



International Criminal Court Cases in Africa: Status and Policy Issues

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Summary

The Statute of the International Criminal Court (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 war crimes, crimes against humanity, and genocide. As of March 2010, 111 countries were parties to the Statute. The United States is not a party. The ICC has, to-date, initiated investigations exclusively in Sub-Saharan Africa. The 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 has opened an investigation in Kenya and a preliminary examination in Guinea.

One of the individuals sought by the ICC is Sudanese President Omar Hassan al-Bashir. The Court issued an arrest warrant for Bashir in March 2009. The prosecution, the first attempt by the ICC to pursue a sitting head of state, has drawn praise from human rights advocates, while raising concerns that ICC actions could endanger peace processes and access by humanitarian organizations. Unlike the 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. 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.

Four suspects are currently in ICC custody. Three are alleged leaders of militias in the Democratic Republic of Congo (DRC), and the fourth is a former Congolese rebel leader, vice president, and senator who is accused of war crimes in neighboring Central African Republic. In addition, two alleged Darfur rebel leaders have voluntarily answered summonses to appear before the Court. A third alleged Darfur rebel leader voluntarily appeared in May 2009; the case against him was dismissed. All other suspects are at large, and the Court has yet to secure a conviction.

Congressional interest in the work of the ICC in Africa has arisen in connection with concern over gross human rights violations on the African continent and beyond, as well as concerns over ICC jurisdiction and executive branch policy toward the Court. At the ICC's recent review conference in Kampala, Uganda, Obama Administration officials reiterated the United States' intention to provide diplomatic and informational support to individual ICC prosecutions on a case-by-case basis. Legislation before the 111th Congress references the ICC warrant against Bashir and, more broadly, U.S. government support for ICC prosecutions.

This report provides background on the ICC and its investigations in Africa, with an overview of cases currently before the Court. The report also examines issues raised by the ICC's actions in Africa, including the potential deterrence of future abuses and the potential impact on African peace processes. Further background can be found in CRS Report RL31437, *International Criminal Court: Overview and Selected Legal Issues*, by Jennifer K. Elsea, and CRS Report R41116, *The International Criminal Court (ICC): Jurisdiction, Extradition, and U.S. Policy*, by Emily C. Barbour and Matthew C. Weed.

Contents

Background	1
Overview of the International Criminal Court.....	1
The U.S. Position on the ICC	2
The ICC and Other International Courts and Tribunals	4
Congressional Interest in the ICC in Africa.....	5
The ICC and Human Rights in Africa.....	5
ICC Cases and Investigations in Africa.....	6
Sudan.....	7
U.N. Security Council Resolution 1593.....	7
Ahmad Muhammad Harun and Ali Kushayb	8
Investigation of Rebel Crimes	9
The Case Against Bashir	9
Security Council Considerations in July 2008: Context and Background	15
Uganda	17
Democratic Republic of Congo (DRC).....	18
Thomas Lubanga Dyilo.....	19
Germain Katanga and Mathieu Ngudjolo Chui	19
Bosco Ntaganda	19
Central African Republic (CAR)	20
Kenya	21
Guinea	21
Issues Raised by the ICC’s Actions in Africa	22
Potential Deterrent Effect	22
Accusations of Bias.....	23
Justice vs. Peace?.....	24

Tables

Table 1. Summary of ICC Activities in Africa.....	6
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Appendixes

Appendix. African States That Are ICC Parties and Have Concluded an “Article 98 Agreement” With the United States	26
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Contacts

Author Contact Information	27
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Background

Overview of the International Criminal Court

The Statute of the ICC, also known as the Rome Statute (the Statute), entered into force on July 1, 2002, and established a permanent, independent Court to investigate and bring to justice individuals who commit war crimes, crimes against humanity, and genocide.¹ The ICC's jurisdiction extends over crimes committed since the entry into force of the Statute. The ICC is headquartered in The Hague, Netherlands. As of March 2010, 111 countries were parties to the Statute.² The United States is not a party to the ICC. The ICC's Assembly of States 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).³

As outlined in the Statute, situations⁴ may be referred to the ICC in one of three ways: 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—have referred situations to the Prosecutor. The U.N. Security Council has referred one situation (Darfur, Sudan) to the Prosecutor. One situation, Kenya, is under investigation following an application by the ICC Prosecutor. At least six others remain under consideration.⁵

¹ The ICC began operating at its inauguration on March 11, 2003. 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. ICC states parties adopted amendments to the Rome Statute that define and determine ICC jurisdiction over the crimes of aggression at the Review Conference of the Rome Statute that took place in Kampala, Uganda, from May 31 to June 11, 2010. Under the amendments, the ICC may not take jurisdiction over aggression crimes until at least January 2017, and only if states parties vote to activate such jurisdiction at that time.

² For the current status of signatures, ratifications, and reservations, see the ICC's website, <http://www.icc-cpi.int/asp/statesparties.html>.

³ For background information on the International Criminal Court, see CRS Report RL31437, *International Criminal Court: Overview and Selected Legal Issues*, by Jennifer K. Elsea.

⁴ 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.)

⁵ 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.

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.”⁶ Although many domestic legal systems grant sitting heads of state immunity from criminal prosecution, the Statute grants the ICC jurisdiction over any individual, regardless of official capacity.⁷

The U.S. Position on the ICC

The United States is not a party to the Rome Statute. The United States signed the Statute on December 31, 2000, but at the time, the Clinton Administration had objections to it and said it would not submit it to the Senate for its advice and consent to ratification. The Statute was never submitted to the Senate. In May 2002, the Bush Administration notified the United Nations that it did not intend to become a party to the ICC, and that there were therefore no legal obligations arising from the signature. The Bush Administration opposed the Court and renounced any U.S. obligations under the treaty. Objections to the Court were based on a number of factors, including

- the Court’s assertion of jurisdiction (in certain circumstances) over citizens, including military personnel, of countries that are not parties to the treaty;⁸
- 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 concluded bilateral immunity agreements (BIAs), known as “Article 98 agreements,” with most states parties to exempt U.S. citizens from possible surrender to the ICC.⁹ 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 providing material assistance to the ICC in its investigations, arrests, detentions, extraditions, or prosecutions of war crimes, under the American

⁶ 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). Even in such a case, the ICC may retain jurisdiction if domestic proceedings are not conducted impartially or independently (Rome Statute, Article 17).

