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## International Community Responds to Darfur: ICC Prosecution Renews Hope for International Justice, The

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# THE INTERNATIONAL COMMUNITY RESPONDS TO DARFUR: ICC PROSECUTION RENEWS HOPE FOR INTERNATIONAL JUSTICE<sup>1</sup>

John E. Tanagho and John P. Hermina

## I. Introduction

Meet Hamid Saleem. Saleem lived with his wife and four children in a small village in northern Darfur called Boba.<sup>2</sup> On April 30, 2004 all that changed. That day a Sudanese military aircraft attacked his village. He and his family fled into the surrounding mountains. It was the last time he saw his family. The Janjaweed militia killed his brother and fifteen other Darfuris in a raid and then buried them in a pit. Now safe in London, Saleem said: "What is happening there is genocide. A specific race is being targeted - my Zagawa tribe."<sup>3</sup>

Six years old—that is the current age of the first genocide of the twenty-first century.<sup>4</sup> Over the past six years, the mostly Arab Islamic government of Sudan has waged a violent war against the mostly Black African tribes of Darfur.<sup>5</sup> Through an orchestrated campaign of violence and extermination, Sudan's Armed Forces (SAF) and its proxy Arab Militias, the Janjaweed,<sup>6</sup> have killed

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<sup>1</sup> This article grew out of a paper submitted for the spring 2008 International Criminal Law Seminar co-taught by Professors Jerry E. Norton and Alan Raphael at Loyola University Chicago School of Law. John Tanagho is an associate at the law firm of Schiff Hardin LLP where he focuses in a wide range of general litigation, with a concentration in white collar and corporate compliance matters. John thanks his wife Wendy for all her support. John Hermina received his Juris Doctor from Loyola University Chicago School of Law in May 2009. He is currently pursuing a career in human rights. John thanks his parents and his fiancé for all their support.

<sup>2</sup> The story of Hamid Saleem is taken from Hamid's self-told story provided to BBCArabic.com. *Displaced by Darfur: Your Stories*, BBC News, Oct. 2, 2006, <http://news.bbc.co.uk/2/hi/africa/5391656.stm>.

<sup>3</sup> *Id.* Mohamed Baraka Mohamed, 56, a lawyer and former minister in Sudan's Parliament from 2001–2005 "confirm[s] that what is going on is genocide." *Id.* Mohamed was beaten in school if he did not speak Arabic. *Id.* He says the attitude of forced Arabisation "is not confined to the Sudanese government - other Arab and Muslim countries are included. Has a single Arab or Muslim country condemned what is happening in Darfur?" *Id.*

<sup>4</sup> Genocide Intervention Network Darfur Page, <http://www.genocideintervention.net/educate/darfur> (last visited Feb. 14, 2008).

<sup>5</sup> See Eric Reeves, *Genocide by Attrition in Sudan*, WASH. POST, Apr. 6, 2008, at B07, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/04/AR2008040403087.html> [hereinafter Reeves, *Genocide by Attrition*]. "Sudan's National Islamic Front regime" was in its "sixth year of genocidal counterinsurgency warfare in the vast western region of Darfur, targeting African civilian populations." *Id.* Eric Reeves, a professor at Smith College, is the author of *A LONG DAY'S DYING: CRITICAL MOMENTS IN THE DARFUR GENOCIDE*. He is a consultant to several human rights and humanitarian organizations in Sudan.

<sup>6</sup> The term "janjaweed" means "devils on horseback." Martin Fletcher, *Janjaweed Defector Confesses Sudan's Atrocities in Darfur*, SUDAN TRIB., Oct. 19, 2006, available at <http://www.sudantribune.com/spip.php?article18203>.

