

## **The ICC's Involvement in the Situation in Darfur: Not a Threat to Peace**

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### **Introduction**

On March 31, 2005, the U.N. Security Council adopted Resolution 1593,<sup>1</sup> in light of findings of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur,<sup>2</sup> deciding to refer the situation in Darfur since July 1, 2002, to the Prosecutor of the International Criminal Court (ICC). The Resolution requires the Government of Sudan and all other parties to the conflict in Darfur to cooperate fully with, and provide any necessary assistance to the Court and the Prosecutor. For the Security Council, such a resolution represented a precedent in exercising its power of referral.<sup>3</sup>

On June 6, 2005, the Prosecutor of the ICC announced he was opening investigations into the events in Darfur. These led to the indictment of two high-level

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<sup>1</sup> S.C. Res. 1593, U.N. Doc. S/RES/1593 (31 March 2005).

<sup>2</sup> U.N. Secretary-General, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* 118 (January 25, 2005), U.N. Doc. S/2005/60 (1 February 2005).

<sup>3</sup> Julie B. Martin, *The International Criminal Court: Defining Complementarity and Divining Implications for the United States*, 4 *Loy. Int'l L. Rev.* 109 (2006).

Sudanese officials in 2007 against whom the ICC issued arrest warrants.<sup>4</sup> On July 14, 2008, the Prosecutor of the Court applied to the Court for a warrant of arrest against the Sudanese President, Al-Bashir, for aiding and abetting of crimes of genocide, crimes against humanity and war crimes in Darfur.<sup>5</sup>

Under President Al-Bashir, Sudan signed the Rome Statute on September 8, 2000, but has not yet ratified it. Based on that, the Sudanese government rejects the jurisdiction of the ICC arguing that Sudan is not a signatory to the Rome Statute<sup>6</sup>, and that Sudan's own judiciary has sole jurisdiction over crimes in Darfur, and is thus qualified and ready to try those accused of any violations there.<sup>7</sup> Some observers consider such outside involvement a breach of the principles of national sovereignty since the Sudan had not ratified the Rome Statute.<sup>8</sup>

This paper will first examine the principle argument put forth by the Sudanese Government, namely, that the ICC does not have jurisdiction over the situation in Darfur. The second section analyzes the grounds on which the Security Council relies for the referral of the situation of Darfur to the ICC and whether the ICC is the best mechanism to ensure accountability, while the final section is devoted to the effects of the ICC involvement on the peace process.

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<sup>4</sup> ICC, *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")* (2007), available at <http://www.icc-cpi.int/cases/Darfur/c0205.html>, [last accessed Dec. 05, 2008].

<sup>5</sup> ICC, *Prosecutor's Statement on the Prosecutor's Application for a warrant of Arrest under Article 58 Against Omar Hassan Ahmad AL BASHIR* (July, 2008), available at: <http://www.icc-cpi.int/library/organs/otp/ICC-OTP-ST20080714-ENG.pdf>, [last accessed Dec. 05, 2008].

<sup>6</sup> U.N. Doc., A/CONF.183/9 (17 July 1998). The Statute entered into force on 1 July 2002.

<sup>7</sup> Sudan Tribune, *Sudan rejects ICC jurisdiction, says one suspect held* (Feb. 27, 2007), available at: <http://www.sudantribune.com/spip.php?article20473>, [last update Nov. 21, 2008].

<sup>8</sup> Dr. Hassan Haj-Ali & Ibrahim Adam, *Illiquid, Toxic and Not an Asset: End the ICC's involvement in Sudan* (Oct. 5, 2008), available at: <http://www.ssrc.org/blogs/darfur/2008/10/05/illiquid-toxic-and-not-an-asset-end-the-icc%E2%80%99s-involvement-in-sudan/>, [last accessed Dec. 05, 2008].

## **The ICC Jurisdiction and the Sudanese Government's Argument**

### ***The Jurisdiction of the ICC***

The past century has witnessed many of the most serious atrocities in the history of humanity; these crimes had in many cases been committed with impunity. As a response, a number of states agreed in Rome upon the establishment of the ICC to achieve justice, end impunity, and to deter future crimes.<sup>9</sup> The Court came into force in 2002, and so far, 108 countries are States Parties to its Statute.<sup>10</sup> Since its establishment, the ICC has become engaged in only four situations: the Democratic Republic of Congo; Uganda; the Central African Republic; and Darfur.<sup>11</sup> The jurisdiction of the ICC is provided by the Rome Statute. It is limited to specific crimes committed by a specific category of legal persons.

### **Personal Jurisdiction**

According to Articles 1 and 26 of the Rome Statute, any individual above the age of 18, regardless of his or her official statute, official capacity as a head of state or government, either at the time of the commission of the offence or at the time of prosecution, may be brought before the ICC. An individual suspected of committing a crime of the ICC's jurisdiction must be either a national of a State Party to the Rome Statute, or the act for which they are being prosecuted must have been committed on the territory of a State Party.<sup>12</sup> However, the court can assert jurisdiction over crimes committed by an individual who is not a national of a State Party and when offences are committed in the territory of a non-State Party if the Security Council under Article 13(b)

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<sup>9</sup> Mark S. Ellis and Richard J. Goldstone, *The International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century* 7-13 (2008).

<sup>10</sup> ICC, *about the Court*, available at: <http://www.icc-cpi.int/about.html>, [last accessed Dec. 5, 2008].

<sup>11</sup> Ellis and Goldstone, *supra* note 9, at 4.

<sup>12</sup> Charles Villa-Vicencio and Erik Doxtader, *Pieces of the Puzzle: Keywords on Reconciliation and Transitional Justice* 80-82 (2004).

of the Rome Statute refers the matter to the court.<sup>13</sup> Hence, the referral of the Darfur Case to the ICC by the Security Council gives the ICC jurisdiction to try nationals of Sudan.

### **Subject-Matter Jurisdiction**

The Court has the competence to adjudge specific crimes, namely, those that are considered the most serious and affect the international community as a whole. It has jurisdiction with respect to the crimes of genocide, crimes against humanity, war crimes, and aggression.<sup>14</sup>

### **The Principle of Complementarity**

The complementarity principle, as a prerequisite to the ICC jurisdiction, is recognized in the Preamble and Article 1 of the Rome Statute. It explicitly states that the Court's jurisdiction shall be complementary to that of national jurisdictions.<sup>15</sup> The complementarity principle is one of the important distinctive features of the ICC to function as a court of last resort when national courts are unwilling or unable to genuinely conduct the investigation and prosecution process.<sup>16</sup> Under Article 17(3) of the Rome Statute, a state may be deemed unable to investigate or prosecute alleged crimes when "due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings." Article 7(2) of the Rome Statute, provides that a state may be able to investigate and to prosecute, but unwilling. Unwillingness of a state can be indicated if it "fails to conduct proceedings or obstructions of justice are carried out for the purpose of shielding individuals from prosecution by other tribunals; or where proceedings lack independence and impartiality, and are otherwise inconsistent with bringing an offender to justice; or that there is an

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<sup>13</sup> Ellis and Goldstone, *supra* note 9, at 249, 250.

