



Situation Report

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Sudan: What Implications for President Al-Bashir's Indictment by the ICC?

Executive Summary

- The conflict involving the government of Sudan and insurgents in Darfur stems mainly from the erosion of traditional mechanisms of peaceful settlement of disputes; the inadequacy of the alternative mechanisms; the marginalisation of the region; and the emergence of some Darfuri politicians who found the capability to organise themselves to challenge the central government to address these grievances.
- Although one can question the claim that genocide has been occurring in Darfur, there is abundant evidence that other crimes of grave concern to the international community and which are condemned and punishable by international law, including war crimes and crimes against humanity, have been committed in Darfur.
- The International Criminal Court (ICC) has jurisdiction over crimes committed in Sudan notwithstanding Khartoum's non-membership status in it, if we consider the trigger mechanisms of the Rome Statute (Art. 13) and the fact that it was the UN Security Council that referred the situation in Sudan to the ICC in accordance with these mechanisms.
- If gross violations of human rights that are committed during armed conflicts go unpunished, this might lead to a cycle of violence, as some victims, finding themselves in a position of power, might decide to take the law into their own hands, or some perpetrators, knowing that they will not be punished, might be encouraged to commit more crimes.
- Despite all this, given the situation on the ground in Darfur and the provisions of the Rome Statute with regard to the nexus between peace and justice, one could argue that the indictment of President Al-Bashir by the Prosecutor of the ICC was wrongly timed and that it can be seen as a mistake by the Prosecutor.
- Perhaps the best way out is for the judges of the ICC to withhold the issuance of the arrest warrant so that the threat of issuing it could be used to put more pressure on the Sudanese parties to move on the peace process. Another solution could be for the UN Security Council to invoke Article 16 of the Rome Statute and suspend the investigation for a period of 12 months renewable, as the African Union *rightly* requested in a communiqué of its Peace and Security Council.

Introduction

Whereas the 2005 Comprehensive Peace Agreement (CPA) to end Sudan's long civil war entered the mid-point of the six-year interim period in early July 2008, the Darfur crisis continued unabated and the peace process for Darfur had been almost at a dead-end since the signing of the Darfur Peace Agreement (DPA) in

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Abuja, Nigeria in May 2006. Moreover, although its force was building up, the deployment of troops of the African Union-United Nations Hybrid Operation in Darfur (UNAMID) was far from being complete, nor was it free from obstacles.

This notwithstanding, on 14 July 2008 the Prosecutor of the International Criminal Court (ICC) charged President Omar Hassan Al-Bashir, the President of the Republic of Sudan, with genocide, war crimes and crimes against humanity allegedly committed during the armed conflict in Darfur since July 2002.

Sudan has not ratified the Rome Statute of the ICC and does not officially recognise the Court's jurisdiction. It should be noted, however, that Sudan did send a delegation and participate in the discussions at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, held in Rome from 15 June to 17 July 1998, and did sign the Rome Statute on adoption in 1998.

President Al-Bashir's indictment by the Court has been received with mixed reactions around the world. Many have expressed fear that the move might have serious ramifications for the peace process in Darfur, and question its wisdom. Others, on the other hand, believe that it is indeed a good move that will render justice to the victims of the atrocities in Darfur, enhance the credibility of international justice, and force the Sudanese authorities to make genuine progress in the peace process.

For their part, and despite their public defiance and claims that they are not worried by the charges that they emphatically deny, the Sudanese authorities have engaged in relentless diplomatic manoeuvres to have the charges against President Al-Bashir dropped. These manoeuvres led the Arab League and the African Union – Sudan being a member of both – to condemn the move of the ICC and/or to request the United Nations to intervene with a view to at least suspending the proceedings of the Court, on the basis that its 'wrong timing' might not serve the interests of peace and that without peace, it might not serve the interests of victims or of justice either.

The delicacy of the problem stems from the apparent difficulty of prosecuting suspected criminals involved in an ongoing armed conflict who have not been defeated, and/or suspected criminals who still wield significant power and ability to spoil the peace process, without jeopardising that process. While the peace process in Darfur was almost dead at the time of the indictment of President Al-Bashir, efforts were being made to revive it; and, most important, President Al-Bashir was in power and could not be expected to sign a definitive peace agreement and/or voluntarily leave power with the ICC indictment hanging over his head. Yet, many instruments of international law call for the punishment of crimes such as genocide, war crimes and crimes against humanity, and the ICC was set up as a permanent international court – for the first time in human history – to act on the provisions of these international legal instruments. It is also widely believed that punishing the perpetrators of serious crimes committed during armed conflicts constitutes one of the essential measures to prevent such crimes being committed in the future, and, *ipso facto*, an effective post-conflict peace-building measure.

This Situation Report looks at this delicate issue with a view to identifying, at least, a few possible scenarios of how to deal with the matter under discussion. To do so, it first provides a brief overview of the conflict situation and the peace process in Darfur since that conflict began on a large scale in early 2003,¹ for this is important for understanding the fears that some have expressed about possible ramifications of the ICC's move on the ground in Darfur. It then, secondly, looks in some detail at the move by the Prosecutor of the ICC and puts this in its proper judicial and procedural contexts in light of the Rome Statute. As the Sudanese authorities deny the charges of the Prosecutor and maintain that the Court does not have any jurisdiction over Sudan because Khartoum has not ratified the Rome Statute, the third section ponders the issue of the ICC's jurisdiction over non-State Parties and Sudan in particular, and looks at the charges in question. The

fourth section provides an analysis of the moves by the African Union, with a view to establishing whether these are the appropriate moves capable of addressing the two main concerns in this issue: bringing about peace without condoning impunity.

Darfur (or Dar Fur, in the proper transliteration from Arabic) was an independent Sultanate (kingdom) until the British colonial army conquered it in 1916, defeating the army of Sultan Ali Dinar, a descendant of the 17th century founder of the Fur Sultanate, Suleiman Solong. Most recent works mention 1916 as the sole date at which Darfur was occupied. While that was the date of its 'effective' occupation by the British, the territory had been nominally annexed by Britain before, but it had remained virtually independent until the events of 1916.²

As de Waal notes, most of contemporary maps or descriptions of Darfur tend to divide the territory into well-defined tribal or ethnic domains. But these might be misleading, for the territory has such a long history of internal migration, mixing and intermarriage that ethnic boundaries are mostly a matter of convenience – if not, at times, of imagination. This said, the Fur people are the largest single ethnic group in the region, hence the name Dar Fur (meaning the Land of the Fur). With regard to religion, however, almost all the inhabitants of Darfur, be they Arab or, like the Fur, Zaghawa and Masaalit, non-Arab, are Muslim, and Arabic is the *lingua franca*.³

Although some are herders that occupy well-defined areas (such as the Baggara in southern Darfur), most Arab groups of the territory are nomadic or semi-nomadic, roaming over vast distances in search of grazing areas for their herds of cattle and/or camels. In contrast to this, but with some exceptions, most of non-Arab groups are sedentary farmers. Historically, these groups (including some within the same category of groups) have come into conflict over land, water or livestock, but these disputes were generally settled through traditional dispute settlement mechanisms overseen by paramount chiefs. This was so until Sudan became independent in 1956 and, one could argue, well into the post-independence years.⁴

But over the years, and particularly from the 1970s under the socialist government of Jaafar An-Nimeri, Khartoum began to introduce a number of administrative changes in Darfur – as elsewhere in the country – that eroded these traditional mechanisms of dispute settlement, as the government appointed officials who did not enjoy the same respect and credibility that local communities had for their traditional leaders. Moreover, these administrative changes led to some distortions in the power relations between the various groups of the territory, particularly after the partition of Darfur into three states, which led to a fragmentation of the collective power of some ethnic groups.