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almost 400,000 people.<sup>7</sup> Sudan claims to be conducting a counterinsurgency against rebel groups in Darfur;<sup>8</sup> however, the world, including the International Criminal Court (ICC),<sup>9</sup> has documented Sudan's systematic attack against innocent and unarmed (non-combatant) Darfur civilians and their villages.<sup>10</sup> In addition to the murders, almost 2.5 million people are displaced; and the violence continues virtually unabated to this day.<sup>11</sup>

Non-governmental organizations and advocacy groups have criticized and lamented, with good reason, the international community's failure to timely and adequately respond to the atrocities in Darfur.<sup>12</sup> The international community has, however, slowly responded most recently with the ICC's historic issuance of an arrest warrant for Sudan's President Omar Hassan Ahmad Al-Bashir for five counts of crimes against humanity and two counts of war crimes for his "essential role" in the murder, torture, rape, and displacement of millions of civilians in

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<sup>7</sup> Eric Reeves, *How Many Deaths in Darfur?*, THE GUARDIAN (ON-LINE), Aug. 20, 2007, <http://www.sudanreeves.org/index.php?name=news&file=article&sid=181&theme=Printer> "We could easily be talking about 400,000 deaths." (quoting John Hagan, a sociologist at Northwestern University, in Jeffrey Gettleman, *Toll of Darfur Underreported, Study Declares*, N.Y. TIMES, Sept. 15, 2006, available at [http://www.nytimes.com/2006/09/15/world/africa/15darfur.html?\\_r=1&scp=1&sq=sept.%2015,%202006,%20Hagan&st=cse](http://www.nytimes.com/2006/09/15/world/africa/15darfur.html?_r=1&scp=1&sq=sept.%2015,%202006,%20Hagan&st=cse)).

<sup>8</sup> See *infra* Part III.A (discussing rebel attacks on Sudanese government installations).

<sup>9</sup> Established through the Rome Conference in July 17, 1998, and codified by the Rome Treaty, the ICC is the world's first permanent international court. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. Thus far, 105 States are Parties to the Rome Treaty. In the words of ICC Prosecutor Luis Moreno-Ocampo, the Court is "a tool to manage violent international conflicts." ICC Chief Prosecutor, Luis Moreno-Ocampo, Presentation at the Midwest Regional Conference on International Justice: The International Criminal Court 10 Years after the Rome Conference, Harold Washington Library, Chi., Ill. (Apr. 25, 2008) [hereinafter Conference on International Justice].

<sup>10</sup> Google Maps reveals the product of Sudan's scorched-earth campaign and the aftermath of burned Darfur villages. Google Maps, <http://maps.google.com> (search for "Darfur," then click on "Satellite" hyperlink in upper right corner of map).

<sup>11</sup> See Amber Henshaw, *Darfur: Little Hope Five Years On*, BBC NEWS, Feb. 26, 2008, <http://news.bbc.co.uk/2/hi/africa/7263663.stm>. Auriol Miller, head of Oxfam in Sudan, stated that "[t]he situation is not better than it was five years ago." *Id.* Eighty thousand Darfur civilians had been displaced as of April 2008. Ambassador Richard Williamson, Presidential Special Envoy to Sudan, Conference on International Justice, *supra* note 9.

<sup>12</sup> Save Darfur Coalition President, Jerry Fowler, spoke with Darfur refugees in Chad in the middle of 2005, right after the U.N. Security Council referred the situation in Darfur to the ICC. Jerry Fowler, President of the Save Darfur Coalition, Conference on International Justice, *supra* note 9. At that time, Darfur refugees asked him "when will Bashir be in the Hague?" *Id.* Fowler remembers that the people genuinely expected that when the rest of the world found out what was happening in Darfur, they would be protected and able to return home. *Id.* Fowler contends, however, that as of April 2008, there had been "no effective international response to Darfur." *Id.* See also Amnesty International, *Support the Work of the International Criminal Court in Darfur, Sudan!*, <http://www.amnestyusa.org/justice/page.php?id=1011445> (last visited Feb. 25, 2009) ("Despite international outrage, not a single person responsible for war crimes or crimes against humanity in Darfur has been brought to justice."); *The Crisis in Darfur*, ReliefWeb, Aug. 21, 2006, <http://www.reliefweb.int/rw/RWB.NSF/db900SID/AMMF-6SWE2D?OpenDocument> ("International response to this crisis has been shockingly slow and ineffective. Despite widespread awareness of the extent of the human rights violations in Darfur, the government of Sudan and its allies on the U.N. Security Council have successfully blocked the imposition of punitive international sanctions on officials responsible for masterminding the violent campaign in Darfur.").