<sup>14</sup> See *Article 5 of the Rome Statute*.

<sup>15</sup> Julie B. Martin, *The International Criminal Court: Defining Complementarity and Divining Implications for the United States*, 4 *Loy. Int'l L. Rev.* 108-109 (2006).

<sup>16</sup> Christopher D. Totten & Nicholas Tyler, *Arguing For An Integrated Approach To Resolving The Crisis In Darfur: The Challenges Of Complementarity, Enforcement, And Related Issues In The International Criminal Court*, 98 *J. Crim. L. & Criminology* 1080-1081 (2008).

unjustified delay in the proceedings evidencing a lack of intent to bring an offender to justice.”<sup>17</sup>

### ***Are Sudanese Courts Competent?***

As mentioned, the Rome Statute reminds states of their duty to exercise criminal jurisdiction over those responsible for committing genocide, war crimes, and crimes against humanity, and that a case is inadmissible before the court if national courts have the ability and the willingness to investigate and prosecute. Thus if Sudan exercised its primary responsibility to investigate and prosecute international crimes committed in its territory by competent courts it would preclude the ICC from exercising jurisdiction. Sudan claims to be doing so and has opposed ICC’s jurisdiction on those grounds. The question therefore as to whether Sudan is willing and able to investigate the crimes in Darfur arises.

### **The Sudan Government’s Willingness to Investigate and Prosecute**

The Sudanese Government has been requested by the international community to address the situation in Darfur many times in order to put an end to the atrocities and to combat impunity by bringing the perpetrators to justice.<sup>18</sup> But the Government has, despite massive evidence to the contrary, maintained and persistently tried to convince the international community that there were no widespread or systematic crimes being committed in Darfur. In May, 2004, President Al-Bashir established the National Commission of Inquiry to investigate crimes committed in the Darfur conflict.<sup>19</sup> The Commission concluded that the crimes committed in Darfur were due to tribal conflicts and rebel activities, and were not as grave or widespread and systematic as the crimes covered by the Rome Statute.<sup>20</sup> This was refuted in January, 2005, just days after the

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<sup>17</sup> Martin, *supra* note 15, at 113.

<sup>18</sup> U.N. Secretary-General, *Report of the International Commission of Inquiry on Darfur*, *supra*, note 2

<sup>19</sup> Martin, *supra* note 15, at 112.

<sup>20</sup> U.N. Secretary-General, *Report of the International Commission of Inquiry on Darfur*, *supra*, note 2 at 115-117.

National Commission published its report by the International Commission of Inquiry on Darfur which declared in their report the existence of widespread and grave crimes in Darfur.<sup>21</sup> The International Commission asserted that the Report of the National Commission lacked impartiality because the Commission was working under great pressure to approve the Sudanese Government's claims. This illustrates the impossibility for a national body under the current circumstances in Sudan to provide the truth about how the situation in Darfur is.<sup>22</sup>

In addition, the U.N. Security Council issued many resolutions in 2004 calling on the Sudanese Government to take steps to end the violence and human rights violations in Darfur and bring to justice *janjaweed* militia leaders and their associates who have been accused of human rights and international humanitarian law violations as well as other atrocities.<sup>23</sup> Sudanese officials in many occasions declared that the domestic courts would prosecute the perpetrators, yet in reality, no concrete actions were taken. Instead, members of the *janjaweed* have quietly been incorporated into regular police forces, the army, and the popular defense forces.<sup>24</sup> Even in the few occasions where courts prosecuted some officials, impunity remained a serious problem because when they are convicted, amnesty is often granted by a presidential decree<sup>25</sup> - Presidential Decree No. 114 of 11<sup>th</sup> June 2006 for instance, declared a general amnesty that grants immunity from domestic criminal prosecution to the movements that supported and signed the Darfur Peace Agreement.<sup>26</sup>

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21 *Id.* at 158-159.

22 *Id.* at 118.

23 See for example *Resolution 1556* (2004), S.C. Res. 1556, U.N. Doc. S/RES/1556 (2004) (July 30, 2004), *Resolution 1564* (2004), S.C. Res. 1564, U.N. Doc. S/RES/1564 (2004) (Sep.18, 2004), and *Resolution 1574* (2004) S.C. Res. 1574, U.N. Doc. S/RES/1574 (2004) (Nov.19, 2004).

24 Human Rights Watch, *Country Summary: Sudan* (Jan., 2005), available at: <http://www.hrw.org/legacy/wr2k5/pdf/sudan.pdf>, [last accessed Nov. 15, 2008].

25 U.S. Department of State, "*Country Reports on Human Rights Practices*" *Sudan*, 2006, Released by the Bureau of Democracy, Human Rights, and Labor, US Department of State (March 6, 2007), available at: <http://www.state.gov/g/drl/rls/hrrpt/2006/78759.htm>, [last accessed Dec. 3, 2008].

26 Human Rights Committee, *List Of Issues To Be Taken Up In Connection With The Consideration Of The Third Periodic Report Of The Sudan*, U.N. Doc. CCPR/C/SDN/Q/3/CRP.2, p2 (9 May 2007) available at:

By June 2005, between 180,000 and 300,000 people had been killed and a further 2.4 million made homeless in Darfur.<sup>27</sup> The Government however did not make any noteworthy steps to stop the violence or protect the lives and property of the victims. It has pursued its unwillingness to end the violence and bring perpetrators to justice even after the involvement of the ICC in Darfur. It not only refused to hand over the two indicted officials to the ICC, but also abstained from prosecuting them nationally. Instead, it granted one of them a promotion to a cabinet minister's position.<sup>28</sup> These factors together lead to a reasonable conclusion that the Sudanese Government is unwilling to address effectively the atrocities committed in Darfur by investigating and prosecuting perpetrators.