⁷ Article 27 of the Rome Statute.

⁸ 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.

⁹ 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** for a list of states parties to the ICC and Article 98 agreements in Africa.

Servicemembers' Protection Act of 2002, or ASPA (P.L. 107-206, Title II). The prohibition covers, 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 personnel, and the sharing of classified and law enforcement information.¹⁰ Section 2015 of ASPA (22 U.S.C. 7433, known as the "Dodd Amendment"), however, provides an exception to these provisions:

Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.

A review by the Department of Justice concluded in January 2010 that diplomatic support or "informational support" for "particular investigations or prosecutions" by the ICC would not violate existing laws.¹¹

The Obama Administration is conducting a review of its policy toward the ICC. In her confirmation hearing as Secretary of State before the Senate Foreign Relations Committee in January 2009, 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."¹² Speaking in Nairobi, Kenya, in August 2009, Secretary of State Clinton said that it was a "great regret" that the United States was not a party to the ICC, but that the United States has supported the Court and "continue[s] to do so."¹³ Obama Administration officials have recently indicated, amid a wider review of U.S. policy toward the Court, that the Administration is "considering ways in which we may be able to assist the ICC, consistent with our law, in investigations involving atrocities."¹⁴

In November 2009, the United States began formally attending meetings of the ICC's Assembly of States Parties as an observer nation, and recently sent a delegation led by Ambassador-at-Large for War Crimes Issues Stephen Rapp and State Department Legal Advisor Harold Koh to the Review Conference of the Rome Statute in Kampala, Uganda. Administration officials reiterated at the Conference the United States' intention to support current cases before the ICC. In addition, Rapp stated that Administration officials had "renewed our commitment to the rule of law and capacity-building projects in which we have ongoing in each" African country in which ICC prosecutions are taking place. At the same time, Rapp averred that the Administration was "nowhere near that point" of submitting the Rome Statute for ratification.¹⁵

¹⁰ 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.

¹¹ U.S. Department of Justice, Office of Legal Counsel, "Memorandum for Mary DeRosa, Legal Advisor, National Security Council, Re: Engagement with the International Criminal Court," January 15, 2010.

¹² Walter Pincus, "Clinton's Goals Detailed," *The Washington Post*, January 19, 2009.

¹³ Mary Beth Sheridan, "Clinton Says U.S. Supports International Criminal Court," August 6, 2009.

¹⁴ U.S. Mission in Geneva, "Press Briefing with Stephen J. Rapp, Ambassador-at-Large for War Crimes," January 22, 2010.

¹⁵ State Department, "Briefing on the International Criminal Court Conference in Kampala, Uganda," June 2, 2010.

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 other *ad hoc* international courts and tribunals, such as the International Criminal Tribunals for the former Yugoslavia¹⁶ and for Rwanda.¹⁷ In addition, the United Nations authorized the creation of a Special Court for Sierra Leone (SC-SL) to prosecute those with the greatest responsibility for serious violations of international humanitarian law and domestic law committed in the territory of Sierra Leone since November 30, 1996.¹⁸ Separate judicial mechanisms have also been set up for cases involving East Timor (Timor-Leste) and Cambodia. Further, the U.N. Security Council authorized establishment of a Special International Tribunal for Lebanon in 2007, which began functioning in March 2009.

These courts and tribunals are distinct from the ICC. While established by the U.N. Security Council to address allegations of crimes against humanity in various countries, these tribunals were case-specific, limited in jurisdiction, and temporary. By contrast, the ICC was established by multilateral treaty and is a permanent, international criminal tribunal. It is not a U.N. body.¹⁹

International Court of Justice

The International Court of Justice (ICJ), also located in The Hague, is the principal judicial organ of the United Nations. The ICJ does not prosecute individuals; its role is to settle, in accordance with international law, legal disputes submitted to it by states. Only states may submit cases for consideration, although the ICJ will also give advisory opinions on legal questions when requested to do so by authorized international organizations.²⁰

¹⁶ 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.

¹⁷ 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).

¹⁸ The Special Court for Sierra Leone (SCSL), a hybrid international-domestic court based in Sierra Leone's capital, Freetown, was set up jointly by the Government of Sierra Leone and the United Nations under Security Council Resolution 1315 (2000). 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 SC-SL for crimes against humanity and other violations of international humanitarian law.

¹⁹ 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 RL31437, *International Criminal Court: Overview and Selected Legal Issues*, by Jennifer K. Elsea; CRS Report R41116, *The International Criminal Court (ICC): Jurisdiction, Extradition, and U.S. Policy*, by Emily C. Barbour and Matthew C. Weed; and CRS Report RL32605, *Genocide: Legal Precedent Surrounding the Definition of the Crime*, by Judith Derenzo and Michael John Garcia.

²⁰ See U.S. Department of State, *United States Participation in the United Nations—2006*, p. 130.

Congressional Interest in the ICC in Africa

Members of Congress have taken a range of positions on the ICC with regard to Africa. 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 and other grounds. For example, several pieces of draft legislation, such as H.R. 5351 (Ros-Lehtinen), S.Con.Res. 59 (Vitter), and H.Con.Res. 265 (Lamborn), express broad objections to the ICC and to U.S. cooperation with it.

The ICC and Human Rights in Africa

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

Jurisdictional and other concerns led Congress to pass 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 (see **Appendix**). However, despite continuing opposition among some Members, a combination of presidential waivers and changes to the law have effectively nullified restrictions on U.S. assistance to African parties to the ICC.

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, citing concerns that the restrictions could preclude valuable military-to-military ties.²¹ Congress repealed the ASPA restriction on IMET funding in the National Defense Authorization Act for FY2007 (P.L. 109-364), which was signed into law on October 17, 2006. The National Defense Authorization Act for FY2008 (P.L. 110-181), signed into law on January 28, 2008, repealed Section 2007 of ASPA entirely, ending remaining prohibitions on FMF

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

and EDA assistance.

Separately, the Nethercutt Amendment to the FY2005 Consolidated Appropriations Act (P.L. 108-447) prohibited Economic Support Fund (ESF) assistance to ICC parties 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 was subsequently carried over via continuing resolutions on February 15, 2007 (P.L. 110-5) and September 29, 2007 (P.L. 110-92). A substantially identical restriction was included in the Consolidated Appropriations Act of 2008 (P.L. 110-161, Section 671), signed into law December 26, 2007. However, in practice, this restriction was not applied to African countries, due to presidential waivers with respect to Kenya, Mali, Namibia, Niger, South Africa, and Tanzania.²² The Omnibus Appropriations Act of 2009 (P.L. 111-8) did not carry forward Section 671, ending such restrictions on ESF assistance.

