

Sudan: Impact of the Rome Statute and the International Criminal Court

Suliman Baldo

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Executive Summary

Few conflicts have garnered as much attention as the recent one in Darfur. Widespread atrocities reported by several organizations including an International Commission of Investigation compelled the United Nations (UN) Security Council to refer the situation in the western region of Sudan to the International Criminal Court (ICC) in March 2005. Since then, arrest warrants were issued for State Minister Ahmed Harun, militia leader Ahmed Kushayb, and most notably President Omar al-Bashir.

When the ICC first began investigating crimes committed in Darfur, the Sudanese government established a range of mechanisms to investigate such crimes, including a Special Court for Events in Darfur and a specially assigned prosecutor general. However, the government's measures appeared designed to satisfy the optics of complementarity but not the substance. After the ICC Prosecutor applied for al-Bashir's arrest warrant in July 2008, Sudan's stance toward the Court changed from lack of cooperation to outright hostility. The government lobbied unsuccessfully to include a clause on an Article 16 deferral in the extension of the mandate of the joint United Nations—African Union Mission in Darfur in July 2008. The government's diplomatic campaign against the indictment of its president exploited and effectively amplified a growing sense of resentment in Africa against the application of universal jurisdiction and ICC investigations in the African context. The resulting risk of a serious backlash in Africa against international justice prompted the African Union (AU) to establish a High-Level Panel for Darfur (AUPD) with a mandate to recommend approaches for reconciling the demands of justice, peace, and reconciliation.

The AUPD's October 2009 report proposes a range of measures to promote peace, justice, and reconciliation in Darfur and has been endorsed by the AU Peace and Security Council as official AU policy. Perhaps in response to the arrest warrants and in anticipation of Sudan's April 2010 presidential elections, the ruling National Congress Party revived the peace talks on Darfur. This led to an agreement with the Justice and Equality Movement in February 2010 and then with the Liberation and Justice Movement in March.

Whether this process will be consolidated remains to be seen. In addition to expelling the main humanitarian organizations operating in Darfur, the government also de-registered prominent human rights organizations accused of collaborating with the ICC. These maneuvers demonstrate no genuine commitment to justice for the victims of Darfur and were intended to shield those who have criminal responsibility for Rome Statute crimes.

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About the Author

Suliman Baldo is director of the Africa program at ICTJ. A widely recognized expert on conflict resolution and human rights in Africa, he has worked extensively in the DRC, Ethiopia, Eritrea, and Sudan. He has been a lecturer at the University of Khartoum and Field Director for Oxfam America, covering Sudan and the Horn of Africa, later becoming the founder and director of Al-Fanar Center for Development Services in Khartoum. Mr. Baldo spent seven years at Human Rights Watch (HRW) as a senior researcher in the Africa division. He also served as director of the Africa program at the International Crisis Group (ICG). Suliman Baldo holds a Ph.D. in Comparative Literature (1982) and an M.A. in Modern literature (1976), both from the University of Dijon in France, and a B.A. from the University of Khartoum.

Introduction

The conflict in Sudan's western Darfur region continues to pit government forces and allied militias against splinters of the two rebel groups that launched the rebellion in 2002-03, the Sudan Liberation Movement (SLM), and Justice and Equality Movement (JEM). The rebellion was initially very limited, led by young fighters predominantly hailing from Darfur's indigenous African groups, the Fur, Zaghawa, and Massalit. They wanted to draw attention to the political and economic marginalization of their region. They made significant military gains initially by attacking isolated government garrisons and police stations for arms and other supplies.

In response, the government recruited local tribal militias mostly from groups of Arab extraction that are landless under the region's traditional land tenure systems. These forces jointly led fierce scorched-earth attacks against the rebels' communities. The militia fighters were enticed by the promise of war booty and the prospects of keeping land they took. The government capitalized on this interest in a counterinsurgency campaign, in which mass atrocities were repeatedly perpetrated, but for which there was total impunity.