In addition to this, the successive leaders in Khartoum greatly neglected Darfur, like all the peripheral regions of the country, and focused almost all their attention on Khartoum and its environs.⁵ Increased desertification and drought in the 1970s and 1980s resulted in high rates of mortality in the region and loss of livelihood for both agriculturists and nomads, leading to increasingly land-related conflicts.⁶ As the government was busy fighting a war with the Sudan People's Liberation Army (SPLA) in the South, and Darfur was in the periphery that did not matter much in Khartoum, attempts by the government to mediate the conflicts in the three states of Darfur did not produce any lasting peace. And this fuelled perceptions among Darfuris that the authorities in Khartoum did not take their needs seriously. Thus, the fighting intensified in the mid- to late 1990s.

It was against this backdrop that two rebel movements began to organise in 2001/2 and eventually launched their first noticeable attacks in February 2003. These are the Darfur Liberation Front (renamed in early 2003 as the Sudan Liberation Army, SLA) and the Justice and Equality Movement (JEM). The two rebel movements drew most of their members and support base from the non-Arab Fur, Zaghawa and Masaalit ethnic groups. While the two movements seem to differ in their political philosophies, they both declare that their struggle is aimed

at ending the economic and political marginalisation of Darfur.⁷ Several other insurgent groups have emerged as well and the rebels' disunity complicates peace efforts.

One could argue that the conflict in Darfur stems mainly from the erosion of traditional mechanisms of peaceful settlements of disputes; the inadequacy of alternative mechanisms introduced by the central government to deal with these disputes; the marginalisation of the region, in common with other peripheral regions of the country; and the emergence of some Darfuri politicians – inspired by the experience of SPLA in the South – who found the capability to organise themselves to challenge the central government to address these grievances. Of course one should not be so naïve as to believe that all the rebel leaders or elements are solely motivated by these grievances and that they do not have their own personal agendas.

Still engaged with the SPLA in the South, and rather surprised by the coherent and fierce nature of the Darfur rebel attacks, the central government in Khartoum 'sub-contracted' the counter-insurgency war to local Arab militias called *Janjaweed* – 'outlaws on camelback', as Alhagi Marong rightly translates it.⁸

The ensuing war between government forces and these two rebel movements has had serious effects on the civilian populations of Darfur, with many horrendous crimes committed against them, including mass killings, rape, destruction of their property and livelihood and the displacement of hundreds of thousands. This massive suffering of civilian populations led in late 2003 and early 2004 to claims of genocide and ethnic cleansing allegedly perpetrated by the Sudanese government and its allied militias.⁹ For example, in an address to the UN General Assembly in September 2004, US President George W. Bush adopted the genocide claim and called for the establishment of a special court to try those Sudanese officials suspected of involvement in these alleged crimes.¹⁰

In view of this situation, the African Union deployed the African Union Mission in Sudan (AMIS) in 2004 to protect the civilians and complement the political dialogue between the Sudanese parties. It was agreed in late 2006 that the mandate of this force should be transferred to a hybrid AU-UN force, and this force was authorised to deploy in 2007 under the name of African Union-United Nations Hybrid Operation in Darfur (UNAMID). The AMIS failed in its mission, and UNAMID encountered difficulties of many kinds, including technical and political problems with its deployment, which officially took effect on 1 January 2008.¹¹

The UN Security Council also set up an International Commission of Inquiry on Darfur in 2004 'to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties'; 'to determine also whether or not acts of genocide have occurred'; and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.¹²

The Commission submitted its report to the Secretary-General on 25 January 2005 and concluded that although it could not substantiate genocide claims, many other crimes of grave concern to the international community, such as war crimes and crimes against humanity, had been committed in Darfur. It thus recommended 'that the Security Council should refer the situation in Darfur to the International Criminal Court, pursuant to Article 13(b) of the Statute of the Court'. It added in its recommendations that 'many of the alleged crimes documented in Darfur have been widespread and systematic. [Their nature and gravity meet] all the [admissibility] thresholds of the Rome Statute for the International Criminal Court. The Sudanese justice system has demonstrated its inability and unwillingness to investigate and prosecute the perpetrators of these crimes.'¹³

In the meantime, delegations of Darfuri armed groups and of the Sudanese government met in the Nigerian capital, Abuja and adopted the Darfur Peace Agreement (DPA) on 5 May 2006. This accord sought to have the parties commit themselves to power sharing, wealth sharing, a comprehensive ceasefire and a

political dialogue between Darfuri parties called the Darfur-Darfur Dialogue and Consultation (DDDC). But this agreement has not been effective, partly because of the refusal of some rebel movements to sign it. Instead, attacks continued on the ground in a flagrant violation of the spirit of the DPA. So much so that the Peace and Security Council of the African Union (PSC-AU), at its 75th meeting held on 4–5 April 2007, almost a year after the partial signing of the accord, expressed 'its profound concern at the prevailing security situation in Darfur'. The Council strongly condemned 'the violations of the ceasefire and other acts of violence and banditry, in total disregard of the agreements signed by the Sudanese parties and the basic norms of international humanitarian law'.¹⁴ It can be argued that the DPA was almost dead by July 2008 when the Prosecutor of the ICC indicted President Al-Bashir, although efforts were being made, particularly by the AU, to revive the peace process.

It was on the basis of the recommendations of the International Commission of Inquiry on Darfur that the UN Security Council, acting under Chapter VII of the UN charter, passed Resolution 1593 (2005) of 31 March 2005 in which it decided to 'refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court'. It then invited the latter to inform the Council within three months of the adoption of this resolution, and every six months thereafter, of actions taken by his office pursuant to this resolution.