### **The Ability of the National Judicial System to Investigate and Prosecute**

As noted above, a state may be deemed unable to investigate or prosecute crimes when obstacles in its judicial system prevent it from carrying out the judicial process as a whole. In the Darfur case, two kinds of obstacles prevent the Sudanese judicial system from operating and function properly with regard to the crimes committed therein:

### **Lack of Judicial Independence**

Despite the fact that the constitution and the law in Sudan provide for an independent judiciary, the judiciary, in reality, is largely subservient to the regime.<sup>29</sup> Since 1958, the country's various military governments have routinely interfered with the

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[http://74.125.95.104/search?q=cache:mM9t\\_zL\\_hvoJ:www2.ohchr.org/english/bodies/hrc/docs/Advanc eDocs/ccpr\\_c\\_sdn\\_q3\\_en.pdf+Presidential+Decree+no.+114+sudan&hl=en&ct=clnk&cd=5&gl=us](http://74.125.95.104/search?q=cache:mM9t_zL_hvoJ:www2.ohchr.org/english/bodies/hrc/docs/Advanc eDocs/ccpr_c_sdn_q3_en.pdf+Presidential+Decree+no.+114+sudan&hl=en&ct=clnk&cd=5&gl=us)

<sup>27</sup> Sudan Tribune, *Sudan's own court for Darfur crimes to open Tuesday*, (June 13, 2005), available at: [http://www.sudantribune.com/spip.php?article10119&var\\_recherche=sudanese%20court](http://www.sudantribune.com/spip.php?article10119&var_recherche=sudanese%20court), [last update Dec. 3, 2008].

<sup>28</sup> Human Rights Watch, Sara Darehshori, *An ICC indictment of Sudan's president serves peace and justice*, (July, 2008), available at: <http://www.hrw.org/en/news/2008/07/14/doing-right-thing-darfur>, [last accessed Nov. 12, 2008].

<sup>29</sup> U.S. Department of State, *supra* note 25.

judicial process. For example, in July 1989, the RCC-NS<sup>30</sup> issued Decree No.(3), giving the president the power to appoint and dismiss all judges.<sup>31</sup> Under the authority of this decree, Al-Bashir exercised his power to dismiss judges who disagree with the Government from their positions.<sup>32</sup> In September 1990, Al-Bashir dismissed more than seventy judges. The effect of these actions was to make the judiciary responsible to the president.<sup>33</sup> This interference of the Government clearly illustrates its efforts to undermine the ability of the judiciary to operate independently. In the case of Darfur, where the Government has been implicated in the violations, the Government is even much more likely to interfere in any judicial attempts to redress the human rights violations.<sup>34</sup>

## Legal Obstacles

Most of the serious crimes which have been committed in Darfur are of an international character i.e., crimes against humanity and war crimes (excluding genocide which is not agreed upon).<sup>35</sup> The question thus arises whether the legal regime in Sudan has the capability to properly address such crimes? The answer to this question lies in a number of factors:

### *A Problematic Criminal Code*

The Criminal Act was issued in 1991 and is generally based on Islamic Law. In Chapter 14, it deals with crimes against human life and health, but it does not address the issue of crimes against humanity, genocide, or violations of international humanitarian

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<sup>30</sup> The Revolutionary Command Council for National Salvation: It is the top decision-making body of the state. Its chairman is Al- Bashir. More details are available at: <http://www.country-data.com/cgi-bin/query/r-13403.html>.

<sup>31</sup> Helen Chapin Metz, ed. *Sudan: A Country Study*. Washington: GPO for the Library of Congress, 1991. available at: <http://countrystudies.us/sudan/65.htm>

<sup>32</sup> Martin, *supra* note 15, at 111.

<sup>33</sup> Metz, *supra* note 31.

<sup>34</sup> Martin, *supra* note 15, at 111.

<sup>35</sup> U.N. Secretary-General, *Report of the International Commission of Inquiry on Darfur*, *supra* note 2, at 4.

law.<sup>36</sup> The absence of an explicit statutory basis, which sets out the elements of the crimes in domestic statutes raises a serious impediment; and it is unlikely that those responsible for the most serious violation of an international character in Darfur can be prosecuted in an appropriate manner under Sudanese law.

### *Immunity of Prosecution*

Many of the Sudanese laws protect Sudanese law enforcement officials from criminal prosecution<sup>37</sup> such as the members of the National Security Forces, police officers, and armed forces when they commit any crime connected with their official work.<sup>38</sup> The Criminal Code also provides immunity to subordinates in Article 11 if committing a crime complying with a superior order. It states that:

No act shall be deemed an offence if done by a person who is bound, or authorized to do it by law, or by a legal order issued from a competent authority, or who believes in good faith that he is bound or authorized so to do.

This status of the Sudanese laws creates “a climate of impunity” and makes accountability against such officials for the crimes they commit unachievable.<sup>39</sup>

### *The Absence of Principle of Command Responsibility*

The Sudanese Criminal Procedure Code does not recognize the principle of command responsibility.<sup>40</sup> Consequently, prosecuting superior commanders for crimes committed by their subordinates under their orders or policy would be problematic.

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<sup>36</sup> See *the Sudanese Criminal Code of 1991*, Arabic script, available at:

<http://www.lawsofsudan.net/modules.php?name=Content&pa=showpage&pid=3>

<sup>37</sup> Commission on Human Rights, *Report of the Special Rapporteur on the human rights situation in the Sudan*, U.N. Doc. E/CN.4/2006/111, p 15 (11 January 2006).

<sup>38</sup> See *the National Security Forces Act of 1999, the 1999 Police Forces Act, and the People's Armed Forces Act*. See also Report of the U.N. Secretary-General, *supra* note 28, at 113-114.

<sup>39</sup> Commission on Human Rights, *supra* note 37, at 15.

<sup>40</sup> *The Sudanese criminal procedure code*, Arabic script, available at:

<http://www.lawsofsudan.net/modules.php?name=Content&pa=showpage&pid=4>

## **The Complementarity Principle and the Special Criminal Court on the Events in Darfur**

As the UN Special Rapporteur on the Human Rights Situation in Darfur stated in her 2006 Report, “the most prominent accountability mechanism in Darfur was the Special Criminal Court on the Events in Darfur.”<sup>41</sup> On June 7, 2005, one day after the Prosecutor of the International Criminal Court announced he was opening investigations into the events in Darfur, the Sudanese Government set up the Special Criminal Court to try those accused of widespread crimes in the Darfur region and to demonstrate that the Government is able to handle prosecutions domestically.<sup>42</sup> Part II of the Warrant of Establishment of the Court gives it jurisdiction over Darfur and makes it competent to try the following:

“(a) Acts which constitute crimes under the Sudan Criminal Act and any other penal Acts;

(b) The criminal information submitted to it by the committee formed by the Minister of Justice (by order No 3/2005 dated 19.1.2005) to investigate into the alleged contraventions stated in the report of the fact – finding Committee;

(c) Any other criminal information under any other law in accordance with a decision made by the Chief Justice.”<sup>43</sup>

On November 10, 2005, the Chief Justice issued a decree amending the subject matter jurisdiction of the Court - extending it to include crimes under international

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<sup>41</sup> Commission of Human Rights, *supra* note 37, at 14.

