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Recent Development

## SUDAN'S COURTS AND COMPLEMENTARITY IN THE FACE OF DARFUR

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On March 31, 2005, the U.N. Security Council made history by referring its first case, the mass atrocities in the Darfur region of Sudan, to the International Criminal Court (ICC). Soon after the ICC Prosecutor announced that he would open an investigation, the Sudanese government responded by establishing special criminal courts to try crimes committed in Darfur. This Recent Development assesses whether creation of these courts by Sudan means that the ICC may no longer try cases of this nature because of the complementarity provision in the Rome Statute.<sup>1</sup> I proceed by reviewing the Darfur atrocities and the principle of complementarity, and conclude by identifying several issues that will be particularly important in determining whether Darfur cases will be tried before the ICC.

Violence in the impoverished Darfur region has raged since February 2003, when two local groups attacked government forces and installments, citing mistreatment of black African tribes by the Arab-dominated government.<sup>2</sup> Khartoum has responded forcefully with a bloody campaign against civilians. Non-governmental organizations claim that the Sudanese government also sponsors self-organized militias, including the notorious Janjaweed.<sup>3</sup> The violence has resulted in the deaths of an estimated 180,000 people in the first eighteen months and the displacement of approximately two million people throughout the harsh, arid region.<sup>4</sup> Human rights groups have documented widespread rape, torture, murder, looting, and the destruction of entire villages.<sup>5</sup> The United States has termed the campaign genocide.<sup>6</sup> Early in 2004, a U.N. official declared the situation in Darfur the worst humanitarian crisis in the world.<sup>7</sup>

In October 2004, in response to mounting international pressure, U.N. Secretary General Kofi Annan created the International Commission of Inquiry for Darfur to investigate alleged violations of international law and determine whether genocide was occurring.<sup>8</sup> While the Commission declined to label the events as genocide, it reported in January 2005 that the government of Sudan, the Janjaweed, and rebel forces were all responsible for serious violations of law and sent the names of fifty-one individuals \*277 to the U.N. Security Council for further action.<sup>9</sup> The Commission further found the Sudanese government unable or unwilling to investigate and prosecute the crimes committed in Darfur, stating that “[t]he measures taken so far by the [Sudanese] Government to address the crisis have been both grossly inadequate and ineffective, which has contributed to the climate of almost total impunity for human rights violations in Darfur.”<sup>10</sup>

Building on the findings and recommendations of the Commission, the U.N. Security Council passed Resolution 1593 on March 31, 2005.<sup>11</sup> The resolution invoked Article VII of the U.N. Charter, declaring the situation in Darfur a threat to international peace and security, and officially referred it to the ICC. The resolution further recognized that Sudan was not a State Party to the ICC, but required it nonetheless to “cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution.”<sup>12</sup> The Sudanese Council of Ministers' reaction was apoplectic, pronouncing its “total rejection” of the ICC.<sup>13</sup> Sudanese President Umar al-Bashir stated that Sudan would not hand over any nationals to the Court and reaffirmed Sudan's sovereignty and independence, its impartiality, and the competence of its judiciary.<sup>14</sup>

After assessing the crimes and admissibility of the Darfur atrocities, ICC Prosecutor Luis Moreno-Ocampo announced on June 6, 2005 that he would open an investigation into crimes in Sudan.<sup>15</sup> One week after this announcement, Sudan countered by establishing a domestic tribunal to try some 160 individuals suspected of war crimes.<sup>16</sup> The Minister of Justice, Ali Mohamed Osman Yassin, declared the Sudanese court “a substitute to the International Criminal Court.”<sup>17</sup>

The Rome Statute creating the ICC entered into force on July 1, 2002.<sup>18</sup> The Court began operating in March 2003, and, as of the date of the Darfur referral, had pending investigations in Uganda and the Democratic Republic of the Congo (DRC).<sup>19</sup> The case of Darfur, however, differs significantly from Uganda and the DRC, both of which are State Parties to the Rome Statute and conferred jurisdiction upon the Court through self-referral. In contrast, the ICC obtained jurisdiction over the Darfur case only through the U.N. Security Council referral. Sudan maintains that one reason why the Court lacks jurisdiction is because it has not ratified the Rome Statute. However, under the \*278 Rome Statute, U.N. Security Council referral obviated the need for territorial or personal jurisdiction through State Party status.<sup>20</sup>

The Rome Statute stipulates that the ICC should be only “complementary to national criminal jurisdictions.”<sup>21</sup> Moreover, the Preamble of the Rome Statute also declares that “effective prosecution must be ensured by taking measures at the national level” and that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”<sup>22</sup> Because these complementarity provisions apply to a U.N.-referred situation, the main challenge to the ICC's jurisdiction is Sudan's recent establishment of the special Darfur courts.