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Darfur.<sup>13</sup> The international community's main failure has been its apparent inability, or simply reluctance (lack of "will"), to physically intervene and protect civilians from brutal violence, death, and displacement.<sup>14</sup> The failure to ensure the safe and effective delivery of humanitarian aid to Darfur's 2.5 million displaced persons comes in a close second to the failure to stop the intentional physical violence.<sup>15</sup> The United Nations Security Council has allowed Sudan's allies with embedded self-interest, such as China and Russia, to veto or otherwise block most, but not all, attempts at a meaningful response.<sup>16</sup>

We, however, should not overlook what the international community, through the U.N., ICC, and other actors, has done in response to the crisis in Darfur; even if that response is, to date, insufficient. While it is easy to belie the international community's response, it is also beneficial to observe and analyze what the international community has done right.

This article discusses and examines the international community's response to Darfur. The article does this by focusing on the varied responses of the African Union (AU), the U.N. High Commission for Human Rights (UNHCR), the U.N. Security Council and Secretary-General, and the United States. The article especially focuses on the historic indictments and arrest warrants issued by the ICC against three individuals, one of them being Sudan's sitting President Omar Al-Bashir.

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<sup>13</sup> Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009) [hereinafter Bashir Warrant, Case No. ICC-02/05-01/09]. On July 14, 2008, the ICC Chief Prosecutor requested an arrest warrant from the ICC Pre-trial Chamber for President Al-Bashir for ten counts of crimes of genocide, crimes against humanity, and war crimes in Darfur. Press Release, ICC, Prosecutor Presents Case Against Sudanese President, Hassan Ahmad Al Bashir, For Genocide, Crimes Against Humanity and War Crimes in Darfur (July 14, 2008), available at [http://www.icc-cpi.int/pressrelease\\_details&id=406&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=406&l=en.html). This article does not extensively discuss the ICC's historic issuance of a warrant for Bashir because this article was written several months prior.

<sup>14</sup> Ambassador Richard Williamson, Presidential Special Envoy to Sudan, Conference on International Justice, *supra* note 9 ("We have done very little on the ground to prevent the people of Darfur from experiencing suffering.").

<sup>15</sup> Reeves, *Genocide by Attrition*, *supra* note 5. "The consensus among nongovernmental aid organizations is that they have access to only 40 percent of the population in need; 2.5 million of the 4.3 million Darfuris affected by conflict—primarily women and children—can't be securely reached by those attempting to provide food, clean water, shelter and primary medical care." *Id.* The failed delivery of sufficient aid is a byproduct of the failure to end the violence. *Id.* "Violence in Darfur also targets aid workers and peacekeepers, limiting the ability of the international community to conduct humanitarian operations." Genocide Intervention Network Darfur Page, *supra* note 4. There has also been at least one reported attack on an international organization's vehicle. High Commissioner for Human Rights, *Situation of Human Rights in the Darfur Region of the Sudan*, ¶ 19, delivered to the Chairperson of the Commission of Human Rights, U.N. Doc. E/CN.4/2005/3 (May 7, 2004) [hereinafter *Report of the High Commissioner*] (reporting an attack by Janjaweed militia on a international organization's vehicle).

<sup>16</sup> John Prendergast & Colin Thomas-Jensen, *Darfur, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW* 2.0, 150 (Roy Gutman et al. eds., 2007). China's interest lies primarily in its economic desire to drill and extract oil from Sudan's oil fields. Currently, "[t]hrough its state-owned companies, China controls almost all of the known oil potential in Sudan. . . . China holds the majority rights to drill in eight" of Sudan's nine significant oil blocks. HUMAN RIGHTS FIRST, INVESTING IN TRAGEDY: CHINA'S MONEY, POLITICS, AND ARMS IN SUDAN 3 (2008), <http://www.humanrightsfirst.info/pdf/080311-cah-investing-in-tragedy-report.pdf>. This fifty-eight page report by Human Rights First painstakingly documents China's deep economic investment in Sudan, even in the face of Sudan's genocide against the people of Darfur.