ICC Cases and Investigations in Africa

The ICC Prosecutor has opened cases against 16 individuals, all in connection with crimes allegedly committed in African countries. ICC cases so far stem from investigations into the Darfur region of Sudan, northern Uganda, eastern Democratic Republic of Congo (DRC), and the Central African Republic. The Prosecutor has also opened an investigation into Kenya and is examining the situation in Guinea, but has not publicly opened any cases in connection with these countries. In contrast to Sudan, which has resisted ICC jurisdiction, Uganda, DRC, CAR, Kenya, and Guinea are states parties to the ICC. Four suspects are currently in ICC custody, all Congolese nationals; no convictions have been obtained.

Table 1. Summary of ICC Activities in Africa

Situation	Case	Status
Darfur, Sudan	Former Interior Minister Ahmad Muhammad Harun; alleged former militia leader Ali Kushayb	Arrest warrants issued. Suspects at large.
	Darfur rebel leaders Bahar Idriss Abu Garda, Abdallah Banda Abakaer Nourain, and Saleh Mohammed Jerbo Jamus	Prosecutor's case against Abu Garda dismissed by ICC judges. Banda and Jerbo surrendered voluntarily to the Court in June 2010.
	Sudanese President Omar Hassan al-Bashir	Arrest warrant issued. Suspect at large, reelected president in April 2010.
"Situation of the Lord's Resistance Army (LRA)" [Uganda]	LRA commanders Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya	Arrest warrants issued. Otti and Lukwiya reportedly killed. Remaining suspects at large.
Democratic Republic of Congo	Alleged militia leader Thomas Lubanga Dyilo	Suspect in ICC custody. Trial initiated in January 2009.
	Alleged militia leaders Germain Katanga; Mathieu Ngudjolo Chui	Suspects in ICC custody. Joint trial initiated in November 2009.

(...continued)

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

Situation	Case	Status
	Former militia and rebel leader turned DRC army officer Bosco Ntaganda	Arrest warrant issued. Suspect at large.
Central African Republic	Former Congolese rebel leader, later Congolese transitional vice president and Senator Jean-Pierre Bemba Gombo	Suspect in ICC custody. Charges confirmed in June 2009. Pre-trial phase.
Kenya	No cases yet opened.	Investigation initiated in March 2010.
Guinea	No cases yet opened.	Preliminary examination initiated in October 2009.

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 had established an International Commission of Inquiry on Darfur under Resolution 1564, maintaining that the Sudanese government had not met its obligations under previous Resolutions.²³ In January 2005, the Commission reported that it had compiled a confidential list of potential war crimes suspects and “strongly recommend[ed]” that the Security Council refer the situation to the ICC.²⁴

On March 31, 2005, U.N. Security Council Resolution 1593 referred the situation in Darfur to the ICC Prosecutor. Following the referral, the ICC Prosecutor received the document archive of the Commission of Inquiry and 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. The Sudanese government also created its own special courts for Darfur in an apparent effort to stave off the ICC’s jurisdiction; however, the courts’ efforts were widely criticized as insufficient.²⁵

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.²⁶ The Resolution was adopted by a vote of 11 in favor, none against, and with four abstentions—the United States, China, Algeria, and Brazil.²⁷

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

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

²⁵ See 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.

²⁶ 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.

²⁷ U.N. Security Council Resolution 1593 (2005), March 31, 2005.

While Sudan is not a party to the ICC and has not consented to its jurisdiction, the case can be referred to the ICC by the U.N. Security Council under Chapter VII. The Resolution is binding on all U.N. member states, including Sudan. Under the ICC Statute, the ICC is authorized, but not required, to accept the case.²⁸

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.²⁹ The Administration supported the formation of the International Commission of Inquiry for Darfur.³⁰ 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.³¹ 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.³² 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.³³ 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 toward the ICC and it remains to be seen how it will address situations like Darfur.

Ahmad Muhammad Harun and Ali Kushayb

In May 2007, the ICC publicly issued arrest warrants for former Interior Minister Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb), an alleged former Janjaweed leader in Darfur.³⁴ They were each accused of over 40 counts of war crimes and crimes

²⁸ 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.

²⁹ 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.

³⁰ 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.

³¹ 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.

³² See Paragraph 6 of Security Council Resolution 1593; also see Kirgis, *Op. Cit.*

³³ 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.

³⁴ 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. The Sudanese government has denied having control over the Janjaweed, a term (continued...)

against humanity in connection with abuses allegedly committed in Darfur in 2003 and 2004. The Sudanese government refused to comply with either warrant. Although news reports suggest Sudanese authorities arrested Kushayb in October 2008, 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.³⁵ In May 2009, Harun was appointed governor of South Kordofan State. In June 2010, the ICC Pre-Trial Chamber informed the U.N. Security Council that “the Republic of Sudan is failing to comply with its cooperation obligations stemming from Resolution 1593 (2005) in relation to the enforcement of the warrants of arrest issued by the Chamber against Ahmad Harun and Ali Kushayb.”³⁶

Investigation of Rebel Crimes

In December 2007, the ICC Prosecutor announced the opening of a new investigation into the targeting of peacekeepers and aid workers in Darfur. In 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, 2007. Twelve African Union peacekeepers were allegedly killed and eight injured in the attack.³⁷

In May 2009, ICC pretrial judges issued a summons to one of the three alleged rebels, Bahar Idriss Abu Garda, to appear before the Court.³⁸ Abu Garda reported to The Hague voluntarily, where he maintained that he was innocent. In February 2010, ICC judges declined to confirm the Prosecutor’s case, contending that there was insufficient evidence to establish that Abu Garda could be held criminally responsible for the attack on peacekeepers. In June 2010, the two remaining rebel commanders sought by the Prosecutor in connection with the attack, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, voluntarily surrendered to the Court. Their names had not previously been made public.

The Case Against Bashir

On March 4, 2009, ICC judges issued an arrest warrant for 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, referring 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. 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-

(...continued)

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.

³⁵ Jeffrey Gettleman, “Sudan Arrests Militia Chief Facing Trial,” *The New York Times*, October 14, 2008.