Some 300,000 people were killed in these attacks, and another 2.5 million are known to be living in camps for the internally displaced within Darfur or as refugees in bordering countries. The mass atrocities committed in the course of the conflict have been amply documented by national and international investigations and in the reports of independent human rights groups. The conflict's merger with civil conflicts in neighboring Chad and Central African Republic added to its potency, and major regional powers were drawn into the fray.

Deeming that the situation in Darfur posed serious threats to international peace and security, the UN Security Council, acting under Chapter VII of the UN Charter, resolved in Resolution 1593 (2005) to refer the situation to the ICC. In the absence of credible national proceedings to address the mass atrocities known to have occurred in the region since the rebellion started in 2002, the ICC Prosecutor launched his investigation in June 2005. (Before this, a National Commission of Inquiry and a UN International Commission of Inquiry (ICI) concluded that widespread crimes took place in the region. The ICI, headed by Antonio Cassese, also found that the violations in Darfur amounted to crimes against humanity and war crimes.)¹

In April 2007, the ICC Pre-Trial Chamber I issued an arrest warrant against Ahmed Harun, then the Sudanese State Minister for Interior, and militia leader Ahmed Kushayb, on 51 counts of crimes against humanity and war crimes. In July 2008, it issued arrest warrants on war crimes and crimes against humanity charges for President al-Bashir. The following July, the Prosecutor appealed the chamber's decision not to extend al-Bashir's arrest warrant to include genocide charges. Then on February 3, 2010, the Appeals Chamber remanded the issue to the Trial Chamber, finding that it had applied the wrong standard of proof. As of May 2010, the Trial Chamber had yet to issue its decision.

In November 2008, the ICC Prosecutor charged three rebel commanders for war crimes and crimes against humanity that occurred during an attack they allegedly led on a base of the African Union peacekeeping mission in Darfur. One of them, Idriss Bahar Abu Garda, voluntarily made himself available for the proceedings following a court summons. Charges against him were dismissed in February 2010 for lack of evidence. The Prosecutor's request to appeal this decision was also dismissed. The two other arrest warrants remain outstanding.

Complementarity

In the case of Darfur, the relevant question relating to complementarity is whether or not national institutions have instituted or will pursue genuine investigations or prosecutions in cases currently under investigation by the ICC.

Sudan's Legal Framework

Sudan has adequate international human rights legal standards in its constitution that also mandate legislative reforms to reconcile existing laws with international obligations. Both the 2005 Interim National Constitution (INC) and 2005 Interim Constitution of Southern Sudan (ICSS) mandate the integration of all the rights and freedoms enshrined in the human rights instruments ratified into the Bill of Rights.² The 2005 Comprehensive Peace Agreement (CPA), on which the two constitutions are based, also requires the introduction of legislative reforms to eliminate and amend laws that are in contradiction with the Bill of Rights.³

However, the criminal law framework remains flawed and a record of legislative reforms since 2005 is indicative of the government's lack of political will to uphold the standards stipulated in the Bill of Rights and the international instruments to which Sudan is party. Examples abound of this lack of commitment to reform, such as the late creation of the constitutionally-mandated National Human Rights Commission in April 2009, four years after the proclamation of the INC.

While expressly penalizing serious violations of international humanitarian law and human rights law, the Armed Forces Act of 2007 retains provisions that give impunity to members of the military, such as the rule that, for criminal suits against military personnel to proceed, immunities must be first waived by the president. Also, obedience to superior orders can be a defense for acts punished in the law, if committed in good faith or in performance of duties.

The 2009 amendments to the Criminal Act of 1991 mark a significant development because they introduce war crimes, crimes against humanity, and genocide into Sudanese criminal law. However, at the same time, parallel amendments to the Criminal Procedure Act leave room for impunity by prohibiting investigations or proceedings outside the country against any Sudanese person accused of committing any violation of international humanitarian laws, including crimes against humanity, genocide, and war crimes. They also prohibit anyone in Sudan from assisting in the extradition of any Sudanese for prosecution of the above crimes.

