal Court Cases in Africa: Status and Policy Issues

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Summary

The International Criminal Court (ICC), established in 2002, has to-date initiated investigations exclusively in Sub-Saharan Africa. The ICC Prosecutor has opened cases against 16 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 Kenya, Côte d'Ivoire, 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 African continent and beyond.

On March 4, 2009, ICC judges issued an arrest warrant for Sudanese President Omar Hassan al-Bashir for war crimes and crimes against humanity. The case against Bashir represents the first attempt by the ICC to prosecute a sitting head of state. The prosecution has drawn praise from human rights advocates as a step toward ending impunity for serious human rights abuses in Africa. However, it also has raised concerns that ICC actions could endanger peace processes in Darfur and southern Sudan. Additional fears that the ICC could imperil international humanitarian operations in Sudan were heightened when the Sudanese government responded to the warrant by expelling international relief agencies.

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, may influence the ICC's actions. Obama Administration officials have expressed support for the prosecution of perpetrators of atrocities in Darfur and have suggested that Bashir should face the accusations against him. Legislation before the 111th Congress references the ICC warrant against Bashir and, more broadly, U.S. government support for ICC prosecutions.

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 rebel leader, transitional vice president, and senator and who is accused of overseeing war crimes in neighboring Central African Republic. Additionally, a Darfur rebel leader summoned by ICC judges voluntarily appeared before the Court in May.

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 (ICC)*, by Jennifer K. Elsea.

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Recent Developments

On March 4, 2009, a panel of judges of the International Criminal Court (ICC) issued an arrest warrant for Sudanese President Omar Hassan al-Bashir for war crimes and crimes against humanity in the Darfur region of Sudan. This represents the first attempt by the ICC to prosecute a sitting head of state. While the decision to seek Bashir's arrest has drawn praise from human rights advocates, it also has raised concerns that ICC actions could endanger peace processes in Darfur and southern Sudan. Additional fears that the ICC could imperil humanitarian operations in Sudan were heightened when the Sudanese government responded to the warrant by expelling over a dozen international relief agencies. While the ICC judges approved the Prosecutor's request for a warrant for Bashir, they dismissed the Prosecutor's attempt to prosecute Bashir for the crime of genocide. The Prosecutor has appealed the dismissal.

The decision to prosecute an African head of state has sparked a backlash among African countries, 30 of which are parties to the Court. The African Union (AU) has repeatedly called for a deferral of the prosecution. In July 2009, AU members resolved not to cooperate with the ICC on carrying out the Bashir arrest warrant.¹ At the same time, African parties to the ICC suggested they would refrain from withdrawing from the Court altogether.² International human rights groups criticized the move by the AU, and the government of Botswana, a party to the ICC, said in a statement that Botswana "does not agree with this decision and wishes to reaffirm its position that as a state party... it has treaty obligations to fully cooperate with the ICC in the arrest and transfer of the president of Sudan to the ICC."³ An AU panel on Darfur, headed by former South African President Thabo Mbeki, said it had not taken a stance with regard to the Bashir warrant.⁴

The Obama Administration has expressed support for the ICC investigation and prosecution of war crimes in Sudan, and an Administration spokesman stated that "those that have committed atrocities [in Darfur] should be held accountable."⁵ Secretary of State Hillary Clinton, speaking to reporters, said "President Bashir would have a chance to have his day in court if he believes that the indictment is wrongly charged. He can certainly contest it."⁶ In late March 2009, then acting State Department spokesman Robert Wood said, "We have said over and over again that those who commit atrocities need to be held accountable... We are under no obligation to the ICC to arrest President Bashir. We're not a party to the Rome Statute. And let's leave it at that."⁷ In July, the Obama Administration's Special Envoy on Sudan, Gen. Scott Gration, stated that the United States would engage with Sudan's president, "but that does not mean that [Bashir] does not need to do what's right in terms of facing the International Criminal Court and those charges."⁸

¹ *Reuters*, "AU Leaders Vote to End Bashir Cooperation with ICC," July 3, 2009.

² Barry Malone, "Africa ICC Members Will Not Quit Despite Bashir Move," *Reuters*, June 9, 2009.

³ *AFP*, "Botswana Says Al-Bashir Must Stand Trial at ICC," July 6, 2009.

⁴ *Reuters*, "Mbeki-Led African Panel Says No Stance on ICC," July 11, 2009.

⁵ *Agence France-Presse (AFP)*, "White House Demands 'Accountability' on Darfur After Warrant," March 4, 2009; Colum Lynch, "Sudan Retains Clout While Charges Loom," *The Washington Post*, February 9, 2009.

⁶ *Reuters*, "Clinton Says Al-Bashir Can 'Have His Day in Court,' March 4, 2009.

⁷ *AFP*, "US Says 'Under No Obligation' to Arrest Beshir," March 24, 2009.

⁸ *AFP*, "US Envoy: Must Cooperate With Sudan Even if New Warrant Issued," July 9, 2009.

In July 2009, President Obama referred to the conflict in Darfur as a “genocide,” and averred that it was a “millstone around Africa’s neck.”⁹ At the same time, Special Envoy Gration suggested at a press briefing in June that the Sudanese government was no longer engaged in a “coordinated” genocidal campaign in Darfur, contending that ongoing violence represented “the remnants of genocide” and fighting “primarily between rebel groups, the Sudanese government, and... some violence between Chad and Sudan.”¹⁰

Members of Congress have expressed a range of positions with regard to the warrant for Bashir. Senator Russell Feingold has urged the Administration not to defer the ICC prosecution, stating, “If there is significant progress made toward ending violence on the ground in Darfur, it may be appropriate to consider a suspension at that time.”¹¹ Senator John Kerry has said the warrant “complicates matters,” but should not stop U.S. efforts to resolve the conflict in Darfur.¹² Legislation before the 111th Congress references the ICC warrant against Bashir and, more broadly, U.S. government support for ICC prosecutions.

