



# International Criminal Court Cases in Africa: Status and Policy Issues

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## Summary

The International Criminal Court (ICC) has, to date, opened cases exclusively in Africa. Cases concerning 25 individuals are open before the Court, pertaining to crimes allegedly committed in six African states: Libya, Kenya, Sudan (Darfur), Uganda (the Lord's Resistance Army, LRA), the Democratic Republic of Congo, and the Central African Republic. A 26<sup>th</sup> case, against a Darfur rebel commander, was dismissed. The ICC Prosecutor has yet to secure any convictions. In addition, the Prosecutor has initiated preliminary examinations—a potential precursor to a full investigation—in Côte d'Ivoire, Guinea, and Nigeria, along with several countries outside of Africa, such as Afghanistan, Colombia, Georgia, Honduras, and the Republic of Korea.

The Statute of the ICC, also known as the Rome Statute, entered into force on July 1, 2002, and established a permanent, independent Court to investigate and bring to justice individuals who commit war crimes, crimes against humanity, and genocide. As of July 2011, 116 countries—including 32 African countries, the largest regional block—were parties to the Statute. Tunisia was the latest country to have become a party, in June 2011. The United States is not a party.

ICC prosecutions have been praised by human rights advocates. At the same time, the ICC Prosecutor's choice of cases and the perception that the Court has disproportionately focused on Africa have been controversial. The Prosecutor's attempts to prosecute two sitting African heads of state, Sudan's Omar Hassan al Bashir and Libya's Muammar al Qadhafi, have been particularly contested, and the African Union has decided not to enforce ICC arrest warrants for either leader. Neither Sudan nor Libya is a party to the ICC; in both cases, jurisdiction was granted through a United Nations Security Council resolution. (The United States abstained from the former Security Council vote, in 2005, and voted in favor of the latter, in February 2011.) Controversy within Africa has also surfaced over ICC attempts to prosecute Kenyan officials in connection with post-election violence in 2007-2008. Although Kenya is a party to the Court, the government has recently objected to ICC involvement, which some contend could be destabilizing.

Congressional interest in the work of the ICC in Africa has arisen in connection with concerns over gross human rights violations on the African continent and beyond, along with broader concerns over ICC jurisdiction and U.S. policy toward the Court. Obama Administration officials have expressed support for several ICC prosecutions. At the ICC's 2010 review conference in Kampala, Uganda, Obama Administration officials reiterated the United States' intention to provide diplomatic and informational support to ICC prosecutions on a case-by-case basis. The U.S. government is prohibited by law from providing material assistance to the ICC under the American Servicemembers' Protection Act of 2002, or ASPA (P.L. 107-206, Title II). Legislation introduced during the 111<sup>th</sup> Congress referenced the ICC in connection with several African conflicts and, more broadly, U.S. policy toward, and cooperation with, the Court. S.Res. 85 (Menendez) welcomes the U.N. Security Council referral of Libya to the ICC.

This report provides background on current ICC cases and examines issues raised by the ICC's actions in Africa. Further analysis can be found in CRS Report R41116, *The International Criminal Court (ICC): Jurisdiction, Extradition, and U.S. Policy*, by Emily C. Barbour and Matthew C. Weed, and CRS Report R41682, *International Criminal Court and the Rome Statute: 2010 Review Conference*, by Matthew C. Weed.

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## Recent Developments

- On June 27, ICC judges issued arrest warrants for Libyan leader Muammar al Qadhafi, his son Sayf al Islam al Qadhafi, and intelligence chief Abdullah al Senussi, having found “reasonable grounds” to believe that they are responsible for crimes against humanity, including murder and “persecution.” (See “Libya,” below.)
- The trial of Congolese militia leader Thomas Lubanga Dyilo, in ICC custody since 2006, is expected to bring the Court’s first final verdict before year’s end.
- The six Kenyan suspects sought by the ICC, most of them senior government officials, appeared voluntarily before the Court in April 2011. Charges against them have not yet been confirmed by ICC judges.
- In March 2011, ICC judges confirmed war crimes charges sought by the Prosecutor against two Darfur rebel commanders, paving the way for a trial (see “Darfur Rebel Commanders,” below).
- On June 23, 2011, the ICC Prosecutor requested authorization from ICC judges to open a formal investigation into war crimes and crimes against humanity following Côte d’Ivoire’s disputed presidential run-off vote in November 2010.<sup>1</sup> A U.N. investigation concluded in June that “serious violations of human rights and international humanitarian law were committed by different actors,” potentially amounting to crimes under ICC jurisdiction.<sup>2</sup> Côte d’Ivoire is not a state party, but its government submitted it to ICC jurisdiction in 2003. The government of newly inaugurated President Alassane Ouattara has also accepted ICC jurisdiction, and signed a cooperation agreement with the ICC on June 28.

## Background

### Overview of the International Criminal Court

The Statute of the ICC, also known as the Rome Statute (the Statute), entered into force on July 1, 2002, and established a permanent, independent Court to investigate and bring to justice individuals who commit war crimes, crimes against humanity, and genocide.<sup>3</sup> The ICC’s jurisdiction extends over crimes committed since the entry into force of the Statute. The ICC is headquartered in The Hague, Netherlands. As of March 2010, 111 countries were parties to the

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<sup>1</sup> See CRS Report RS21989, *Côte d’Ivoire Post-Gbagbo: Crisis Recovery*, by Nicolas Cook.

<sup>2</sup> Hui Min Neo, “Possible Crimes Against Humanity By All Sides in I.Coast: UN,” *Agence France Presse (AFP)*, June 10, 2011.

<sup>3</sup> The ICC began operating at its inauguration on March 11, 2003. The Statute also established a second independent institution, the Trust Fund for Victims, to help victims of these crimes. The Trust Fund for Victims can only act in situations where the ICC has jurisdiction. ICC states parties adopted amendments to the Rome Statute that define and determine ICC jurisdiction over the crimes of aggression at the Review Conference of the Rome Statute that took place in Kampala, Uganda, from May 31 to June 11, 2010. Under the amendments, the ICC may not take jurisdiction over aggression crimes until at least January 2017, and only if states parties vote to activate such jurisdiction at that time.

Statute.<sup>4</sup> The United States is not a party to the ICC. The ICC's Assembly of States Parties provides administrative oversight and other support for the Court, including adoption of the budget and election of 18 judges, a Prosecutor (currently Luis Moreno-Ocampo from Argentina), and a Registrar (currently Bruno Cathala from France).<sup>5</sup>

As outlined in the Statute, situations<sup>6</sup> may be referred to the ICC in one of three ways: by a state party to the Statute, the ICC Prosecutor, or the United Nations (U.N.) Security Council. Currently, four situations have been publicly referred to the Prosecutor. The governments of three countries (all parties to the ICC)—Uganda, the Democratic Republic of Congo, and the Central African Republic—have referred situations to the Prosecutor. The U.N. Security Council has referred one situation (Darfur, Sudan) to the Prosecutor. One situation, Kenya, is under investigation following an application by the ICC Prosecutor. At least six others remain under consideration.<sup>7</sup>

The ICC is considered a court of last resort—it will only investigate or prosecute cases of the most serious crimes perpetrated by individuals (not organizations or governments), and then, only when national judicial systems are unwilling or unable to handle them. This principle of admissibility before the Court is known as “complementarity.”<sup>8</sup> Although many domestic legal systems grant sitting heads of state immunity from criminal prosecution, the Statute grants the ICC jurisdiction over any individual, regardless of official capacity.<sup>9</sup>

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<sup>4</sup> For the current status of signatures, ratifications, and reservations, see the ICC's website, <http://www.icc-cpi.int/asp/statesparties.html>.

<sup>5</sup> For background information on the International Criminal Court, see CRS Report RL31437, *International Criminal Court: Overview and Selected Legal Issues*, by Jennifer K. Elsea.

<sup>6</sup> Articles 13 and 14 (1) of the Rome Statute provide for both States Parties and U.N. Security Council referral of “situations” to the Court. During the negotiations, the question arose of whether individual “cases” or “situations” should be referred to the ICC Prosecutor. According to one author, writing on the jurisdiction of the ICC, “it was suggested that States Parties should not be able to make complaints about individual crimes or cases: it would be more appropriate, and less political, if ‘situations’ were instead referred to the Court.” (Elizabeth Wilmshurst, “Jurisdiction of the Court,” Chapter 3, in Roy S. Lee, editor, *The International Criminal Court. The Making of the Rome Statute: Issues, Negotiations, Results* [Boston: Kluwer Law International, 1999], p. 131.) Another author, writing on the role of the Prosecutor, noted that the “powers of the Prosecutor could also be broadened in the context of a State’s complaint to the Court, if the complaint referred to ‘situations’ rather than to individual ‘cases.’” A proposal to this effect, introduced by the U.S. delegation in 1996, was “very soon supported by a large majority of States,” many of whom had been “uneasy” with allowing a party to “select individual cases of violations and lodge complaints ... with respect to such cases. This could ... encourage politicization of the complaint procedure.” The Prosecutor, after referral of the situation, could “initiate a case against the individual or individuals concerned.” (Silvia A. Fernandez de Gurmendi, “The Role of the International Prosecutor,” Chapter 6, in Lee, *The International Criminal Court*, p. 180.)

<sup>7</sup> Reportedly, the ICC has received 1,700 communications about alleged crimes in 139 countries, but 80 percent have been found to be outside the jurisdiction of the court. The Prosecutor has received self referrals only from African countries. See Stephanie Hanson, Global Policy Forum, “Africa and the International Criminal Court,” *Council on Foreign Relations*, July 24, 2008.

<sup>8</sup> In the ICC case against Congolese suspect Thomas Lubanga Dyilo, the Pre-Trial Chamber ruled that in order for a case to be inadmissible, national proceedings must encompass “both the person and the conduct which is the subject of the case before the Court” (ICC Pre-Trial Chamber I, *The Prosecutor Vs. Thomas Lubanga Dyilo, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 38*, February 10, 2006). Even in such a case, the ICC may retain jurisdiction if domestic proceedings are not conducted impartially or independently (Rome Statute, Article 17).

<sup>9</sup> Article 27 of the Rome Statute.

## The U.S. Position on the ICC

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

- the Court’s assertion of jurisdiction (in certain circumstances) over citizens, including military personnel, of countries that are not parties to the treaty;<sup>10</sup>
- the perceived lack of adequate checks and balances on the powers of the ICC prosecutors and judges;
- the perceived dilution of the role of the U.N. Security Council in maintaining peace and security; and
- the ICC’s potentially chilling effect on America’s willingness to project power in the defense of its interests.

The Bush Administration concluded bilateral immunity agreements (BIAs), known as “Article 98 agreements,” with most states parties to exempt U.S. citizens from possible surrender to the ICC.<sup>11</sup> These agreements are named for Article 98(2) of the Statute, which bars the ICC from asking for surrender of persons from a state party that would require it to act contrary to its international obligations.

The U.S. government is prohibited by law from providing material assistance to the ICC in its investigations, arrests, detentions, extraditions, or prosecutions of war crimes, under the American Servicemembers’ Protection Act of 2002, or ASPA (P.L. 107-206, Title II). The prohibition covers, among other things, the obligation of appropriated funds, assistance in investigations on U.S. territory, participation in U.N. peacekeeping operations unless certain protections from ICC actions are provided to specific categories of personnel, and the sharing of classified and law enforcement information.<sup>12</sup> Section 2015 of ASPA (22 U.S.C. 7433, known as the “Dodd Amendment”), however, provides an exception to these provisions:

Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other

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<sup>10</sup> The United States had supported a version of the Rome Statute that would have allowed the U.N. Security Council to refer cases involving non-states parties to the ICC, but would not have allowed other states or the Prosecutor to refer cases.

<sup>11</sup> Each state party to an Article 98 agreement promises that it will not surrender citizens of the other state party to international tribunals or the ICC, unless both parties agree in advance. An Article 98 agreement would prevent the surrender of certain persons to the ICC by parties to the agreement, but would not bind the ICC if it were to obtain custody of the accused through other means. See the **Appendix** for a list of states parties to the ICC and Article 98 agreements in Africa.

<sup>12</sup> These prohibitions do not apply to cooperation with an *ad hoc* international criminal tribunal established by the U.N. Security Council such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR). See 22 U.S.C. 7423(a)(1). In the case of Darfur, the *Darfur Accountability and Divestment Act of 2007* (H.R. 180), passed by the House on August 3, 2007, would have offered U.S. support to the ICC’s efforts to prosecute those responsible for acts of genocide in Darfur, but was not enacted into law.

members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.