National Mechanisms

The Sudanese government responded to the Security Council referral with an array of legal, diplomatic, political, and propaganda strategies aimed to discredit the ICC and derail its investigations of the crimes that occurred in the course of the conflict. At the same time, Sudan showed little interest in acknowledging its overwhelming share of responsibility for these crimes or taking genuine measures to hold perpetrators accountable, particularly during the 2003-04 peak of its devastating counterinsurgency campaign.

As the prospects of international investigations materialized with the Security Council's referral, the period 2004-05 witnessed the creation of several investigative and judicial entities to uncover crimes that occurred in Darfur. These included a new Special Criminal Court for Events in Darfur (SCCED) on June 7, 2005, only one day after the Prosecutor opened his investigation. In November 2005, the Ministry of Justice established two additional chambers for the Special Court and created special investigative committees—the Judicial Investigations Committee, the Special Prosecutions Commissions, the Committees Against Rape, the Unit for Combating Violence Against Women and Children, and the Committee on Compensations—to also address the crimes committed in Darfur.

The performance of the Special Court for Darfur as well as that of the other investigative mechanisms failed to persuade locals and international monitors that these were genuine efforts to end impunity in Darfur and to bring justice to victims. In particular, most proceedings dealt with relatively minor crimes, and there is no evidence that any of these bodies have addressed cases under consideration by the ICC.⁴

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In mid-July 2008, the ICC Prosecutor announced that he would seek an arrest warrant against President al-Bashir. In response, in early August 2008 the Minister of Justice appointed Nimir Ibrahim Mohamed as prosecutor general for the crimes committed in Darfur since 2003. The minister also named a committee of attorneys to assist the prosecutor general and required him to submit detailed monthly reports on the progress of his investigations. The minister gave a mandate to the new mechanism that much resembled the one he granted in 2005 to the investigative committees, that of investigating crimes committed in violation of the Criminal Act 1991 and the Arms and Ammunition Act 1986.

In April 2009, the prosecutor general said in a meeting of Darfur's Human Rights Forum that his office was investigating incidents in West Darfur that occurred during the conflict in villages near Wadi Saleh.⁵ He planned to investigate crimes that occurred in Shataya and Buram in South Darfur. In response to questions from members of the international community, he indicated that investigations focused on unlawful possession of arms, kidnapping, killings, and damage or loss of property. He explained that the Criminal Act of 1991 was the main applicable law to his work as the more recent Armed Forces Act of 2007, which provides for the punishment of war crimes and crimes against humanity, cannot be applied retroactively. National legislation did not allow the application of the doctrine of command responsibility, but those who assisted in committing crimes could face punishment, he added.

Monitoring of the activities of the office of the prosecutor general in Darfur's three states revealed the existence of "Committees of Notables (*lajan hukama*)" purporting to assist the prosecutor general's office to identify witnesses and victims and to conduct damage assessments related to numbers of victims and loss/damage of property, with the aim of facilitating reconciliation. Human rights monitors noted that the office does not have an independent budget to cover travel and other expenses related to its activities in the field. Their observation of one investigation indicated that the protection of victims and witnesses was inadequate.⁶

In its second report to the AU on domestic proceedings dated February 2, 2009, Sudan stated that the prosecutor general for crimes committed in the course of the Darfur conflict and members of the Investigation Committee attached to his office had conducted five visits to Darfur during which they interviewed witnesses and conducted investigations on incidents in West Darfur. Sudan has yet to report any meaningful progress in the conduct of its domestic proceedings.⁷

The record of the prosecutor general for Darfur suggests that, since its creation, this mechanism had mainly helped the government argue that it had put in place domestic mechanisms to prosecute perpetrators of crimes against humanity. In reality, very little has been done.

Sudan's Lack of Cooperation with the ICC

Indications of Sudan's unwillingness also arise from its lack of cooperation. UN Security Council Resolution 1593 requires the "Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully and provide any necessary assistance to the Court and the Prosecutor." The Security Council in its presidential statement 21 of June 16, 2008, reiterated this obligation to "cooperate fully with the Court, consistent with resolution 1593 (2005), in order to put an end to impunity for the crimes committed in Darfur."