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Three points are put forward in this article. First, the U.N. Security Council and the ICC can work together to seek to end impunity by bringing international criminals to justice through fair and independent mechanisms. Second, much can be learned about the international community's potential to respond to ongoing international crimes by examining what the international community has done as we can be critiquing what the international community has failed to do. Finally, the international community's failure to protect civilians in Darfur may, one day, help create a new binding rule of international law, namely, the Responsibility to Protect (R2P).

This article proposes that: (1) national and international actors utilize existing mechanisms to execute the outstanding ICC warrants against three of the most culpable people for the atrocities in Darfur: Ahmad Harun, Ali Kushayb, and Omar Al-Bashir;<sup>17</sup> and (2) the U.N., Rome Statute' States Parties, the U.N. Security Council, and other national and international bodies affirm the R2P principle so that it may become a binding rule of international law.<sup>18</sup>

In the end, this article concludes that there is hope for the ICC and the international community's ability and willingness to respond to genocide and crimes against humanity by holding those most responsible accountable for their crimes, and, therefore, ending the epidemic of impunity.<sup>19</sup> There is also hope that our collective failure to adequately and timely respond to Darfur and the U.N.'s subsequent response through varied resolutions will help "crystallize"<sup>20</sup> a new international norm—the Responsibility to Protect.<sup>21</sup>

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<sup>17</sup> See *infra* Part V.1 (proposing that U.N. Member States, States Parties to the Rome Statute, and other, work to execute the outstanding arrest warrants).

<sup>18</sup> See *infra* Part V.2 (proposing that all relevant international and national actors affirm the R2P principle).

<sup>19</sup> "[A]n international system of justice is emerging and the age of impunity is coming to an end." Jonathan Fanton, *Supporting the 'Court of Last Resort,'* SAN DIEGO UNION-TRIB., Apr. 21, 2008, available at [http://www.signonsandiego.com/uniontrib/20080421/news\\_mz1e21fanton.html](http://www.signonsandiego.com/uniontrib/20080421/news_mz1e21fanton.html) (discussing the ICC's work to bring Lord's Resistance Army rebels to justice and arguing that the United States should become a State Party to the Rome Statute). Mr. Fanton is President of the John D. and Catherine T. MacArthur Foundation. *Id.* This emergence can be seen in the Prosecutor's indictment of Al-Bashir, which is the first time a sitting head of state has been indicted by a permanent international criminal court. Nicholas D. Kristof, *President Bashir and Genocide*, N.Y. TIMES, July 14, 2008, available at <http://kristof.blogs.nytimes.com/2008/07/14/president-bashir-and-genocide/?scp=4&sq=indictment%20Bashir&st=cse>. See also *infra* notes 220 and accompanying text (discussing the ICC Prosecutor's request for and issuance of a warrant for Bashir).

<sup>20</sup> "Crystallization" is the process where a non-binding legal concept becomes a binding rule of international law. See *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 38 (Feb. 20). For a more in-depth look at how the U.N.'s response to Darfur, including the Security Council resolutions, might lead to R2P becoming a binding rule of international law, see Max W. Matthews, *Tracking The Emergence Of A New International Norm: The Responsibility To Protect And The Crisis In Darfur*, 31 B.C. INT'L & COMP. L. REV. 137 (2008). Matthews argues that recent Security Council resolutions in response to the continuing international crimes in Darfur, Sudan, "explicitly invoke R2P while calling for protective actions in accordance with the principle" [and] [i]f the Security Council continues to implement R2P, the principle may crystallize into a binding norm of international law in the foreseeable future."

<sup>21</sup> See Int'l Comm'n on Intervention & State Sovereignty [ICISS], *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001), [www.iciss.ca/pdf/Commission-Report.pdf](http://www.iciss.ca/pdf/Commission-Report.pdf) [hereinafter ICISS Report]; see also Michael Clough, *Darfur: Whose Responsibility To Protect*, HUMAN RIGHTS WATCH, <http://hrw.org/wr2k5/darfur/1.htm> (noting that a U.N. Panel

## II. Background

This part discusses Sudan's troubled political history, its current demographics, the North-South conflicts, and the events preceding the Darfur conflict.<sup>22</sup>