On 6 June 2005 Luis Moreno-Ocampo, the Prosecutor of the ICC, announced his decision to open an investigation into the situation in Darfur and began submitting periodic reports to the Security Council, as the latter had requested. On 27 February 2007 he indicted two Sudanese officials, Ahmed Harun, the then Minister of State for Internal Affairs, and Ali Mohamed Ali Abdel-Rahman, also known as Ali Kushayb. He charged each of them with 51 counts of war crimes and crimes against humanity that they allegedly committed in Darfur since 2003. He made a request to the Pre-Trial Chamber of the ICC for the issuance of arrest warrants against them, and the three judges of the Pre-Trial Chamber issued warrants on 27 April 2007. But at the time this report was completed, the two Sudanese officials had still not been arrested or appeared before the ICC.¹⁵

Then the Prosecutor of the ICC went further to indict, on 14 July 2008, the Sudanese head of state, President Omar Hassan Al-Bashir. In his submission to the Pre-Trial judges, the Prosecutor accused the Sudanese leader of the crime of genocide, crimes against humanity and war crimes in Darfur since July 2002. He thus requested the judges to issue an arrest warrant against President Al-Bashir on the ground that the Sudanese leader

bears criminal responsibility for the crime of genocide under Article 6 (a) of the Rome Statute, killing members of the Fur, Masalit [sic] and Zaghawa ethnic groups . . . , (b) causing serious bodily or mental harm to members of those groups, and (c) deliberately inflicting on those groups conditions of life calculated to bring about their physical destruction in part; for crimes against humanity under Article 7 (1) of the Statute, committed as part of a widespread and systematic attack directed against the civilian population of Darfur with knowledge of the attack, the acts of (a) murder, (b) extermination, (d) forcible transfer of the population, (f) torture, and (g) rapes; and for war crimes under Article 8 (2)(e)(i) of the Statute, for intentionally directing attacks against the civilian population as such, and (v) pillaging a town or place.

For a better understanding of this process and some arguments against the decision of the Prosecutor, it is important to look at the procedures of ICC investigation and prosecution as laid down by Article 53 of the Rome Statute. The first paragraph of this article of the Statute sets out three conditions for the initiation of an investigation by the Prosecutor, which should also partly guide the decision of the judges to issue arrest warrants against a suspect:

- The information at the disposal of the Prosecutor should provide a reasonable basis to believe that a crime within the jurisdiction of the Court (i.e. war crimes, crimes against humanity, and genocide) has been or is being committed;

- The case has not been nor is being investigated or prosecuted by another judicial entity in accordance with acceptable international legal standards;
- The gravity of the crime, the interests of victims, and the absence of reasonable grounds to believe that an investigation or prosecution would not serve ‘the interests of justice’, must all be taken into account.

When the prosecutor initiates and concludes an investigation having satisfied himself that the case fulfils these conditions, he may then present his evidence to the Pre-Trial Chamber, requesting a summons or a warrant of arrest against the accused, whichever is the best manner to ensure his or her appearance in court. This is what the Prosecutor did on 14 July with regard to President Al-Bashir, asking for the issuance of an arrest warrant against the Sudanese leader.

From that point, he put the matter in the hands of the judges of the Pre-Trial Chamber to scrutinise his evidence and decide whether or not to issue the warrant he requested. In examination of the evidence provided by the Prosecution and before deciding whether or not to authorise issuance of the warrant, judges are required by Article 58 (1) to satisfy themselves with two conditions. First, that there are reasonable grounds to believe that the accused, in this case President Al-Bashir, has committed the crimes that the Prosecution alleges, or some of them, and that these crimes are admissible under its jurisdiction; secondly, that ‘the arrest of the person appears necessary’. The need for an arrest should be based on at least one of three considerations: a) to ensure the appearance of the accused in court; b) to ensure that he does not obstruct or endanger the investigation or the court proceedings; or c) to prevent him, where applicable, from continuing with the commission of the crimes in question or related crimes that are under the jurisdiction of the Court.

This process should have begun from the date the Prosecutor made the request, but it could take months. The judges had not made a decision by the time this report was completed. Although the proper legal evaluation of the Prosecution’s request is the task of the judges of the ICC Pre-Trial Chamber, the next section will attempt to analyse the submission against the arguments of the Sudanese authorities that the ICC does not have jurisdiction over Sudan and that, in any case, the charges are not founded.

As noted above, Sudan is not a State Party to the ICC because it has not ratified the Rome Statute. As of 15 August 2008, only 106 countries had ratified the Statute, of which 30 were from Africa, constituting about 56 per cent of the AU membership.¹⁷ But does this mean that the ICC does not have jurisdiction over Sudan and other countries that are not State Parties to the Rome Treaty?

In normal circumstances, the ICC cannot exercise its jurisdiction over non-state parties like Sudan that have not ratified its statute. It is true that Article 4 of the Rome Statute gives the Court an international legal personality with the authority to exercise its functions and powers on the territory of any State Party or, by special agreement, on the territory of any other state. But Articles 34–37 of the 1969 Vienna Convention on the Law of Treaties (VCLT) exempt third parties (non-signatory parties) from any obligations or rights arising from treaties that they have not ratified, unless they expressly accept this obligation in writing. Article 35 of the Convention states this explicitly, even if the parties to the treaty intended some of its provisions to apply to third parties.

However, given Sudan’s membership of the UN, if we consider the Charter of the UN and the close relationship between the ICC and the UN, particularly through the October 2004 agreement, it can be argued that the Court can indirectly exercise its jurisdiction over Sudan if the UN Security Council refers Sudan to it. There are three trigger mechanisms for the referral of situations and cases to the ICC according to the Rome Statute. One of those is Security Council referral.¹⁸ Article 13 (b) of the Rome Statute entrusts the Security Council of the UN with the power to refer to the Prosecutor of the ICC any crimes falling under the Court’s jurisdiction, regardless of the status of the country that has jurisdiction over that

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crime. This means that the Council can refer situations arising in any country, regardless of that country's membership or non-membership of the ICC. The Council shall do this by passing a resolution under chapter VII of the UN Charter.

It was indeed the Security Council, acting under this provision of the Rome Statute, that referred the situation of Sudan to the Prosecutor of the ICC in its Resolution 1593 (2005) of 31 March 2005. But given that the Security Council was only able to refer the situation in Sudan to the ICC thanks to this provision of the Rome Statute to which Sudan is not a party, the question may arise of why Sudan should be bound by that referral.

This makes it important to establish whether there is a binding link, even indirect, between Sudan and this provision of the Rome Statute. For that purpose, it is worth noting that Article 2 of the Rome Statute stipulates that 'the Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties'. On 9 December 2003, the 72nd plenary meeting of the 58th session of the General Assembly of the UN, where Sudan is represented, passed Resolution 58/79 expressing its appreciation for the UN Secretary-General 'for providing effective and efficient assistance in the establishment of the International Criminal Court'. It then invited the Secretary-General to 'take steps to conclude a relationship agreement between the United Nations and the International Criminal Court and to submit the negotiated draft agreement to the General Assembly for approval'.¹⁹

The President of the ICC, Philippe Kirsch, and the Secretary-General of the UN, Kofi Annan, each representing his institution, finally signed this agreement on 4 October 2004.²⁰ This came after both the Assembly of States Parties of the ICC and the General Assembly of the UN had approved the draft agreement, respectively on 7 and 13 September 2004.²¹ Article 2(3) of this Agreement commits both the UN and the ICC to respect each other's status and mandate. One could therefore argue that all member states of the UN are bound by this agreement, which obligates them to respect the provisions of the Rome Statute. While this Agreement does not establish a direct ICC jurisdiction over UN members, it implies the acceptance, by the UN, of the provisions of Article 13(2) of the Rome Statute. Should the UN Security Council therefore refer to the ICC the situation arising from events in a member state, such as Sudan, in accordance with this prerogative it has accepted in the Rome Statute, that state has to respect and abide by that referral because of its membership of the UN.