Following the launch of its investigation in 2005, the ICC Prosecutor persistently sought to establish a working relationship with the government of Sudan. The government was responsive for about two years. It allowed representatives to conduct five missions to Khartoum between 2005 and 2007. Although these missions focused primarily on complementarity, the Court representatives were given access to people and documents of interest at their request. The government stopped cooperating in 2007.⁸

Since 2005, the ICC Prosecutor has documented in his ten reports to the Security Council how Sudan continued to flout its cooperation obligations, most notably by failing to arrest those wanted by the ICC. In April 2010, the Prosecutor requested the Pre-Trial Chamber I judges to enter a finding of non-cooperation against the Sudanese government in light of its refusal to hand over persons charged with committing war crimes and crimes against humanity in Darfur.

Sudan increased its overt hostility to the ICC when it became clear that the investigations were targeting those at the top of the chain of the command in the army and security agencies at the time of the events in Darfur.

When the Prosecutor applied for al-Bashir's arrest warrant in mid-July 2008, many observers expressed fears that the government would retaliate by targeting the large humanitarian and peacekeeping operations. Official spokespersons for President al-Bashir's government and the ruling National Congress Party initially made many threats to that effect. They accused the Prosecutor of serving Western political interests instead of justice, rejected the ICC's jurisdiction and, with no hint of irony, gravely warned that arrest warrants would destroy the chances of peace in Darfur—a process that was completely stalled at the time. Balancing these concerns, human rights advocates argued for the rights of the victims to justice and redress, and for the imperative of ending impunity—which drove the violence in Sudan—to justify the involvement of the ICC.

However, instead of the angry backlash predicted in July, Sudan launched a comprehensive diplomatic campaign aimed at mobilizing its allies in the international community to press for the deferral of ICC action in Darfur under Article 16 of the Rome Statute on grounds that the arrest warrant was likely to disrupt peace.

The vote for renewing the mandate of UNAMID on July 31, 2008, provided the first setting for Sudan's political challenge to the ICC's action. The AU, the League of Arab States, and the Organization of the Islamic Conference issued strong statements before and after the Prosecutor's announcement, describing the action as destabilizing the chances for peace. Several African and Arab members of the UN Security Council, supported by permanent members China and Russia, proposed a draft resolution renewing the authorization of UNAMID, with a paragraph deferring the ICC investigation against al-Bashir under Article 16 of the Rome Statute before the decision of the Pre-Trial Chamber was made public, but the draft failed to draw sufficient support.

The high diplomatic maneuvers prepared the ground for the revival of the peace talks in Doha, Qatar, with the government of Qatar acting as a host and facilitator of the efforts of the Joint UN/AU mediator.

The High-Level Panel for Darfur (Mbeki Panel)

At the same time, Sudan aggressively pursued the mobilization of other AU member states in support of its position and sought to dilute the support of the ICC in Africa and to assert al-Bashir's immunity.⁹ To contain the risk of a broad-based backlash against international justice in Africa, the AU created an independent High-Level Panel led by former South African president Thabo Mbeki (the Mbeki Panel) to explore "options that reconcile the imperatives of accountability and the fight against impunity, reconciliation and healing in Sudan," as defined in the Peace and Security Council Communiqué of the 142nd meeting of the Peace and Security Council on July 21, 2008.

The panel's launch in March 2009 came shortly after the ICC confirmed charges against President al-Bashir. In its final report issued in October 2009, the panel did not challenge the ICC's independent jurisdiction in the Darfur situation and instead called on the government to respond to the Court by legal means. It held the government of Sudan responsible

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to provide justice to its citizens and noted “as a result of the failings of the State in dealing with the grave situation in Darfur, faith in the criminal justice system has been severely eroded. To restore confidence and prevent impunity, a root-and-branch change will be required. In particular, it will be necessary to establish an integrated system of accountability consisting of various measures and institutions working together to deal with the full range of abuses and violations that have been committed during the conflict.”¹⁰ The panel also recommended establishing a hybrid tribunal, a reparations program for victims and a truth and reconciliation commission. On October 29, 2009, the AU’s Peace and Security Council endorsed these recommendations and established an AU High Implementation Panel (AUHIP) with the mandate of assisting in their implementation.