### A. Sudan's Troubled Political History

In order to better understand the conflict in Darfur, this article will briefly address the relevant events preceding this crisis, beginning with a brief political history of Sudan. The people of Sudan have experienced constant turmoil since their independence from Egypt and Britain in 1956.<sup>23</sup> The past governments in Khartoum have "hoarded the country's wealth and treated its citizens with the utmost contempt."<sup>24</sup>

At independence, Northern, Southern, and Western Sudan came together under a single democratic government.<sup>25</sup> Democracy, however, lasted for only two years before the first *coups d'état* overthrew the government and established a military regime.<sup>26</sup> Sudan attempted to restore democracy on two more occasions: the first from 1965 to 1969, and the second from 1985 to 1989.<sup>27</sup> Each democratic rule ended with a *coups d'état* creating a military regime.<sup>28</sup> The current government is the result of a 1989 coup led by the current president Omar Hassan Al-Bashir.<sup>29</sup>

### B. Sudan's Current Demographics

Currently, ethnic Black Africans make up fifty-two percent of Sudan's population of forty million, while ethnic Arab Africans make up about thirty nine per-

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referred to the emerging norm of the international responsibility to protect civilians where governments are powerless or unwilling to do so).

<sup>22</sup> See *infra* Part II (discussing Sudan's troubled political history, its current demographics, the North-South conflicts, and the events preceding the Darfur conflict).

<sup>23</sup> See generally Int'l Comm'n of Inquiry on Darfur [ICOI], *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 2 (Jan. 25, 2005), available at [http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf) [hereinafter ICOI Report]; Prendergast & Thomas-Jensen, *supra* note 16, at 147.

<sup>24</sup> Prendergast & Thomas-Jensen, *supra* note 16, at 147.

<sup>25</sup> ICOI Report, *supra* note 23, at 18; R.S. O'Fahey, *The Sudan: Past, Present, and Future: Does Darfur Have A Future In The Sudan*, 30 FLETCHER F. WORLD AFF. 27, 27-29 (2006). Modern Sudan is the result of Egyptian and British involvement in the region. *Id.* Egypt controlled Northern Sudan until Britain controlled Egypt and also took control of Northern Sudan. *Id.* Worried about the French, the British quickly captured Southern Sudan in 1898. *Id.* In 1916, the British also managed to gain control over the Darfur region. *Id.* Prior to British control, Darfur was an independent nation. *Id.* At independence, all three regions became the State of Sudan. *Id.*

<sup>26</sup> ICOI Report, *supra* note 23, at 18.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Sudan President Marks Coup Anniversary with Promise of Peace*, SUDAN TRIB., June 30, 2003, available at <http://www.sudantribune.com/spip.php?article3>. Omar Hassan El-Bashir is also spelled as Omar al-Bashir in various sources.

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cent of the population.<sup>30</sup> The Darfur region's six million people consist mostly of Black African Muslims.<sup>31</sup> With a life expectancy of about fifty years, the population is growing at a rate of two percent a year.<sup>32</sup> Though most of the people in Sudan speak Arabic, 130 other languages are also spoken in Sudan.<sup>33</sup> Sudan's land mass is about one quarter the size of the United States, and most of the population lives in rural areas.<sup>34</sup>

### C. The North-South Conflicts and Other Events Leading to the Darfur Conflict

#### 1. *The 1955 – 1972 Conflict Against the Anya Rebels*

The North and South entered into conflict starting with the rule of General Ibrahim Abbud in 1955. General Abbud supported the spread of Islam and Arabic throughout Sudan.<sup>35</sup> The South consisted mostly of Christians and Animist Black Africans, while the North consisted mostly of Arab-Muslim Africans. Frustrated with the decision, the South resisted the changes even to the point of an armed rebellion until they reached an agreement with the former leader, Colonel Gaafar Mohamed Al-Nimeiri in 1972.<sup>36</sup> This agreement, among other things, gave autonomy to the South.<sup>37</sup>

After the discovery of oil in Southern Sudan, Colonel Al-Nimeiri effectively canceled the agreement in order to capitalize on this valuable resource.<sup>38</sup> In addition to destroying the South's autonomy and siphoning its oil, Colonel Al-Nimeiri, under the influence of the National Islamic Front<sup>39</sup> and the Muslim

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<sup>30</sup> CIA The World Factbook, Sudan Page, <https://www.cia.gov/library/publications/the-world-factbook/geos/su.html> (last visited Feb. 15, 2009) [hereinafter CIA Factbook].