In her confirmation hearing as Secretary of State before the Senate Foreign Relations Committee in January 2009, Hillary Clinton said, “Whether we work toward joining or not, we will end hostility toward the ICC and look for opportunities to encourage effective ICC action in ways that promote U.S. interests by bringing war criminals to justice.”<sup>13</sup> Speaking in Nairobi, Kenya, in August 2009, Secretary of State Clinton said that it was a “great regret” that the United States was not a party to the ICC, but that the United States has supported the Court and “continue[s] to do so.”<sup>14</sup> Obama Administration officials have recently indicated, amid a wider review of U.S. policy toward the Court, that the Administration is “considering ways in which we may be able to assist the ICC, consistent with our law, in investigations involving atrocities.”<sup>15</sup> A January 2010 review by the Department of Justice concluded that diplomatic or “informational” support for “particular investigations or prosecutions” by the ICC would not violate existing laws.<sup>16</sup>

In November 2009, the United States began formally attending meetings of the ICC’s Assembly of States Parties as an observer nation, and in May 2010 sent a delegation led by Ambassador-at-Large for War Crimes Issues Stephen Rapp and State Department Legal Advisor Harold Koh to the Review Conference of the Rome Statute in Kampala, Uganda. Administration officials reiterated at the Conference the United States’ intention to support current cases before the ICC. In addition, Rapp stated that Administration officials had “renewed our commitment to the rule of law and capacity-building projects in which we have ongoing in each” African country in which ICC prosecutions are taking place. At the same time, Rapp averred that the Administration was “nowhere near that point” of submitting the Rome Statute for ratification.<sup>17</sup> The United States voted in favor of U.N. Security Council Resolution 1970, referring the situation in Libya to the ICC, the first time it has done so.

## **The ICC and Other International Courts and Tribunals**

The post-World War II Nuremberg and Tokyo tribunals to prosecute Nazi and Japanese leaders for crimes against peace, war crimes, and crimes against humanity established precedent for other *ad hoc* international courts and tribunals, such as the International Criminal Tribunals for the former Yugoslavia<sup>18</sup> and for Rwanda.<sup>19</sup> In addition, the United Nations authorized the creation of

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<sup>13</sup> Walter Pincus, “Clinton’s Goals Detailed,” *The Washington Post*, January 19, 2009.

<sup>14</sup> Mary Beth Sheridan, “Clinton Says U.S. Supports International Criminal Court,” August 6, 2009.

<sup>15</sup> U.S. Mission in Geneva, “Press Briefing with Stephen J. Rapp, Ambassador-at-Large for War Crimes,” January 22, 2010.

<sup>16</sup> U.S. Department of Justice, Office of Legal Counsel, “Memorandum for Mary DeRosa, Legal Advisor, National Security Council, Re: Engagement with the International Criminal Court,” January 15, 2010.

<sup>17</sup> State Department, “Briefing on the International Criminal Court Conference in Kampala, Uganda,” June 2, 2010.

<sup>18</sup> On May 25, 1993, U.N. Security Council Resolution 827 (1993) established the International Criminal Tribunal for the former Yugoslavia (ICTY). It had its precursors in U.N. Security Council Resolution 752, which asked parties to respect humanitarian law; U.N. Security Council Resolution 771, which condemned ethnic cleansing and demanded access by international observers; and U.N. Security Council Resolution 780, which requested the U.N. Secretary-General to establish a Commission of Experts to investigate alleged violations of humanitarian law.

<sup>19</sup> U.N. Security Council Resolution 935 (2004) asked the Secretary-General to establish a Commission of Experts to examine the allegations of genocide and grave violations of international humanitarian law in Rwanda. After its investigation, the Commission recommended that an international tribunal be established to address the crimes. On November 8, 2004, the Security Council, in Resolution 955, established the International Criminal Tribunal for (continued...)

a Special Court for Sierra Leone (SC-SL) to prosecute those with the greatest responsibility for serious violations of international humanitarian law and domestic law committed in the territory of Sierra Leone since November 30, 1996.<sup>20</sup> Separate judicial mechanisms have also been set up for cases involving East Timor (Timor-Leste) and Cambodia. Further, the U.N. Security Council authorized establishment of a Special International Tribunal for Lebanon in 2007, which began functioning in March 2009.

These courts and tribunals are distinct from the ICC. While established by the U.N. Security Council to address allegations of crimes against humanity in various countries, these tribunals were case-specific, limited in jurisdiction, and temporary. By contrast, the ICC was established by multilateral treaty and is a permanent, international criminal tribunal. It is not a U.N. body.<sup>21</sup>

The International Court of Justice (ICJ), also located in The Hague, is the principal judicial organ of the United Nations. The ICJ does not prosecute individuals; its role is to settle, in accordance with international law, legal disputes submitted to it by states. Only states may submit cases for consideration, although the ICJ will also give advisory opinions on legal questions when requested to do so by authorized international organizations.<sup>22</sup>

## **Congressional Interest in ICC Activities in Africa**

Members of Congress have taken a range of positions on the ICC with regard to Africa. Many in Congress are concerned about massive human rights violations on the continent, and some see the ICC as a possible means of redress for these crimes. At the same time, many Members oppose the Court on jurisdictional and other grounds. For example, several pieces of draft legislation introduced during the 111<sup>th</sup> Congress, such as H.R. 5351 (Ros-Lehtinen), S.Con.Res. 59 (Vitter), and H.Con.Res. 265 (Lamborn), expressed broad objections to the ICC and to U.S. cooperation with it. S.Con.Res. 71 (Feingold) stated that it is in “the United States national interest” to help “prevent and mitigate acts of genocide and other mass atrocities against civilians,” but did not explicitly reference the ICC.

In the 112<sup>th</sup> Congress, S.Res. 85 (Menendez), agreed to in the Senate on March 1, 2011, welcomes the U.N. Security Council referral of Libya to the ICC. Draft legislation introduced during the 111<sup>th</sup> Congress referenced the ICC in connection with human rights abuses committed in the Democratic Republic of Congo and by the Lord’s Resistance Army in central Africa, and in

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(...continued)

Rwanda (ICTR).

<sup>20</sup> The Special Court for Sierra Leone (SCSL), a hybrid international-domestic court based in Sierra Leone’s capital, Freetown, was set up jointly by the Government of Sierra Leone and the United Nations under Security Council Resolution 1315 (2000). While most suspects have been tried in Freetown, former President Charles Taylor of Liberia is in custody in the Hague, where he is being tried by the SC-SL for crimes against humanity and other violations of international humanitarian law.

<sup>21</sup> The creation of the ICC is the culmination of a decades-long effort to establish an international court with the jurisdiction to try individuals for the commission of crimes against humanity. For a general background and discussion of the ICC, see CRS Report RL31437, *International Criminal Court: Overview and Selected Legal Issues*, by Jennifer K. Elsea; CRS Report R41116, *The International Criminal Court (ICC): Jurisdiction, Extradition, and U.S. Policy*, by Emily C. Barbour and Matthew C. Weed; and CRS Report RL32605, *Genocide: Legal Precedent Surrounding the Definition of the Crime*, by Judith Derenzo and Michael John Garcia.

<sup>22</sup> See U.S. Department of State, *United States Participation in the United Nations—2006*, p. 130.



connection with the global use of child soldiers. Additionally, there has been particular congressional interest in the ICC's work related to Darfur.

### **Restrictions on U.S. Assistance to African Parties to the ICC**

Jurisdictional and other concerns led Congress to pass ASPA (P.L. 107-206, Title II), which was signed into law on August 2, 2002. Section 2007 of ASPA prohibited U.S. military assistance to ICC member-states, except for NATO countries, major non-NATO allies, and countries subject to various other waiver provisions. Permanent waivers were granted to countries that ratified Article 98 agreements promising not to surrender U.S. nationals to the Court (see **Appendix**). However, despite continuing opposition among some Members, a combination of presidential waivers and changes to the law have effectively nullified restrictions on U.S. assistance to African parties to the ICC.

In Africa, ASPA effectively froze International Military Education and Training (IMET), Foreign Military Financing (FMF), and Excess Defense Articles (EDA) accounts for Kenya, Mali, Namibia, Niger, South Africa, and Tanzania. However, President Bush waived the prohibition on IMET assistance to 21 countries, including these six, on September 29, 2006, citing concerns that the restrictions could preclude valuable military-to-military ties.<sup>23</sup> Congress repealed the ASPA restriction on IMET funding in the National Defense Authorization Act for FY2007 (P.L. 109-364), which was signed into law on October 17, 2006. The National Defense Authorization Act for FY2008 (P.L. 110-181), signed into law on January 28, 2008, repealed Section 2007 of ASPA entirely, ending remaining prohibitions on FMF and EDA assistance.

Separately, the Nethercutt Amendment to the FY2005 Consolidated Appropriations Act (P.L. 108-447) prohibited Economic Support Fund (ESF) assistance to ICC parties that had not entered into an Article 98 agreement with the United States, with certain waiver provisions. This prohibition was included as part of the FY2006 Consolidated Appropriations Act (P.L. 109-102, Section 574), and was subsequently carried over via continuing resolutions on February 15, 2007 (P.L. 110-5) and September 29, 2007 (P.L. 110-92). A substantially identical restriction was included in the Consolidated Appropriations Act of 2008 (P.L. 110-161, Section 671), signed into law December 26, 2007. However, in practice, this restriction was not applied to African countries, due to presidential waivers with respect to Kenya, Mali, Namibia, Niger, South Africa, and Tanzania.<sup>24</sup> The Omnibus Appropriations Act of 2009 (P.L. 111-8) did not carry forward Section 671, ending such restrictions on ESF assistance.

## **ICC Cases and Investigations in Africa**

The ICC Prosecutor has opened cases against 26 individuals in connection with five African countries. Twenty-five of these remain open; the 26<sup>th</sup>, against Darfur rebel leader Bahar Idriss Abu Garda, was dismissed by judges, though the prosecutor may attempt to submit new evidence in an attempt to re-open it. The cases stem from investigations into violence in Libya, Kenya's post-election unrest in 2007-2008, rebellion and counter-insurgency in the Darfur region of Sudan, the Lord's Resistance Army insurgency in central Africa, civil conflict in eastern Democratic Republic of Congo (DRC), and a 2002-2003 conflict in the Central African Republic. The Prosecutor is also examining 2010-2011 violence in Côte d'Ivoire, a 2009 military crackdown on opposition supporters in Guinea, and inter-communal violence in central Nigeria, but has not opened formal investigations or opened cases with regard to these situations.

Uganda, DRC, CAR, Kenya, Nigeria, and Guinea are states parties to the ICC. Sudan, Libya, and Côte d'Ivoire are not. ICC jurisdiction in Sudan and Libya stems from U.N. Security Council actions, while jurisdiction in Côte d'Ivoire was granted by virtue of a declaration submitted by the Ivorian Government on October 1, 2003, which accepted the jurisdiction of the Court as of

<sup>23</sup> Presidential Determination No. 2006-27 of September 29, 2006; CRS interview with State Department official, September 4, 2008.

<sup>24</sup> Presidential Determination No. 2007-5 of November 27, 2006, waives restrictions on FY2006 ESF assistance; Presidential Determination No. 2008-21 of June 20, 2008, does not specify a fiscal year.

September 19, 2002.<sup>25</sup> Five suspects—four Congolese nationals and one Rwandan—are currently in ICC custody. The ICC Prosecutor has sought summonses, rather than arrest warrants, in connection with attempted prosecutions of Darfur rebel commanders and of Kenyan suspects. The Prosecutor has not secured any convictions to date.

**Table 1. Summary of ICC Activities in Africa**

<b>Situation</b>	<b>Case</b>	<b>Status</b>
Libya	Muammar al Qadhafi, his son Sayf al Islam al Qadhafi, and intelligence chief Abdullah al Senussi	Arrest warrants issued on June 27, 2011. Jurisdiction granted by the U.N. Security Council in February 2011. Investigation opened on March 3.
Kenya	Politician William Ruto, Minister of Industrialization Henry Kosgey, and journalist Joshua Arab Sang	Suspects appeared voluntarily before the Court in April 2011 in responses to summonses. Confirmation of charges hearing scheduled for September 2011.
	Deputy Prime Minister Uhuru Kenyatta, Cabinet Secretary Francis Muthaura, and Maj. Gen. (Retd.) Hussein Ali	Suspects appeared voluntarily before the Court in April 2011 in response to summonses. Confirmation of charges hearing scheduled for September 2011.
Darfur, Sudan	Former Interior Minister Ahmad Muhammad Harun and alleged former militia leader Ali Kushayb	Arrest warrants issued in May 2007. Suspects at large. Harun is governor of Sudan's Southern Kordofan state.
	Darfur rebel leader Bahar Idriss Abu Garda	Prosecutor's case dismissed by ICC judges in February 2010.
	Darfur rebel leaders Abdallah Banda Abakaer Nourain, and Saleh Mohammed Jerbo Jamus	Pre-trial phase; charges confirmed in March 2011. Banda and Jerbo appeared voluntarily before the Court in response to summonses in June 2010.
	Sudanese President Omar Hassan al Bashir	Arrest warrant issued in March 2009 for war crimes and crimes against humanity. Additional arrest warrant issued for genocide in July 2010. Bashir re-elected president in April 2010.
"Situation of the Lord's Resistance Army (LRA)" [Uganda]	LRA commanders Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya	Arrest warrants unsealed in October 2005. Otti and Lukwiya reportedly dead. Remaining suspects at large.

<sup>25</sup> ICC Office of the Prosecutor Weekly Briefing, 15-21 February 2011, Issue #75.