³⁶ U.N. document S/2010/265.

³⁷ 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), which was later folded into the U.N.-African Union Mission in Darfur (UNAMID).

³⁸ The ICC judges decided that an arrest warrant was not necessary to ensure Abu Garda’s appearance before the Court.

perpetrator.”³⁹ 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.

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. 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.⁴⁰

Human rights organizations hailed the warrant, the first issued by the ICC against a sitting head of state, as an important step against impunity. Many governments, including France, Germany, Canada, the United Kingdom, and Denmark, and the European Union, have called on Sudan to cooperate. Reactions by African and Middle Eastern governments have been more critical, with many condemning the ICC or calling for its prosecution to be deferred. The governments of Russia and China also oppose the prosecution attempt.

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.⁴¹ However, most observers agree that there is little chance of Bashir being arrested. 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.”⁴² Sudanese government officials have rejected the ICC’s jurisdiction, though some legal experts argue that Sudan is obligated as a U.N. member state to cooperate because the warrant stems from a U.N. Security Council resolution.⁴³ Since the warrant was issued, Bashir has traveled to numerous countries in the region, including Egypt, Ethiopia, Qatar, Saudi Arabia, and Zimbabwe; however, he has not visited any countries that are parties to the ICC.

*Genocide Accusations*⁴⁴

In his request for an arrest warrant in July 2008, the ICC Prosecutor accused Bashir of three counts of genocide, making the Sudanese president the first individual to be accused of this crime before the Court. The Prosecutor alleged that Bashir “intends to destroy in substantial part the

³⁹ ICC Pre-Trial Chamber I, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, March 4, 2009.

⁴⁰ 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.

⁴¹ ICC press release, “ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan,” March 4, 2009.

⁴² Patrick Worsnip, “No Quick Way to Enforce ICC Warrant for Bashir,” *Reuters*, March 5, 2009.

⁴³ 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.”)

⁴⁴ 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 the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

Fur, Masalit and Zaghawa ethnic groups as such” through coordinated attacks by government troops and Janjaweed militia.⁴⁵ In 2009, ICC judges 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.⁴⁶ The Prosecutor appealed, successfully, against the decision to exclude genocide, and on July 12, 2010, ICC judges issued a second warrant for Bashir, this time citing “reasonable grounds” to believe Bashir is criminally responsible for three counts of genocide. The second warrant does not replace, revoke, or otherwise alter the first warrant, which also remains in effect.⁴⁷

Many human rights advocates welcomed the attempt to prosecute Bashir for genocide. However, the formulation of the Prosecutor’s accusation has 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.”⁴⁸ Darfur activists accused the Commission of allowing political considerations to affect its conclusions.⁴⁹ However, some critics contend that the Prosecutor’s application concerning genocide did not sufficiently establish intent or Bashir’s alleged role.⁵⁰

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.⁵¹ The Bashir administration has portrayed the ICC as an instrument of Western pressure for regime change, has repeatedly denied that genocide or ethnic cleansing is taking place in Darfur, and has accused the Prosecutor of basing his investigation on testimony by rebel leaders and spies posing as humanitarian workers.⁵² The government has barred ICC

⁴⁵ Darfur’s main rebel groups are associated with these ethnicities; the Prosecutor’s case against Bashir alleges that military and militia attacks specifically targeted civilians even where rebel locations were spatially separate and well-known. The Prosecutor’s application for a warrant referenced additional attacks against other ethnic groups in connection with alleged war crimes and crimes against humanity.

⁴⁶ ICC press release, “ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan,” March 4, 2009.

⁴⁷ ICC, “Pre-Trial Chamber I Issues a Second Warrant of Arrest Against Omar Al Bashir for Counts of Genocide,” July 12, 2010.

⁴⁸ 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.

⁴⁹ E.g., Eric Reeves, “Report of the International Commission of Inquiry on Darfur: A critical analysis (Part II),” *Sudanreeves.org*, February 6, 2005.

⁵⁰ 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.

⁵¹ 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.

⁵² 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; *The Associated Press* (hereafter, *AP*), “Sudan Dismisses ICC Proceedings on Darfur, Reiterates Refusal to Hand Over Any Suspects,” July 11, 2008; and de Waal, *Op. Cit.*

personnel from speaking to Sudanese officials, and authorities have taken a hardline stance against Sudanese suspected of sympathizing with the ICC prosecution attempt.⁵³ The government also responded by expelling over a dozen international aid organizations that 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, one in a series of remarks by Sudanese officials that appeared to threaten the safety of U.N. personnel in Sudan.⁵⁴

Reactions to the warrant among Sudanese opposition groups have varied. Islamist opposition leader Hassan Al-Turabi (and former Bashir ally) criticized the Bashir administration’s stance toward the ICC and has called on the president to turn himself over to the international justice system.⁵⁵ Other Sudanese opposition members have displayed measured support for Bashir while privately acknowledging mixed reactions.⁵⁶ Three major Darfur rebel factions—the Sudan Liberation Movement (SLM), Sudan Liberation Army (SLA), and Justice and Equality Movement (JEM)—welcomed the arrest warrant.⁵⁷ Reports suggest 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)—is ambivalent about the attempt to prosecute Bashir.⁵⁸ The SPLM initially called on the government “to cooperate with [the] ICC on the legal processes.”⁵⁹ However, after the arrest warrant was issued, the SPLM released a statement saying that “Sudan should stand with Bashir at this hard time.”⁶⁰ 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.⁶¹

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.”⁶² 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 to multiple friendly countries in the weeks following the warrant’s issuance.

⁵³ CRS interview with ICC Office of the Prosecutor official, September 3, 2008. ICC prosecutorial staff have conducted extensive interviews with witnesses outside of Sudan, including in neighboring countries. In November 2008, Sudanese police detained a human rights activist they accused of being in contact with the ICC, and 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. Also in January, a Sudanese man was convicted of “spying” for the ICC and sentenced to prison.

⁵⁴ 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.

⁵⁵ Turabi was detained for two months in early 2009 in apparent connection with statements to this effect.

⁵⁶ 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.

⁵⁷ *Reuters*, “Reaction to Warrant for Bashir’s Arrest,” March 4, 2009.

⁵⁸ 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.

⁵⁹ 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.

⁶⁰ *Reuters*, “Reaction to Warrant for Bashir’s Arrest,” March 4, 2009.