<sup>31</sup> ICOI Report, *supra* note 23, at 20, 22. *The Sudan*, ENCYCLOPÆDIA BRITANNICA ONLINE, <http://www.britannica.com/eb/article-24339> (last visited Feb. 17, 2009). The Distinction between Arab Africans and Black Africans are vague at best. *Id.* Though the distinctions were not considered to be a source of conflict in the past, the distinction became a justification and instigator in the conflict. *Id.* One's tribal affiliations and his/her perception of identity are among the many factors that comprise this distinction. *Id.* While many claim to be ethnically Arab are actually racially mixed between Africans and Arabs. *Id.*

<sup>32</sup> CIA Factbook, *supra* note 30.

<sup>33</sup> Ethnologue Report for Sudan, Languages of Sudan, [http://www.ethnologue.com/show\\_country.asp?name=sd](http://www.ethnologue.com/show_country.asp?name=sd).

<sup>34</sup> ICOI Report, *supra* note 23, at 17; CIA Factbook, *supra* note 30.

<sup>35</sup> ICOI Report, *supra* note 23, at 18.

<sup>36</sup> *Id.* at 18. Gaafar Al-Nimeiri is also spelled Jafar Numayri in other sources.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Who's Who: Significant People and Organisations, <http://www.sudanupdate.org/WHOSWHO/NIF.HTM> (last visited Feb. 15, 2009); *Profile: Sudan's Islamist Leader*, BBC News, <http://news.bbc.co.uk/2/hi/africa/3190770.stm> [hereinafter *Sudan's Islamist Leader*]. The National Islamic Front (NIF) originated from the Muslim Brotherhood in Egypt. Who's Who: Significant People and Organisations, *supra* note 39. The NIF is a political group seeking the implementation of Sharia Law and is also responsible for the coup removing Sadiq al-Mahdi, Turabi's brother in law. *Id.*

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Brotherhood led by Hassan Al-Turabi,<sup>40</sup> instated Sharia Law throughout Sudan in 1983.<sup>41</sup>

Two more coups took place after 1983, with the second one putting Al-Bashir in power.<sup>42</sup> Al-Bashir, also supported and influenced by Hassan Al-Turabi, implemented changes into the judicial system to fit his views of political Islam, further fueling the conflict.<sup>43</sup> Later, Al-Bashir's party, the National Congress, implemented a Constitution and held elections in 1998.<sup>44</sup> Still displeased, opposing parties boycotted the elections and Al-Bashir was elected president.<sup>45</sup> Al-Bashir's party also won most of the parliamentary seats.<sup>46</sup> Following a dispute between Al-Bashir and the National Congress, Al-Bashir dissolved the Parliament and placed Hassan Al-Turabi and several officials in alliance with Al-Turabi into custody.<sup>47</sup>

### 2. *The Twenty Year North-South War*

Destroying a peaceful period of eleven years, Colonel Al-Nimeiri triggered a second civil war in 1983 that lasted twenty years.<sup>48</sup> Like Khartoum's violent strategy in Darfur, the Government sponsored and armed ethnically-based mili-

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<sup>40</sup> Dr. Usha Sanyal, *POLS 304-Politics of the Middle East: Glossary*, Fall 2004, <http://www.queens.edu/undergraduate/courses/POLS304glossary.asp> (last visited Feb. 15, 2009). The Muslim Brotherhood is "a political group, strong in Egypt (1930-1952) and in several other Arab countries, calling for an Islamic political and social system and opposing Western power and cultural influence." *Id.* Both the NIF and the Muslim Brotherhood were lead by Hassan Al-Turabi. *Sudan's Islamist Leader*, *supra* note 39. Hassan Al-Turabi is a Sunni Muslim born in 1932 to a Sufi Muslim sheikh. *Id.* Turabi led the Muslim Brotherhood and, after the 1985 coup, he organized the NIF in prison. *Id.* Currently Turabi is under house arrest after a power struggle with El-Bashir. *Id.*

<sup>41</sup> ICOI Report, *supra* note 23, at 18; *Timeline: Sudan*, BBC NEWS, [http://news.bbc.co.uk/2/hi/middle\\_east/country\\_profiles/827425.stm](http://news.bbc.co.uk/2/hi/middle_east/country_profiles/827425.stm).