Thus, one could argue that the Prosecutor of the ICC acted lawfully and in accordance with his powers within the Rome Statute when he initiated investigations into alleged crimes in Sudan after the UN Security Council referred the situation of Sudan to the Court. Sudan may not have any convincing argument to contest the legality of the process initiated by the Prosecutor. Of course one can criticise the ICC for having such a discriminatory provision in the Rome Statute, given that it exempts the three veto wielding powers on the Security Council which have not accepted the Statute (China, Russia and the US) from any possible referral to the ICC unless they accept this, which is inconceivable.²² But this is a totally different matter that can only be addressed through an amendment of the Rome Statute.²³

With the question of the overall jurisdiction resolved, one has to look now at the issue of admissibility of the crimes that the Prosecutor of the ICC alleges to have been committed in Sudan, in terms of Article 17 of the Rome Statute. As noted above, in his submission of 14 July 2008 to the judges of the Pre-Trial Chamber, the ICC Prosecutor claimed that he had compelling evidence that President Al-Bashir committed all the three kinds of crimes contained in Article 5 of the Rome Statute, and that the accused was criminally responsible for them.

It is possible to question or doubt the commission of some of these crimes in Darfur, particularly the genocide charge. First, the International Commission of Inquiry on Darfur, set up by the UN Security Council in 2004, did not make a case for this in its report, which forms one of the main sources of the Prosecutor in his

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case against President Al-Bashir. This report noted that although serious violations of international humanitarian law have been committed in Darfur, 'the crucial element of *genocidal intent* appears to be missing, at least as far as the central Government authorities are concerned.'²⁴ It will indeed be hard to prove such a genocidal intent. For example – and this is the second reason for questioning the validity of this charge – there is no evidence of the Sudanese authorities engaging in systematic persecution of members of the Fur, Masaalit or Zaghawa communities that reside in other parts of Sudan, particularly Khartoum, simply because they belong to these ethnic groups. Unless there is evidence for this, it will be hard to counter the arguments of the Sudanese authorities that members of these three communities who have been victimised in Darfur were targeted because of their real or perceived support for the rebellion, which draws most of its elements and support from the three communities. Of course establishing the crime of genocide does not require 'systematic persecution' of the target group, but the 'counterinsurgency' argument cannot be discarded outright if no other members of these groups are found to have been targeted apart from those associated with the rebellion. This does not mean that their real or perceived support for the rebellion justifies the crimes committed against some of them.

This said, the Commission and many other sources provide abundant evidence that other crimes admissible to the Court, including war crimes and crimes against humanity, have been committed in Darfur.²⁵ This would make the arguments against the genocide claim of less importance.

Another condition that the Prosecutor needed to satisfy before indicting President Al-Bashir or any other Sudanese official was to ensure that the cases against them had not been and were not being investigated or prosecuted by the Sudan itself. In this regard, one can argue that the Prosecutor acted lawfully, for there was no evidence that the Sudanese authorities had investigated or prosecuted the crimes in question. In fact, they deny the charges, an attitude that, by implication, excludes any possibility that they have investigated or prosecuted the crimes or would be willing to genuinely do so in the future.

One could therefore argue that the case against President Al-Bashir and the charges, or at least some of them, set out against him do pass the admissibility test according to the Rome Statute of the ICC. But this does not necessarily mean that the accused is guilty of the alleged crimes, and he should not be considered as such until proven so. Nor does it mean that some of the concerns raised about the Prosecutor's move are to be discarded altogether, even within the framework of the Rome Statute and international law in general. It is to some of these concerns, particularly those voiced by the African Union, that we now turn.

As the ICC Prosecutor made his submission against President Al-Bashir, the statements by various Sudanese political actors and protests organised in Sudan made it clear that almost all the political parties in Sudan were suggesting, at least publicly, that the move would be a complicating factor in the peace process in Darfur.²⁶ The head of the opposition Umma Party, the former Prime Minister Sadiq Al-Mahdi, went as far as claiming that 'targeting any person in this country, especially its leader, is targeting Sudan, its people, stability, peace and security.'²⁷

Briefing journalists at the UN headquarters in New York on the day the Prosecutor of the ICC indicted the Sudanese president and requested the Pre-Trial Chamber to issue a warrant of arrest, Farhan Haq, Associate Spokesperson of the UN Secretary-General, was asked whether the ICC's action was helpful – that is, helpful for the peace process. The spokesperson replied that the ICC acted independently and that the judicial process must be allowed to take its course. He acknowledged, however, that 'the Secretary-General had made clear his own worries about whether the UN system would be able to carry out its mandated tasks' as a result of the ICC's move.²⁸ These worries were confirmed when the UN decided to evacuate a number of 'non essential personnel' from Sudan to neighbouring Uganda and Kenya following the ICC action, arguably out of fear that they might be targeted in reprisal attacks by the Sudanese authorities and/or some Sudanese nationals.

In a similar briefing three days later, the Deputy Spokesperson of the Secretary-General reported that Ban Ki-moon emphasised the need 'to strike the correct balance between the duty of justice and the pursuit of peace' in efforts to strengthen the ICC. While he emphasised that 'impunity for crimes can never be tolerated' and that 'amnesties for international crimes are unacceptable,' the concern about possible impacts of the ICC action on the peace process is obvious in this statement.²⁹ This is so particularly as the spokesperson also pointed out that the Secretary-General 'stressed the need to further improve cooperation between the Court and the United Nations in ways that take into account the legitimate interests of both partners'. Clearly, the main interest of the UN is international peace and security. One could therefore take this sentence as reflecting the earlier statement calling for the need to 'strike the correct balance' between peace and justice.

Since these remarks and questions assume that peace concerns can justify the suspension or halting of the proceedings of the ICC, it is imperative to scrutinise this assumption and critically analyse it. But before doing so, and in order to put that exercise in a proper context, we shall first look at the preoccupations of the African Union. We will then try to deal with that assumption (or, for some, assertion).

The position and suggestions of the African Union

The official position of the AU was adopted by its Peace and Security Council (PSC) at its 142nd meeting, held at the AU Commission in Addis Ababa on 21 July 2008. The position is contained in a four-page communiqué that 'reiterates AU's unflinching commitment to combating impunity and promoting democracy, the rule of law and good governance.' The communiqué also 'condemns once again the gross violations of human rights in Darfur'.

The 9th paragraph of the communiqué states that given the delicate nature of the peace processes and the conflict situations in Sudan, 'approval by the Pre-Trial Chamber 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 result, may lead to further suffering for the people of the Sudan and greater destabilisation with far-reaching consequences for the country and the region'.

On the basis of this preoccupation and analysis, the PSC requested the UN Security Council to invoke Article 16 of the Rome Statute that allows it to pass a resolution, under Chapter VII of the UN Charter, requesting the ICC to defer the process initiated against President Al-Bashir for a 12-month, renewable period. In its consideration of this request, the AU urged the Security Council to take into account 'the need to ensure that the ongoing peace efforts [to revive the stalled or dead Abuja process] are not jeopardised, as well as the fact that, in the current circumstances, a prosecution may not be in the interest of the victims and justice' – referring to a condition contained in this article of the Rome Statute for such an action by the Security Council.