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 and human rights, namely war crimes, crimes against humanity, and genocide.¹³ 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 January 2009, 108 countries were parties to the Statute.¹⁴ The United States is not a party to the ICC. The Assembly of States Parties (the body made up of the 108 parties) provides administrative oversight and other support for the Court, including adoption of the budget and election of 18 judges, a Prosecutor (currently Luis Moreno-Ocampo from Argentina), and a Registrar (currently Bruno Cathala from France).¹⁵

⁹ *AFP*, “Sudan: Obama Comments ‘A Step Back,’” July 11, 2009.

¹⁰ Colum Lynch, “Sudan’s ‘Coordinated’ Genocide in Darfur is Over, U.S. Envoy Says,” *The Washington Post*, June 18, 2009.

¹¹ *AFP*, “Obama Must Support Beshir Warrant: US senator,” March 4, 2009.

¹² *Reuters*, “INTERVIEW-Kerry says ICC case no bar on Darfur peace drive,” April 17, 2009.

¹³ 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.

¹⁴ For the current status of signatures, ratifications, and reservations, see the ICC’s website, <http://www.icc-cpi.int/asp/statesparties.html>.

¹⁵ For background information on the International Criminal Court, see CRS Report RL31437, *International Criminal Court: Overview and Selected Legal Issues*, by Jennifer K. Elsea.

Situations¹⁶ 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.¹⁷ At least two potential situations were dismissed following preliminary analysis, and at least six others remain under consideration.¹⁸

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.”¹⁹ 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.²⁰

The U.S. Position on the ICC

The United States is not a party to the Rome Statute. The Bush Administration opposed the Court and renounced any U.S. obligations under the treaty.²¹ It objected to the Court on a number of grounds, including:

¹⁶ 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.)

¹⁷ See press releases on each referral at the ICC’s website, <http://www.icc-cpi.int>.

¹⁸ 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.

¹⁹ 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).

²⁰ Article 27 of the Rome Statute.

²¹ The United States signed the Rome Statute under the Clinton Administration, on December 31, 2000, but did not submit the agreement to the Senate for its advice and consent to treaty and ratification. 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.

- the Court's assertion of jurisdiction (in certain circumstances) over citizens, including military personnel, of countries that are not parties to the treaty²²;
- 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.

The Bush Administration 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.²³ 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.²⁴

The Obama Administration is conducting a high-level review of its policy toward the ICC. In her confirmation hearing before the Senate Foreign Relations Committee in January 2009, Secretary of State Hillary Clinton said, "Whether we work toward joining or not, we will end hostility toward the ICC and look for opportunities to encourage effective ICC action in ways that promote U.S. interests by bringing war criminals to justice."²⁵ In March 2009, then-acting Assistant Secretary for International Organizations James B. Warlick said, in response to a question on the Administration's position on joining the ICC, "There will be a policy process that will address this Administration's position on the International Criminal Court, so it's too early to say."²⁶

²² 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.

²³ 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 the **Appendix A** for a list of states parties to the ICC and Article 98 agreements in Africa.

²⁴ 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 have offered U.S. support to the ICC's efforts to prosecute those responsible for acts of genocide in Darfur, but was not enacted into law.

²⁵ Walter Pincus, "Clinton's Goals Detailed," *The Washington Post*, January 19, 2009.

²⁶ U.S. State Department, "U.S. Reengagement with the U.N." March 20, 2009, Foreign Press Center briefing transcript.

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.²⁷ It is not a U.N. body. By contrast, the tribunals for the former Yugoslavia²⁸ and Rwanda,²⁹ which were created under separate U.N. Security 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.³⁰ 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.³¹ 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

²⁷ 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 Precedent Surrounding the Definition of the Crime*, by Judith Derenzo and Michael John Garcia.

²⁸ 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 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.

²⁹ 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).

³⁰ See, for example, "African International Courts and Tribunals" website, at <http://www.aict-cita.org>.

³¹ 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.

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.³²

Congressional Interest in the ICC in Africa

Members of Congress have taken a range of positions on the ICC with regard to Africa. 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. At the same time, some oppose the Court on jurisdictional grounds. A combination of presidential waivers and changes to the law have effectively nullified restrictions on U.S. assistance to African parties to the ICC. 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. Separately, a restriction on Economic Support Fund (ESF) assistance to certain foreign governments that were parties to the ICC was not carried forward in the Omnibus Appropriations Act of 2009 (P.L. 111-8).

The ICC and Human Rights

Recent draft legislation before Congress has referenced the ICC in connection with human rights abuses in conflicts in Uganda and the Democratic Republic of Congo, and in connection with the global use of child soldiers. Additionally, there has been particular congressional interest in the ICC's work related to Darfur. Relevant legislation before the 111th Congress includes:

- H.Con.Res. 97 ("Calling on the President to support United Nations Security Council referrals of situations involving genocide, war crimes, and crimes against humanity to the International Criminal Court, to cooperate with investigations and prosecutions conducted by the International Criminal Court, and participate as an observer at meetings of the Assembly of States Parties to the Rome Statute"), introduced on April 2, 2009 and referred to the House Committee on Foreign Affairs; and
- H.Res. 241 ("Commending the International Criminal Court for issuing a warrant for the arrest of Omar Hassan Ahmad al-Bashir, President of the Republic of the Sudan, for war crimes and crimes against humanity, and expressing the hope that this will be a significant step in the long road towards achieving peace and stability in the Darfur region"), introduced on March 12, 2009 and referred to the House Committee on Foreign Affairs.