<sup>42</sup> ICOI Report, *supra* note 23, at 18-19.

<sup>43</sup> *Id.* at 19.

<sup>44</sup> Ghazi Suleiman & Curtis Francis Doebbler, *Human Rights in Sudan in the Wake of the New Constitution*, 6 No. 1 HUM. RTS. BRIEF 1 (1998), available at <http://www.wcl.american.edu/hrbrief/fall98/ghazi.html>.

<sup>45</sup> ICOI Report, *supra* note 23, at 19.

<sup>46</sup> *Sudan's Islamist Leader*, *supra* note 39; ICOI Report, *supra* note 23, at 19.

<sup>47</sup> ICOI Report, *supra* note 23, at 19.

<sup>48</sup> Simon Apiku, *Sudan in Danger of Reverting to North-South War*, REUTERS, Sept. 13, 2007, <http://www.reuters.com/article/reutersEdge/idUSAPI25818020070913>; ICOI Report, *supra* note 23, at 18. During the North-South civil war, the North enslaved countless numbers of Southern Sudanese people. AMBASSADOR SHIRIN TAHIR-KHELI REMARKED AT THE 57th Session of the U.N. Commission on Human Rights:

How will history judge the 57th Commission should it fail to acknowledge the heinous practice of slavery of people of southern Sudan? A long series of reports by U.N. special rapporteurs and many others have it made amply clear that the Sudanese Government continues to tolerate, if not encourage slavery. Many of the women taken north by the government-backed militias have been raped, sexually abused, or forced into becoming sex slaves. Others are forced to work as field hands or domestic laborers. In his interim report last fall, then-Special Rapporteur Leonardo Franco, described the conditions these enslaved people face as 'extremely harsh: abuse, torture, rape, and, at times, killing being the norm.'

AMBASSADOR SHIRIN TAHIR-KHELI, HEAD OF THE U.S. DELEGATION, U.N. COMMISSION ON HUMAN RIGHTS Item 9: Violation of Human Rights and Fundamental Freedoms in Any Part of the World (Mar. 30, 2001) (transcript available at <http://2001-2009.state.gov/g/drl/rls/rm/2001/1806.htm>).



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tias to attack Southern rebel groups, “terrorize and forcibly displace civilians, and intimidate humanitarian workers to force their withdrawal.”<sup>49</sup> By the end of the conflict, two million people had died and four and half million people were displaced.<sup>50</sup>

After North-South peace talks began in 2002, the Sudan People’s Liberation Movement (SPLM) and the government of Sudan<sup>51</sup> signed the Comprehensive Peace Agreement (CPA) in 2004.<sup>52</sup> At this time, however, it is unclear whether the North-South peace accord will last, as reports show that Al-Bashir’s National Congress Party (NCP) refuses to uphold their end of the agreement.<sup>53</sup>

In September 2007, Sudanese Security Forces raided a SPLM office in Khartoum.<sup>54</sup> The SPLM has repeatedly expressed concerns about the sincerity of the NCP because the NCP is selectively implementing the CPA and attempted to renegotiate several provisions.<sup>55</sup> The biggest disagreements revolve around the protocol on the oil-rich Abyei region, demarcation of the North-South boundary line, and the complete departure of Northern forces from Southern Sudan.<sup>56</sup> Khartoum refuses to relinquish Abyei’s lucrative oil fields and recently rejected a new boundary proposed by an international commission that would give Abyei to the South.<sup>57</sup>

SPLM officials report that Khartoum is mobilizing Arab tribes, the Misseriya, to sabotage the CPA’s implementation.<sup>58</sup> SPLM leaders further allege that the NCP is withholding promised money for a census necessary for the 2009 elections and a referendum on the secession of the South from Sudan in 2011.<sup>59</sup> Hopefully the international community will not lose sight of the importance of the CPA’s implementation, even as it focuses on the crisis in Darfur. History shows that the North-South conflict is never completely unrelated to the Darfur conflict.