The Council further invited the AU Commission to establish an independent High-Level Panel to examine the situation in depth and submit recommendations 'on how best the issues of accountability and combating impunity, on the one hand, and reconciliation and healing, on the other, could be effectively and comprehensively addressed, including through the establishment of truth and/or reconciliation commissions.' The Council finally urged the Sudanese government to take immediate and concrete steps, in the meantime, to investigate human rights violations in Darfur and bring their perpetrators to justice.³⁰

Even though it did not explicitly approve the request of the AU in Resolution 1828 (2008) that it passed on 31 July 2008, the UN Security Council did take note of the PSC's communiqué and noted that it was mindful of the 'concerns raised by members of the [AU] Council regarding potential developments subsequent to the application by the Prosecutor of the International Criminal Court of 14 July 2008'.³¹

So, clearly, the main preoccupation of the AU in this position is the peace process and the need not to jeopardise this. Other entities have also expressed concern at the ICC indictment, such as the Arab League.³² But the difference is that unlike the Arab League, for example, the AU tries to work within the framework of the Rome Statute and does not call on the UN Security Council to go beyond what the Rome Statute allows it to do: to invoke the provisions of Article 16 of that Statute.

A critical analysis of the AU's position

The strength or otherwise of the AU's position, and whether the Security Council can or should give satisfaction to its request, depend on whether concerns of peace and security can justify this, and whether the claims that the ICC move is likely to have the adverse effect that the AU and other actors claim are valid.

Provision for invoking peace concerns as a justification for the ICC to suspend or halt its investigations can, arguably, be found in two sections of the Rome Statute. Paragraphs 1 (c) and (2) (c) of Article 53 of the Statute authorise the Prosecutor of the ICC to suspend or abandon an investigation or prosecution where there are substantial reasons to believe that the investigation or prosecution 'would not serve the interests of justice.' Secondly, Article 16 of the Statute gives a similar prerogative to the UN Security Council which, in a resolution adopted under Chapter VII of the UN Charter, can request the Court to suspend an investigation or prosecution for a period of 12 months, renewable, on the basis of considerations of international peace and security.

But there is no consensus among legal experts on how to interpret the provisions of these two articles of the Rome Statute. The point of contention seems to be the definition of the terms 'interests of justice'. For example, Stahn and Human Rights Watch (HRW) argued in 2005 that since the term is not clearly defined in the Statute, the Office of the Prosecutor (OTP) of the ICC 'should adopt a strict construction of the phrase 'interests of justice' in order to adhere to the context of the Rome Statute, its object and purpose, and to the requirements of international law' (in HRW's words).³³ And in their view, these things are clearly defined in the Preamble of the Statute, which is to combat impunity.

But in a study focusing particularly on this *Policy Paper* of HRW, Lovat argues that while it is true that there is no clear definition of the phrase 'interests of justice' in the June 2003 Draft Regulations of the OTP, endnote no. 79 of that document recognises that in the view of legal experts consulted by the Court, were it to be decided that such a clear definition of the phrase must be given, this could comprise, as well as two other elements, a situation where 'the start of an investigation would seriously endanger the successful completion of a reconciliation or peace process'.³⁴

This notwithstanding, Human Rights Watch goes further to invite the OTP to publish, in a *Policy Paper*, new regulations narrowing the reading of the phrase 'interests of justice' to prevent it from being manipulated for political purposes. Indeed, in September 2007, the OTP published a *Policy Paper on the Interests of Justice* in nine pages.³⁵ In this document, the Prosecutor of the ICC states, amongst other things, that the criteria for the exercise of Article 53 of the Rome Statute 'will naturally be guided by the objects and purposes of the Statute – namely the prevention of serious crimes of concern to the international community through ending impunity.' He also noted that 'there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions [such as the UN Security Council] other than the Office of the Prosecutor'.³⁶

These arguments are almost identical to the ones advanced in HRW's *Policy Paper*. But HRW acknowledges that 'the only means by which the Rome Statute explicitly permits concerns about peace process to "trump" prosecutorial efforts is through a deferral by the UN Security Council,' as outlined in Article 16 of the Statute. This is also what the OTP means by peace concerns falling 'under the mandate

of institutions other than the OTP'. This means that HRW does not reject the provisions of Article 16, although it 'has concerns about how Article 16 may be applied' – that is, the danger of political interference in the judicial process.³⁷

What seems to follow from these arguments is that the debate about the principle of peace concerns justifying a suspension or halt to ICC investigations or proceedings is rather a 'technical' one, as the question is about 'who' has the authority to ask for the suspension or ending of investigation or prosecution, and not about whether the decision can be made.

In fact, in his second report to the Security Council pursuant to the latter's Resolution 1593 (2005) on Sudan,³⁸ the Prosecutor of the ICC noted that to establish whether a prosecution in Sudan is not in the interests of justice, on the basis of the provisions of Article 53 (2) (c) of the Rome Statute, he would consider 'the various national and international efforts to achieve peace and security, as well as the views of witnesses and victims of the crimes'³⁹.

One could also refer to the arrest warrants issued against two Sudanese officials in 2007, as noted above. A basic principle of the Court is that it only indicts those that bear the greatest responsibility. In his submission against the Sudanese leader, the Prosecutor of the ICC asserted that at 'all times relevant to this Application, Al-Bashir [was] President of the Republic of the Sudan [and]. . . has absolute control'. In light of this principle of the Court and this assertion of the Prosecutor, one could ask the question: was the Prosecutor in any doubt, at the time of indicting the other two Sudanese individuals in 2007, that they reported to President Al-Bashir? If not, then why did he not indict Al-Bashir at the time if his decision was not to do with considerations of the possible implications of that action on the peace process in Sudan? Was it not more logical to start with the one that 'bears the greatest responsibility'? If so, what made him believe in July 2008 that there would not be such implications? It is this preoccupation that arguably informs the position taken by the African Union and many of those who have voiced concerns over the ICC's action.

It is fair to argue, then, that the AU has made a pertinent request that is compatible with the Rome Statute. Considering the situation on the ground in Darfur and Sudan in general, one cannot but concede that the premises of the AU's request are valid considerations that the Security Council should heed.