Situation	Case	Status
Democratic Republic of Congo	Alleged militia leader Thomas Lubanga Dyilo	Trial initiated in January 2009 and expected to conclude in August 2009. Suspect transferred to ICC custody in March 2006.
	Alleged militia leaders Germain Katanga and Mathieu Ngudjolo Chui	Joint trial initiated in November 2009. Suspects transferred to ICC custody in October 2007 and February 2008, respectively.
	Former militia and rebel leader turned DRC army officer Bosco Ntaganda	Arrest warrant issued in August 2006, unsealed in April 2008. Suspect widely reported to be living in Goma and participating in Congolese military operations.
	Alleged militia political leader Calixte Mbarushimana	Arrested in France in October 2010, transferred to ICC custody on January 25, 2011.
Central African Republic	Former Congolese rebel leader turned Congolese transitional vice president and Senator Jean-Pierre Bemba Gombo	Trial initiated in November 2010. Suspect arrested in Belgium and transferred to ICC custody in July 2008.
Côte d'Ivoire	—	Prosecutor requested authorization to open a full investigation on June 23, 2011.
Guinea	—	Preliminary examination.
Nigeria	—	Preliminary examination.

## Libya

On June 27, ICC judges issued arrest warrants for Libyan leader Muammar al Qadhafi, his son Sayf al Islam al Qadhafi, and intelligence chief Abdullah al Senussi, having found “reasonable grounds” to believe that they are responsible for crimes against humanity, including murder and “persecution.” In his application for the warrants, filed on May 16, the Prosecutor alleged that Qadhafi “conceived and implemented, through persons of his inner circle” such as Sayf al Islam and Al Senussi, “a plan to suppress any challenge to his absolute authority through killings and other acts of persecution executed by Libyan Security Forces. They implemented a State policy of widespread and systematic attacks against a civilian population, in particular demonstrators and alleged dissidents.”<sup>26</sup> The ICC Prosecutor has subsequently suggested he may seek additional charges related to sexual assault. Some observers have argued that the warrants make it less likely that Qadhafi will agree to relinquish power, while others argue that they could deter further abuses.<sup>27</sup> The Qadhafi government has denied accusations of rights abuses.

<sup>26</sup> ICC Pre-Trial Chamber I, Office of the Prosecutor, *Situation in the Libyan Arab Jamahiriya: Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif al-Islam Gaddafi and Abdullah al-Senussi*, May 16, 2011.

<sup>27</sup> See CRS Report RL33142, *Libya: Unrest and U.S. Policy*, by Christopher M. Blanchard.

On February 26, 2011, U.N. Security Council Resolution 1970 referred the situation in Libya since February 15, 2011, to the ICC. This action provides the ICC with jurisdiction over war crimes, crimes against humanity, and genocide occurring in Libya since that date, even though Libya is not a state party to the Court. The United States voted in favor of the resolution, the first time it has done so in referring an issue to the ICC. The Prosecutor indicated in opening a formal investigation in March that he would focus on the role of the government and security forces in ongoing violence, but warned that members of armed opposition groups could also be held criminally liable for abuses.

ICC President Sang-Hyun Song suggested in April that the Libya investigation had placed significant pressure on the Court's budget, which could potentially impede the Court's ability to advance its existing prosecutions or examinations of new situations.<sup>28</sup>

## Kenya

The Prosecutor's request to open an investigation in Kenya was approved by ICC judges in March 2010. Kenya is a party to the ICC, but it was the first instance in which ICC judges authorized an investigation based on a recommendation from the Prosecutor, as opposed to a state referral or U.N. Security Council directive. The investigation was related to post-election violence in Kenya in 2007-2008, in which over 1,000 individuals were killed, hundreds of thousands displaced, and a range of other abuses, including sexual violence, allegedly committed. A government of national unity was formed following the disputed elections, and the issue of accountability for abuses has remained a sensitive one in Kenyan politics. The Prosecutor contends that high-ranking officials planned and instigated large-scale abuses, a view supported by independent investigations into the violence.<sup>29</sup>

On December 15, 2010, the Prosecutor presented two cases, against a total of six individuals, for alleged crimes against humanity. The Prosecutor applied to ICC judges for summonses, rather than arrest warrants, stating that summonses would be sufficient to ensure the suspects' appearance before the Court.<sup>30</sup> Judges issued the summonses in March 2011, and in April the six suspects appeared voluntarily before the court, where they each denied the accusations against them.

The suspects named in the first case are William Ruto, Member of Parliament and former Minister of Education; Henry Kosgey, Minister of Industrialization; and Joshua Arap Sang, a radio journalist. They are each accused of three counts of crimes against humanity, related to murder, forcible population transfers, and "persecution." Those named in the second case are Francis Muthaura, head of the public service, secretary to the Cabinet, and chairman of the National Security Advisory Committee; Uhuru Kenyatta, deputy prime minister and minister of finance (and the son of Kenya's founding leader Jomo Kenyatta); and Mohamed Hussein Ali, former commissioner of the Kenyan police. They are each accused of five counts of crimes

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<sup>28</sup> Aaron Gray-Bloch, "Interview-ICC Budget 'Under Pressure' to Fund Libya Probe," *Reuters*, April 14, 2011.

<sup>29</sup> For example, the state-funded Kenya National Commission on Human Rights has alleged that senior government ministers were perpetrators of violence, including Higher Education Minister William Ruto and Finance Minister Uhuru Kenyatta. Both have denied the allegations, and Ruto accused the Commission of bribing witnesses. See *Reuters*, "Kenyan Ex-Minister Says Meeting with ICC a Success," November 8, 2010.

<sup>30</sup> ICC Office of the Prosecutor, *Factsheet: Situation in the Republic of Kenya*, December 15, 2010.

against humanity, related to murder, forcible population transfers, rape, “persecution,” and “other inhumane acts.”<sup>31</sup>

The suspects in the first case are associated with Prime Minister Raila Odinga, while those in the second case are associated with President Mwai Kibaki. The prosecutions, which have targeted the upper echelons of political power, are an extremely sensitive issue in Kenya with potential implications for the country’s stability, inter-ethnic relations, and elections scheduled for 2012. The ICC Prosecutor appeared to acknowledge this sensitivity by naming suspects of different ethnic groups and political loyalties. Polls indicate that a majority of Kenyans support ICC prosecutions over domestic trials.<sup>32</sup> Still, the case has sparked a backlash within Kenya’s political class despite earlier support for ICC involvement. Although Odinga has repeatedly encouraged the ICC to pursue its cases (which are widely viewed as more detrimental to his potential political rivals than to him), President Kibaki has criticized the ICC cases and called for trials to be held within Kenya instead. To date, none of the suspects targeted by the ICC have been charged in Kenya, though they were reportedly questioned by public prosecutors in July 2011. In December 2010, parliamentarians passed legislation urging Kenya to withdraw from the Court. (According to some legal analysts, a withdrawal would not necessarily preclude ICC jurisdiction over crimes committed during the period when Kenya was a state party.) Efforts by Kenya’s government and the African Union (AU) to push for a deferral of ICC prosecutions by the U.N. Security Council in the interest of peace and security have been unsuccessful to date. Kenyan government legal filings to ICC judges that challenge the cases’ admissibility have been similarly unsuccessful.

The Kenyan government initially pledged to cooperate with ICC actions, although senior officials have been accused by some observers and the ICC Prosecutor as attempting to stonewall investigations. Some Kenyans are reportedly concerned that prosecutions could stir up the same ethnic tensions that led to the post-election turmoil, while others fear that a lack of prosecutions could lead to future electoral violence.<sup>33</sup> Other concerns center around the protection and relocation of witnesses and victims, who have already reportedly been subjected to intimidation and threats.<sup>34</sup> In August 2010, Kenya was criticized by ICC advocates when it welcomed Sudanese President Bashir (see “The Case Against Bashir,” below) to a celebration of the country’s adoption of a new constitution.

## **Background on ICC Involvement**

ICC involvement in Kenya follows protracted domestic wrangling over how to ensure justice for victims of the electoral violence without upsetting the government’s fragile power-sharing agreement. An official investigation into the post-election violence, known as the Waki Commission, identified potential suspects and recommended the establishment of an independent Kenyan tribunal with international participation. In December 2008, the government accepted the

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<sup>31</sup> ICC, “Situation in the Republic of Kenya,” accessed on July 20, 2011.

<sup>32</sup> *Reuters*, “Majority of Kenyans Back Trials at Hague ICC—Poll,” September 22, 2010; *Reuters*, “Kenyans Want ICC Suspects Out of Public Office—Poll,” December 18, 2010; *Reuters*, “Kenyan Support for Local Violence Trials Slips—Poll,” April 5, 2011.

<sup>33</sup> *Reuters*, “Most Kenyans Want Violence Suspects Tried by ICC,” July 18, 2009; *Reuters*, “Kenya Keeps Options Open on Violence Court,” July 30, 2009.

<sup>34</sup> Andrew Teyie, “Kenya: Ocampo Witnesses Fear Leak,” *Nairobi Star*, April 21, 2010; AP, “International Court Prosecutor Says ‘Bribed’ Witnesses Will Not Testify in Kenya Violence Case,” November 17, 2010; *Nairobi Star*, “Government Explains Kimeli Death to Ocampo,” May 23, 2011.

Waki Commission's findings and agreed that it would refer the situation to the ICC if the Commission's recommendations were not implemented. Donors, including the United States and the European Union, expressed support for an independent domestic tribunal, and the Kenyan parliament was expected to pass legislation establishing such a tribunal by March 2009. In July 2009, however, legislation had yet to be passed, prompting chief mediator Koffi Annan, the former U.N. Secretary-General, to submit a list of individuals suspected of orchestrating the violence to the ICC. The Kenyan Cabinet subsequently announced that it would not establish a special tribunal, but would instead convene a Truth, Justice and Reconciliation Commission (TJRC) which would not prosecute suspects but rather to oversee reforms in the judiciary, police, and other investigatory bodies that may, in turn, deal with the issue.<sup>35</sup>

## **U.S. Reactions**

The United States initially expressed support for domestic prosecutions of suspects in post-election violence, but has supported ICC involvement in the absence of domestic action. Upon the Prosecutor's announcement of six suspects, President Obama stated, "I urge all of Kenya's leaders, and the people whom they serve, to cooperate fully with the ICC investigation and remain focused on implementation of the reform agenda and the future of your nation."<sup>36</sup> In February, U.S. Deputy Secretary of State James Steinberg said, "We are very committed to the principle of accountability and the avoidance of impunity and right now the only mechanism to pursue that is through the ICC." He added, "That is the choice the Kenyan government made when both the executive branch and the legislature chose not to pursue a domestic approach."<sup>37</sup> The United States opposed U.N. Security Council deferral of the ICC prosecutions in Kenya.<sup>38</sup>

## **Sudan**

ICC jurisdiction in Sudan was conferred by the U.N. Security Council, as Sudan is not a party to the Court. U.N. Security Council Resolution 1593, in 2005, referred the situation in Darfur, dating back to July 1, 2002, to the ICC Prosecutor.<sup>39</sup> The Resolution was adopted by a vote of 11 in favor, none against, and with four abstentions—the United States, China, Algeria, and Brazil.<sup>40</sup> While Sudan is not a party to the ICC and has not consented to its jurisdiction, the Court argues that the Resolution is binding on all U.N. member states, including Sudan. Under the ICC Statute, the ICC was authorized, but not required, to accept the case.<sup>41</sup>

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<sup>35</sup> The ability and political will of the Commission to fulfill its mandate are reportedly unproven. See Mike Pflanz, "US Professor Quits Kenyan Truth Commission, Citing Lack of Confidence," *The Christian Science Monitor*, October 22, 2010.

<sup>36</sup> White House, "Statement by President Obama on the International Criminal Court Announcement," December 15, 2010.

<sup>37</sup> *Reuters*, "U.S. Backs Trials of Kenyan Poll Clash Suspects," February 3, 2011.

<sup>38</sup> Tom Odula, "US Opposes Kenya's Bid to Defer Int'l Trials of 6 Accused of Vote Violence that Killed 1,000," *AP*, March 10, 2011.

<sup>39</sup> See U.N. Press Release, "Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court," SC/8351; and U.N. Press Release, "Secretary-General Welcomes Adoption of Security Council Resolution Referring Situation in Darfur, Sudan to International Criminal Court Prosecutor," March 31, 2005, SG/SM/9797- AFR/1132.

<sup>40</sup> U.N. Security Council Resolution 1593 (2005), March 31, 2005.

<sup>41</sup> Frederic L. Kirgis, "U.N. Commission's Report on Violations of International Humanitarian Law in Darfur: Security Council Referral to the International Criminal Court," *American Society of International Law Insight Addendum*, April (continued...)