Peace and Justice

Opinions differ widely about what the actual impact of al-Bashir’s arrest warrant—the first the ICC has issued for a sitting president—has been on mediation efforts in Darfur. The Court’s involvement clearly affected the calculations of the parties, and might have created the conditions that made the reconvening of the talks in February 2009 possible. The ruling NCP, led by President al-Bashir, also put considerable pressure on its southern partner, the SPLM, to tone down its support of the ICC investigation. The latter complied to ensure that the NCP would deliver on its commitments under the 2005 Comprehensive Peace Agreement that ended two decades of war.

In Darfur, the Court’s intervention changed the balance of power between the government and the JEM, the strongest of Darfur’s many rebel factions. The advance notification that the ICC would make public its decision on al-Bashir’s arrest warrant on March 4, 2009, gave added urgency to demonstrate the government’s commitment to the peace process in Darfur. By concluding a “Goodwill and Confidence-Building Agreement to Resolve Darfur Conflict” with the JEM on February 17, 2009, Sudan hoped to neutralize the threats the JEM posed and also to qualify for a reprieve from the impending ICC indictment. The JEM came to the table seeing an advantage in negotiating with a politically and diplomatically weakened government. International mediators were thus able to use Sudan’s moment of vulnerability, caused by the international judicial process, to press for deliverables on the peace front.

The JEM’s motivations for joining the peace process were also questionable. The looming arrest warrant against the Sudanese president emboldened the JEM and offered it a formidable propaganda tool and a platform for grandstanding. Even as the movement was negotiating with the government in Doha, its leader threatened to attack the capital to arrest and hand al-Bashir over to the ICC, clearly contrary to the spirit and letter of the Doha Goodwill and Confidence-Building Agreement.¹¹

Mediators and international actors used the February 2009 Goodwill and Confidence-Building Agreement for leverage to press Darfur’s largest rebel group, the SLM, to join the Doha talks. They pressured the main SLM factions to reunify as a prerequisite for joining the process, leading to their merger into a newly established Liberation and Justice Movement (LJM). The peace process resumed in Doha in the first quarter of 2010. The government signed two separate and different framework agreements in mid-February and mid-March 2010 respectively with the JEM and the LJM.¹²

The added pressure of the April 2010 elections also drove these developments. The ICC case against al-Bashir provided much ammunition to opposition campaigners as they argued that his election would ensure the continued isolation of Sudan in the world community and tarnish its image for returning an indicted candidate to office. Still the president and his

party won by a landslide. Al-Bashir's re-election is bound to have obvious consequences for the peace process and the ICC case against him. The elected government's delegation would likely insist on keeping accountability for the crimes committed in Darfur off the negotiations' agenda. The peace process is expected to resume in earnest as soon as the new elected government is put in place with the aim of reaching a final peace agreement between the government, the JEM, and the LJM.

Impact of the ICC on Victims and Affected Communities

Following the announcement of al-Bashir's indictment, the government expelled 13 leading relief organizations involved in the large humanitarian operation in Darfur. The expelled NGOs were among the largest and most experienced operating in the region, and their expulsion significantly curtailed humanitarian efforts that were already dwindling. As a result of this expulsion, the internally displaced persons suffered additional hardships.

The expulsion of the international relief organizations received much coverage in the international media, yet the concurrent deregistration of three leading Sudanese human rights groups that focus on Darfur—the Khartoum Center for Development and Environment, the Amal Center for Rehabilitation of Torture Victims, and the Sudan Social Development Organization (SUDO)—passed almost unnoticed. By targeting the three groups on suspicion of their alleged cooperation with the ICC, the government aimed to curb their active monitoring and advocacy initiatives for the rights of the victims of the conflict.

Arrests and harassment of human rights defenders continued after the Court's decision to arrest al-Bashir. Human rights monitors documented more than 20 cases of arrests and detention by the National Intelligence and Security Services, some of which included torture and ill treatment, on grounds of alleged support to the ICC or providing information to the international community (these including detentions of NGO and UNAMID national staff). Editors and columnists who wrote about the ICC case against the president were also harassed.