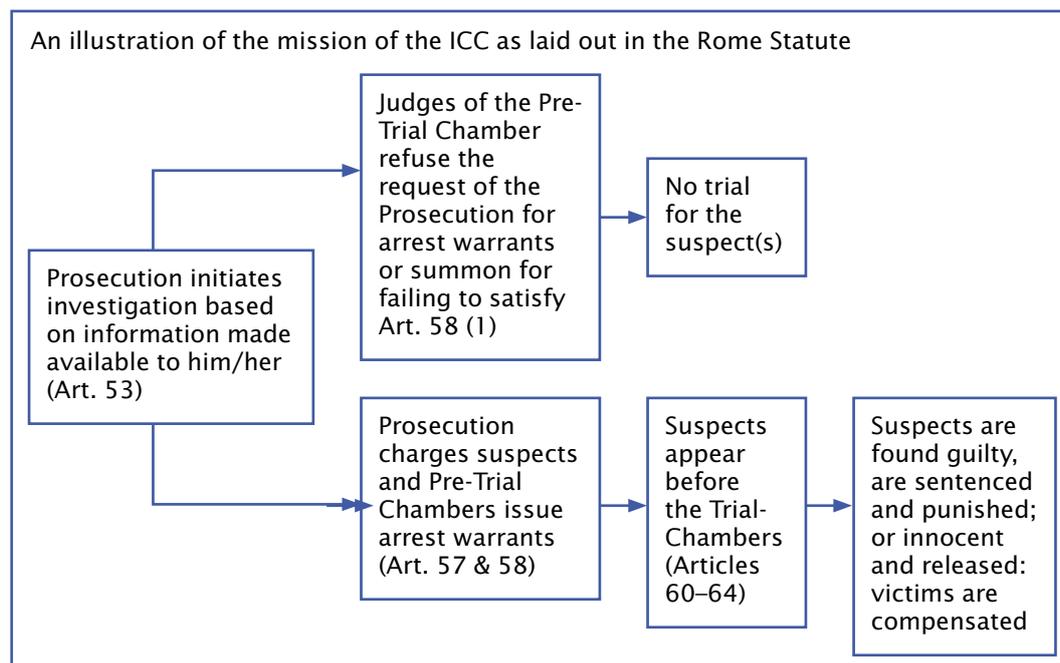
It is true that the move of the ICC Prosecutor has so far not produced any adverse effects on the ground in Sudan. On the contrary, what has been seen so far is a positive movement by the Sudanese government on the peace process: a rally by President Al-Bashir in Darfur during which he acknowledged that Darfuris have legitimate grievances; an undertaking to allow unhindered deployment of UNAMID forces in Darfur; meetings with non-armed opposition parties, and calls for inclusive peace talks on Darfur. Some might therefore be tempted to conclude that the indictment has actually contributed to the peace process.

This Situation Report calls for a cautious look at these developments, by proposing the most likely scenarios about the directions they may take in the coming weeks and months. One should not be so naïve as to believe that such moves signify a sea change in Khartoum and that we are now going to see a swift settlement of the Darfur debacle.

The consultations by President Al-Bashir with opposition political parties cannot be seen as a positive effect of the ICC's indictment; on the contrary, they are aimed at garnering local support for the position of the government vis-à-vis the ICC. The rallies in Darfur and the cooperation with the UN can all be interpreted as a strategy by the authorities in Khartoum to show 'good behaviour' and tell the world, at the opportune moment, that they have done their best in the peace process and it is the ICC that is blocking that process.

The argument that the current moves of the Sudanese government represent a triumph of the ICC emanates from a not-so-critical analysis of the strategies of the

Sudanese government, or from imagination of a totally new mission for the ICC: that of inducing the revival of stalled peace processes, rather than investigating alleged crimes, trying the suspects and punishing those found guilty, the Court's true role illustrated in the graph below.



Graph A: Yardstick of the success of ICC's involvement in a given case ⁴⁰

The most likely direction the situation might take would be for these moves to continue and peace talks to start in earnest, to the point of drafting a peace agreement. Such a development would owe a good deal to the ICC's move, but this is as far as the effect of that move can go. Beyond that point, as in the case of the insurgency in the North of Uganda, the process is likely to stall, with the Sudanese government making its signing of a definitive peace accord conditional on the disengagement of the ICC.

This disengagement could come about by the Security Council invoking Article 16 of the Rome Statute and the judges accepting its request, or by the judges of the Pre-Trial Chamber refusing to issue arrest warrants on the ground that the submission of the Prosecutor failed to meet the criteria laid out in Article 58(1) and/or Article 53 (1) (c) and (2) (c) of the Rome Statute. The disengagement would also have to extend to the case of the two Sudanese officials indicted in 2007. Without this, the ICC would find itself in the same situation as that created by the indictments against leaders of the Lord's Resistance Army (LRA) in Northern Uganda: either to disengage, with or without conditions, to allow the peace process to proceed, or to remain firm in its position and stand by its decision to try the indicted people regardless of the impact of this decision on the peace process.⁴¹ Of course, if the ICC were to disengage in the case of President Al-Bashir, the latter might agree to extradite those two Sudanese officials to the Court as a compromise measure. But he might also feel vindicated and emboldened by the ICC's disengagement and still refuse to hand over the two officials. Given this, damage seems to have been done to either the credibility of the ICC (first scenario), particularly if its disengagement happens after the issuance of arrest warrants, or to the peace process, if the Court's involvement is blamed for the collapse of that process (second scenario).⁴²

The Situation Report looked at the decision in mid-July by the chief prosecutor of the International Criminal Court to seek a warrant of arrest against President Hassan Omar Al-Bashir of the Sudan for alleged war crimes, crimes against humanity and genocide in Darfur. The main thrust of the Report was to analyse the possible implications this move might have for the peace process in that western region of the Sudan and, by extension, in the Sudan as a whole. The Report began

by providing a concise analysis of the Darfur crisis and the developments that are likely to have spurred the move by the Prosecutor of the ICC. It then made a number of submissions with regard to this issue.

First, the ICC has jurisdiction over Sudan notwithstanding Khartoum's non-membership status in it, if we consider the Rome Statute, the UN Charter and the fact that it was the UN Security Council that referred the situation of Sudan to the ICC. Secondly, if gross violations of human rights that are committed during armed conflicts go unpunished, this might lead to the creation of a cycle of violence, as either some victims, finding themselves in a position of power, might decide to take the law into their own hands, or some perpetrators, knowing that they will not be punished, might feel free to commit more crimes. Thirdly, we noted that despite all this, given the situation on the ground and the provisions of the Rome Statute with regard to peace processes, one could argue that the move of the ICC at this particular time was not the right move and that it can be seen as a mistake by the Prosecutor. It was finally noted that arguments against the ICC action, in order for them to carry weight, should not be purely political, but based on legal reasoning, like the AU's arguments in the 21 July 2008 communiqué of its Peace and Security Council.

We noted the undertaking of the Prosecutor of the ICC in his second report to the UN Security Council pursuant to Resolution 1593 (2005). In that report, he asserted that to establish whether a prosecution in Sudan is not in the interests of justice, on the basis of the provisions of Article 53 (2) (c) of the Rome Statute, he would consider 'the various national and international efforts to achieve peace and security, as well as the views of witnesses and victims of the crimes'. In light of the security situation on the ground in Darfur, one could argue that the Prosecutor did not follow this undertaking.

Of course he acted within his rights and prerogatives that the Rome Statute offers him, procedurally speaking. But is there a basis for him to believe that the Court will be able to act on its warrant of arrest if the judges were to issue one? The concern here is not only about the peace process, but also about the credibility of the ICC itself. What will the Court do if its disengagement becomes the *sine qua non* for the signing of a definitive peace accord, as seems now to be the case in Northern Uganda? Is it not wiser to withhold threats you cannot act on, to avoid discrediting yourself? This may be a political consideration, but the Court is not entirely above politics.