The complementarity provision is further codified in articles 17(1)(a)-(c) and 20(3) of the Rome Statute.<sup>23</sup> These articles prevent the ICC from assuming jurisdiction over a case if: (1) the state having jurisdiction is investigating or has prosecuted the case; (2) the state has investigated, and then elected not to prosecute, an individual; or (3) the state has already tried the individual.<sup>24</sup> However, there are important exceptions to this rule. Articles 17 and 20 further state that the ICC may prosecute if the State is “unwilling or unable” to prosecute “genuinely.”<sup>25</sup> The Rome Statute does not define what constitutes a “genuine” prosecution, but the drafting history indicates that the term allows for some subjectivity in determining the “unwillingness” of a state to prosecute.<sup>26</sup> Section 2 of article 17 and section 3 of article 20 clarify that a state may be considered “unwilling” to prosecute, even if domestic trials are taking place, if the purpose of national proceedings is to shield individuals from criminal responsibility; if there was an unjustified delay in proceedings; if the proceedings were not independent or impartial, or if the proceedings failed to accord with international due process norms.<sup>27</sup> Article 17, section 3 notes that a State may be “unable” to prosecute in the case of total or substantial collapse or unavailability of the judicial system.<sup>28</sup>

In January 2005, the International Commission of Inquiry reported that Sudan had failed to demonstrate willingness to prosecute, a finding with which the UN Security Council and ICC Prosecutor agreed.<sup>29</sup> However, these assessments predated the establishment of the Sudanese special courts in June 2005. Therefore, the Prosecutor must now show to the ICC Pre-Trial Chamber that the efforts by the Sudanese national courts are not genuine and that the ICC therefore may retain its jurisdiction over the case.<sup>30</sup>

\*279 When the Sudanese government announced that it would conduct its own investigations, Antonio Cassese, former head of the Commission of Inquiry, asserted that “[t]hese [trials] will have no credibility. The country has no way to conduct proper trials, the whole judiciary is flawed.”<sup>31</sup> Similarly, human rights groups have been skeptical of Sudan's motives.<sup>32</sup> The Sudanese government insists that it is committed to the national proceedings. Chief Justice Jalal-Eddin Mohamed Osman of the specialized courts emphasized that the Sudanese judiciary is “capable, willing and committed to shoulder full responsibility in the establishment of justice and restoration of rights.”<sup>33</sup>

The ICC should tread carefully. In judging Sudan's willingness and ability to prosecute, the Court will be setting its first precedent. Also, one of the ICC's stated goals is to encourage states to bring the guilty to justice themselves. Most importantly,

very little evidence is readily available for a determinative assessment of Sudan's "unwillingness" or "inability" to prosecute in a genuine manner.<sup>34</sup> This is particularly apparent with respect to several issues that will be central to whether the ICC will retain jurisdiction.

One issue to view critically is the timing of the establishment of Sudan's domestic courts. There is no question that, for over two years, Sudanese officials declined to act, even in the face of highly publicized reports of appalling atrocities, and that once Moreno-Ocampo made his announcement, the government reacted quickly by creating the domestic tribunal. These two elements--inaction followed by hasty action--may lend credence to the claim that the Sudanese court was only established to shield the accused from liability for their alleged crimes. However, if fair trials are held, one could argue that the ICC has fulfilled its mandate of fostering domestic accountability by prompting Sudan to take prosecution seriously. Consequently, rather than emphasizing the timing, the Prosecutor and Court should look most critically at the procedural and institutional features of the trials as they progress.