<sup>42</sup> Human Rights Watch, *Lack of Conviction, The Special Criminal Court on the Events in Darfur, A Human Rights Watch Briefing Paper*, 1 (June, 2006), available at: <http://www.hrw.org/backgrounder/ij/sudan0606/sudan0606.pdf>

<sup>43</sup> The Warrant of Establishment of the Criminal Court for the Trial of the Crimes Committed in Darfur, (June 7, 2005), available at: <http://www.sudanjudiciary.org/newse/news.php?id=8>

humanitarian law.<sup>44</sup> The Government considers the court a substitute to an international criminal court aimed at divesting the ICC of jurisdiction<sup>45</sup> under the complementarity principle.<sup>46</sup> On June 18, 2005, the Sudanese Special Court heard the first cases of people accused of committing crimes in the States of Darfur. These cases were of the 160 people that the Sudanese Government had indicated would be brought before the court.<sup>47</sup> After making judgments in only six low-level prosecutions, the Special Court was replaced with three special courts for the three regions of Darfur.<sup>48</sup> As of September 2008, none of the few cases that had been brought before these courts involved any high-ranking official perpetrators, nor did they include grave crimes - all the cases were of ordinary crimes committed by low-ranking individuals.<sup>49</sup> In addition, the Court lacked adequate resources for its proper functioning. For instance, in Southern Darfur, the Court had no administrative officer, registrar or clerk.<sup>50</sup> Considering the work that the Special Court has done, at least so far, it appears to be true that the Sudanese Government created this Court mainly to stave off the jurisdiction of the ICC over the situation in Darfur under the principle of complementarity.<sup>51</sup>

Given these facts about Sudanese courts and the Sudanese laws, it is unlikely that the jurisdiction of the ICC in Darfur can be supplanted by any of the Sudanese Courts without substantive legal and judicial reforms to address the above concerns.

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<sup>44</sup> Commission of Human Rights, *supra* note 37, at 14.

<sup>45</sup> Sudan Tribune, *supra* note 27.

<sup>46</sup> Totten & Tyler, *supra* note 16, at 1095.

<sup>47</sup> Irin, *Sudan: Judiciary challenges ICC over Darfur cases*, (June 24, 2005), available at: <http://www.irinnews.org/report.aspx?reportid=55068>, last visit 11-21-2008.

<sup>48</sup> Totten & Tyler, *supra* note 16, at 1096.

<sup>49</sup> Human Rights Watch, *African Union: Don't Trade Away Justice in Darfur*, (September 22, 2008), available at: <http://www.hrw.org/en/news/2008/09/22/african-union-don-t-trade-away-justice-darfur>, [last accessed Dec. 2, 2008].

<sup>50</sup> Commission of Human Rights, *supra* note 37, at 15.

<sup>51</sup> Human Rights Watch, *supra* note 42, at 1.

## UN Security Council Referral of the Situation to the ICC

### *A Threat to Peace and Security*

On July 30, 2004, the U.N. Security Council (UNSC) acting under Chapter VII of the U.N. Charter<sup>52</sup> adopted Resolution 1556, determining that the situation in Darfur “constitutes a threat to international peace and security and to stability in the region,” and accordingly demanded that the Sudanese Government “disarm the Janjaweed militias” and bring those responsible for atrocities to justice.<sup>53</sup> Two months later, the UNSC adopted Resolution 1574 demanding that all the parties to the conflict “cease all violence.”<sup>54</sup> Pursuant to Resolution 1564,<sup>55</sup> the U.N. Secretary-General established the International Commission of Inquiry on Darfur to “investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, ... and to identify the perpetrators of such violations with a view to ensure that those responsible are held accountable”. The Commission of Inquiry carried out its mandate and issued a report concluding that none of the parties to the conflict made any concrete step(s) towards ensuring peace and justice as required by the UNSC’s Resolutions and that instead, human life and human dignity were still being attacked everyday and “on so large a scale.”<sup>56</sup>

The continuous non-cooperation of the Sudanese Government was also indicated in two meetings of the Peace and Security Council of the African Union, on July 21, 2008, and on July 14, 2008. The Peace and Security Council of the African Union (AU) then urged, “once again”, the Government of the Sudan to take immediate and concrete steps

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<sup>52</sup> United Nations, *Charter of the United Nations*, 24 October 1945. 1 UNTS XVI.

<sup>53</sup> S.C. Res. 1556, U.N. Doc. S/RES/1556 (2004) (July 30, 2004)

<sup>54</sup> S.C. Res. 1574, U.N. Doc. S/RES/1574 (2004) (Nov.19, 2004)

<sup>55</sup> S.C. Res. 1564, U.N. Doc. S/RES/1564 (2004) (Sep.18, 2004)

<sup>56</sup> U.N. Secretary-General, *Report of the International Commission of Inquiry on Darfur*, *supra* note 2, at 144-145.

to investigate human rights violations in Darfur and to bring to justice the perpetrators.<sup>57</sup> As previously mentioned, the situation in Darfur was being aggravated daily and no proportional remedial action was being taken by any of the parties (rebels or the Sudan Government). The result was (and still remains) that more atrocities were being committed with impunity - innocent people were being killed, properties destroyed and many people displaced from their homes into displacement camps under deplorable conditions. In response, the UNSC, in Resolution 1593, determined that the “situation in Sudan continues to constitute a threat to international peace and security,” and it warranted UNSC intervention to exercise its power and decide what proper measures should be taken to maintain peace and security.<sup>58</sup> The UNSC took one such measure and referred the situation in Darfur to the ICC.

### ***Is the ICC the Best Mechanism to Ensure Accountability in Darfur?***

It is unarguable that domestic courts should operate as “the first line of defense” in addressing human rights violations in a country. However, when domestic prosecution is impossible or confronted by difficulties and fair trial is frustrated, and where the need for establishing international peace and security is paramount, alternative mechanisms to national prosecution on the international level are necessary. Recent models of the international criminal prosecutions are represented either by the ICC or by ad hoc tribunals.<sup>59</sup>

As previously discussed, serious obstacles confront the Sudanese national courts, making them unable to try individuals for human rights violations, particularly grave violations committed by high-ranking members of the government.<sup>60</sup> Taking into account the gravity of the violations being committed and the challenges of the national court

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<sup>57</sup> African Union, Peace and Security Council, 151st Meeting, (Sep. 22, 2008), New York, PSC/MIN/Comm.1(CLI), available at: [http://www.africa-union.org/root/au/Conferences/2008/september/psc/Sudan%20Comm%20\(Eng\).pdf](http://www.africa-union.org/root/au/Conferences/2008/september/psc/Sudan%20Comm%20(Eng).pdf)

<sup>58</sup> U.N. Secretary-General, *Report of the International Commission of Inquiry on Darfur*, *supra* note 2 at 5.

<sup>59</sup> Rosanna Lipscomb, *Restructuring The ICC Framework To Advance Transitional Justice: A Search For A Permanent Solution In Sudan*, 106 *Colum. L. Rev.* 183 (January, 2006).