Perhaps the best way out of this situation is for the judges to withhold the arrest warrant and use the threat of issuing it to put more pressure on the Sudanese authorities to move on the peace process. Some sort of pressure should also be put on the rebel movements, for they have also been responsible for some crimes, even though not on the scale of the government's. Another solution could be for the UN Security Council to invoke Article 16 of the Rome Statute to suspend the case for a 12-month period that will regularly get renewed so long as the Sudanese parties commit themselves to lasting peace in the country; Article 16 does not put any limit to the number of renewals of a request by the Security Council.

A parallel case of unlimited renewals by the UN is the United Nations Disengagement Observer Force (UNDOF) established in 1974 following the agreed disengagement of the Israeli and Syrian forces from the Golan Heights. In August 2008, this force was still stationed in the Middle East with its mandate being renewed *every six months*. The same is true for the United Nations *Interim* Force in Lebanon (UNIFIL), created by the Security Council in 1978 to confirm Israeli withdrawal from that country.

Neither of the two proposals made above will be without risks. The judges of the ICC might be accused of acting politically, but as has been noted above, the Court is not entirely above politics. One would be tempted to conclude that the damage, either to the peace process or the ICC itself, has been done.

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- * Senior Researcher in the African Security Analysis Programme. The author is grateful to Godfrey Musila, Paul Simon Handy, Solomon Dersso, and Paula Roque for their critical comments on an earlier draft of the Report.
- 1 This alludes to the fact that although the current phase of the conflict in Darfur started in February 2003, the conflict and the build-up to the current phase were there years earlier.
 - 2 For a more detailed historical background on Darfur up to its occupation by the British colonial forces in 1916, see Arthur E. Robinson, 'The Arab Dynasty of Dar For (Darfur)', *Journal of the Royal African Society*, 27 (108), July 1928, pp. 353–63. The full study is published in a series of six articles, with the last one published in vol. 29, no. 114 (January 1930) of the same journal. Notwithstanding the title, the article deals with both Arab and non-Arab groups of Darfur. The reader must beware, however, of the subjective use of some words and the author's pejorative qualifications of Darfuri personalities who resisted the British army.
 - 3 See Alex de Waal, 'Counter-Insurgency on the Cheap', *Review of African Political Economy*, 31 (102), December 2004, pp. 716–25.
 - 4 See Alhagi Marong, "'Outlaws on camelback": State and individual responsibility for serious violations of international Law in Darfur', *ISS Occasional Paper* no. 136, April 2007.
 - 5 It must be noted that this pattern can be observed also in many other African countries; most African leaders do not seem to realise that their countries extend beyond the capital city.
 - 6 On these natural disasters and their consequences in Darfur, see Alex de Waal, 'Famine Mortality: A Case Study of Darfur, Sudan 1984–5', *Population Studies*, 43 (1), March 1989, pp. 5–24.
 - 7 Marong, "'Outlaws on camelback'", op. cit.
 - 8 Ibid.
 - 9 See for example Eric Reeves, 'Catastrophe in Darfur', *Review of African Political Economy*, 31 (99), March 2004, pp. 160–1. An American organisation called Save Darfur spearheaded this campaign, often organising massive public rallies across the US. It is not impossible that the US administration was influenced by this campaign. But in retrospect, it would seem that some of the protestors' claims were rather exaggerated, and that the genocide claim is not founded – which does not suggest that serious crimes punishable under international law were not committed in Darfur. See the group's website at: <http://www.savedarfur.org/content>
 - 10 See 'President and Secretary of State Characterize Events in Darfur as Genocide', *The American Journal of International Law*, 99(1), January 2005, pp. 266–7.
 - 11 For a comprehensive analysis of the AMIS and UNAMID forces in Darfur, see Festus Aboagye, 'The hybrid operation for Darfur: A critical review of the concept of the mechanism', *ISS Occasional Paper* no. 149, August 2007. For discussions surrounding the replacement of AMIS with a UN force, see Issaka K. Souaré, 'Remplacer la force africaine par une mission onusienne au Soudan? Entre solutions locales et solutions internationales dans les situations de conflits armés' [Replacing AMIS with a UN mission in Sudan? Between Local and International Solutions in Armed Conflict Situations] in *Les Opérations de paix: Du Suez à Kandahar*, Notes de Recherches no. 33, February 2007 (Montreal, Centre d'études des politiques étrangères et de sécurité), pp. 81–110.
 - 12 The Commission was established by Security Council resolution 1564 (2004) of 18 September 2004. Passed under Chapter VII of the UN Charter, this resolution requested the UN Secretary-General to rapidly set up the Commission. In October 2004 the Secretary-General appointed a five-member body headed by Judge Antonio Cassese, a former Italian President of the International Criminal Tribunal for the former Yugoslavia, to carry out this task and report back to him in three months' time, by 25 January 2005.
 - 13 See the *Report of the Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004*, Geneva, 25 January 2005, p. 162.
 - 14 See PSC-AU, 'Communiqué of the Peace and Security Council on the Situation in Darfur', PSC/PR/Comm (LXXV) of 4–5 April 2007.
 - 15 For more background information about the ICC's involvement in Darfur and a chronology of its actions in this regard, see <http://www.icc-cpi.int/cases/Darfur.html>
 - 16 See Article 5 of the Rome Statute for a list of these crimes, which also include the crime of aggression. But there is a stay on the Court's exercise of jurisdiction over this latter crime pending the adoption of a unanimous definition of the crime and conditions under which it can be admissible under the jurisdiction of the ICC. See Art. 5(2) of the Rome Statute for this caveat.
 - 17 For a list of countries that have ratified the Rome Treaty and the date of their ratification, see <http://www.icc-cpi.int/asp/statesparties.html> [last access: 15 August 2008].
 - 18 The other two mechanisms are a referral by a State Party, and for the Prosecutor of the ICC to initiate his own investigation in accordance with his powers under Article 15 of the Rome Statute.
 - 19 See General Assembly, Resolution A/RES/58/79 of 9 December 2003.
 - 20 See *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*. A PDF copy of the 8-page, 23-paragraph agreement may be found in the *Official Journal of the ICC* in all the five official languages of the UN at: http://www.icc-cpi.int/about/Official_Journal.html
 - 21 See General Assembly resolution A/Res/58/318 of 13 September 2004. The resolution was adopted at the 58th session as Agenda item 154. The full text of the Agreement is contained in the Report of the Sixth Committee (Legal Committee) to the 59th session of the General Assembly on 19 November 2004 (A/59/512). It can also be found in the annex to General Assembly resolution A/Res/58/874 of 20 August 2004.
 - 22 It is true that the third trigger mechanism of ICC process, namely the Prosecutor initiating his or her own investigations, makes it possible for the Court to indict nationals of all countries, including, potentially,