The Security Council had previously, in September 2004, established an International Commission of Inquiry on Darfur under Resolution 1564, maintaining that the Sudanese government had not met its obligations under previous Resolutions.<sup>42</sup> In January 2005, the Commission reported that it had compiled a confidential list of potential war crimes suspects and “strongly recommend[ed]” that the Security Council refer the situation to the ICC.<sup>43</sup> Following the Council’s referral, the ICC Prosecutor received the document archive of the Commission of Inquiry and the Commission’s sealed list of individuals suspected of committing serious abuses in Darfur, though this list is not binding on the selection of suspects. The Office of the Prosecutor initiated its own investigation in June 2005. The Sudanese government also created its own special courts for Darfur in an apparent effort to stave off the ICC’s jurisdiction; however, the courts’ efforts were widely criticized as insufficient.<sup>44</sup>

### **The U.S. Position on U.N. Security Council Resolution 1593**

In statements made in July and September 2004, respectively, Congress and the Bush Administration declared that genocide was taking place in Darfur.<sup>45</sup> The Administration supported the formation of the International Commission of Inquiry for Darfur.<sup>46</sup> However, the Bush Administration preferred a special tribunal in Africa to be the mechanism of accountability for those who committed crimes in Darfur. It objected to the U.N. Security Council referral to the ICC because of its stated objections to the ICC’s jurisdiction over nationals of states not party to the Rome Statute.<sup>47</sup> Still, the United States had at one time supported a version of the Rome Statute that would have allowed the U.N. Security Council to refer cases involving non-states parties to the ICC, but would not have allowed other states or the Prosecutor to refer cases.

The United States abstained on Resolution 1593 (which is not equivalent to a veto in the Security Council) because the Resolution included language that dealt with the sovereignty questions of concern and essentially protected U.S. nationals and other persons of non-party States other than Sudan from prosecution.<sup>48</sup> The abstention did not change the fundamental objections of the Bush Administration to the ICC. At the same time, the Bush Administration supported international cooperation to stop atrocities occurring in Darfur.<sup>49</sup>

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5, 2005.

<sup>42</sup> S/RES/1564 (2004), September 18, 2004.

<sup>43</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, S/2005/60, January 25, 2005.

<sup>44</sup> Human Rights Watch, *Lack of Conviction: The Special Criminal Court on the Events in Darfur*, June 2006; U.N. News, “Sudan’s Special Court On Darfur Crimes Not Satisfactory, UN Genocide Expert Says,” December 16, 2005; *Sudan Tribune*, “Govt Fires Darfur War Crimes Prosecutor Amid Talk of ‘Transitional Justice,’” October 18, 2010.

<sup>45</sup> Concurrent Resolution Declaring Genocide in Darfur, Sudan (H.Con.Res. 467 [108<sup>th</sup>], July 22, 2004; Congressional Testimony by then-Secretary of State Colin Powell, September 9, 2004.

<sup>46</sup> U.N. Press Release, “Security Council Declares Intention to Consider Sanctions to Obtain Sudan’s Full Compliance with Security, Disarmament Obligations on Darfur,” SC/8191, September 18, 2004.

<sup>47</sup> U.S. Mission to the United Nations (USUN) Press Release #055, “Explanation of Vote on the Sudan Accountability Resolution,” Ambassador Ann W. Patterson, March 31, 2005.

<sup>48</sup> See Paragraph 6 of Security Council Resolution 1593; also see Kirgis, *Op. Cit.*

<sup>49</sup> USUN Press Release #055, *Op. Cit.*; USUN Press Release #229, “Statement on the Report of the International Criminal Court,” Carolyn Willson, Minister Counselor for International Legal Affairs, November 23, 2005.

## **Ahmad Muhammad Harun and Ali Kushayb**

In May 2007, the ICC publicly issued arrest warrants for former Interior Minister Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb), an alleged former Janjaweed leader in Darfur.<sup>50</sup> They were each accused of over 40 counts of war crimes and crimes against humanity in connection with abuses allegedly committed in Darfur in 2003 and 2004. The Sudanese government refused to comply with either warrant. Although news reports suggest Sudanese authorities arrested Kushayb in October 2008, Sudanese officials stated they would conduct their own investigation into his alleged crimes in Darfur, and did not indicate that they planned to turn him over to the ICC.<sup>51</sup> In May 2009, Harun was appointed governor of South Kordofan State. In June 2010, the ICC Pre-Trial Chamber informed the U.N. Security Council that “the Republic of Sudan is failing to comply with its cooperation obligations stemming from Resolution 1593 (2005) in relation to the enforcement of the warrants of arrest issued by the Chamber against Ahmad Harun and Ali Kushayb.”<sup>52</sup>

## **Darfur Rebel Commanders**

In December 2007, the ICC Prosecutor announced the opening of a new investigation into the targeting of peacekeepers and aid workers in Darfur. In November 2008, the Prosecutor submitted a sealed case against three alleged rebel commanders in Darfur whom he accused of committing war crimes during an attack on the town of Haskanita on September 29, 2007. Twelve African Union peacekeepers were allegedly killed and eight injured in the attack.<sup>53</sup>

In May 2009, ICC pretrial judges issued a summons to one of the three suspects, Bahar Idriss Abu Garda, to appear before the Court.<sup>54</sup> Abu Garda reported to The Hague voluntarily, where he denied the accusations of involvement in the Haskanita incident. In February 2010, ICC judges declined to confirm the Prosecutor’s case against Abu Garda, contending that there was insufficient evidence to establish that he could be held criminally responsible for the attack on peacekeepers.

In June 2010, two other rebel commanders sought by the Prosecutor, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, voluntarily surrendered to the Court. Their names had not previously been made public. Banda, a former military commander in the rebel Justice and Equality Movement (JEM), and Jerbo, a former leader in the Sudan Liberation Movement (SLM)-Unity faction, each face three counts of war crimes related to “violence to life,”

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<sup>50</sup> ICC Press Release, “Warrants of Arrest for the Minister of State for Humanitarian Affairs of Sudan, and a Leader of the Militia/Janjaweed,” May 2, 2007. The Sudanese government has denied having control over the Janjaweed, a term for ethnic Arab militias accused of perpetrating human rights abuses in Darfur. However, consensus exists among human rights researchers, journalists, and others who have visited Darfur that the Janjaweed have received arms and support from the government.

<sup>51</sup> Jeffrey Gettleman, “Sudan Arrests Militia Chief Facing Trial,” *The New York Times*, October 14, 2008.

<sup>52</sup> U.N. document S/2010/265.

<sup>53</sup> ICC Office of the Prosecutor, “Attacks on Peacekeepers Will Not Be Tolerated; ICC Prosecutor presents evidence in third case in Darfur,” November 20, 2008. The peacekeepers were serving under the African Union Mission in Sudan (AMIS), which was later folded into the U.N.-African Union Mission in Darfur (UNAMID).

<sup>54</sup> The ICC judges decided that an arrest warrant was not necessary to ensure Abu Garda’s appearance before the Court.



intentionally directing attacks against a peacekeeping mission, and pillaging.<sup>55</sup> On March 7, 2010, ICC judges confirmed the charges against Banda and Jerbo, paving the way for a trial.

## **The Case Against Bashir**

On March 4, 2009, ICC judges issued an arrest warrant for Sudanese President Omar Hassan al Bashir. The warrant holds that there are “reasonable grounds” to believe Bashir is criminally responsible for five counts of crimes against humanity and two counts of war crimes, referring to alleged attacks by Sudanese security forces and pro-government militia in the Darfur region of Sudan during the government’s six-year counter-insurgency campaign.<sup>56</sup> The ICC warrant states that there are reasonable grounds to believe attacks against civilians in Darfur were a “core component” of the Sudanese government’s military strategy, that such attacks were widespread and systematic, and that Bashir acted “as an indirect perpetrator, or as an indirect co-perpetrator.”<sup>57</sup> In his application for an arrest warrant, filed in July 2008, the ICC Prosecutor affirmed that while Bashir did not “physically or directly” carry out abuses, “he committed these crimes through members of the state apparatus, the army, and the Militia/Janjaweed” as president and commander-in-chief of the Sudanese armed forces.

The arrest warrant is not an indictment; under ICC procedures, charges must be confirmed at a pre-trial hearing. The decision to issue a warrant is expected to take into account whether there are reasonable grounds to believe that a suspect committed crimes as alleged by the Prosecutor and whether a warrant is necessary to ensure the suspect’s appearance in court. Although many domestic legal systems grant sitting heads of state immunity from criminal prosecution, the Rome Statute grants the ICC jurisdiction regardless of official capacity.<sup>58</sup>

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

The ICC urged “all States, whether party or not to the Rome Statute, as well as international and regional organizations,” to “cooperate fully” with the warrant.<sup>59</sup> However, most observers agree that there is little chance of Bashir being arrested in Sudan. One analysis noted that while Bashir may risk arrest if he travels overseas, “no one expects Sudan to hand over Bashir, who has been executive ruler of the country for more than 15 years, absent major political changes in the country.”<sup>60</sup> Sudanese government officials have rejected the ICC’s jurisdiction, though some legal experts argue that Sudan is obligated as a U.N. member state to cooperate because the warrant

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<sup>55</sup> ICC, “Case The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus.”

<sup>56</sup> See CRS Report RL33574, *Sudan: The Crisis in Darfur and Status of the North-South Peace Agreement*, by Ted Dagne.

<sup>57</sup> ICC Pre-Trial Chamber I, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, March 4, 2009.

<sup>58</sup> Rome Statute, Art. 27. International legal experts are, however, divided as to whether the Rome Statute waives “procedural” immunity for sitting heads of state—i.e., protection from arrest while traveling in official capacity—under customary international law.

<sup>59</sup> ICC press release, “ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan,” March 4, 2009.

<sup>60</sup> Patrick Worsnip, “No Quick Way to Enforce ICC Warrant for Bashir,” *Reuters*, March 5, 2009.

stems from a U.N. Security Council resolution under Chapter VII.<sup>61</sup> In June 2011, the ICC Prosecutor argued in an appearance before the Security Council that “crimes against humanity and genocide continue unabated in Darfur” at Bashir’s behest.<sup>62</sup>

### *Genocide Accusations*<sup>63</sup>

In his application for an arrest warrant in July 2008, the ICC Prosecutor accused Bashir of three counts of genocide, making the Sudanese president the first individual to be accused of this crime before the Court. The Prosecutor alleged that Bashir “intends to destroy in substantial part the Fur, Masalit and Zaghawa ethnic groups as such” through coordinated attacks by government troops and Janjaweed militia.<sup>64</sup> In 2009, ICC judges found, by a ruling of two-to-one, that the Prosecutor had “failed to provide reasonable grounds to believe that the Government of Sudan acted with specific intent” to destroy these groups.<sup>65</sup> The Prosecutor appealed, and on July 12, 2010, ICC judges issued a second warrant for Bashir, this time citing three counts of genocide. The second warrant does not replace, revoke, or otherwise alter the first warrant, which also remains in effect.<sup>66</sup>

Many human rights advocates welcomed the attempt to bring genocide charges. However, the formulation of the Prosecutor’s accusation has drawn some criticism. The U.N. Commission of Inquiry concluded in its January 2005 report that the violence in Darfur did not amount to genocide, although “international offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide.”<sup>67</sup> Some Darfur activists accused the Commission of allowing political considerations to affect its conclusions.<sup>68</sup> However, some critics contend that the Prosecutor’s application concerning genocide did not sufficiently establish intent or Bashir’s alleged role.<sup>69</sup>

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<sup>61</sup> The Sudanese government signed the Rome Statute on September 8, 2000, but did not ratify it. On August 26, 2008, Sudan notified the Secretary-General of the United Nations, as depositary of Rome Statute of the International Criminal Court, that Sudan “does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000.” (Reference: C.N.612.2008.TREATIES-6 [Depositary Notification], Rome Statute of the International Criminal Court, “Sudan: Notification.”)

<sup>62</sup> AFP, “Bashir Committing New Crimes in Darfur: Prosecutor,” June 8, 2011.

<sup>63</sup> See CRS Report RL32605, *Genocide: Legal Precedent Surrounding the Definition of the Crime*, by Judith Derenzo and Michael John Garcia, for a discussion of the legal elements of genocide under the Rome Statute and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

<sup>64</sup> Darfur’s main rebel groups are associated with these ethnicities; the Prosecutor’s case against Bashir alleges that military and militia attacks specifically targeted civilians even where rebel locations were spatially separate and well-known. The Prosecutor’s application for a warrant referenced additional attacks against other ethnic groups in connection with alleged war crimes and crimes against humanity.

<sup>65</sup> ICC press release, “ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan,” March 4, 2009.

<sup>66</sup> ICC, “Pre-Trial Chamber I Issues a Second Warrant of Arrest Against Omar Al Bashir for Counts of Genocide,” July 12, 2010.

<sup>67</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, January 25, 2005.

<sup>68</sup> E.g., Eric Reeves, “Report of the International Commission of Inquiry on Darfur: A critical analysis (Part II),” *Sudanreeves.org*, February 6, 2005.

<sup>69</sup> See e.g. Alex de Waal, “Darfur, the Court and Khartoum: The Politics of State Non-Cooperation,” in Nicholas Waddell and Phil Clark, eds., *Courting Conflict? Justice, Peace and the ICC in Africa* (London: The Royal Africa Society, March 2008); Andrew Heavens, “ICC Case Against Bashir Has Holes—Sudan Expert,” *Reuters*, January 27, 2009; Rony Brauman, “The ICC’s Bashir Indictment: Law Against Peace,” *World Politics Review*, July 23, 2008. For further background, see Human Rights Watch, *Entrenching Impunity: Government Responsibility for International* (continued...)