<sup>60</sup> Totten & Tyler, *supra* note 16, at 1102.

system, an urgent substitute mechanism for prosecution is vital. There have been many arguments about what the most effective channels for dealing with the crimes committed in Darfur are. While some see the ICC as the best mechanism and the “only credible way” to ensure justice and deal with the most culpable criminals in Darfur in the absence of competent national courts, others criticize the involvement of the ICC suggesting an international criminal tribunal or a hybrid tribunal.<sup>61</sup> The United States, for instance, proposed that a new tribunal to operate for 3-5 years, renewable annually as needed, operating quickly in Tanzania sharing the infrastructure of the International Criminal Tribunal for Rwanda (ICTR), would be the most suitable mechanism to address the situation in Darfur. And unlike the ICC, it would have jurisdiction over serious crimes committed in Darfur before the ICC came to existence as well as after.<sup>62</sup> This proposal was criticized as not the best mechanism for ensuring justice in Darfur for two main reasons: First, that setting up a new tribunal is not an easy task. In addition to the fact that the ICTR’s infrastructure is not enough for the ICTR itself, a new tribunal would require a new beginning.<sup>63</sup> It would need an agreement as to its location, structure and organization. It also would require creating its statute; what crimes come under its jurisdiction and their definitions. Appointing judges, prosecutors, and administrative staff is also needed. In practical terms, this means massive delays – and that it would be years before the tribunal starts operations. Consequently, the more time the tribunal needs to get started, the more atrocities would take place.<sup>64</sup> Second, that creating a new tribunal from scratch would cost a huge amount of funds.<sup>65</sup>

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<sup>61</sup> U.N. Secretary-General, *supra* note 28, at 148-149.

<sup>62</sup> Human Rights Watch, *U.S. Proposal for a Darfur Tribunal: Not an Effective Option to Ensure Justice*, available at: <http://hrw.org/english/docs/2005/02/15/sudan10179.htm>, [last accessed Dec. 3, 2008].

<sup>63</sup> Joanne Mariner, *Deadly Delay on Darfur* (Feb. 02, 2005), available at: <http://writ.news.findlaw.com/mariner/20050202.html>, [last accessed Dec. 3, 2008].

<sup>64</sup> Citizens for Global Solutions, *Options for Accountability in Sudan: Those Responsible for the Atrocities in Darfur Should be Prosecuted 2* (January, 2005), available at: [http://oldsite.globalsolutions.org/programs/law\\_justice/icc/resources/Options\\_Accountability\\_Briefing\\_Jan05.pdf](http://oldsite.globalsolutions.org/programs/law_justice/icc/resources/Options_Accountability_Briefing_Jan05.pdf), [last accessed, 06-12-2008].

<sup>65</sup> Human Rights Watch, *supra* note 62.

The other previously suggested method is that of a hybrid tribunal i.e., a tribunal that includes elements of both international and national prosecution.<sup>66</sup> It is considered by some as the best way forward for ensuring accountability in Darfur, and since it involves some national judges, prosecutors and staff, it would be more attractive to the Government, and thus, it can ensure justice and bolster the rule of law.<sup>67</sup> The idea of a hybrid tribunal seems justifiable, but in addition to the obstacles in establishing a new tribunal, such tribunals rely mainly on the political will of the host country's government to support the tribunal and make real attempts to achieve accountability and justice.<sup>68</sup> The big challenge in the Darfur case against the establishment of a hybrid tribunal, like that in Sierra Leone,<sup>69</sup> is that the Sudanese domestic regime itself is implicated in the atrocities,<sup>70</sup> so its cooperation in establishing such a tribunal and bringing to justice perpetrators is highly questionable.<sup>71</sup>

By contrast, the difficulties confronting these options of accountability are non-existent in the ICC route. Firstly, the ICC is already set up and running. It has the benefit of experience, and has prosecuted crimes committed in other African countries. Secondly, the majority of atrocities against civilians took place in early 2003, i.e., not before the creation of the ICC. This means the ICC would have jurisdiction to prosecute the overwhelmingly serious violations,<sup>72</sup> let alone that the advantages of speed and staying power of the ICC outweigh any benefit of being able to potentially prosecute a small number of additional crimes" committed before the Rome Statute came into force.<sup>73</sup>

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<sup>66</sup> Lipscomb, *supra* note 59, at 184.

<sup>67</sup> *Id.* at 200.

<sup>68</sup> Citizens for Global Solutions, *supra* note 64, at 3.

<sup>69</sup> The hybrid tribunal in Sierra Leone is called the Special Court for Sierra Leone. It was set up jointly by an agreement between the U.N. and the Government of Sierra Leone concluded on January 16, 2002. It is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. See *the Special Court for Sierra Leone website* at: <http://www.sc-sl.org/>.

<sup>70</sup> Lipscomb, *supra* note 59, at 200.

<sup>71</sup> Richard Williamson, *The Collective International Responsibility to Protect: The Case of Darfur* 4 *Nw. U. J. Int'l Hum. Rts.* 125 (2005).

<sup>72</sup> Corrina Heyder, *The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status*, 24 *Berkeley J. Int'l L.* 653 (2006).

<sup>73</sup> Human Rights Watch, *supra* note 62.

Thirdly, the ICC has more credibility in that it was originally established to deal with grave violations such as those taking place in Darfur.<sup>74</sup>

In addition, the ICC under Article 3 of Rome Statute may sit in locations other than The Hague whenever it considers that desirable. This consideration will depend on the difficulties that might face the ICC in the prosecution process due to its location,<sup>75</sup> which indicates the possibility for the ICC to change its location for Darfur trials if justice requires so. The ICC as it is “predicated on retribution, deterrence, expressivism, and restorative justice,”<sup>76</sup> seems to be the best available mechanism to ensure justice and deal with the most culpable criminals in Darfur in the absence of a competent national court. It can function both as a criminal court ensuring accountability, as well as “an organ of international security meant to restore peace.”<sup>77</sup>

### ***The Role of National Courts***

Referral of the situation to the ICC does not preclude the pursuit of other transitional justice options for three main reasons. Firstly, the ICC’s jurisdiction is limited by its statute to genocide, war crimes, and crimes against humanity committed after the ICC came into force, which means there must be an additional mechanism to prosecute other violations committed before the ICC came into existence as well as prosecuting other crimes of lesser gravity, which do not come under the ICC’s jurisdiction.<sup>78</sup> Secondly, the total number of cases and suspected perpetrators that would be brought before the ICC will be limited by its Prosecutor’s own discretion who has stated that a guiding principle, consistent with that of other war crimes tribunals, is that the ICC will only try the “big

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<sup>74</sup> Citizens for Global Solutions, *supra* note 64, at 2.