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.³³ Jurisdictional and

³² See U.S. Department of State, *United States Participation in the United Nations*—2006, p. 130.

³³ See CRS Report RL34003, *Africa Command: U.S. Strategic Interests and the Role of the U.S. Military in Africa*, by (continued...)

other concerns led Congress to pass the 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.³⁴ 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) 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), and 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. However, this restriction was not applied to African countries, due to presidential waivers with respect to Kenya, Mali, Namibia, Niger, South Africa, and Tanzania.³⁵ The Omnibus Appropriations Act of 2009 (P.L. 111-8) did not carry forward Section 671, which contained the restrictions. This ended such limitations on ESF assistance.

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

(...continued)

Lauren Ploch. The Defense Department has signaled its intention 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, previously under Central Command (CENTCOM), was transferred to AFRICOM in 2008.

³⁴ Presidential Determination No. 2006-27 of September 29, 2006; CRS interview with State Department official, September 4, 2008.

³⁵ 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.

concern that the Sudanese government had not met its obligations under previous Resolutions.³⁶ 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.³⁷ 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 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. The Office of the Prosecutor initiated its own investigation in June 2005.

In April 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 and aid workers in Darfur, and in December 2008 filed cases against three rebel commanders in connection with an attack in 2008 that killed twelve African Union peacekeeping troops.

On March 4, 2009, ICC judges issued an arrest warrant for Sudanese President Omar Hassan al-Bashir for crimes against humanity and war crimes in the Darfur region. The warrant, which was issued in response to a request by the ICC Prosecutor in July 2008, represents the first time the ICC has attempted to prosecute a sitting head of state. The judges’ decision, welcomed by many as a step toward ending impunity in Darfur, has provoked condemnation in Sudan and controversy in the region. Sudanese government officials have rejected the ICC’s jurisdiction, as Sudan is not a party to the Court,³⁸ while many international legal experts argue that Sudan is obligated as a U.N. member state to cooperate with ICC actions because they stem from a U.N. Security Council resolution.

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.³⁹ The Resolution was adopted by a vote of 11 in favor, none against, and with four abstentions—the United States, China, Algeria, and Brazil.⁴⁰ 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

³⁶ S/RES/1564 (2004), September 18, 2004.

³⁷ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, S/2005/60, January 25, 2005.

³⁸ 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.”)

³⁹ 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.

⁴⁰ U.N. Security Council Resolution 1593 (2005), March 31, 2005.

all U.N. member states, including Sudan. Under the ICC Statute, the ICC is authorized, but not required, to accept the case.⁴¹

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.⁴² The Administration supported the formation of the International Commission of Inquiry for Darfur.⁴³ 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.⁴⁴ However, the United States had at one time 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.⁴⁵ The abstention did not change the fundamental objections of the Bush Administration to the ICC.

At the same time, the Bush Administration supported international cooperation to stop atrocities occurring in Darfur.⁴⁶ The Administration and Congress 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 presented an obstacle to the use of the ICC for that purpose. As discussed above, the Obama Administration is conducting a review of its policy towards the ICC and it remains to be seen how it will address situations like Darfur.

ICC Warrants Issued in 2007

In April 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.⁴⁷

⁴¹ 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.

⁴² Concurrent Resolution Declaring Genocide in Darfur, Sudan (H.Con.Res. 467 [108th], July 22, 2004; Congressional Testimony by then-Secretary of State Colin Powell, September 9, 2004.

⁴³ 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.

⁴⁴ 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.

⁴⁵ See Paragraph 6 of Security Council Resolution 1593; also see Kirgis, *Op. Cit.*

⁴⁶ 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.

⁴⁷ 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. The warrants were made public in early May 2007.

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 2004.⁴⁸

While the Sudanese government initially refused to comply with either warrant, news reports suggest that Sudanese authorities arrested Kushayb in October 2008.⁴⁹ However, Sudanese officials stated they would conduct their own investigation into his alleged crimes in Darfur, and did not indicate that they planned to turn him over to the ICC. Harun was promoted to Minister of Humanitarian Affairs and co-president of a committee to investigate human rights violations in Sudan.⁵⁰ In May, Harun was reportedly appointed Governor of South Kordofan State. 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.⁵¹

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 November 2008, the Prosecutor submitted a sealed case against three alleged rebel commanders in Darfur whom he accused of committing war crimes during an attack on the town of Haskanita on September 29, 2008. According to the office of the Prosecutor, twelve African Union peacekeepers were killed and eight were injured in the attack.⁵² In May, ICC pretrial judges issued a summons to one of the three, Bahar Idriss Abu Garda, to appear before the Court on May 18.⁵³ Abu Garda reported to The Hague voluntarily. The judges are still deliberating on whether to issue summonses, or warrants, for the two other alleged rebel commanders sought by the Prosecutor, whose names remain undisclosed.

The Case Against Bashir

Arrest Warrant

On March 4, 2009, ICC judges issued a warrant for the arrest of Sudanese President Omar Hassan al-Bashir. The warrant holds that there are "reasonable grounds" to believe Bashir is criminally responsible for five counts of crimes against humanity and two counts of war crimes. The

⁴⁸ 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.