For example, because the Commission of Inquiry specifically implicated the current Khartoum government in atrocities committed in Darfur, any court established by this government will naturally be suspected of lacking the crucial elements of independence and impartiality. As an expert paper commissioned by the Office of the Prosecutor noted, "[c]ommonality of purpose between suspected perpetrators and state authorities involved in investigation, prosecution or adjudication . . . constitutes circumstantial \*280 evidence for an inference of non-genuineness."<sup>35</sup> However, such circumstantial evidence alone will not be sufficient to form the basis of a compelling case for ICC prosecution.

A key factor to watch in determining the willingness to prosecute is the kind of crimes and individuals prosecuted. As of the end of November 2005, the Sudanese courts had convicted at least two Sudanese military members for the murder of a Darfur local whom they accused of complicity in the rebellion.<sup>36</sup> Local groups assert, however, that the courts will only prosecute common law cases rather than crimes against humanity and war crimes.<sup>37</sup> Human rights groups also point to the fact that none of the Sudanese governmental initiatives toward ending impunity for the accused thus far (including a national inquiry, investigatory committee, and the recently established tribunals) has resulted in the suspension, investigation, indictment, or prosecution of any mid to high-level civilian official, military commander, or militia leader.<sup>38</sup>

If, as the prosecutions continue, there is a pattern of indictments for only common law crimes such as murder (rather than war crimes) and only low-level perpetrators, the ICC would have ample grounds for prosecution. In fact, this would be the perfect case of complementary prosecutions, with Sudan prosecuting a lower-level tier of perpetrators and crimes, and the ICC prosecuting select individuals accused of grave atrocities. However, if the Sudanese courts begin to indict high-level officials or prosecute individuals for international crimes, the case for ICC jurisdiction would be more difficult. In this case, the Prosecutor would need to inspect procedural and institutional features of the national trials to ascertain whether they were conducted independently, impartially, in accordance with due process, and without undue delay, political interference, or the express purpose of shielding culpable individuals.

As this is the first case of a Security Council referral of an uncooperative non-State Party to the ICC, there is no case law on complementarity in practice. Further investigations by the Prosecutor as to the institutional and procedural features of the Sudanese courts and their trials are in order. Richard Dicker of Human Rights Watch noted, "[w]ith Darfur, the court has moved into the big league and now the burden is on the prosecutor to produce . . . Darfur certainly focuses attention in a way that the investigations in the Congo and Uganda have not."<sup>39</sup> Indeed, all eyes are on the Court.

#### Footnotes

1 Rome Statute of the International Criminal Court art. 13, July 17, 1998, U.N. Doc. A/CONF.183/9 [hereinafter Rome Statute].

2 See Press Release, Sudan Divestment Campaign, Senate Panel Clears Sudan Divestiture Bill (June 16, 2005), <http://www.sudandivestment.com/njleg.html> [hereinafter Sudan Divestment Press Release].