## ***Sudanese Reactions***

The Bashir Administration has rejected ICC jurisdiction over Darfur as a violation of its sovereignty and an instrument of Western pressure for regime change, and accused the Court of being part of a neocolonialist plot against a sovereign African and Muslim state.<sup>70</sup> The Bashir administration has repeatedly denied that genocide or ethnic cleansing is taking place in Darfur and has accused the Prosecutor of basing his investigation on testimony by rebel leaders and “spies” posing as humanitarian workers.<sup>71</sup> The government has barred ICC personnel from speaking to Sudanese officials, and authorities have taken a hard-line stance against Sudanese suspected of sympathizing with the ICC prosecution attempt.<sup>72</sup> The government also responded by expelling over a dozen international aid organizations that it accused of collaborating with the ICC.<sup>73</sup> In July 2010, when a second ICC warrant was issued for Bashir, Sudan expelled two senior humanitarian officials from Darfur. In November, Sudanese security forces attempted to shut down an independent radio station operating in Darfur whose staff they accused of working for the ICC and Darfur rebels.<sup>74</sup>

A *New York Times* analysis noted that while many advocates hope the arrest warrant will weaken Bashir’s hold in power, “Sudanese resentment of the court’s actions could have the reverse effect and rally the nation to his side. After the court’s prosecutor first announced that he was seeking a warrant for Mr. Bashir, some of the president’s political enemies closed ranks behind him.”<sup>75</sup> Analysts disagree over whether the warrant has intensified Bashir’s international isolation. The Sudanese leader has engaged in aggressive diplomatic outreach to allied states, traveling to multiple friendly countries in the weeks following the warrant’s issuance.

## ***Regional Reactions***

The Sudanese government has rallied support from many Arab and African leaders, and among regional organizations such as the African Union (AU), the Arab League, the Community of Sahel-Saharan States (CEN-SAD), and the Organization of the Islamic Conference (OIC), all of which have criticized the ICC and called (unsuccessfully to date) for a deferral of prosecution by

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*Crimes in Darfur*, December 2005.

<sup>70</sup> E.g., BBC Monitoring, “Sudanese Leader Calls International Court ‘Tool of Imperialist Forces,’” [State-owned] Suna News Agency, August 20, 2008; Marlise Simons and Neil MacFarquhar, “Bashir Defies Arrest Order on War Crime Charges,” *The New York Times*, March 6, 2009.

<sup>71</sup> See e.g. *Al-Sahafah* [Khartoum], “Sudanese Aide Accuses West of Striving to Replace Al-Bashir,” via BBC Monitoring, August 21, 2008; *Sudan Tribune*, “Sudan Warns UN Chief Over ICC,” via BBC Monitoring, August 18, 2008; *The Associated Press* (hereafter, *AP*), “Sudan Dismisses ICC Proceedings on Darfur, Reiterates Refusal to Hand Over Any Suspects,” July 11, 2008; and de Waal, *Op. Cit.*

<sup>72</sup> CRS interview with ICC Office of the Prosecutor official, September 3, 2008. ICC prosecutorial staff have conducted extensive interviews with witnesses outside of Sudan, including in neighboring countries. In November 2008, Sudanese police detained a human rights activist they accused of being in contact with the ICC, and in January 2009, a Sudanese man was convicted of “spying” for the ICC and sentenced to prison.

<sup>73</sup> Bashir reportedly warned that “all the diplomatic missions in Sudan, the NGOs, and the peacekeepers” could face the same punishment, one in a series of remarks by Sudanese officials that appeared to threaten the safety of U.N. personnel in Sudan. Abdelmoniem Abu Edries Ali, “Defiant Beshir in Darfur, Warns Foreigners,” *AFP*, March 8, 2009; *AFP*, “ICC Action Against Sudan’s Beshir Could Hurt UN: Ban,” February 4, 2009.

<sup>74</sup> *Reuters*, “Sudan Accuses Darfur Radio Staff of Working for ICC,” November 7, 2010.

<sup>75</sup> Marlise Simons, “Court Issues Warrant for Arrest of Sudan President,” *The New York Times*, March 5, 2009.

the U.N. Security Council. The decision to prosecute an African head of state has notably sparked a backlash among African governments, and the African Union has resolved not to cooperate with the ICC in carrying out the arrest warrant (see “African Union Objections,” below). Some African and Middle Eastern commentators and civil society groups have praised the decision to pursue Bashir as a step against impunity in the region, while others expressed concern that the move displayed bias or a neocolonial attitude toward Africa.<sup>76</sup> In October 2009, an AU panel on Darfur led by former South African President Thabo Mbeki concluded that a special “hybrid” court, consisting of Sudanese and international judges, should try the gravest crimes committed in Darfur, but did not take a position on whether such a court would seek to try cases currently before the ICC. (This proposal has not been carried out to date.)

Bashir has traveled to numerous countries in the region since the first ICC warrant was issued in 2009, including Egypt, Ethiopia, Libya, Qatar, Saudi Arabia, and Zimbabwe, none of which are parties to the ICC. He also traveled to China, not a party to the court, in June 2011. In July 2010, Bashir traveled to neighboring Chad, his first trip to an ICC state party; although Chad had previously publicly supported the ICC prosecution, authorities declined to arrest him amid a broader attempt to improve historically strained bilateral relations between the two states. In August 2010, Bashir traveled to Kenya—also an ICC state party, and one in which prosecutions have been initiated—and Kenyan authorities likewise declined to effect an arrest. In May 2011, Bashir traveled to Djibouti, also a state party. Still, the warrants appear to have had some impact on Bashir’s international movements, and reports suggest that he has chosen not to visit the Central African Republic, Libya, and Malaysia at various times due to diplomatic pressures.

### ***U.S. Reactions***

The Obama Administration has expressed support for the ICC investigation and prosecution of war crimes in Sudan, and Administration officials have repeatedly stated that those responsible for serious crimes in Darfur should be held accountable. In July 2009, the Obama Administration’s Special Envoy on Sudan, retired General J. Scott Gration, stated that U.S. engagement with Sudan in the context of peace negotiations “does not mean that [Bashir] does not need to do what’s right in terms of facing the International Criminal Court and those charges.”<sup>77</sup> In response to a question at an August 2009 press conference in Nairobi, Kenya, Secretary of State Hillary Clinton said, “The actions by the ICC sent a clear message that the behavior of Bashir and his government were outside the bounds of accepted standards and that there would no longer be impunity.... The United States and others have continued to support the need to eventually bring President Bashir to justice.”<sup>78</sup> In July 2010, Gration nonetheless

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<sup>76</sup> See e.g., *The Daily Champion* [Lagos, Nigeria], “Al-Bashir’s Indictment,” August 6, 2008; Paul Ejime, “Before Al-Bashir Goes on Trial,” *The Guardian* [Lagos], July 28, 2008; Al-Jazeera, “The Opposite Direction,” presented by Faysal al-Qasim, August 12, 2008, via the Open Source Center; *AFP*, “Praise and Criticism for ICC From African Rights Organizations,” July 16, 2008; HRW, “AU: African Civil Society Presses States for ICC Support,” November 2, 2009. Archbishop Desmond Tutu of South Africa, who serves on the board of directors of the ICC’s Trust Fund for Victims, has criticized African governments for supporting Bashir, writing, “I regret that the charges against President Bashir are being used to stir up the sentiment that the justice system—and in particular, the international court—is biased against Africa. Justice is in the interest of victims, and the victims of these crimes are African. To imply that the prosecution is a plot by the West is demeaning to Africans and understates the commitment to justice we have seen across the continent.”

<sup>77</sup> *AFP*, “US Envoy: Must Cooperate With Sudan Even if New Warrant Issued,” July 9, 2009.

<sup>78</sup> U.S. State Department/Hillary Rodham Clinton, “Remarks With Kenyan Foreign Minister Moses Wetangula,” Kenyatta International Conference Centre, Nairobi, Kenya, August 5, 2009. In March 2009, Clinton said, “President Bashir would have a chance to have his day in court if he believes that the indictment is wrongly charged. He can (continued...) ”

suggested that the ICC's decision to issue a second arrest warrant for Bashir "will make my mission more difficult and challenging."<sup>79</sup> President Obama subsequently stated in an interview that "it is a balance that has to be struck. We want to move forward in a constructive fashion in Sudan, but we also think that there has to be accountability, and so we are fully supportive of the ICC."<sup>80</sup> In August, Obama expressed "disappointment" that Kenya had hosted Bashir "in defiance of International Criminal Court arrest warrants."<sup>81</sup> Following Bashir's trip to China in June 2011, Secretary of State Hillary Clinton stated that "countries should not be welcoming the Sudanese president because of outstanding charges against him from the international criminal court... I hope that other countries will not offer the opportunity for a visit."<sup>82</sup>

Administration officials have at times appeared to express divergent characterizations of the situation in Darfur. In June 2009, Special Envoy Gration suggested at a press briefing that the Sudanese government was no longer engaged in a "coordinated" genocidal campaign in Darfur, contending that ongoing violence represented "the remnants of genocide" and ongoing fighting between rebel groups, the Sudanese government, and Chadian actors.<sup>83</sup> Previously, U.N. Ambassador Susan Rice had characterized Darfur as a "genocide." In response to questions following Gration's remarks, a State Department spokesman stated, "I think there is no question that genocide has taken place in Darfur. We continue to characterize the circumstances in Darfur as genocide."<sup>84</sup> In July 2009, President Obama referred to Darfur as a "genocide," calling it a "millstone around Africa's neck."<sup>85</sup>

Members of the 111<sup>th</sup> Congress expressed a range of positions with regard to the warrant for Bashir. Senator Russell Feingold urged the Administration not to defer the ICC prosecution, stating, "If there is significant progress made toward ending violence on the ground in Darfur, it may be appropriate to consider a suspension at that time."<sup>86</sup> Senator John Kerry stated the warrant "complicates matters," but should not stop U.S. efforts to resolve the conflict in Darfur.<sup>87</sup> In remarks on behalf of the Congressional Black Caucus, Congresswoman Barbara Lee commented, "it's so important to do the right thing now, which is to support the International Criminal Court in its efforts to hold Sudan's President Bashir accountable for his crimes against humanity." Several pieces of draft legislation introduced during the 111<sup>th</sup> Congress expressed support for ICC prosecutions in connection with Darfur.

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(...continued)

certainly contest it." *Reuters*, "Clinton Says Al-Bashir Can 'Have His Day in Court,'" March 4, 2009. While many refer to the ICC proceedings against Bashir as an "indictment," the warrant is not equivalent to an indictment; any charges must be confirmed at a pre-trial hearing.

<sup>79</sup> *The Cable*, "Obama's Sudan Envoy: Bashir Indictment Makes My Job Harder," July 16, 2010.

<sup>80</sup> The White House, "Interview of the President by South African Broadcasting Corporation," July 14, 2010.

<sup>81</sup> The White House, "Statement by President Obama on the Promulgation of Kenya's New Constitution," August 27, 2010.

<sup>82</sup> "Secretary of State Clinton Delivers Remarks with Spain Foreign Minister Trinidad Jimenez After Their Meeting," July 2, 2011, via *Congressional Quarterly* (CQ).

<sup>83</sup> Colum Lynch, "Sudan's 'Coordinated' Genocide in Darfur is Over, U.S. Envoy Says," *The Washington Post*, June 18, 2009.

<sup>84</sup> ABC News, "US Tries to Walk Back From Comments Downplaying Genocide in Darfur," June 18, 2009.

<sup>85</sup> *AFP*, "Sudan: Obama Comments 'A Step Back,'" July 11, 2009.

<sup>86</sup> *AFP*, "Obama Must Support Beshir Warrant: US senator," March 4, 2009.

<sup>87</sup> *Reuters*, "INTERVIEW-Kerry says ICC case no bar on Darfur peace drive," April 17, 2009.

### ***Potential Deferral of the Bashir Prosecution and Security Council Considerations in July 2008: Context and Background***

The ICC Prosecutor's request for an arrest warrant for Bashir on July 14, 2008, occurred during the time that the U.N. Security Council was considering extension of the Council mandate for the African Union-United Nations Hybrid Operation in Darfur (UNAMID). The Council had before it the report of the U.N. Secretary-General on the deployment of the operation, dated July 7 and covering the period April to June 2008.<sup>88</sup> It was expected that this mandate, which was to expire July 31, would be extended, albeit with some discussion of UNAMID-related issues. Council considerations were significantly impacted by the ICC Prosecutor's announcement.<sup>89</sup>

Among the issues engaging Council members after the July 14 action was the suggestion that the Council include in its resolution a request, under Article 16 of the Rome Statute, for a deferral or suspension of further ICC action on the case for up to 12 months in the interest of facilitating efforts toward a peaceful settlement of the situations in Darfur and South Sudan. Some governments expressed concerns that a positive ICC response to the Prosecutor's request for an arrest warrant would exacerbate the situation on the ground in Darfur, making both peacekeepers and humanitarian workers subject to further attacks.