⁶¹ Opheera McDoom, “Analysis-Justice Clashes With Peace on Darfur Bashir Warrant,” *Reuters*, July 14, 2008; Mushtaq, Op. Cit.

⁶² Marlise Simons, “Court Issues Warrant for Arrest of Sudan President,” *The New York Times*, March 5, 2009.

Regional Reactions

The Sudanese government has rallied support among many 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),⁶³ all of which have criticized the ICC and called (unsuccessfully) for a deferral of prosecution by the U.N. Security Council. Some African and Middle Eastern commentators and civil society groups have praised the decision to pursue Bashir as a step against impunity in the region, while others expressed concern that the move displayed bias or a neocolonial attitude toward Africa.⁶⁴ In October 2009, an AU panel on Darfur led by former South African President Thabo Mbeki concluded that a special “hybrid” court consisting of Sudanese and international judges, should try the gravest crimes committed in Darfur, but did not take a position on whether such a court would seek to try cases currently before the ICC.

Despite support for the prosecution among a small number of African leaders, notably Uganda, Botswana, and Chad, the decision to prosecute an African head of state appears to have sparked a backlash among African governments, 30 of which are parties to the Court. In July 2009, the AU resolved not to cooperate with the ICC in carrying out Bashir’s arrest. At the same time, African parties to the Court suggested they would refrain from withdrawing from the Court altogether.⁶⁵ 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.”⁶⁶ The government of Chad, which has had very tense relations with Sudan, also stated it would arrest Bashir, while news reports have suggested contradictory stances toward a possible arrest by the governments of Uganda and South Africa.⁶⁷

Obama Administration Reactions

The Obama Administration has expressed support for the ICC investigation and prosecution of war crimes in Sudan, and Administration officials have repeatedly stated that those responsible for serious crimes in Darfur should be held “accountable.”⁶⁸ In July 2009, the Obama

⁶³ 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).

⁶⁴ 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; HRW, “AU: African Civil Society Presses States for ICC Support,” November 2, 2009. 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.”

⁶⁵ Barry Malone, “Africa ICC Members Will Not Quit Despite Bashir Move,” *Reuters*, June 9, 2009.

⁶⁶ *AFP*, “Botswana Says Al-Bashir Must Stand Trial at ICC,” July 6, 2009.

⁶⁷ Radio France Internationale (RFI), “Chadian Leader Vows to Cooperate With ICC Over Bashir Warrant,” via BBC Monitoring, July 14, 2009; *Reuters*, “Uganda Says Sudan’s Bashir to Send Deputy Over ICC,” July 16, 2009; *AFP*, “SAfrica Will Arrest Beshir If He Visits: Foreign Ministry,” July 30, 2009.

⁶⁸ *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; *AFP*, “US Envoy: Must Cooperate With Sudan Even if New Warrant Issued,” July 9, 2009.

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."⁶⁹ In response to a question at an August 2009 press conference in Nairobi, Kenya, Secretary of State Hillary Clinton said, "The actions by the ICC sent a clear message that the behavior of Bashir and his government were outside the bounds of accepted standards and that there would no longer be impunity.... The United States and others have continued to support the need to eventually bring President Bashir to justice."⁷⁰ Also in Nairobi, Clinton said that it was a "great regret" that the United States was not a party to the ICC, but that "we have supported the court and continue to do so."⁷¹

Administration officials have at times appeared to express divergent characterizations of the situation in Darfur. In June 2009, Special Envoy Gration suggested at a press briefing 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 ongoing fighting between rebel groups, the Sudanese government, and Chadian actors.⁷² Previously, U.N. Ambassador Susan Rice had characterized Darfur as a "genocide." In response to questions following Gration's remarks, a State Department spokesman stated, "I think there is no question that genocide has taken place in Darfur. We continue to characterize the circumstances in Darfur as genocide."⁷³ In July 2009, President Obama referred to Darfur as a "genocide," calling it a "millstone around Africa's neck."⁷⁴

Congressional Reactions

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."⁷⁵ Senator John Kerry has stated the warrant "complicates matters," but should not stop U.S. efforts to resolve the conflict in Darfur.⁷⁶ In remarks on behalf of the Congressional Black Caucus, Congresswoman Barbara Lee commented, "it's so important to do the right thing now, which is to support the International Criminal Court in its efforts to hold Sudan's President Bashir accountable for his crimes against humanity." The draft bill H.Res. 241 (Hastings) expresses support for the ICC's arrest warrant for Bashir.

⁶⁹ *AFP*, "US Envoy: Must Cooperate With Sudan Even if New Warrant Issued," July 9, 2009.

⁷⁰ U.S. State Department/Hillary Rodham Clinton, "Remarks With Kenyan Foreign Minister Moses Wetangula," Kenyatta International Conference Centre, Nairobi, Kenya, August 5, 2009. In March 2009, Clinton 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." *Reuters*, "Clinton Says Al-Bashir Can 'Have His Day in Court,'" March 4, 2009. While many refer to the ICC proceedings against Bashir as an "indictment," the warrant is not equivalent to an indictment; any charges must be confirmed at a pre-trial hearing.

⁷¹ Mary Beth Sheridan, "Clinton Says U.S. Supports International Criminal Court," August 6, 2009.

⁷² Colum Lynch, "Sudan's 'Coordinated' Genocide in Darfur is Over, U.S. Envoy Says," *The Washington Post*, June 18, 2009.

⁷³ ABC News, "US Tries to Walk Back From Comments Downplaying Genocide in Darfur," June 18, 2009.

⁷⁴ *AFP*, "Sudan: Obama Comments 'A Step Back,'" July 11, 2009.

⁷⁵ *AFP*, "Obama Must Support Beshir Warrant: US senator," March 4, 2009.

⁷⁶ *Reuters*, "INTERVIEW-Kerry says ICC case no bar on Darfur peace drive," April 17, 2009.

Security Council Considerations in July 2008: Context and Background

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

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

Among the 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."⁷⁹ 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

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

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

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

Article 16 was for the Security Council to act pre-emptively to delay the application of international justice for atrocity crimes in a particular situation in order to focus exclusively on performing the Council's mandated responsibilities for international peace and security objectives." This was a tool to be employed by the Council in instances of "premature State Party or Prosecutor referrals." In addition, Scheffer 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."⁸⁰

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.⁸¹ In abstaining on the vote rather than voting against it, the United States supported renewal of the UNAMID mandate but noted that the language in preambular paragraph 9 "would send the wrong signal to President Bashir and undermine efforts to bring him and others to justice."⁸² In remarks with the press following the vote, U.S. Deputy Permanent Representative Alejandro Wolff stated:

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

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.