- 3 See, e.g., Taylor Maltz, Sudanese Genocide and Chinese Development, *Globe*, Oct. 2005, <http://www.gwias.com/globe/archive/000073.html>.
- 4 See Jeevan Vasagar & Ewen MacAskill, 180,000 Die from Hunger in Darfur, *Guardian Unlimited*, Mar. 16, 2005, <http://www.guardian.co.uk/Sudan/story/0,14658,1438471,00.html>.
- 5 See, e.g., Amnesty Int'l USA, Sudan: Human Rights Concerns, <http://www.amnestyusa.org/countries/sudan/index.do> (last visited Dec. 18, 2005).
- 6 See Glenn Kessler & Colum Lynch, U.S. Calls Killings in Darfur Genocide, *Wash. Post*, Sept. 10, 2004, at A1.
- 7 See Mass Rape Atrocity in Western Sudan, *BBC News*, Mar. 19, 2004, <http://news.bbc.co.uk/1/hi/world/africa/3549325.stm>
- 8 S.C. Res. 1564, U.N. Doc. S/RES/1564 (Sept. 18, 2004).
- 9 International Commission of Inquiry on Darfur, Report to the United Nations Secretary-General, 6, U.N. Doc. S/2006/60 (Jan. 31, 2005) [hereinafter Sudan Report].
- 10 *Id.*
- 11 S.C. Res. 1593, P 2, U.N. Doc. S/RES/1593 (Mar. 31, 2005).
- 12 *Id.*
- 13 SUDAN: Darfur War-Crime Suspects Won't Go to ICC, Government Says, *IRINnews.org*, Apr. 4, 2005, <http://www.irinnews.org/print.asp?ReportID=46436>.
- 14 SUDAN: National Courts to Try Suspects of War Crimes, *IRINnews.org*, June 15, 2005, <http://www.irinnews.org/report.asp?ReportID=47654> [hereinafter National Courts Article].
- 15 See Darfur: ICC Prosecutor Briefs Security Council, *Hum. Rts. News*, June 29, 2005, <http://hrw.org/english/docs/2005/06/29/sudan11233.htm> [hereinafter HRW Darfur Editorial].
- 16 See Sudan Divestment Press Release, *supra* note 2.
- 17 See National Courts Article, *supra* note 14.
- 18 Rome Statute, *supra* note 1, art. 13.
- 19 See Peter Apps, ICC Hopes for Uganda Trial in Six Months, Then Congo, *Global Pol'y F.*, Jan. 26, 2005, <http://www.globalpolicy.org/intljustice/icc/2005/0126ugandatrial.htm>.
- 20 Rome Statute, *supra* note 1.
- 21 *Id.* art. 1.
- 22 *Id.* pmbl.
- 23 *Id.* art. 17(1)(a)-(c), 20(3).
- 24 *Id.*
- 25 *Id.*
- 26 Mohamed El Zeidy, The Principle of Complementarity: A New Machinery To Implement International Criminal Law, 23 *Mich. J. Int'l L.* 869, 899-900 (2002).
- 27 Rome Statute, *supra* note 1, art. 17(2), 20(3).
- 28 *Id.* art. 17(3).

- 29 Sudan Report, *supra* note 9.
- 30 Article 19 of the Rome Statute allows both Sudan and any accused individuals to challenge the jurisdiction of the Court or the admissibility of the case on grounds referred to in article 17. Sudan has made declarations rejecting the Court, but whether Sudan has formally invoked complementarity in the method prescribed by the ICC Rules of Procedure and Evidence is unknown. Additionally, it is unclear which party would bear the burden of proving admissibility of the case.
- 31 Marlise Simons, Sudan Poses First Big Trial for World Criminal Court, N.Y. Times, Apr. 29, 2005, at A12 (quoting Antonio Cassese).
- 32 Richard Dicker of Human Rights Watch noted, "let's get real: the Sudanese authorities have shown no interest whatsoever in prosecuting those most responsible for the crimes in Darfur." HRW Darfur Editorial, *supra* note 15; see also Press Release, Amnesty Int'l, Sudan: National Court for Crimes in Darfur Lacks Credibility (June 13, 2005), available at [http:// web.amnesty.org/library/print/ENGAFR540592005](http://web.amnesty.org/library/print/ENGAFR540592005).
- 33 Sudan: Judiciary Challenges ICC over Darfur Cases, IRINnews.org, June 24, 2005, [http:// www.globalpolicy.org/intljustice/icc/2005/0624collaborate.htm](http://www.globalpolicy.org/intljustice/icc/2005/0624collaborate.htm).
- 34 In 2003, the ICC Office of the Prosecutor empanelled a group of experts to explore the principle of complementarity in practice. In an annex, the authors put forth a helpful list of indicators of "unwillingness" and "inability." See ICC Office of the Prosecutor, Informal Expert Paper: The Principle of Complementarity in Practice 28-31 (2003), available at [http:// www.icc-cpi.int/library/organs/otp/complementarity.pdf](http://www.icc-cpi.int/library/organs/otp/complementarity.pdf).
- 35 *Id.* at 29.
- 36 Amnesty Int'l, Sudan: Arming the Perpetrators of Grave Abuses in Darfur (2004), [http://web.amnesty.org/library/Index/ENGAFR541392004? open&of:ENG-2u6](http://web.amnesty.org/library/Index/ENGAFR541392004?open&of:ENG-2u6).
- 37 *Id.*
- 38 See Press Release, Human Rights Watch, U.N.: Put Sudan's Top Leaders on Sanctions List (Dec. 12, 2005), available at [http:// www.hrw.org/english/docs/2005/12/09/sudan12186.htm](http://www.hrw.org/english/docs/2005/12/09/sudan12186.htm).
- 39 Simons, *supra* note 31 (quoting Richard Dicker).

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