This onslaught on humanitarian and human rights protectors represented a clear violation of a commitment that the government undertook only weeks before when it signed the Confidence Building Agreement. The agreement committed the signatories, among other things, to facilitate access of the conflict's victims to humanitarian aid.

Conclusion

The government of Sudan's campaign to undermine ICC support is a multi-layered, aggressive response to what it considers to be the Court's interference in its internal sovereign affairs. Driven by considerations of regime survival, Khartoum's approaches involve well-orchestrated campaigns but offer no evidence of genuine commitment to justice. Domestic mechanisms have been put in place only to shield some people from criminal responsibility for Rome Statute crimes, and have performed dismally. It has not hesitated to punish victims and rights advocates to exert moral pressure on the Court.

The short term political backlash to the ICC arrest warrants was considerable, but dynamics may be changing. That the report of the Mbeki Panel did not challenge the Court's jurisdiction is significant, as is the fact that its recommendations for an integrated system of accountability are now AU official policy. Tentative signs also indicate that the existence of the arrest warrant against al-Bashir may have helped unblock stalemated peace negotiations, at least in the short term. It is as yet too early to identify other forms of impact, but helpful to remember that the ICC is a permanent international criminal court and that its impact will only become clear in the future.

**THE ROME STATUTE REVIEW
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The Review Conference of the Rome Statute provides a unique opportunity to evaluate the progress of the International Criminal Court and the challenges that it faces. ICTJ brings a wealth of expertise in situation countries to the discussions of complementarity, peace and justice, and the impact of the ICC on the status of victims. ICTJ has developed a briefing paper series for the conference available at www.ictj.org.

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Endnotes

1. Although the ICI did find that government authorities had not pursued or implemented a genocidal policy, it noted that competent courts would need to determine whether individuals had committed acts with genocidal intent.
2. For a listing of instruments Sudan has ratified, see www.ohchr.org/EN/countries/AfricaRegion/Pages/SDIndex.aspx.
3. Among the laws needing significant amendments or replacement are: the National Security Forces Act, the Criminal Act of 1991, the Criminal Procedures Act of 1991, and the Press and Printed Materials Bill. International criminal and law of armed conflict standards are less satisfactorily included in Sudan's legal framework.
4. For a record of the SCCED's first year, see "Lack of Conviction: the Special Criminal Court on Events in Darfur," Human Rights Watch Briefing Paper, June 8, 2006.
5. Second meeting of the Darfur Human Rights Forum, held in El Geneina, West Darfur, April 14, 2009. The forum is a consultative and coordination body co-chaired by the government's Advisory Human Rights Council and the UN and AU Mission in Sudan (UNAMID).
6. Personal communication to the author.
7. "Tenth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)" para. 44, at <http://www.icc-cpi.int/NR/rdonlyres/CC15BF0D-FA88-4C95-876E-D651706FE720/281337/10thUNSCReportENG1.pdf>.
8. "Ninth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)" para. 48- 50, at www.icc-cpi.int/NR/rdonlyres/C6FE9E52-4845-41BA-A45D-75BA41D8647C/280448/9th_UNSCReport_Eng1.pdf.
9. See Comfort Ero, *The African Union and the International Criminal Court: The Relationship Between Articles 27 and 98 of the Rome Statute*, ICTJ, May 2010, which focuses on the impact of al-Bashir's case on AU/ICC relations.
10. See *Report of the African Union High Level Panel on Darfur (AUPD)*, African Union document PSC/AHG/2(CCVII).
11. Go to www.sudantribune.com/spip.php?page=imprimable&id_article=30199. For examples of JEM's threats, see "Darfur Rebels Vow To Topple Beshir If ICC Issues Warrant," *Agence France Presse*, Feb. 25, 2009, (www.sudanjem.com/2009/archives/4054/en).
12. See the framework agreement between Sudan and the JEM here: <http://blogs.ssrc.org/sudan/wp-content/uploads/2010/02/Doha-Accord.pdf>.



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ICTJ New York
5 Hanover Square. Floor 24
New York, NY USA 10004