- nationals of China, Russia and the US, the three veto bearers that have not ratified the Rome Statute. But in addition to the fact that the Prosecutor has not yet used this prerogative, this trigger mechanism does not cover all situations, because there are conditions that need to be met for the Prosecutor to do so, as provided by Art. 12(2) of the Statute. For example, if a crime admissible under the Rome Statute was committed by nationals of a country that is not State Party to the Rome Statute against nationals of another country in a similar position, or against its own nationals, the Prosecutor cannot initiate any investigation on this matter. Hence, because the crimes President Al-Bashir is accused of were allegedly committed in Sudan itself and Sudan is not a State Party to the Rome Statute, it was only by Security Council referral that the Prosecutor was able to initiate his investigations. This makes Article 13(b) discriminatory against those states that do not have a veto power in the Security Council and are not signatory to the Rome Statute.
- 23 In his speech at the Rome Conference on 15 June 1998, the Head of the Egyptian delegation and President of the Supreme Court in Egypt, Medhat El-Maraghy, warned against this provision of the Statute. He warned that entrusting the power of case referrals or deferrals to the Security Council, which is a 'political body', would greatly undermine the independence and credibility of the ICC, which is a 'legal body'. He suggested that the role of the Security Council should be strictly limited to the referral of the crime of aggression and that it should not be allowed to interfere in the case of any other crimes. See his speech, in Arabic (all speeches being in the original language in which they were delivered at the conference), at <http://www.un.org/icc/index.htm> > speeches/statements [last access: 10 August 2008]. Interestingly, the Head of the Sudanese delegation at the Rome Conference, the then Minister of Justice, Ali M.O. Yassin, did not make any complaint about this provision in his statement of 18 June 1998, although he had reservations about other provisions of the Statute. See his statement made in English, at the same link.
- 24 I am aware that the report of this Commission is only one source on which the Prosecutor relied in making his case, and that it has been almost four years since the Commission prepared its report. The situation in Darfur has developed, indeed worsened, and the Prosecutor might have marshalled sufficient evidence to sustain a charge of genocide, including evidence establishing the requisite special intent. The argument above is based on what we knew at the time the Prosecutor made his submission. Thanks to my colleague Godfrey Musilia for reminding me of the need to explicitly make this caveat.
- 25 See the *Report of the Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004*, Geneva, 25 January 2005. See particularly the section entitled: 'Do the Crimes Perpetrated in Darfur Constitute Acts of Genocide?', pp. 129–32.
- 26 See 'Protest against ICC forces UN staff to stay at home', *Sudan Tribune*, 16 July 2008.
- 27 See 'Sudan opposition parties & SPLM urge quick resolution to Darfur crisis', *Sudan Tribune*, 15 July 2008.
- 28 See Farhan Haq, 'Highlights of the noon briefing', Monday, 14 July 2008 at <http://www.un.org/News/ossghilites.htm> [accessed: 15 July 2008].
- 29 Marie Okabe, 'Highlights of the noon briefing', Thursday, 17 July 2008.
- 30 See [AU] Peace and Security Council, *Communiqué PSC/MIN/Comm (CXLII)* of 21 July 2008.
- 31 See Security Council Resolution S/Res/1828 (2008) of 31 July 2008. The thrust of the Resolution being the mandate of UNAMID, the Council decided to extend the mandate of the AU-UN Mission in Darfur as set out in resolution 1769 (2007) for a further 12 months to 31 July 2009.
- 32 The most detailed position of the Arab League is contained in a communiqué of the Committee on foreign and political affairs and national security of the transitional Arab parliament of the League. This communiqué was issued following a two-day emergency meeting of the Committee, held in Khartoum on 28–29 July 2008. The communiqué claims that the move of the Prosecutor is informed by an international conspiracy to 'further destabilise Sudan' (para. 1 of its preamble) and 'to weaken Sudan through intervention in its internal affairs in view of controlling its petroleum and other resources' (para. 2 of the preamble). The communiqué thus rejects the claims of the Prosecutor and calls on the United Nations to withdraw its referral of Sudan to the ICC and 'consider the Darfur issue as an internal conflict' that only Sudan has the legal mandate to deal with. A PDF copy of the 4-page, 12-paragraph communiqué, in Arabic, can be found on the website of the League of Arab States at: <http://www.arableagueonline.org/las/index.jsp> [last access: 22 August 2008].
- 33 See Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Court of Justice', *Journal of International Criminal Justice*, vol. 3, 2005, pp. 695–720; Human Rights Watch, 'The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute', *Policy Paper*, June 2005, p. 2.
- 34 See ICC 'Draft Regulations of the Office of the Prosecutor,' 3 June 2003 at http://www.icc-cpi.int/library/organs/otp/draft_regulations.pdf, p. 47. See also Henry M. Lovat, 'Delineating the Interests of Justice: Prosecutorial Discretion and the Rome Statute of the International Criminal Court,' *Bepress Legal Series*, Paper 1435, 2006 at <http://www.law.bepress.com/expresso/eps/1435> [last access: 25 July 2008].
- 35 For a PDF copy of the document, see <http://www.icc-cpi.int>.
- 36 *Ibid.*, p. 1.
- 37 It must be noted that this document of HRW was published in response to a request made by the OTP made during a consultation meeting with NGOs working in the field of human rights. At the meeting, held on 30 November and 1 December 2004, the OTP solicited comments from the assembled NGOs regarding the meaning of the phrase 'interests of justice'. See HRW, *op. cit.*, pp. 1, 5, 7–8.
- 38 The report was in response to the Council's call upon the Prosecutor of the ICC to regularly update it on actions taken by his office pursuant to this resolution.

- 39 See ICC, 'Second Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSC 1593 (2005)', 13 December 2005 at http://www.icc-cpi.int/library/organs/otp/LMO_UNSC?ReportB_En.pdf See p. 6 of the Report.
- 40 In view of its complementary relationship with national courts, another way of measuring the success of the ICC could be for a country such as Sudan to prosecute its own people to avoid ICC involvement. I did not, however, include this in the graph because it would be hard to establish the causal link. How can we be sure whether the country organised such trials just to avoid ICC involvement? It might do so, just as some countries may uphold human rights principles because they fear the naming and shaming of human rights campaigning organisations such as Amnesty International and Human Rights Watch. But how does one prove this?
- 41 For an overview of the Ugandan situation, see Issaka K. Souaré, 'Moving the Ugandan peace process from the dichotomy of driminal trials vs amnesty,' *African Security Review*, 17(2), June 2008, pp. 106–13. Kasaija Phillip Apuuli, 'The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda', *Journal of International Criminal Justice*, 4 (1), 2006, pp. 179–87; Milton Olupot, 'LRA sign agreement, walk out again', *New Vision* (Kampala), 1 March 2008.
- 42 There is the possibility of the ICC issuing the arrest warrant and President Al-Bashir being arrested while visiting a foreign country a few years down the line and then tried by the ICC. But because he will be expected, should the warrant be issued, to avoid visiting any country that is likely to make an arrest, I did not include this possibility because it seems very unlikely. The discussion is concerned with 'likely' scenarios only.