<sup>75</sup> Lipscomb, *supra* note 59, at 207-208.

<sup>76</sup> Linda M. Keller, *Achieving Peace With Justice: The International Criminal Court And Ugandan Alternative Justice Mechanisms*, 23 *Conn. J. Int’l L.* 265 (2008).

<sup>77</sup> George P. Fletcher and Jens David Ohlin, *The ICC-Two Courts in One?*, *Journal of International Criminal Justice*, Volume 4, Number 3, p 432 (2006), available at: <http://jicj.oxfordjournals.org/cgi/reprint/4/3/428>, [last accessed Dec. 12, 2008].

<sup>78</sup> Ralph Henham, Paul Chalfont, Paul Behrens, *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (2007). See also *Article 5*, Rome Statute.

fish” of an atrocity.<sup>79</sup> The ICC prosecution, thus, will not include low-level perpetrators. Finally, the complementarity principle renders the ICC supplemental to domestic courts<sup>80</sup> so the ICC will continue having jurisdiction only insofar as domestic courts are unable or unwilling to prosecute crimes arising under the ICC’s jurisdiction.<sup>81</sup>

It is true that the gravity of violations in Darfur with which neither national courts nor domestic laws are familiar<sup>82</sup> and the failure of the Government to ensure accountability for major human rights violations<sup>83</sup> were what invoked an international action; however, the conflict cannot be isolated from its domestic context.<sup>84</sup> Given that the ICC is not “a supra-national legal institution”<sup>85</sup> and that it will not be able to prosecute the full range of crimes, the Sudanese national courts then are prompted to enhance their performance to take part in the prosecution of violation over which they have jurisdiction.<sup>86</sup>

### **The ICC and the Peace Process**

The involvement of the ICC in the situation of Darfur, and what followed in terms of arrest warrants against Sudanese officials and an application for an arrest warrant against President Al-Bashir, elicited a mixed range of responses, some advocate and welcome the actions while others condemned them. The most common reason for condemnation of

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<sup>79</sup> *Id.* at 53,54.

<sup>80</sup> Lipscomb, *supra* note 59, at 183.

<sup>81</sup> Henham, Chalfont & Behrens, *supra* note 78, at 54.

<sup>82</sup> U.N. Secretary-General, *supra* note 18, at 111-115.

<sup>83</sup> Commission of Human Rights, *supra* note 47, at 14.

<sup>84</sup> Oxford Transitional Justice Research Group, Naseem Badiy, *Ocampo v Bashir: The Perspective from Juba*, p2 (July 2998). Available at: [http://www.csls.ox.ac.uk/documents/Badiy\\_Final.pdf](http://www.csls.ox.ac.uk/documents/Badiy_Final.pdf), [last accessed Dec. 12, 2008].

<sup>85</sup> M. Cherif Bassiouni, *Where is the ICC Heading? The ICC-QuoVadis?*, *Journal of International Criminal Justice*, Volume 4, Number 3, p 422 (2006), available at: <http://jicj.oxfordjournals.org/cgi/reprint/4/3/421?maxtoshow=&HITS=10&hits=10&RESULTFORMA T=1&title=icc+&andorexacttitle=and&titleabstract=darfur&andorexacttitleabs=and&andorexactfulltext =and&searchid=1&FIRSTINDEX=0&sortspec=relevance&resourcetype=HWCIT>, [last accessed Dec. 10, 2008].

<sup>86</sup> Totten & Tyler, *supra* note 16, at 1100.

ICC's involvement is that it will undermine the ongoing peace processes in Sudan. We thus examine this claim more closely.

### ***Will ICC Involvement Undermine the Peace Process?***

Some critics have voiced reservations about the involvement of the ICC in the situation of Darfur, fearing that it would only aggravate matters for people on the ground, especially if the President Al-Bashir is indicted. People who may applaud such indictment could consequently provoke the Government to target them,<sup>87</sup> thus, further atrocities on civilians would take place, causing the security and the humanitarian situation to get worse, and the peace process to be damaged.<sup>88</sup> This is illustrated to some extent by the fact that the arrest warrants against two Sudanese officials (Ahmed Mohamed Haroun and Ali Mohamed 'Kushayb') in 2007 were angrily rejected by the Khartoum Government to the extent that one of them was promoted instead of being surrendered. It is predicted that a warrant against the Sudanese President would provoke an even angrier reaction and undermine peace and justice, as was seen in Zimbabwe, where, it is said, the more President Robert Mugabe is criticized, the more he refuses to cooperate.<sup>89</sup>

The Peace and Security Council of the African Union, at its meeting on July 21, 2008, in relation to the ICC application against President Al-Bashir, held that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace. It recognized that the involvement of the ICC and its possible approval "of the application by the ICC Prosecutor could seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur and the promotion of long-lasting peace and reconciliation in the Sudan as a whole and, as a

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<sup>87</sup> Stephanie Hanson, *Peace, Justice, and Darfur* (July, 2008), available at: [http://www.cfr.org/publication/16840/peace\\_justice\\_and\\_darfur.html](http://www.cfr.org/publication/16840/peace_justice_and_darfur.html), [last accessed Dec. 12, 2008].

<sup>88</sup> Phil Clark, *If Ocampo Indicts Bashir, Nothing May Happen*, Oxford Transitional Justice Research Group, p1 (July, 2008), available at: [http://www.csls.ox.ac.uk/documents/Clark\\_Final.pdf](http://www.csls.ox.ac.uk/documents/Clark_Final.pdf), [last accessed Dec. 12, 2008].

<sup>89</sup> Mary Harper, *What if Ocampo Indicts Bashir?*, (June, 2008), available at: <http://www.ssrc.org/blogs/darfur/2008/06/17/what-if-ocampo-indicts-bashir-3/>, [last accessed Dec. 12, 2008].

result, may lead to further suffering for the people of the Sudan and greater destabilization with far-reaching consequences for the country and the region.”<sup>90</sup>

In weighing this argument, it is worth mentioning that because of the lack of political will to engage in a significant peace process on the part of the Sudanese government, the peace process had been noticeably slow before the involvement of the ICC. For many years, the Sudanese Government denied the gravity of the crimes in Darfur and made access to humanitarian organizations very difficult, and has for years blocked the deployment of peacekeeping troops.<sup>91</sup> In fact, neither the arrest warrants nor the indictment of Al-Bashir had or would have any connection with the failure of peace talks.<sup>92</sup> Conversely, the involvement of the ICC will probably play a distinguished role in providing incentives to the parties of the conflict to work towards achieving peace where all other avenues have failed. If this does not prove to be the case, then the UN Security Council has the authority to decide upon proper measures to maintain peace and security.