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

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

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

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

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 circumstances, the ICC might have a role.⁸⁴ 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.

Uganda

The government of Uganda, a party to the ICC, referred “the situation concerning the Lord’s Resistance Army” to the Court in 2003.⁸⁵ The Lord’s Resistance Army (LRA) is a rebel group that has fought for over two decades in northern Uganda.⁸⁶ 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.⁸⁷ None of the suspects are in custody. Lukwiya and Otti have reportedly been killed since the warrants were issued, while other LRA commanders are thought to be in hiding in neighboring countries. The Prosecutor is also reportedly investigating actions by the Ugandan military in northern Uganda.

Although LRA atrocities have been widely documented, ICC actions in Uganda have met with some 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.⁸⁸ Some observers argue that ICC arrest warrants were a crucial

⁸⁴ 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.

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

⁸⁶ See CRS Report RL33701, *Uganda: Current Conditions and the Crisis in North Uganda*, by Ted Dagne.

⁸⁷ 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.

⁸⁸ See Tim Allen, *Trial Justice: The International Criminal Court and the Lord’s Resistance Army* (London: Zed Books, (continued...))

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, the LRA has demanded that ICC arrest warrants be annulled as a prerequisite to a final agreement, and threats of ICC prosecution are considered by many to be a stumbling block to achieving an elusive final peace deal.⁸⁹

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.⁹⁰ In March 2010, the Ugandan parliament passed legislation known as the International Criminal Court Bill, which creates provisions in Ugandan law for the punishment of genocide, crimes against humanity, and war crimes. Ugandan attempts to prosecute the LRA leaders domestically 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, and only the ICC Prosecutor can move to drop the case.⁹¹

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 2004.⁹² Despite the end of a five-year civil war in 2003 and the holding of national elections in 2006, DRC continues 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.⁹³ 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, which could potentially include officials from neighboring countries as well as members of the Congolese government and military.⁹⁴

(...continued)

2006).

⁸⁹ E.g. *AFP*, "Uganda Rebel Negotiating Team Wants Peace Deal Revised," August 28, 2009.

⁹⁰ In July 2009, the Ugandan government initiated the first prosecution of an alleged LRA commander, Thomas Kwoyelo (who has not been sought by the ICC). Kwoyelo has been charged with kidnap with intent to murder, and not with war crimes. Bill Oketch, Institute for War & Peace Reporting, "Test Case for Ugandan Justice," July 29, 2009.

⁹¹ 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.

⁹² ICC Office of the Prosecutor Press Release, "Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo," April 19, 2004.

⁹³ 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.

⁹⁴ 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

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 of Congolese Patriots (UPC, after its French acronym) in Ituri and its military wing, the Patriotic Forces for the Liberation of Congo (FPLC). At the time, Lubanga was in Congolese custody and had been charged in the domestic justice system.⁹⁵ 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.⁹⁶ Following a lengthy delay due to a procedural challenge, Lubanga's trial began in January 2009. The prosecution wrapped up its presentation of evidence in July 2009; 28 witnesses, including three experts, testified.⁹⁷ Lubanga has pleaded not guilty.

Germain Katanga and Mathieu Ngudjolo Chui

Germain Katanga, the alleged 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 2003.⁹⁸ 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.⁹⁹ In November 2009, the joint trial of Katanga and Ngudjolo opened.

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. The warrant was unsealed in April 2008. Ntaganda is accused of three counts of war crimes related to the recruitment and use of child soldiers in 2002 and 2003.¹⁰⁰ At the time the warrant was unsealed, Ntaganda was reportedly a commander of a different rebel group, the National Congress for the People's Defense (CNDP), in the DRC's North Kivu province.¹⁰¹ Ntaganda later agreed to be integrated into the Congolese military, where he was reportedly promoted to the rank of general.

⁹⁵ Lubanga was reportedly 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.)

⁹⁶ ICC, *The Prosecutor Vs. Thomas Lubanga Dyilo*, Document Containing the Charges, Article 61(3)(a) (Public Redacted Version), August 28, 2006.

⁹⁷ UN News, “Prosecution Wraps Up Case of Warlord at International Criminal Court,” July 15, 2009.

⁹⁸ ICC, Combined Factsheet: Situation in the Democratic Republic of the Congo, Germain Katanga and Mathieu Ngudjolo Chui, June 27, 2008. Their cases were joined in March 2008.

⁹⁹ ICC, Combined Factsheet, Op. Cit.

¹⁰⁰ ICC Pre-Trial Chamber, *The Prosecutor Vs. Bosco Ntaganda, Warrant of Arrest*, August 22, 2006. Ntaganda has reportedly been named by former child soldiers testifying before the ICC in the trial of Thomas Lubanga.

¹⁰¹ In January 2009, Ntaganda ousted CNDP founder Laurent Nkunda, who was later taken into Rwandan custody. For background on the conflict, see International Crisis Group, *Congo: Bringing Peace to North Kivu*, Africa Report No. 133, October 31, 2007.

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.¹⁰² While Ntaganda officially does not have a role in military operations, news reports and human rights advocates allege that he has played a command role in a military offensive in the east since early 2009.¹⁰³ In November 2009, the Obama Administration's Special Advisor on the Great Lakes Region, Howard Wolpe, stated that the DRC's protection of Ntaganda was "inexcusable" and said that the United States would press Congolese authorities to allow Ntaganda's transfer to the ICC. 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 2005.¹⁰⁴ 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 2003.¹⁰⁵ Bemba's MLC, based in the DRC's north, was allegedly invited into CAR by then-President Ange-Félix Patassé to help quell a rebellion. The Prosecutor accused Bemba of five counts of war crimes and three counts of crimes against humanity for alleged rape, torture, pillaging, and other abuses.¹⁰⁶

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. A panel of ICC judges confirmed most of the prosecutors' charges against him in June 2009, paving the way for a trial.¹⁰⁷ Bemba's prosecution by the ICC has been controversial in the DRC, where the MLC is a major opposition party.¹⁰⁸ 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.¹⁰⁹

¹⁰² AFP, "Peace Before Justice, Congo Minister Tells ICC," February 12, 2009.