Article 16 of the ICC Statute is entitled *Deferral of investigation or prosecution* and provides that

No investigation or prosecution can be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Thus, if the U.N. Security Council, acting under Chapter VII of the Charter, adopts a resolution requesting the ICC to suspend or defer any further investigation or prosecution of the case against Bashir, the ICC, including the Prosecutor, would be obliged to cease its investigation in that particular situation and the Pre-Trial Chamber, before which the warrant request is pending, would have to suspend its considerations. The Council request would be applicable for 12 months and would be renewable.

David Scheffer, who headed the U.S. delegation to the conference that drafted the ICC Statute, in an August 20, 2008, Op-ed in *Jurist*, noted that the "negotiating history of Article 16 should be instructive to how the Council currently examines the Darfur situation."<sup>90</sup> Scheffer alleged that Article 16 was drafted and adopted to enable the U.N. Security Council to suspend or defer an ICC investigation or prosecution of a situation "*before either is launched* if priorities of peace and security compelled a delay of international justice." He stated that "the original intent behind Article 16 was for the Security Council to act pre-emptively to delay the application of international justice for atrocity crimes in a particular situation in order to focus exclusively on performing the Council's mandated responsibilities for international peace and security objectives." This was a tool to be employed by the Council in instances of "premature State Party

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<sup>88</sup> The U.N. Security Council requested that the Secretary-General report every 90 days on progress made in implementation of UNAMID and the status of the political process.

<sup>89</sup> Security Council Report, "Update Report, Sudan," July 28, 2008, available at <http://www.securitycouncilreport.org>.

<sup>90</sup> David Scheffer, "The Security Council's Struggle over Darfur and International Justice," *Jurist*—Forum (Jurist, University of Pittsburgh School of Law), online at <http://jurist.law.pitt/foramy/2008/08/security-councils-struggle-over-darfur.php>.

or Prosecutor referrals.” In addition, Scheffer claimed that if the current proposals for Council suspension of further ICC action on a situation referred to the ICC by the Council had been foreseen, “Article 16 never would have been approved by the ... majority of governments attending the U.N. talks on the Rome Statute for it would have been viewed as creating rights for the Security Council far beyond the original intent of the Singapore compromise.”

Scheffer noted, “Nonetheless, one plausibly may argue that the language of Article 16 of the Rome Statute technically empowers the Security Council to intervene at this late date and block approval of an arrest warrant against President Bashir or even suspend its execution following any approval of it by the judges.”<sup>91</sup>

U.N. Security Council Resolution 1828 (2008), adopted on July 31, 2008, by a vote of 14 in favor and with the United States abstaining, extended UNAMID for a further 12 months.<sup>92</sup> In abstaining on the vote rather than voting against it, the United States supported renewal of the UNAMID mandate but noted that the language in preambular paragraph 9 “would send the wrong signal to President Bashir and undermine efforts to bring him and others to justice.”<sup>93</sup> The paragraph referred to the July 14 arrest warrant application by the ICC prosecutor and the possibility of a Council request for deferral of further consideration of ICC consideration of that case. In remarks with the press following the vote, U.S. Deputy Permanent Representative Alejandro Wolff stated:

The reason for our abstention ... had to do with one paragraph that would send the wrong signal at a very important time when we are trying to eliminate the climate of impunity, to deal with justice, and to address crimes in Darfur, by suggesting that there might be a way out. There is no compromise on the issue of justice. The ... United States felt it was time to stand up on this point of moral clarity and make clear that this Permanent Member of the Security Council will not compromise on the issue of justice.<sup>94</sup>

Some observers maintain that under the Bush Administration, the United States moved toward a policy that recognized that under certain circumstances, the ICC might have a role, as evidenced in its abstentions in the 2005 and 2008 Council votes.<sup>95</sup> Others have pointed out, however, that

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<sup>91</sup> Scheffer, *Op. Cit.* A more academic commentary on Article 16 may be found in Luigi Condorelli and Santiago Villalpando, *Referral and Deferral by the Security Council*, Chapter 17.2, in *The International Criminal Court: A Commentary*, edited by Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (New York: Oxford University Press, 2002), vol. I, pp. 644-654.

<sup>92</sup> See S/PV.5947 for verbatim record of the meeting and U.N. Press Release S/9412 for an unofficial summary of the statements made and the text of the adopted resolution. For links to both items, see under July 31 at <http://www.un.org/Depts/dhl/resguide/scact2008.htm>. A U.S. vote against the resolution would have defeated the resolution since that “no” vote would have been a veto.

<sup>93</sup> Explanation of vote by Ambassador Alejandro Wolff, U.S. Deputy Permanent Representative, USUN Press Release # 209 (08), July 31, 2008. The text of preambular paragraph 9 follows: “Taking note of the African Union (AU) communiqué of the 142<sup>nd</sup> [AU] Peace and Security Council (PSC) Meeting dated 21 July (S/2008/481, annex), having in mind concerns raised by members of the Council regarding potential developments subsequent to the application by the Prosecutor of the International Criminal Court of 14 July 2008, and taking note of their intention to consider these matters further.”

<sup>94</sup> Remarks by Ambassador Alejandro Wolff, U.S. Deputy Permanent Representative, at the Security Council Stakeout [with the press], USUN Press Release #210 (08), July 31, 2008.

<sup>95</sup> See, for example, *Council on Foreign Relations*, “Bellinger Says International Court Flawed But Deserving of Help in Some Cases,” Interview, July 10, 2007; *AP*, “U.S. Ambivalent on Genocide Charge Against Sudan’s President,” *International Herald Tribune*, July 15, 2008; Hanson, *Op. Cit.*; and *Council on Foreign Relations*, “The Dilemma of International Justice,” Interview, July 28, 2008.

any perceived moderation in U.S. views toward the Court did not affect its overall position not to become a party to the ICC Statute.

## **Uganda: The Lord's Resistance Army**

The government of Uganda, a party to the ICC, referred “the situation concerning the Lord's Resistance Army” to the ICC in 2003.<sup>96</sup> The Lord's Resistance Army (LRA) is a rebel group that has fought for over two decades in northern Uganda.<sup>97</sup> In October 2005, the ICC unsealed arrest warrants—the first issued by the Court—for LRA leader Joseph Kony and commanders Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya. The LRA is accused of establishing “a pattern of brutalization of civilians,” including murder, forced abduction, sexual enslavement, and mutilation, amounting to crimes against humanity and war crimes.<sup>98</sup> None of the suspects are in custody. Lukwiya and Otti have reportedly been killed since the warrants were issued, while other LRA commanders are thought to be in neighboring countries. Ugandan military operations, supported by the United States, to kill or capture senior LRA leaders in Congo, South Sudan, and Central African Republic are ongoing. The Prosecutor is also reportedly investigating actions by the Ugandan military in northern Uganda.

Although LRA atrocities have been widely documented, ICC actions in Uganda have met with some domestic and international opposition due to debates over what would constitute justice for the war-torn communities of northern Uganda and whether the ICC has helped or hindered the pursuit of a peace agreement.<sup>99</sup> Some observers argue that ICC arrest warrants were a crucial factor in bringing the LRA to the negotiating table in 2006 for peace talks brokered by the Government of South Sudan. In August 2006, rebel and government representatives signed a landmark cessation of hostilities agreement; in February 2008, the government and the LRA reached several significant further agreements, including a permanent cease-fire. However, the LRA has demanded that ICC arrest warrants be annulled as a prerequisite to a final agreement, and threats of ICC prosecution are considered by many to be a stumbling block to achieving an elusive final peace deal.

The Ugandan government has offered a combination of amnesty and domestic prosecutions for lower- and mid-ranking LRA fighters, and is reportedly willing to prosecute LRA leaders in domestic courts if the rebels accept a peace agreement.<sup>100</sup> In March 2010, the Ugandan parliament

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<sup>96</sup> ICC Office of the Prosecutor Press Release, “President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC,” January 29, 2004. According to an Office of the Prosecutor official, referrals by the governments of Uganda and DRC followed moves by the Office of the Prosecutor to open investigations under its discretionary power (CRS interview, September 3, 2008); see also Payam Akhavan, “The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court,” *The American Journal of International Law*, 99, 2 (April 2005), pp. 405-406.

<sup>97</sup> See CRS Report RL33701, *Uganda: Current Conditions and the Crisis in North Uganda*, by Ted Dagne.

<sup>98</sup> ICC Press Release, “Warrant of Arrest Unsealed Against Five LRA Commanders,” October 14, 2005. Kony is wanted for 12 counts of crimes against humanity, including murder, enslavement, sexual enslavement, rape, and “inhumane acts,” and 21 counts of war crimes, including murder, cruel treatment of civilians, directing an attack against a civilian population, pillaging, inducing rape, and the forced enlistment of children; the other LRA commanders are accused of crimes against humanity and war crimes, ranging from four to 32 counts.

<sup>99</sup> See Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed Books, 2006).

<sup>100</sup> In July 2009, the Ugandan government initiated the first prosecution of an alleged LRA commander, Thomas Kwoyelo (who has not been sought by the ICC). Bill Oketch, Institute for War & Peace Reporting, “Test Case for Ugandan Justice,” July 29, 2009.



passed legislation known as the International Criminal Court Bill, which creates provisions in domestic law for the punishment of genocide, crimes against humanity, and war crimes. Ugandan attempts to prosecute the LRA leaders domestically could entail challenging the LRA cases' admissibility before the ICC under the principle of complementarity; however, only the ICC's Pre-Trial Chamber has the authority to make a decision on admissibility, and only the ICC Prosecutor can move to drop the case.<sup>101</sup>

## **Democratic Republic of Congo (DRC)**

The DRC government referred "the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC" to the Prosecutor in April 2004.<sup>102</sup> Despite the end of a five-year civil war in 2003 and the holding of national elections in 2006, DRC continues to suffer from armed conflict, particularly in the volatile eastern regions bordering Rwanda, Uganda, and Burundi. The ICC has issued four arrest warrants in its first DRC investigation, which focuses on the eastern Congolese district of Ituri, where an inter-ethnic war erupted in June 2003 with reported involvement by neighboring governments.<sup>103</sup> Three suspects are in custody, while a fourth remains at large. A second investigation focuses on sexual crimes and other abuses committed in the eastern provinces of North and South Kivu. One case has been made public in connection with the Kivus investigation; the suspect was arrested in France in October 2010 and transferred to ICC custody.

### **Thomas Lubanga Dyilo**

The ICC issued a sealed arrest warrant in February 2006 for Thomas Lubanga Dyilo, the alleged founder and leader of the Union of Congolese Patriots (UPC, after its French acronym) in Ituri and its military wing, the Patriotic Forces for the Liberation of Congo (FPLC). At the time, Lubanga was in Congolese custody and had been charged in the domestic justice system.<sup>104</sup> After a determination of admissibility by the ICC, Lubanga was transferred to ICC custody in March 2006. The ICC has charged Lubanga with three counts of war crimes related to the recruitment and use of child soldiers.<sup>105</sup> Following a lengthy delay due to a procedural challenge, Lubanga's trial began in January 2009. The trial is expected to conclude in August 2011 and to bring the ICC's first final verdict before year's end.

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<sup>101</sup> CRS interview with ICC Office of the Prosecutor official, September 3, 2008. According to the official, the Ugandan government has expressed continued commitment to arresting the LRA leaders in discussions with the ICC.

<sup>102</sup> ICC Office of the Prosecutor Press Release, "Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo," April 19, 2004.

<sup>103</sup> Ituri's armed groups did not participate in the peace process between DRC's major rebel movements that brought the country's nationwide civil war to an end in 2003. While U.N. peacekeepers and DRC government troops have succeeded in staunching much of the violence in Ituri, many of the groups have not disarmed, and the area is still considered unstable.

<sup>104</sup> Lubanga was reportedly arrested by Congolese authorities after the killing of nine U.N. peacekeepers in Ituri in February 2005. He and other Ituri militia members had been charged with genocide, war crimes, and crimes against humanity, but had not been brought to trial when the ICC warrant was issued. (Human Rights Watch, "D.R. Congo: ICC Arrest First Step to Justice," March 17, 2006.)

<sup>105</sup> ICC, *The Prosecutor Vs. Thomas Lubanga Dyilo, Document Containing the Charges, Article 61(3)(a) (Public Redacted Version)*, August 28, 2006.

Lubanga has pleaded not guilty: his defense team maintains that Lubanga was only a political leader who tried to demobilize children fighting in his group, and that he is a scapegoat for other, more senior militant leaders.<sup>106</sup> The trial has been beset by procedural challenges. Judges have several times halted proceedings and ordered Lubanga's release, contending that a fair trial was impossible because prosecutors had erred in handling evidence and refused to disclose sources' identities to judges and the defense. In each instance, prosecutors successfully appealed to overturn the judges' decision, allowing the trial to resume.<sup>107</sup>

## **Germain Katanga and Mathieu Ngudjolo Chui**

Germain Katanga, the alleged commander of the *Force de Résistance Patriotique en Ituri* (FRPI) and Ngudjolo, the alleged highest-ranking commander of the *Front des Nationalistes et Intégrationnistes* (FNI), are being prosecuted as co-perpetrators for allegedly having "acted in concert to mount an attack targeted mainly at Hema civilians" in Ituri in 2003.<sup>108</sup> The ICC issued sealed arrest warrants for Katanga and Ngudjolo in July 2007, and they were transferred by Congolese authorities to ICC custody in October 2007 and February 2008, respectively. The Prosecutor has accused them jointly of four counts of crimes against humanity and nine counts of war crimes related to murder, "inhumane acts," sexual crimes, the use of child soldiers, rape, and other abuses.<sup>109</sup> In November 2009, the joint trial of Katanga and Ngudjolo opened.