⁴⁹ Jeffrey Gettleman, "Sudan Arrests Militia Chief Facing Trial," *The New York Times*, October 14, 2008.

⁵⁰ 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.

⁵¹ 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.

⁵² ICC Office of the Prosecutor, "Attacks on Peacekeepers Will Not Be Tolerated; ICC Prosecutor presents evidence in third case in Darfur," November 20, 2008. The peacekeepers were serving under the African Union Mission in Sudan (AMIS).

⁵³ The ICC judges issued a summons for Abu Garda, having decided that an arrest warrant was not necessary to ensure the suspect's appearance before the Court. ICC, "Questions and Answers on the Summons to Appear Issued for Bahr Idriss Abu Garda," May 18, 2009.

accusations refer to alleged attacks by Sudanese security forces and pro-government militia in the Darfur region of Sudan during the government's six-year counter-insurgency campaign.⁵⁴

The ICC warrant states that there are reasonable grounds to believe attacks against civilians in Darfur were a "core component" of the Sudanese government's military strategy, that such attacks were widespread and systematic, and that Bashir acted "as an indirect perpetrator, or as an indirect co-perpetrator." In his application for an arrest warrant, filed in July 2008, the ICC Prosecutor 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 Sudanese armed forces.

Although many domestic legal systems grant sitting heads of state immunity from criminal prosecution, the Rome Statute grants the ICC jurisdiction regardless of official capacity.⁵⁵ Human rights organizations, including Amnesty International and Human Rights Watch, hailed the arrest warrant, the first issued by the ICC against a sitting head of state, as an important step against impunity. Many Western governments, including France, Germany, Canada, the United Kingdom, and Denmark, and the European Union as an entity, have called on Sudan to cooperate with the warrant. Reactions by African and Middle Eastern governments have been more critical, with many condemning the ICC or calling for its prosecution to be deferred. Additionally, the governments of Russia and China have opposed the prosecution attempt.

The arrest warrant is not an indictment; under ICC procedures, charges must be confirmed at a pre-trial hearing. The decision to issue a warrant is expected to take into account whether there are reasonable grounds to believe that a suspect committed crimes as alleged by the Prosecutor and whether a warrant is necessary to ensure the suspect's appearance in court. The ICC urged "all States, whether party or not to the Rome Statute, as well as international and regional organizations," to "cooperate fully" with the warrant.⁵⁶ One analysis noted that while Bashir may risk arrest if he travels overseas, "no one expects Sudan to hand over Bashir, who has been executive ruler of the country for more than 15 years, absent major political changes in the country."⁵⁷

Genocide Accusations⁵⁸

In his request for an arrest warrant in July 2008, the ICC Prosecutor accused Bashir of three counts of genocide, making Bashir the first individual to be accused of genocide before the Court. The Prosecutor alleged 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.⁵⁹ However, the panel of ICC judges who responded to the application for a

⁵⁴ ICC Pre-Trial Chamber I, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, March 4, 2009.

⁵⁵ Rome Statute, Art. 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 in official capacity – under customary international law.

⁵⁶ ICC press release, "ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan," March 4, 2009.

⁵⁷ Patrick Worsnip, "No Quick Way to Enforce ICC Warrant for Bashir," *Reuters*, March 5, 2009.

⁵⁸ 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.

⁵⁹ Darfur's main rebel groups are associated with these ethnicities; the Prosecutor's case against Bashir alleges that (continued...)

warrant found, by a ruling of two-to-one, that the Prosecutor had “failed to provide reasonable grounds to believe that the Government of Sudan acted with specific intent” to destroy these groups.⁶⁰ The judges added, however, that the arrest warrant could be amended to include accusations of genocide if further evidence was submitted by the Prosecutor. The Prosecutor is appealing the judges’ decision to omit the genocide counts from the arrest warrant.⁶¹

Many human rights advocates had welcomed the attempt to prosecute Bashir for genocide.⁶² However, the formulation of the Prosecutor’s accusation had drawn some criticism. The U.N. Commission of Inquiry concluded in its January 2005 report that the violence in Darfur did not amount to genocide, although “international offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide.”⁶³ Many Darfur activists accused the Commission of allowing political considerations to affect its conclusions.⁶⁴ Other analysts argue that while the Sudanese government is responsible for serious crimes in Darfur, the Prosecutor’s justification for genocide charges did not sufficiently establish intent or Bashir’s alleged role.⁶⁵

In July 2009, President Obama referred to the conflict in Darfur as a “genocide,” and averred that it was a “millstone around Africa’s neck.”⁶⁶ At the same time, Special Envoy Gration suggested at a press briefing in June that the Sudanese government was no longer engaged in a “coordinated” genocidal campaign in Darfur, contending that ongoing violence represented “the remnants of genocide” and fighting “primarily between rebel groups, the Sudanese government, and... some violence between Chad and Sudan.”⁶⁷

(...continued)

military and militia attacks specifically targeted civilians even where rebel locations were spatially separate and well-known. The Prosecutor’s application for a warrant referenced additional attacks against other ethnic groups in connection with alleged war crimes and crimes against humanity.

⁶⁰ ICC press release, “ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan,” March 4, 2009.

⁶¹ ICC Office of the Prosecutor, “Prosecution’s Application for Leave to Appeal the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir,” March 10, 2009.

⁶² 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.

⁶³ 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.