¹⁰³ Xinhua, "UN Mission in DR Congo Denies Ntaganda's Role in Military Operations," September 10, 2009; Agence France-Presse (AFP), "No Arrest Yet for Ex-Rebel Leader Ntaganda: Kinshasa," October 29, 2009.

¹⁰⁴ ICC Office of the Prosecutor Press Release, "Prosecutor Receives Referral Concerning Central African Republic," January 7, 2005.

¹⁰⁵ Bozizé took power in a coup in 2003 and is the current president of CAR.

¹⁰⁶ 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.

¹⁰⁷ UN News Service, "ICC Confirms Charges Against Former DR Congo Leader," June 16, 2009.

¹⁰⁸ The MLC converted itself into a political party following the end of the DRC civil war in 2003. 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; his supporters accused the president of electoral fraud. Bemba won a Senate seat in January 2007, but he went into exile in April 2007 after relations with Kabila continued to deteriorate.

¹⁰⁹ 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.

Kenya

In March 2010, a panel of ICC judges approved, in a two-to-one decision, the Prosecutor's request to open an investigation into post-election violence in Kenya in late 2007 and early 2008, in which over 1,100 were reportedly killed along with other abuses. A government of national unity was formed following the disputed elections, but many believe high-ranking officials planned and instigated large-scale abuses, a view supported by independent investigations into the violence. Kenya is a party to the ICC, but the decision marks the first time ICC judges have authorized an investigation on a recommendation from the Prosecutor, as opposed to a state referral or U.N. Security Council directive. The Prosecutor has stated that he will seek to prosecute up to six Kenyans, representing those most responsible from "both sides" of the election violence.¹¹⁰ Those sought reportedly include senior officials in the power-sharing government. The Kenyan government has pledged to cooperate with ICC actions.

An official investigation into the post-election violence, known as the Waki Commission, identified potential suspects and recommended the establishment of an independent Kenyan tribunal with international participation. Donors, including the United States and the European Union, expressed support for an independent domestic tribunal.¹¹¹ In December 2008, the government accepted the Waki Commission's findings and agreed that it would refer the situation to the ICC if the Commission's recommendations were not implemented. The Kenyan parliament was expected to pass legislation establishing such a tribunal by March 2009. In July 2009, noting delays, chief mediator Koffi Annan submitted information on 10 individuals suspected of orchestrating the violence to the ICC. The Cabinet later announced that it would not establish a special tribunal, but would instead convene a "Truth, Justice and Reconciliation Commission" (TJRC) which would not prosecute suspects but rather to oversee reforms in the judiciary, police, and other investigatory bodies that may, in turn, deal with the issue. Some Kenyans are reportedly concerned that local prosecutions could stir up the same ethnic tensions that led to the post-election turmoil, while others fear that a lack of prosecutions could lead to future electoral violence.¹¹² Other concerns center around the protection of witnesses and victims, who have already reportedly been subjected to intimidation and threats.¹¹³

Guinea

ICC prosecutors announced a "preliminary examination" of the situation in Guinea in October 2009, following a violent military crackdown on opposition supporters in late September in which over 150 were reportedly killed and dozens of women sexually assaulted. A U.N. commission of inquiry concluded in December 2009 that crimes against humanity may have been committed for which the Guinean state carried legal responsibility, in addition to the potential individual liability

¹¹⁰ *Reuters*, "Interview—ICC Prosecutor Targets Up To Six Kenyans," May 12, 2010.

¹¹¹ *The Nation* (Nairobi), "EU Piles Pressure on Govt Over Poll Trials," July 27, 2009; U.S. State Department/Hillary Rodham Clinton, "Remarks with Kenyan Foreign Minister Moses Wetangula," Kenyatta International Conference Centre, Nairobi, Kenya, August 5, 2009. Secretary of State Hillary Clinton added, "If there's not going to be a special local tribunal that has confidence of the people, then I think the people deserve to know that someone is going to put in motion the process to hold people accountable, and it may well be that that is the ICC." (State Department, "Remarks at 'Towninterview' Hosted by CNN and KTN—Hillary Rodham Clinton, Secretary of State," August 6, 2009.

¹¹² *Reuters*, "Most Kenyans Want Violence Suspects Tried by ICC," July 18, 2009; *Reuters*, "Kenya Keeps Options Open on Violence Court," July 30, 2009.

¹¹³ Andrew Teyie, "Kenya: Ocampo Witnesses Fear Leak," *Nairobi Star*, April 21, 2010.

of Guinean junta leader Capt. Moussa Dadis Camara and certain other commanders of the security forces.¹¹⁴ The commission recommended that cases in which there was a “strong presumption” of crimes against humanity should be referred to the ICC.¹¹⁵ In February 2010, ICC deputy prosecutor Fatou Bensouda visited Guinea and promised that perpetrators of abuses in September 2009 would be brought to justice.¹¹⁶

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, ICC 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.¹¹⁷ 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.”¹¹⁸ (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.¹¹⁹)

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.¹²⁰ 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 Sudan, in particular, has bared tensions between the ICC’s universal mandate and its reliance on the enforcement power of

¹¹⁴ Report of the International Commission of Inquiry Mandated to Establish the Facts and Circumstances of the Events of 29 September 2009 in Guinea, December 29, 2009.

¹¹⁵ For further background on Guinea and the events of September 2009, see CRS Report R40703, *Guinea: Background and Relations with the United States*, by Alexis Arieff and Nicolas Cook.

¹¹⁶ Kissy Agyeman-Togobo, “International Criminal Court Vows ‘No Impunity’ for Perpetrators of Guinea Massacre,” IHS Global Insight Daily Analysis, February 19, 2010.

¹¹⁷ 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.

¹¹⁸ Waddell and Clark, “Introduction,” in *Courting Conflict?*

¹¹⁹ CRS interview with ICC prosecutorial official, September 3, 2008.