### ***The ICC, Deterrence and Peace***

Contrary to the previous view, several human-rights activists believe that ICC indictments against high-level Sudanese officials, including the President, represent a huge step towards realizing human dignity, democracy and peace. It would demonstrate that the international community is actively fighting for human rights of victims and that it would bring to justice whoever is responsible and that there is no place for impunity

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<sup>90</sup> African Union, *supra* note 57.

<sup>91</sup> International federation for Human Rights, *The International Criminal Court and Darfur : Questions and Answers* (2008), available at: [http://www.fidh.org/IMG/pdf/FIDH\\_Q\\_A\\_Darfur\\_ENG.pdf](http://www.fidh.org/IMG/pdf/FIDH_Q_A_Darfur_ENG.pdf), [last accessed Dec. 13, 2008].

<sup>91</sup> Sudan Tribune, *Sudan rejects French proposal to extradite Darfur suspects*, (Aug. 8, 2008), available at: <http://www.sudantribune.com/spip.php?article28188>, [last accessed Dec. 12, 2008].

<sup>92</sup> Human Rights Watch, *Letter to Members of the Security Council*, written by: Richard Dicker, Georgette Gagnon , and Steve Crawshaw (Sep. 11, 2008), available at: [http://www.iccnw.org/documents/Security\\_Council\\_Article\\_16\\_letter\\_09.11.08.pdf](http://www.iccnw.org/documents/Security_Council_Article_16_letter_09.11.08.pdf), [last accessed Dec. 12, 2008].

even for heads of state.<sup>93</sup> Supporters of the move, like Save Darfur Coalition and Amnesty International assert that involvement of the ICC and the indictment of Al-Bashir can only assist the struggle for peace.<sup>94</sup> One important impact of the ICC involvement is that the threat of prosecution can have a “deterrent effect helping to save many lives,” and preventing “more Darfurians from losing their homes and livelihoods.”<sup>95</sup> History shows that ICC indictments exercise effective pressure over governments to promote peace as priority and “do not necessarily sabotage peace negotiations. The guerrillas in Uganda [for instance] did not pursue serious peace negotiations until *after* they were indicted.”<sup>96</sup> The arrest warrants issued against them created an incentive to reach a compromise where all other attempts had failed.<sup>97</sup> The deterrence effect is attainable, however, only where undesirable consequences are probable.<sup>98</sup> With respect to the Darfur Case, the threat of prosecution may have even a greater deterrent effect because it is against the Government itself, making it consider the position more carefully and the risk of losing its seat in power<sup>99</sup> in case it does not affect positive steps. One might argue that such threat cannot have a deterrent effect because the enforcement measures the ICC equipped with in the Rome Statute are not sufficient enough. This might, to some extent, be right in some cases but not Darfur’s where the situation was referred to the ICC by the Security Council acting under Chapter VII. This means, “the Court’s action can now be backed up by Chapter VII enforcement mechanisms, in case the relevant states fail to live up to their obligation to cooperate with the Court.”<sup>100</sup>

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<sup>93</sup> Alex de Waal, *Sudan and the International Criminal Court: a guide to the controversy* (July 14, 2008), available at: <http://www.opendemocracy.net/article/sudan-and-the-international-criminal-court-a-guide-to-the-controversy>, [last accessed Dec. 10, 2008].

<sup>94</sup> Haj-Ali & Adam, *supra* note 8.

<sup>95</sup> Georgette Gagnon, *The Collective International Responsibility to Protect: The Case of Darfur*, 4 *Nw. U. J. Int'l Hum. Rts.* 121 (2005).

<sup>96</sup> Douglass Cassel, *Pursuing Peace with Justice: Lessons from Uganda*, Worldview Commentary No. 247 on Chicago Public Radio, 91.5 FM WBEZ, (Oct. 5, 2006), available at: <http://www.chicagopublicradio.org/content.aspx?audioID=669>, [last accessed Dec. 14, 2008].

<sup>97</sup> Clark, *supra* note 88, at 15-19.

<sup>98</sup> *Id.* at 18-19.

<sup>99</sup> *Id.* at 17.

<sup>100</sup> Antonio Cassese, *Is the ICC Still Having Teething Problems?*, *Journal of International Criminal Justice*, Volume 4, Number 3, p 434 (2006), available at: <http://jicj.oxfordjournals.org/cgi/reprint/4/3/434?maxtoshow=&HITS=10&hits=10&RESULTFORMA>

Contrary to fears that the interference would worsen the situation on the ground, the involvement of the ICC, and more effectively, the application for arrest warrants against the Sudanese President seem to have prompted some regional actors to pay more attention to the situation in Darfur and support the peace process. The recent establishment of the African High-Level Panel to make recommendations to the AU Peace and Security Council on how best to address accountability, impunity and reconciliation issues in Darfur is an effort on the part of the AU to address the situation.<sup>101</sup> The AU's urge on July 21, 2008, as previously mentioned, to the Sudanese government on investigating human rights violations in Darfur without delay, and its plans to start investigating human rights violations with the Sudanese Government cooperation also are recent enhancements.<sup>102</sup> On another channel, the Arab League's proposal for Qatar to sponsor new peace talks is an important improvement immediately following the accusation of Al-Bashir.<sup>103</sup>

### ***Possibilities of a Suspension of ICC Indictments in the Interest of Peace***

#### **Security Council Deferral**

The involvement of the ICC, especially the announcement requesting the arrest of Al-Bashir has put intense pressure over the Sudanese Government to reconsider its obligation to safeguard peace and justice. Under Article 16 of the Rome Statute, the UN Security Council has the authority, under Chapter VII of the UN Charter, to suspend investigations or prosecutions held by the ICC for a period of 12 months renewable under the same conditions periodically. Therefore, it is likely that the Security Council might use its power to suspend the investigations if concrete steps, towards achieving peace and

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<sup>101</sup> AU Peace and Security Council, *142nd Meeting* (July 21, 2008), PSC/MIN/Comm(CXLII), available at: [http://www.iccnw.org/documents/AU\\_142-communicue-eng.pdf](http://www.iccnw.org/documents/AU_142-communicue-eng.pdf). [last accessed Dec. 14, 2008].

<sup>102</sup> Khartoum (AFP), *AU Recruiting Top Lawyers Over Sudan War Crimes Probe*, AFP, (Aug. 5, 2008), available at: <http://www.sudan.net/news/posted/16170.html>, [last accessed Dec. 14, 2008].