⁶⁴ E.g., Eric Reeves, “Report of the International Commission of Inquiry on Darfur: A critical analysis (Part II),” *Sudanreeves.org*, February 6, 2005.

⁶⁵ See e.g. 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); Andrew Heavens, “ICC Case Against Bashir Has Holes – Sudan Expert,” *Reuters*, January 27, 2009; 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.

⁶⁶ *AFP*, “Sudan: Obama Comments ‘A Step Back,’” July 11, 2009.

⁶⁷ Colum Lynch, “Sudan’s ‘Coordinated’ Genocide in Darfur is Over, U.S. Envoy Says,” *The Washington Post*, June 18, 2009.

Sudanese Reactions

The Bashir Administration has rejected ICC jurisdiction over Darfur as a violation of its sovereignty and accused the Court of being part of a neocolonialist plot against a sovereign African and Muslim state.⁶⁸ Other Sudanese 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 legislative and presidential elections scheduled to take place in 2010.

The Bashir Administration

The Bashir Administration has portrayed the ICC as an instrument of Western pressure for regime change.⁶⁹ 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. 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.⁷⁰ 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.⁷¹

Government authorities have taken a hardline stance against Sudanese suspected of sympathizing with the ICC prosecution attempt. In November 2008, Sudanese police detained a human rights activist they accused of being in contact with the ICC, while in January 2009, authorities jailed a prominent Islamist opposition leader who had called for Bashir to surrender to the ICC in order to avoid internal strife.⁷² Also in January, a Sudanese man was reportedly convicted of “spying” for the ICC and sentenced to 17 years in prison.⁷³ In February, a senior official warned that an arrest warrant for Bashir would derail peace talks with Darfur rebels.⁷⁴

The government responded to the arrest warrant by expelling over a dozen international aid organizations it accused of collaborating with the ICC, including Oxfam and Doctors Without Borders. Bashir reportedly warned that “all the diplomatic missions in Sudan, the NGOs, and the peacekeepers” could face the same punishment, the latest in a series of remarks by Sudanese officials that appeared to threaten the safety of U.N. personnel in Sudan if an arrest warrant were issued.⁷⁵ Officials reportedly threatened to retaliate harshly against anyone who “cooperated”

⁶⁸ E.g., BBC Monitoring, “Sudanese Leader Calls International Court ‘Tool of Imperialist Forces,’” [State-owned] Suna News Agency, August 20, 2008; Marlise Simons and Neil MacFarquhar, “Bashir Defies Arrest Order on War Crime Charges,” *The New York Times*, March 6, 2009.

⁶⁹ 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.

⁷⁰ 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.

⁷¹ *The Associated Press* (hereafter, *AP*), “Sudan Dismisses ICC Proceedings on Darfur, Reiterates Refusal to Hand Over Any Suspects,” July 11, 2008.

⁷² *AFP*, “Sudan Police Detain Rights Activist for Contact with the ICC,” November 26, 2008; Mohamed Osman, “Sudan Detains Opposition Leader Who Urged President to Face Darfur Genocide Charges,” *AP*, January 15, 2009.

⁷³ BBC News Online, “Sudanese ‘War Crimes Spy’ Jailed,” January 28, 2009.

⁷⁴ Andrew Heavens, “Darfur War Crimes Warrant Will Ruin Talks – Official,” *Reuters*, February 16, 2009.

⁷⁵ Abdelmoniem Abu Edries Ali, “Defiant Beshir in Darfur, Warns Foreigners,” *AFP*, March 8, 2009; *AFP*, “ICC Action Against Sudan’s Beshir Could Hurt UN: Ban,” February 4, 2009.

with the court, while government supporters organized mass rallies in the president's favor. A *New York Times* analysis noted that while many advocates hope the arrest warrant will weaken Bashir's hold in power, "Sudanese resentment of the court's actions could have the reverse effect and rally the nation to his side. After the court's prosecutor first announced that he was seeking a warrant for Mr. Bashir, some of the president's political enemies closed ranks behind him."⁷⁶ Similarly, analysts disagree over whether the warrant has intensified Bashir's international isolation. The Sudanese leader has engaged in aggressive diplomatic outreach to allied states, traveling overseas to multiple friendly countries in the weeks following the warrant's issuance.

Other Sudanese Reactions

Islamist opposition leader Hassan Al-Turabi (and former key Bashir ally) has criticized the Bashir Administration's stance toward the ICC and has called on the president to turn himself over to the international justice system.⁷⁷ (Turabi was detained for two months in 2009 in apparent connection with statements to this effect.) Other Sudanese opposition members have displayed measured support for Bashir, reportedly due to concerns that ICC actions could derail elections scheduled for early 2010, while privately acknowledging mixed reactions.⁷⁸ Spokesmen for three major Darfur rebel factions—the Sudan Liberation Movement (SLM), Sudan Liberation Army (SLA), and Justice and Equality Movement (JEM)—welcomed the prosecution of Bashir, as have many Darfuri refugees, according to news reports.⁷⁹ The JEM, which in February had signed a deal on confidence-building measures with the government, stated in March that the arrest warrant precluded the continuation of peace talks.⁸⁰

Reports suggest southern Sudanese are ambivalent about the attempt to prosecute Bashir.⁸¹ 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)—initially 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."⁸² However, after the arrest warrant was issued, the SPLM released a statement saying that "Sudan should stand with Bashir at this hard time."⁸³ The SPLM nevertheless criticized the expulsion of aid organizations. Some SPLM officials are reportedly concerned that ICC actions could endanger the CPA, while others have expressed hope that prosecution could leverage international pressure on Khartoum.⁸⁴

⁷⁶ Marlise Simons, "Court Issues Warrant for Arrest of Sudan President," *The New York Times*, March 5, 2009.