¹²⁰ 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.

states.¹²¹ 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, a country which is not a party to the Court, has portrayed the ICC as a form of "imperialism" that seeks to "undermine people from poor and African countries, and other powerless countries in terms of economic development and politics."¹²² Some 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.¹²³ The attempt to prosecute Bashir has been particularly controversial, drawing rebuke from African governments and regional organizations. Jean Ping, president of the AU Commission, has accused the ICC of hypocrisy, contending that "we are not against the ICC, but there are two systems of measurement ... the ICC seems to exist solely for judging Africans."¹²⁴

Supporters of the Court respond that most 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. 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.¹²⁵ In addition, supporters contend that national legal systems in Africa are particularly weak, which has allowed the ICC to assert its jurisdiction under the principle of complementarity.¹²⁶ These sentiments were echoed by former U.N. Secretary-General Kofi Annan, who stated, "In all of these cases, it is the culture of impunity, not African countries, which are the target. This is exactly the role of the I.C.C. It is a court of last resort."¹²⁷ At the June 2010 meeting of ICC states parties in Kampala, Uganda, participants initiated mechanisms for increasing coordination between donors on strengthening national justice systems; the United States, which participated in the meeting as an observer, has expressed support for such efforts.¹²⁸

The Prosecutor's selection of cases also has proven controversial. 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

¹²¹ See e.g. Kenneth A. Rodman, "Darfur and the Limits of Legal Deterrence," *Human Rights Quarterly*, 30, 3, August 2008.

¹²² *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.

¹²³ See e.g. Oraib Al Rantawi, "A Step Forward or Backward?" *Bitter Lemons*, 32, 6, August 14, 2008 ; Charles Kazooba, "African Legislators See Bias in ICC's Workings," June 7, 2010.

¹²⁴ Christophe Ayad, "Nous Sommes Faibles, Alors On Nous Juge et On Nous Punit," *Libération* (Paris), CRS transl.

¹²⁵ CRS interview with Office of the Prosecutor official, September 3, 2008.

¹²⁶ See e.g. Stephanie Hanson, "Africa and the International Criminal Court," *Council on Foreign Relations*, July 24, 2008.

¹²⁷ Kofi A. Annan, "Justice Vs. Impunity," *International Herald Tribune*, May 30, 2010.

¹²⁸ State Department, "U.S. Engagement With The International Criminal Court and The Outcome Of The Recently Concluded Review Conference," June 15, 2010.

of particular charges, while those of apparently equal culpability have not.”¹²⁹ For example, 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.¹³⁰ The decision to pursue DRC opposition leader Jean-Pierre Bemba Gombo has provoked accusations that the Prosecutor was swayed by political bias or, potentially, excessive pragmatism, since other Congolese and CAR political actors accused of similar abuses have not been pursued to date. ICC supporters have responded that the Prosecutor is mandated to focus on particularly serious cases, and that investigations are ongoing in these countries.

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.”¹³¹

Concerns that the aims of “justice” and “peace” may conflict have been particularly prominent in Uganda and Sudan. In Uganda, some argue that ICC arrest warrants against LRA commanders have acted as an impediment to achieving a final peace agreement. Ugandan critics reportedly include ethnic Acholi elders who support the use of traditional reconciliation mechanisms instead of international prosecution.¹³² Conversely, others contend that the threat of ICC prosecution could serve as “an important ingredient in a political solution” for the conflict-plagued north.¹³³ 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. For example, according to former U.S. special 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.”¹³⁴

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

¹²⁹ Waddell and Clark, Op. Cit.

¹³⁰ 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.; and Kiwanuka Lawrence, “ICC Should Indict Museveni—Otunnu,” *The Weekly Observer* (Kampala), August 20, 2009. 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.

¹³¹ Nick Grono and Adam O’Brien, “Justice in Conflict? The ICC and Peace Processes,” in *Courting Conflict?*

¹³² E.g. Moses Akena and David L. Okumu, “Acholi Leaders Criticize ICC’s Operations,” *The Monitor*, August 6, 2009.

¹³³ Akhavan, “The Lord’s Resistance Army Case,” Op. Cit.

¹³⁴ Quoted in Opheera McDoom, “Analysis: Justice Clashes With Peace on Darfur Bashir Warrant,” *Reuters*, July 14, 2008.

testimony before Congress, when asked about the impact of the ICC warrant on U.N. peacekeeping operations in Darfur, Director of National Intelligence Dennis C. Blair said that “the indictment and President Bashir’s reaction have made him less cooperative than he was” and that the warrant would “make it harder” for the U.N. to run peacekeeping operations in Darfur.¹³⁵ In early August 2009, the outgoing commander of the hybrid U.N.-AU peacekeeping mission in Darfur (UNAMID), General Martin Luther Agwai, reportedly stated that the decision to pursue Bashir had been a “big blow” for UNAMID and the peace process, although it had not as drastic an effect on the ground as he had feared.¹³⁶ 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.¹³⁷

Supporters of the Court maintain that the ICC warrant against Bashir may open 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.¹³⁸ For example, Priscilla Hayner of the International Center for Transitional Justice has written that “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.”¹³⁹ Some argue that “peace deals that sacrifice justice often fail to produce peace” in the long run.¹⁴⁰ Many observers have pointed out that discerning the effect of ICC actions on complex processes is extremely difficult.

¹³⁵ 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.

¹³⁶ Louis Charbonneau, “INTERVIEW-Dialogue With Sudan Govt, Rebels Needed—US Envoy,” *Reuters*, August 6, 2009; U.N. News, “Press Conference by United Nations Force Commanders in Darfur, Democratic Republic of Congo,” August 6, 2009.

¹³⁷ 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.

¹³⁸ 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.

¹³⁹ Priscilla Hayner, “Seeking Justice as War Crimes Rage On,” *The Chicago Tribune*, July 16, 2008.

¹⁴⁰ Grono and O’Brien, Op. Cit.

Appendix. African States That Are ICC Parties and Have Concluded an “Article 98 Agreement” With the United States

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	X	
Lesotho	X	X
Liberia	X	X
Libya		
Madagascar	X	X
Malawi	X	X
Mali	X	
Mauritania		X

Country	Party to ICC	Ratified Article 98 Agreement
Mauritius	X	X
Morocco		X
Mozambique		X
Namibia	X	
Niger	X	
Nigeria	X	X
Rwanda		X
São Tomé and Príncipe		X
Senegal	X	X
Seychelles		X
Sierra Leone	X	X
Somalia		
South Africa	X	
Sudan		
Swaziland		X
Tanzania	X	
Togo		X
Tunisia		X
Uganda	X	X
Zambia	X	X
Zimbabwe		

Sources: United Nations, Multilateral Treaties Deposited with the Secretary-General; U.S. Department of State, Treaties in Force 2007.

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