## **Bosco Ntaganda**

The ICC issued a sealed warrant for the arrest of Bosco Ntaganda, the alleged former deputy military commander in Lubanga's FPLC militia, in August 2006. The warrant was unsealed in April 2008, but Ntaganda remains at large. Ntaganda is accused of three counts of war crimes related to the recruitment and use of child soldiers in 2002 and 2003.<sup>110</sup> His nationality is disputed: the ICC arrest warrant states that he is "believed to be a Rwandan national," but other sources state that he is an ethnic Tutsi from DRC's North Kivu province.<sup>111</sup>

At the time the warrant was unsealed, Ntaganda was a commander in a different rebel group, the National Congress for the People's Defense (CNDP), in North Kivu. Ntaganda later agreed to be integrated into the Congolese armed forces as part of a January 2009 peace deal, and he was reportedly promoted to the rank of military general. The Congolese government has since refused to pursue Ntaganda on behalf of the ICC, arguing that to do so would jeopardize peace efforts in the Kivu region.<sup>112</sup> Foreign diplomats and human rights advocates allege that Ntaganda is living

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<sup>106</sup> Marlise Simons, "For International Court, Frustration and Missteps in Its First Trial," *The New York Times*, November 21, 2010.

<sup>107</sup> See ICC Press Release, "The Appeals Chamber Reversed the Decisions to Stay Proceedings and to Release Thomas Lubanga Dyilo," October 8, 2010.

<sup>108</sup> ICC, *Combined Factsheet: Situation in the Democratic Republic of the Congo, Germain Katanga and Mathieu Ngudjolo Chui*, June 27, 2008. Their cases were joined in March 2008.

<sup>109</sup> ICC, *Combined Factsheet*, Op. Cit.

<sup>110</sup> ICC Pre-Trial Chamber, *The Prosecutor Vs. Bosco Ntaganda, Warrant of Arrest*, August 22, 2006. Ntaganda has reportedly been named by former child soldiers testifying before the ICC in the trial of Thomas Lubanga.

<sup>111</sup> Olivia Bueno, "Lubanga's Missing Co-Perpetrator - Who is Bosco Ntaganda?" *Lubanga Trial Website*, September 15, 2010

<sup>112</sup> *AFP*, "Peace Before Justice, Congo Minister Tells ICC," February 12, 2009; *AFP*, "La RDC Redit Qu'Elle N'Exécute Pas le Mandat d'Arrest Contre Ntaganda," October 2, 2010.

openly in the North Kivu city of Goma; that he has played a command role in a high-profile DRC military offensive in the east since early 2009, contrary to statements by the U.N. peacekeeping mission in Congo, which supported the offensive; and that he has continued to orchestrate extrajudicial killings and disappearances of perceived opponents.<sup>113</sup> Others have alleged that he is involved in illicit minerals smuggling.<sup>114</sup> In November 2009, the Obama Administration's then-Special Advisor on the Great Lakes Region, Howard Wolpe, stated that the DRC's protection of Ntaganda was "inexcusable" and said that the United States would press Congolese authorities to allow Ntaganda's transfer to the ICC.

### **Callixte Mbarushimana**

ICC judges issued a sealed warrant for the arrest of Callixte Mbarushimana, a Rwandan national and the alleged political leader in exile of the Democratic Forces for the Liberation of Rwanda (FDLR) militia, on September 28, 2010. The warrant cites "reasonable grounds" to believe Mbarushimana is criminally responsible for six counts of war crimes and five counts of crimes against humanity.<sup>115</sup> On October 12, Mbarushimana was arrested in France, where he was living as a political refugee. A French court verdict on November 3 paved the way for his transfer to ICC custody on January 25, 2011.

The FDLR is based in the conflict-ridden Kivu provinces of eastern DRC but is primarily led by Rwandan Hutu extremists, including individuals who fled to DRC during the aftermath of the 1994 Rwandan genocide as well as members of the diaspora.<sup>116</sup> The Prosecutor's case against Mbarushimana alleges that he commanded FDLR attacks against civilians in the Kivus, including murder, torture, rape, and the destruction of property. The United States welcomed the arrest, noting that Mbarushimana has been the target of U.N. and U.S. sanctions since 2008, and indicating U.S. support for the ICC's "ongoing investigations into atrocities that have been committed in the Democratic Republic of the Congo."<sup>117</sup> The government of Rwanda, previously a vocal opponent of the Court, has welcomed the prosecution but stated that it would have preferred to try Mbarushimana within Rwanda on charges related to the 1994 genocide.

### **Central African Republic (CAR)**

The government of CAR, a party to the ICC, referred "the situation of crimes within the jurisdiction of the Court committed anywhere on [CAR] territory" to the ICC Prosecutor in January 2005.<sup>118</sup>

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<sup>113</sup> *Xinhua*, "UN Mission in DR Congo Denies Ntaganda's Role in Military Operations," September 10, 2009; *Reuters*, "Congo War Indictee Says Directs UN-Backed Ops," October 6, 2010; HRW, "DR Congo: ICC-Indicted War Criminal Involved in Assassinations of Opponents," October 13, 2010.

<sup>114</sup> *The Economist*, "Still Smuggling," February 12, 2011.

<sup>115</sup> ICC, *Warrant of Arrest for Callixte Mbarushimana*, September 28, 2010.

<sup>116</sup> Rwandan survivors have alleged that Mbarushimana took part in the 1994 genocide, though he is reportedly not on the list of high-level suspects sought by the International Criminal Tribunal for Rwanda. *AFP*, "FDLR Chief Mbarushimana Took Part in Genocide: Survivors," October 13, 2010.

<sup>117</sup> U.S. State Department, "Democratic Republic of the Congo: Arrest of Callixte Mbarushimana," October 13, 2010.

<sup>118</sup> ICC Office of the Prosecutor Press Release, "Prosecutor Receives Referral Concerning Central African Republic," January 7, 2005.

## **Jean-Pierre Bemba Gombo**

In May 2008, the ICC issued a sealed warrant of arrest for Jean-Pierre Bemba Gombo. A former DRC rebel leader turned politician and successful businessman, Bemba had been the leading challenger to incumbent President Joseph Kabila in DRC's 2006 presidential election, and was elected to the Congolese legislature in January 2007. He subsequently went into exile in Europe following armed clashes with security forces loyal to Kabila. The warrant alleged that as commander of the Movement for the Liberation of Congo (MLC), one of two main DRC rebel groups during that country's civil war (1998-2003), Bemba had overseen systematic attacks on civilians in CAR territory between October 2002 and March 2003. Bemba's MLC, based in the DRC's north, allegedly committed these abuses after it was invited into CAR by then-President Ange-Félix Patassé to help quell a rebellion.<sup>119</sup>

Bemba was arrested in Belgium in May 2008 and turned over to the ICC in July 2008. In June 2009, a panel of ICC judges confirmed three charges of war crimes and two charges of crimes against humanity for alleged rape, murder, and pillaging.<sup>120</sup> The charges hinge on the question of command responsibility: the Prosecutor contends that Bemba personally managed the MLC, stayed in constant contact with combatants, and was well informed about the group's activities in CAR.<sup>121</sup> Bemba's trial opened on November 22, 2010, after ICC judges dismissed various legal appeals. The prosecution has been controversial in the DRC, where Bemba's MLC continues to function as an opposition party. The Office of the Prosecutor has denied that political considerations played a role in the case, and the government of DRC has denied involvement in the prosecution.<sup>122</sup>

## **Issues Raised by the ICC's Actions in Africa**

Some observers have praised the ICC's investigations in Africa as a crucial step against impunity on the continent, but ICC actions have also provoked debates over the court's potential impact, its perceived prioritization of Africa over other regions, its selection of cases, and the potential effect of prosecutions on peace processes. Notably, critics have accused the ICC of potentially jeopardizing political settlements that may keep the peace in the pursuit of an often abstract "justice." Supporters of the Court reject these criticisms, and hope that ICC investigations will contribute to Africa's long-term peace and stability.

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<sup>119</sup> The rebellion, led by François Bozizé, was successful, and Bozizé took control of CAR in 2003. Bozizé's government then initiated the ICC referral.

<sup>120</sup> ICC Pre-Trial Chamber II, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, June 15, 2009. Judges declined to confirm the Prosecutor's charges in connection with one additional count of crimes against humanity (torture) and two additional counts of war crimes (torture, "outrage upon personal dignity").

<sup>121</sup> Eric Witte, "Command Responsibility and the Trial of Jean-Pierre Bemba," *Bemba Trial Website*, November 23, 2010.

<sup>122</sup> CRS interview with Office of the Prosecutor official, September 3, 2008; Voice of America, "Congo Denies Instigating ICC Charges Against Former VP Bemba," June 16, 2009.

## African Union Objections

The African Union (AU) has strongly objected to certain ICC actions, causing some backers of the Court to be concerned that it could lose the support of its largest regional block. In particular, the AU objects to ICC attempts to prosecute sitting heads of state in Sudan and Libya, and has decided not to enforce arrest warrants for Bashir or Qadhafi.<sup>123</sup> Indeed, the Sudanese president has visited Chad, Kenya, and Djibouti, all ICC states parties, since the first warrant for his arrest was issued in 2009. At least one AU member, Botswana, has indicated, however, that it intends to enforce the warrants, and other AU states may quietly hold the same position.<sup>124</sup> At an AU summit in January 2011, the AU Assembly additionally endorsed Kenya's request for a deferral of prosecutions there. Such a deferral could only be enacted through action by ICC judges or at the U.N. Security Council, and neither has moved to do so. AU Commission chairman Jean Ping has repeatedly accused the ICC Prosecutor of relying on "double standards" with regard to Africa (see "Accusations of Bias," below).<sup>125</sup> At the same time, African parties to the ICC have refrained from withdrawing from the Court.

## Impact on Deterrence

The ICC's founders anticipated that by ending impunity, the ICC would deter future atrocities.<sup>126</sup> Indeed, some observers argue that the ICC's success should be evaluated not just based on the punishment of past atrocities, but also in terms of "the effect its investigations have on reducing abysmal conduct in the present and future."<sup>127</sup> (The Office of the Prosecutor maintains that the choice of cases is not based on calculations of deterrent effect, though the Office acknowledges that strategic communications related to ICC prosecutions may play a role in deterrence.<sup>128</sup>)

The goal of deterrence has been particularly salient in the ICC's investigations in Africa, which have focused on regions where atrocities are ongoing or have only recently ended.<sup>129</sup> However, difficulties encountered in enforcing ICC arrest warrants and the fact that the Court has yet to convict any suspects have led some to question whether the threat of ICC prosecution is credible.

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<sup>123</sup> In July 2009, the AU resolved not to cooperate with the ICC's arrest warrant for Sudan's President Bashir. AU heads of state adopted a similar resolution in July 2010, after a second warrant for Bashir was issued for the crime of genocide, and simultaneously rejected the ICC's request to open a liaison office at the AU headquarters in Ethiopia. AU Commission Chairman Jean Ping stated that the genocide warrant "does not solve the problem in Darfur. In fact it is the contrary... We have no problem with the ICC and we are against impunity. But the way prosecutor Ocampo is rendering justice is the issue." The AU has also objected to NATO military actions in Libya. *AFP*, "Beshir Charges Won't Help Darfur: African Union," July 14, 2010; *Pretoria News*, "Botswana Backs International Criminal Court Warrant for Gaddafi," July 7, 2011; Rukmini Callimachi, "L'Union Africaine Demande à Ses Membres d'Ignorer le Mandat Contre Kadhafi," July 2, 2011.

<sup>124</sup> *AFP*, "Botswana Says Al-Bashir Must Stand Trial at ICC," July 6, 2009; Radio France Internationale (RFI), "Chadian Leader Vows to Cooperate With ICC Over Bashir Warrant," via BBC Monitoring, July 14, 2009; *Reuters*, "Uganda Says Sudan's Bashir to Send Deputy Over ICC," July 16, 2009; *AFP*, "SAfrica Will Arrest Beshir If He Visits: Foreign Ministry," July 30, 2009.

<sup>125</sup> Richard Lough, "African Union Accuses ICC Prosecutor of Bias," January 29, 2011.

<sup>126</sup> Preamble of the Rome Statute; see also International Criminal Court Assembly of States Parties, "Court Adopts Agreements to Launch Court's Operation," United Nations Press Release L/3013, September 9, 2002.

<sup>127</sup> Waddell and Clark, "Introduction," in *Courting Conflict?*

<sup>128</sup> CRS interview with ICC prosecutorial official, September 3, 2008.

<sup>129</sup> The ICC's temporal jurisdiction, which limits prosecution to crimes committed after the entry into force of the Rome Statute, has contributed to this phenomenon.