⁷⁷ Guillaume Lavallee, "Freed Opposition Leader Slams Sudan Response to Warrant," *AFP*, March 9, 2009.

⁷⁸ 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.

⁷⁹ *Reuters*, "Reaction to Warrant for Bashir's Arrest," March 4, 2009; Sarah El Deeb, "Darfur Refugees Say Genocide Trial for Sudan President is Only Path to Real Peace," *AP*, November 15, 2008.

⁸⁰ Samer al-Atrush, "Darfur Rebel Group Says Peace Talks Not Possible," *AFP*, March 4, 2009.

⁸¹ See e.g. "Sudan: Saving Omer," *Africa Confidential*, August 1, 2008; and Naseem Badiey, "Ocampo v Bashir: The Perspective from Juba," *Oxford Transitional Justice Research Working Paper Series*, July 18, 2008.

⁸² 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.

⁸³ *Reuters*, "Reaction to Warrant for Bashir's Arrest," March 4, 2009.

⁸⁴ Opheera McDoom, "Analysis-Justice Clashes With Peace on Darfur Bashir Warrant," *Reuters*, July 14, 2008; Mushtaq, Op. Cit.

Regional Reactions

The Sudanese government has rallied support 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),⁸⁵ all of which have criticized the ICC arrest warrant and called for a deferral of prosecution. Many African and Middle Eastern governments expressed concern over the arrest warrant, including the governments of South Africa, Nigeria, Kenya, Rwanda, Tanzania, Benin, Eritrea, Egypt, Iran, Syria, Libya, Algeria, and Morocco. Some African leaders, notably Botswana's President Ian Khama and Uganda's President Yoweri Museveni, have taken a more supportive stance toward the ICC.⁸⁶ Some African and Middle Eastern commentators have praised the ICC decision to pursue Bashir as an important step against impunity in the region, while others expressed concern that the move displayed bias against African countries or a neocolonial attitude.⁸⁷

By mid-2009, the decision to prosecute an African head of state appeared to have sparked a backlash among African countries, 30 of which are parties to the Court. In July 2009, AU members resolved not to cooperate with the ICC on carrying out Bashir's arrest.⁸⁸ At the same time, African states parties suggested they would refrain from withdrawing from the Court altogether.⁸⁹ International human rights groups criticized the AU resolution, and the government of Botswana, a party to the ICC, said in a statement that Botswana "does not agree with this decision and wishes to reaffirm its position that as a state party... it has treaty obligations to fully cooperate with the ICC in the arrest and transfer of the president of Sudan to the ICC."⁹⁰ An AU panel on Darfur, headed by former South African President Thabo Mbeki, said it had not taken a stance with regard to the Bashir warrant.⁹¹

Security Council Considerations in July 2008: Context and Background

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

⁸⁵ 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).

⁸⁶ Rodney Muhumuza, "We Can't Condemn ICC Over Bashir—Museveni," *The Monitor* [Kampala], August 4, 2008; *BBC Monitoring Africa*, "AU differs with Botswana leader over ICC warrant against Sudan's Bashir" (via Factiva), May 6, 2009.

⁸⁷ See e.g., *The Daily Champion* [Lagos, Nigeria], "Al-Bashir's Indictment," 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. Archbishop Desmond Tutu of South Africa, who serves on the board of directors of the ICC's Trust Fund for Victims, has criticized African governments for supporting Bashir, writing, "I regret that the charges against President Bashir are being used to stir up the sentiment that the justice system—and in particular, the international court—is biased against Africa. Justice is in the interest of victims, and the victims of these crimes are African. To imply that the prosecution is a plot by the West is demeaning to Africans and understates the commitment to justice we have seen across the continent."

⁸⁸ *Reuters*, "AU Leaders Vote to End Bashir Cooperation with ICC," July 3, 2009.

⁸⁹ Barry Malone, "Africa ICC Members Will Not Quit Despite Bashir Move," *Reuters*, June 9, 2009.

⁹⁰ *AFP*, "Botswana Says Al-Bashir Must Stand Trial at ICC," July 6, 2009.

⁹¹ *Reuters*, "Mbeki-Led African Panel Says No Stance on ICC," July 11, 2009.

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 2008.⁹² 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.⁹³

Among the 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.

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.”⁹⁴ Scheffer alleged 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

⁹² 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.

⁹³ Security Council Report, “Update Report, Sudan,” July 28, 2008, available at <http://www.securitycouncilreport.org>.

⁹⁴ 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.edu/forumy/2008/08/security-councils-struggle-over-darfur.php>.

or Prosecutor referrals.” In addition, Scheffer claimed 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.”⁹⁵

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.⁹⁶ 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.”⁹⁷ 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.⁹⁸

The United States also 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. While the Bush Administration would have likely 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 under the Bush Administration, the United States moved to a policy that recognized that under certain

⁹⁵ 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.

⁹⁶ 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.

⁹⁷ 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.”

⁹⁸ 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.

circumstances, the ICC might have a role.⁹⁹ Others have pointed out, however, that any perceived moderation in U.S. views toward the Court did not affect its overall position not to become a party to the ICC Statute.

The two U.S. abstentions in the Council appear to have been driven by non-ICC foreign policy issues that were 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 also perceived as more important and led to the U.S. abstention in July 2008.