<sup>103</sup> Reuters, Andrew Heavens, *Darfur rebels to go to Qatar for peace consultation*, (18 Nov 2008), available at: <http://africa.reuters.com/top/news/usnJOE4AH05E.html>, [last updated Dec. 13, 2008].

mitigating the rigors of the status quo in Darfur, are taken. This incentive seems to have a strong effect on Sudanese Government policy and arguably, the Sudanese government is unlikely to aggravate the situation in Darfur since it has been actively seeking a suspension of the investigation.<sup>104</sup> The Sudanese Government has engaged in discussions with the major powers of the Security Council to explore the possibility of such a suspension. The dialogue has naturally included what would be required to support a deferral. France and Britain for example, have implied that they might accept suspension on imposed conditions.<sup>105</sup> The United States and other European countries said they are ready to have the indictment deferred if Khartoum changes its policies in Darfur.<sup>106</sup> A recent step taken by the President Al-Bashir towards improving the situation has been his announcement on an immediate ceasefire in the Darfur region, and the declaration that his government would start disarming militias and restrict the use of weapons among armed groups.<sup>107</sup> If the Government succeeds in a ceasefire and adopts the use of peace agreements, this would go some way towards persuading the Security Council under its peace and security mandate to put the ICC prosecution on hold to allow for the implementation of a peace deal.<sup>108</sup> This authority of the UN Security Council to delay prosecution was inserted in the Rome Statute to allow the Council to perform its Charter-mandated responsibilities for international peace and security objectives.<sup>109</sup> Nevertheless, it should be noted that such a suspension should be “a last resort”. It should not be decided unless a peace agreement is signed and that parties prove their good faith by

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<sup>104</sup> John Prendergast and Colin Thomas-Jensen, *Sudan: Opportunity in the Midst of Crisis* 2 (Sep. 2008), available at: <http://www.americanprogress.org/issues/2008/09/pdf/sudan.pdf>, [last accessed Dec. 10, 2008].

<sup>105</sup> Alex de Waal, *Khartoum Should Not Count On an Article 16 Deferral of the ICC* (2008), available at: <http://www.ssrc.org/blogs/darfur/2008/09/18/khartoum-should-not-count-on-an-article-16-deferral-of-the-icc/>, [last accessed Dec. 13, 2008].

<sup>106</sup> Peter Clotey, *Sudan Ready to Cooperate Without Preconditions Over ICC Warrant* (October 2008), available at: <http://www.voanews.com/english/archive/2008-10/2008-10-06-voa2.cfm?CFID=68166272&CFTOKEN=44147236>, [last accessed Dec 12, 2008].

<sup>107</sup> BBC News, *Sudan declares Darfur ceasefire* (Nov. 12, 2008), available at: <http://news.bbc.co.uk/2/hi/africa/7724220.stm>, [last updated on Nov. 12, 2008].

<sup>108</sup> Keller, *supra* note 76, at 242.

<sup>109</sup> David Scheffer, *The Security Council's Struggle over Darfur and International Justice* (Aug. 20, 2008), available at: <http://jurist.law.pitt.edu/forumy/2008/08/security-councils-struggle-over-darfur.php>, [last accessed Dec. 12, 2008].

implementing it.<sup>110</sup> While such a suspension may delay justice, it does not necessarily mean it would amount to a denial of justice;<sup>111</sup> it is just prioritizing stoppage of atrocities and ensuring peace for now.

### **Possible Suspension by the ICC Prosecutor**

Some commentators have interpreted Article 53 of the Rome Statute in a way that would allow for suspension of prosecution by the ICC Prosecutor<sup>112</sup> on the basis that although the main concern of the ICC prosecutor is to examine the evidence and pursue criminal prosecution,<sup>113</sup> Article 53 gives him a broader power that is not limited to only deciding not to pursue litigation where there is no sufficient basis for prosecution (for example, for lack of an adequate legal or factual basis,) but that he may also reconsider at “at any time, a decision whether to initiate/continue an investigation or prosecution based on new facts or information.” New facts or information can be, for instance, a peace agreement requiring promises of non-prosecution.”<sup>114</sup>

It is likely that the ICC will tend to preserve its legitimacy and credibility by not dropping the Darfur prosecutions, but at the same time, it would, in all likelihood, prefer not to be blamed for causing further death and atrocities.<sup>115</sup> In supporting this conclusion, the Chief Prosecutor of the ICC, at a meeting in May, 2008, hosted by Oxford Transitional Justice Research, announced that “the fundamental role of the ICC is to

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<sup>110</sup> Douglass Cassel, *supra* note 96.

<sup>111</sup> Bassiouni, *supra* note 85, at 422.

<sup>112</sup> Keller, *supra* note 76, at 250-251.

<sup>113</sup> Alex de Waal, *Sudan and the International Criminal Court: a guide to the controversy* (July 14, 2008), available at: <http://www.opendemocracy.net/article/sudan-and-the-international-criminal-court-a-guide-to-the-controversy>, [last accessed Dec. 10, 2008].

<sup>114</sup> Keller, *supra* note 76, at 250-251.

<sup>115</sup> *Id.*, at 212.

coordinate its activities with government and non-government actors in order to help end conflict” and that the ICC is just one piece of “the peacekeeping puzzle.”<sup>116</sup>

The involvement of the ICC in the situation in Darfur also gives an incentive to the Sudanese Government to initiate a serious reform of its laws and judicial system to prevent more interference by the ICC. Advancing the legal system could invoke the principle of complementarity to the extent that makes national courts a substitute to the ICC. If the national courts and the Government both become willing and able to genuinely investigate and prosecute accusations of atrocities,<sup>117</sup> the complementarity principle would come into play leading to a deferral of the prosecution to the Sudanese domestic courts.<sup>118</sup> And if that is achieved, it would constitute a success for the ICC<sup>119</sup> because it can be said that “the deterrence effect may flow not only from successful prosecutions but because powerful politicians are forced by international institutions to respond and change their behaviour.”<sup>120</sup>

## Conclusion

The referral of the Darfur situation reflects the extreme need for international justice when the national counterpart fails to play its role in ensuring peace and justice. Such a need however, must be limited in scope only to the extent necessary to fill the justice gap. The gravity of crimes being committed in Darfur, on one hand, and the inability of the Sudanese courts and laws to provide accountability, on the other hand, made the international action involving the ICC of utmost necessity and the ICC represents the best available and credible mechanism to ensure justice. However, in the event that the deterrence of the ICC results in a peace agreement, it would be of importance that either the UN Security Council or the ICC Prosecutor suspends the investigation to advance

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<sup>116</sup> Clark, *supra* note 88, at 2.

<sup>117</sup> Henham, Chalfont & Behrens, *supra* note 78, at 54 – 56.

<sup>118</sup> Totten & Tyler, *supra* note 16, at 1097-1098.

<sup>119</sup> Heyder, *supra* note 72, at 663.

<sup>120</sup> Sharath Srinivasan, *Dilemmas of Confrontation and Cooperation: Politics in Sudan During Ocampo v Bashir*, Oxford Transitional Justice Research Group, p3 (July 2008).

peace but such suspension should not amount to denial of justice to the victims and impunity but that justice could be achieved in a peaceful environment.