Some observers suggest that the Court's failure to apprehend suspects in Sudan, in particular, has bared tensions between the ICC's universal mandate and its reliance on the enforcement power of states.<sup>130</sup> Others maintain that deterrence is difficult to evaluate and that changes in perpetrators' behavior may be visible only over the long run. Some argue that the Court's compilation of evidence, including transcribed interviews with witnesses, may serve future prosecutions or reconciliation processes even if they do not immediately lead to convictions. Some commentators have raised the possibility that transitional countries in the Middle East—such as Tunisia and Egypt—might submit to the ICC to investigate past abuses by authoritarian regimes.<sup>131</sup>

## Accusations of Bias

The ICC's investigations in Africa have stirred concerns over African sovereignty, in part due to the long history of foreign intervention on the continent. For example, President Paul Kagame of Rwanda, a country which is not a party to the Court, has portrayed the ICC as a form of "imperialism" that seeks to "undermine people from poor and African countries, and other powerless countries in terms of economic development and politics."<sup>132</sup> Some commentators allege that the Prosecutor has limited investigations to Africa because of geopolitical pressures, either out of a desire to avoid confrontation with major powers or as a tool of Western foreign policy.<sup>133</sup> The attempt to prosecute Bashir has been particularly controversial, drawing rebuke from African governments and regional organizations. Jean Ping, president of the AU Commission, has accused the ICC of hypocrisy, contending that "we are not against the ICC, but there are two systems of measurement ... the ICC seems to exist solely for judging Africans."<sup>134</sup>

Supporters of the Court respond that most investigations to-date have been determined by referrals, either by African states or the Security Council, and that the Prosecutor continues to analyze situations outside of Africa. The Office of the Prosecutor maintains that its choice of cases is based on the relative gravity of abuses, and that crimes committed in Africa are among the world's most serious.<sup>135</sup> A prominent South African jurist, Constitutional Court Chief Justice Sandile Ngcobo, recently expressed a similar interpretation, stating that "abuses committed in Sub-Saharan Africa have been among the most serious, and this is certainly a legitimate criterion for the selection of cases."<sup>136</sup> ICC officials, including Deputy Prosecutor Fatou Bensouda—a national of The Gambia—contend that the Court is protecting Africans rather than "targeting" them.<sup>137</sup>

Supporters also contend that national legal systems in Africa are particularly weak, which has allowed the ICC to assert its jurisdiction under the principle of complementarity.<sup>138</sup> These

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<sup>130</sup> Kenneth A. Rodman, "Darfur and the Limits of Legal Deterrence," *Human Rights Quarterly*, 30, 3, August 2008.

<sup>131</sup> William J. Dobson, "What the Dictators Could Say," *The Washington Post*, April 23, 2011.

<sup>132</sup> *AFP*, "Rwanda's Kagame says ICC Targeting Poor, African Countries," July 31, 2008; Rwanda Radio via BBC Monitoring, "Rwandan President Dismisses ICC as Court Meant to 'Undermine' Africa," August 1, 2008.

<sup>133</sup> See e.g. Oraib Al Rantawi, "A Step Forward or Backward?" *Bitter Lemons*, 32, 6, August 14, 2008 ; Charles Kazooba, "African Legislators See Bias in ICC's Workings," June 7, 2010.

<sup>134</sup> Christophe Ayad, "Nous Sommes Faibles, Alors On Nous Juge et On Nous Punit," *Libération* (Paris), CRS transl., July 30, 2009.

<sup>135</sup> CRS interview with Office of the Prosecutor official, September 3, 2008.

<sup>136</sup> Franny Rabkin, "'No Anti-African Bias' at International Criminal Court," *Business Day*, July 20, 2010.

<sup>137</sup> Tim Cocks, "Interview-ICC Says Protecting Africans, Not Targeting Them," *Reuters*, June 29, 2011.

<sup>138</sup> See e.g. Stephanie Hanson, "Africa and the International Criminal Court," *Council on Foreign Relations*, July 24, (continued...)

sentiments were echoed by former U.N. Secretary-General Kofi Annan, who stated, “In all of these cases, it is the culture of impunity, not African countries, which are the target. This is exactly the role of the I.C.C. It is a court of last resort.”<sup>139</sup> At the June 2010 meeting of ICC states parties in Kampala, Uganda, participants initiated mechanisms for increasing coordination between donors on strengthening national justice systems. The United States, which participated in the meeting as an observer, has expressed support for such efforts.<sup>140</sup>

The Prosecutor’s selection of cases also has proven controversial. As one pair of authors has written, “perceptions of the ICC on the ground have at times been damaged by insufficient efforts by the Court to make clear the basis on which individuals have been the subject of warrants and of particular charges, while those of apparently equal culpability have not.”<sup>141</sup> For example, some have criticized ICC prosecutions in Uganda, the DRC, and CAR for focusing on alleged abuses by rebel fighters to the exclusion of those reportedly committed by government troops.<sup>142</sup> The decision to pursue DRC opposition leader Jean-Pierre Bemba Gombo has provoked accusations that the Prosecutor was swayed by political bias or, potentially, excessive pragmatism, since other Congolese and CAR politicians accused of similar abuses have not been pursued to date. ICC supporters have responded that the Prosecutor is mandated to focus on particularly serious cases, and that investigations are ongoing in these countries.

## **Justice vs. Peace?**

One of the most persistent criticisms of the ICC’s actions in Africa has been that by prosecuting participants in ongoing or recently settled conflicts, the Court risks prolonging violence or endangering fragile peace processes. By removing the bargaining chip of amnesty from the negotiating table, critics allege, the ICC may remove incentives for peace settlements while encouraging perpetrators to remain in power in order to shield themselves from prosecution. Some analysts observe that in such cases, “it is difficult to tell victims of these conflicts that the prosecution of a small number of people should take precedence over a peace deal that may end the appalling conditions they endure and the daily risks they face.”<sup>143</sup>

Concerns that the aims of “justice” and “peace” may conflict have been particularly prominent in connection with Sudan, Kenya, and the Lord’s Resistance Army. Similar concerns have recently been voiced with regard to Libya, where Qadhafi has refused to cede power. As one commentator recently argued, “In the past, Africa’s deposed heads of state could count on a comfortable exile in a friendly country... But since the International Criminal Court was established in 2002, rulers who have committed war crimes or human rights violations against their own people have found

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(...continued)

2008.

<sup>139</sup> Kofi A. Annan, “Justice Vs. Impunity,” *International Herald Tribune*, May 30, 2010.

<sup>140</sup> State Department, “U.S. Engagement With The International Criminal Court and The Outcome Of The Recently Concluded Review Conference,” June 15, 2010.

<sup>141</sup> Waddell and Clark, Op. Cit.

<sup>142</sup> Michael Otim and Marieke Wierda, “Justice at Juba: International Obligations and Local Demands in Northern Uganda,” in *Courting Conflict?* See also Tim Allen, Op. Cit.; and Kiwanuka Lawrence, “ICC Should Indict Museveni—Otunnu,” *The Weekly Observer* (Kampala), August 20, 2009. The Prosecutor is investigating alleged abuses by the Ugandan military. Observers agree, however, that alleged abuses by government troops are not equal in gravity to those reportedly committed by the LRA.

<sup>143</sup> Nick Grono and Adam O’Brien, “Justice in Conflict? The ICC and Peace Processes,” in *Courting Conflict?*

their exile options substantially diminished.”<sup>144</sup> In Sudan, some observers have argued that the attempt to prosecute President Bashir complicated implementation of the 2005 Comprehensive Peace Agreement for Southern Sudan and the peace process in Darfur, by providing an incentive to the ruling party’s inner circle to cling to power. For example, according to former U.S. special envoy to Sudan Andrew Natsios, “the regime will now avoid any compromise or anything that would weaken their already weakened position, because if they are forced from office they face trials before the ICC.... [An ICC warrant for Bashir] may well shut off the last remaining hope for a peaceful settlement for the country.”<sup>145</sup> In Kenya, concerns persist that ICC prosecutions could destabilize the fragile political truce that has underpinned the post-2007 government of national unity, although some argue that a lack of accountability for human rights violations would also threaten future stability. Some argued that ICC arrest warrants against LRA commanders acted as an impediment to achieving a final peace agreement to that long-running conflict between 2006 and 2008. Ugandan critics included community elders who supported the use of traditional reconciliation mechanisms instead of international prosecution.<sup>146</sup> Others contend that LRA leaders never seriously intended to negotiate a peace, and that the threat of ICC prosecution could serve as “an important ingredient in a political solution” for the conflict-plagued north.<sup>147</sup> This discussion has been muted in recent years, as senior LRA commanders are no longer in northern Uganda and have sought refuge instead in neighboring countries.

Criticisms connected to the case against Bashir in Sudan were reinforced when the Sudanese government responded to the ICC arrest warrant for Bashir by expelling aid agencies and threatening NGOs and peacekeeping troops. In March 2009 testimony before Congress, when asked about the impact of the ICC warrant on U.N. peacekeeping operations in Darfur, then-Director of National Intelligence Dennis C. Blair said that “the indictment and President Bashir’s reaction have made him less cooperative than he was” and that the warrant would “make it harder” for peacekeeping operations in Darfur.<sup>148</sup> In early August 2009, the outgoing commander of the hybrid U.N.-AU peacekeeping mission in Darfur (UNAMID), General Martin Luther Agwai, reportedly stated that the decision to pursue Bashir had been a “big blow” for UNAMID and the peace process, although it had not had as drastic an effect on the ground as he had feared.<sup>149</sup> U.N. Secretary-General Ban Ki-moon, who has maintained a neutral position on the ICC’s actions in Sudan, has nonetheless argued that the international community must seek to balance “peace” and “justice” in dealing with the conflict in Darfur and expressed concern that the expulsion of aid organizations was detrimental to relief and peacekeeping operations.<sup>150</sup>

Supporters of the Court maintain that the warrant against Bashir may open up new opportunities to secure peace in Darfur, as a credible threat of prosecution may serve as an important lever of

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<sup>144</sup> Christine Cheng, “Justice and Gadhafi’s Fight to the Death,” *The Wall Street Journal*, April 6, 2011.

<sup>145</sup> Quoted in Opheera McDoom, “Analysis: Justice Clashes With Peace on Darfur Bashir Warrant,” *Reuters*, July 14, 2008.

<sup>146</sup> Moses Akena and David L. Okumu, “Acholi Leaders Criticize ICC’s Operations,” *The Monitor*, August 6, 2009.

<sup>147</sup> Akhavan, “The Lord’s Resistance Army Case,” *Op. Cit.*

<sup>148</sup> Transcript of Senate Committee on Armed Services hearing on “Current and Future Worldwide Threats to the National Security of the United States, provided by *CQ Transcriptions*, via Factiva, March 10, 2009.

<sup>149</sup> Louis Charbonneau, “INTERVIEW-Dialogue With Sudan Govt, Rebels Needed—US Envoy,” *Reuters*, August 6, 2009; U.N. News, “Press Conference by United Nations Force Commanders in Darfur, Democratic Republic of Congo,” August 6, 2009.

<sup>150</sup> U.N. Security Council, Report of the Secretary-General on the deployment of the African Union-United Nations Hybrid Operation in Darfur, S/2008/558, August 18, 2008; UN News Service, “Ban-Aid Workers’ Expulsion Impeding Peacekeeping, Relief Efforts,” April 22, 2009.



pressure on actors in a conflict.<sup>151</sup> For example, Priscilla Hayner of the International Center for Transitional Justice has written that “it would be wrong to suggest that pragmatism always trumps principle in matters of life and death, and thus that one must ease up on justice in order to achieve peace. In some cases, the interest of peace has been well served by strong, forthright efforts to advance justice.”<sup>152</sup> Some argue that “peace deals that sacrifice justice often fail to produce peace” in the long run.<sup>153</sup> Many observers point out that discerning the effect of ICC actions on complex processes is extremely difficult.

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<sup>151</sup> E.g., Caroline Flintoft [International Crisis Group], “Our Silence on Sudan Shames Us,” *The Globe and Mail*, June 16, 2008; Sara Darehshori [Human Rights Watch], “Doing the Right Thing for Darfur: An ICC indictment of Sudan’s president serves peace and justice,” *The Los Angeles Times*, July 15, 2008.

<sup>152</sup> Priscilla Hayner, “Seeking Justice as War Crimes Rage On,” *The Chicago Tribune*, July 16, 2008.

<sup>153</sup> Grono and O’Brien, Op. Cit.

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

Country	Party to ICC	Ratified Article 98 Agreement
Algeria		X
Angola		X
Benin	X	X
Botswana	X	X
Burkina Faso	X	X
Burundi	X	X
Cameroon		X
Cape Verde		X
Central African Republic	X	X
Chad	X	X
Comoros	X	X
Congo, Republic of	X	X
Congo, Democratic Republic of	X	X
Côte d’Ivoire		X
Djibouti	X	X
Egypt		X
Equatorial Guinea		X
Eritrea		X
Ethiopia		
Gabon	X	X
Gambia, The	X	X
Ghana	X	X
Guinea	X	X
Guinea-Bissau		X
Kenya	X	
Lesotho	X	X
Liberia	X	X
Libya		
Madagascar	X	X
Malawi	X	X
Mali	X	
Mauritania		X

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

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

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