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.

In addition, the ICC Prosecutor is analyzing situations in Kenya, Côte d'Ivoire, and Chad, a preliminary step toward opening a full investigation. In Kenya, an official inquiry into abuses committed in the aftermath of disputed elections in late 2007 has stalled, prompting mediator Kofi Annan to submit information on individuals suspected of orchestrating the violence to the ICC Prosecutor in July 2009.¹⁰⁰ Additionally, many observers of Zimbabwe, including local human rights activists, Archbishop Desmond Tutu of South Africa, and the organization Physicians for Human Rights, have called for an ICC investigation into human rights abuses reportedly committed by government forces in Zimbabwe.¹⁰¹

Uganda

The government of Uganda, a party to the ICC, referred "the situation concerning the Lord's Resistance Army" to the Court in 2003.¹⁰² The Lord's Resistance Army (LRA) is a rebel group

⁹⁹ 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.

¹⁰⁰ United Nations via States News Service, "International Criminal Court Receives Materials on Kenyan Post-Election Violence," July 9, 2009.

¹⁰¹ *AFP*, "Rape in Zimbabwe: Human rights lawyers build prosecution case," August 7, 2008; Angus Shaw, "Nobel Peace Prize Winner Tutu Says Time Has Come for Threat of Force Against Zimbabwe's Leader," *AP*, December 24, 2008; Michelle Faul, "Physicians: Corruption killing people in Zimbabwe," *AP*, January 13, 2009. Zimbabwe is not a party to the ICC, but ICC jurisdiction could be referred through a U.N. Security Council resolution, as with Sudan.

¹⁰² 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 (continued...)

that has fought for over two decades in northern Uganda.¹⁰³ 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.¹⁰⁴ 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 neighboring countries. In February 2009, Odhiambo and Ongwen reportedly entered negotiations on surrendering to the ICC, under the auspices of the U.N. peacekeeping force in southern Sudan.¹⁰⁵ While Uganda’s referral specifically mentioned the Lord’s Resistance Army, the Prosecutor also is investigating crimes allegedly 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.¹⁰⁶ 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 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.¹⁰⁷

(...continued)

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.

¹⁰³ See CRS Report RL33701, *Uganda: Current Conditions and the Crisis in North Uganda*, by Ted Dagne.

¹⁰⁴ 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.

¹⁰⁵ *AFP*, “Two Ugandan Rebel Chiefs Want to Surrender,” February 6, 2009; *AFP*, “LRA Fighters Trapped: Congo spokesman,” February 14, 2009.

¹⁰⁶ See Tim Allen, *Trial Justice: The International Criminal Court and the Lord’s Resistance Army* (London: Zed Books, 2006).

¹⁰⁷ 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.

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 2004.¹⁰⁸ 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.¹⁰⁹ 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.¹¹⁰ The latter investigation could potentially target officials from neighboring countries along with members of the Congolese government and military.¹¹¹

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 custody and had been charged in the domestic justice system.¹¹² 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.¹¹³ Despite a lengthy delay due to a procedural challenge, Lubanga’s trial began in January 2009. Lubanga has pleaded not guilty.

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 2003.¹¹⁴

¹⁰⁸ ICC Office of the Prosecutor Press Release, “Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo,” April 19, 2004.

¹⁰⁹ 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.

¹¹⁰ ICC Press Release, “DRC: ICC Warrant of Arrest Unsealed Against Bosco Ntaganda,” April 29, 2008.

¹¹¹ 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.

¹¹² 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.)

¹¹³ ICC, *The Prosecutor Vs. Thomas Lubanga Dyilo, Document Containing the Charges, Article 61(3)(a)* (Public Redacted Version), August 28, 2006.

¹¹⁴ ICC, Combined Factsheet: Situation in the Democratic Republic of the Congo, Germain Katanga and Mathieu (continued...)

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.¹¹⁵ 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.¹¹⁶ The ICC Prosecutor has accused Ntaganda of three counts of war crimes related to the alleged recruitment and use of child soldiers in 2002 and 2003.¹¹⁷ Attempts to arrest Ntaganda have been complicated by the fact that he is reportedly currently leading the *Congrès National pour la Défense du Peuple* (CNDP) in the DRC’s North Kivu province. The CNDP was founded by Laurent Nkunda, a dissident military general.¹¹⁸ However, in January 2009, Ntaganda, who was formerly second in command, ousted Nkunda, who was later taken into Rwandan custody. Ntaganda agreed to be integrated into the Congolese military, where he was promoted to the rank of general.¹¹⁹ The Congolese government has since refused to pursue Ntaganda on behalf of the ICC, arguing that to do so would jeopardize peace efforts in the Kivu region.¹²⁰ Congolese human rights advocates have rejected this reasoning.¹²¹ Ntaganda remains at large.

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 2005.¹²² 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 *Mouvement 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 2003.¹²³ 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. The

(...continued)

Ngudjolo Chui, June 27, 2008. Their cases were joined in March 2008.

¹¹⁵ ICC, Combined Factsheet, Op. Cit.

¹¹⁶ ICC Press Release, “Warrant of Arrest Against Bosco Ntaganda Unsealed,” April 29, 2008.

¹¹⁷ 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.

¹¹⁸ For background on the conflict, see International Crisis Group, *Congo: Bringing Peace to North Kivu*, Africa Report No. 133, October 31, 2007.

¹¹⁹ HRW, “DR Congo: Brutal Rapes by Rebels and Army,” press release, April 8, 2009.

¹²⁰ AFP, “Peace Before Justice, Congo Minister Tells ICC,” February 12, 2009.

¹²¹ AFP, “Hand Over Rebel Leader Ntaganda to ICC, Say DR Congo NGOs,” February 19, 2009.

¹²² ICC Office of the Prosecutor Press Release, “Prosecutor Receives Referral Concerning Central African Republic,” January 7, 2005.

¹²³ Bozizé took power in a coup in 2003 and is the current president of CAR.

Prosecutor accused Bemba of five counts of war crimes and three counts of crimes against humanity for alleged rape, torture, pillaging, and other abuses.¹²⁴ Bemba, 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 is in the pre-trial phase.

Bemba's prosecution by the ICC has been controversial in the DRC, where the MLC is now the largest opposition party.¹²⁵ After serving as one of four vice-presidents in the DRC transitional government from 2003 to 2006, Bemba took 42% of the vote in the DRC's 2006 presidential election, second only to 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 in 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 denied that political considerations played a role in the decision to pursue Bemba, and the government of DRC has denied involvement in the ICC case against him.¹²⁶

Issues Raised by the ICC's Actions in Africa

Some observers have praised the ICC's investigations in Africa as a crucial step against 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 Deterrent Effect

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.¹²⁷ 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."¹²⁸ (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.¹²⁹)

¹²⁴ 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.

¹²⁵ The MLC converted itself into a political party following the end of the DRC civil war in 2003.

¹²⁶ CRS interview with Office of the Prosecutor official, September 3, 2008; Voice of America, "Congo Denies Instigating ICC Charges Against Former VP Bemba," June 16, 2009.

¹²⁷ 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.

¹²⁸ Waddell and Clark, "Introduction," in *Courting Conflict?*

¹²⁹ CRS interview, September 3, 2008.

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.¹³⁰ 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 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.¹³¹ 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."¹³² Other commentators allege 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.¹³³ 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 continues to analyze situations 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.¹³⁴ 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.¹³⁵

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 locally seen as 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

¹³⁰ 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.

¹³¹ See e.g. Kenneth A. Rodman, "Darfur and the Limits of Legal Deterrence," *Human Rights Quarterly*, 30, 3, August 2008.

¹³² *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.

¹³³ See e.g. Oraib Al Rantawi, "A Step Forward or Backward?" *Bitter Lemons*, 32, 6, August 14, 2008.

¹³⁴ See e.g. Stephanie Hanson, "Africa and the International Criminal Court," *Council on Foreign Relations*, July 24, 2008.

¹³⁵ CRS interview with Office of the Prosecutor official, September 3, 2008.

troops.¹³⁶ The decision to pursue DRC opposition leader Jean-Pierre Bemba Gombo has provoked accusations that the Prosecutor was swayed by political bias, as Bemba was seen as a leading opposition figure in DRC before he entered into exile and was arrested; or excessive pragmatism, since other Congolese political actors accused of similar abuses have not been pursued to date. 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.”¹³⁷ 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.”¹³⁸

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.¹³⁹ 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 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.”¹⁴⁰

These criticisms were reinforced when the Sudanese government responded to the ICC arrest warrant for Bashir by expelling aid agencies and threatening NGOs and peacekeeping troops. In testimony before Congress, when asked about the impact of the ICC warrant on U.N.

¹³⁶ 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.

¹³⁷ Waddell and Clark, Op. Cit.

¹³⁸ Nick Grono and Adam O’Brien, “Justice in Conflict? The ICC and Peace Processes,” in *Courting Conflict?*

¹³⁹ Akhavan, “The Lord’s Resistance Army Case,” Op. Cit.

¹⁴⁰ Quoted in Opheera McDoom, “Analysis: Justice Clashes With Peace on Darfur Bashir Warrant,” *Reuters*, July 14, 2008.

peacekeeping operations in Darfur, Director of National Intelligence Dennis C. Blair said, “the indictment and President Bashir’s reaction have made him less cooperative than he was—than he was before... I think it will make it harder [for the U.N. to run peacekeeping operations in Darfur].”¹⁴¹ 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 and expressed concern that the expulsion of aid organizations was extremely detrimental to relief and peacekeeping operations.¹⁴²

Supporters of the Court argue the ICC request for a warrant against Bashir has opened up new opportunities to secure peace in Darfur, as a credible threat of prosecution may serve as an important lever of pressure on actors in a conflict.¹⁴³ 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.”¹⁴⁴ Some argue that “peace deals that sacrifice justice often fail to produce peace” in the long-run.¹⁴⁵ Observers have pointed out that discerning the effect of ICC actions on complex processes is extremely difficult.

¹⁴¹ Transcript of Senate Committee on Armed Services hearing on “Current and Future Worldwide Threats to the National Security of the United States, provided by *CQ Transcriptions*, via Factiva, March 10, 2009.

¹⁴² 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; UN News Service, “Ban-Aid Workers’ Expulsion Impeding Peacekeeping, Relief Efforts,” April 22, 2009.

¹⁴³ 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.

¹⁴⁴ Priscilla Hayner, “Seeking Justice as War Crimes Rage On,” *The Chicago Tribune*, July 16, 2008.

¹⁴⁵ Grono and O’Brien, Op. Cit.

Appendix A. List of African States Showing Whether They Are Parties to the ICC and Have Ratified an “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

Country	Party to ICC	Ratified Article 98 Agreement
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
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*.

- 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).

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