Throughout the North-South peace talks, the people of Darfur were left completely out of the process.<sup>60</sup> Britain incorporated Darfur into Sudan once British

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<sup>49</sup> Prendergast & Thomas-Jensen, *supra* note 16, at 147.

<sup>50</sup> ICOI Report, *supra* note 23, at 19.

<sup>51</sup> The government of Sudan will also be referred to as “Sudan,” “Sudanese Government,” “Khartoum,” and “Khartoum Government.”

<sup>52</sup> ICOI Report, *supra* note 23, at 19.

<sup>53</sup> Apiku, *supra* note 48.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Alfred de Montesquiou, *A Sudan Town Raises North-South Tensions*, FOX NEWS, Jan. 1, 2008, <http://origin.foxnews.com/wires/2008Jan01/0,4670,SudanVolatileTown,00.html>.

<sup>58</sup> Derek Kilner, *Clashes on Sudan’s North-South Border Threaten Peace Deal*, VOICE OF AM., Mar. 10, 2008, <http://www.voanews.com/english/2008-03-10-voa49.cfm>.

<sup>59</sup> Apiku, *supra* note 48. The Misseriya tribes were among the Arab tribes Khartoum armed to fight against the SPLM during the twenty-year civil war, “in much the same way as the Janjaweed were armed in Darfur.” Kilner, *supra* note 58.

<sup>60</sup> Lydia Polgreen, *An Incomplete Peace: Sudan’s Never-Ending War With Itself*, N.Y. TIMES, May 4, 2008, <http://www.nytimes.com/2006/05/04/world/africa/04darfur.html>.

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rule ended. And once Sudan claimed independence, it incorporated Darfur into Sudan.<sup>61</sup> Administratively, three Governors appointed by the Sudanese government govern the North, South, and Western regions of Darfur.<sup>62</sup> Under Colonel Al-Nimeiri, the Governors were given judicial and executive powers.<sup>63</sup> This move effectively eliminated the tribal systems already in place.<sup>64</sup> The people of Darfur used these tribal systems to resolve problems resulting from the influx of immigrants and inter/intra-tribal relations.<sup>65</sup> The people of Darfur perceived the Sudanese government as unnecessary interveners negatively affecting their private affairs, rather than as a neutral party.<sup>66</sup>

Prior to the Darfur crisis and the peace talks between North and South Sudan, tensions were brewing in Darfur. People began to smuggle and import weapons into Darfur, making arms much more available.<sup>67</sup> Darfur's tribes began to organize themselves militarily.<sup>68</sup> The Arab African nomadic tribes organized themselves into the "Arab Gathering"<sup>69</sup> and the Fur started the "African Belt."<sup>70</sup> These groups clashed and the government intervened, along with several tribal leaders, and temporarily settled the conflict between the groups.<sup>71</sup> The people of Darfur, however, still resented Sudan's refusal to resolve the lingering and growing economic and political tensions.<sup>72</sup>

### III. Discussion

This Part will discuss the five-year conflict in Darfur.<sup>73</sup> It will also go through a timeline of important events.<sup>74</sup> The section on the Pretrial Chamber's findings in Part IV discusses in more detail the specific atrocities in Darfur.<sup>75</sup>

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<sup>61</sup> ICOI Report, *supra* note 23, at 20.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 22.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 21-22.

<sup>66</sup> *Id.* at 23.

<sup>67</sup> ICOI Report, *supra* note 23, at 22. Foreign countries worried about Libya's pursuits with Chad and the war in Southern Sudan have all contributed to the availability of modern weapons in the Darfur region.

<sup>68</sup> *Id.*

<sup>69</sup> Emily Wax, *Sudan's Ragtag Rebels*, WASH. POST, Sept. 7, 2004, at A01, available at <http://www.washingtonpost.com/ac2/wp-dyn/A1193-2004Sep6?language=printer>. In addition to seeking removal of African tribes that were given land during British Rule, the Arab Gathering came together under the notions of Arab supremacy.

<sup>70</sup> ICOI Report, *supra* note 23, at 22.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See *infra* Part III (discussing the Darfur conflict).

<sup>74</sup> See *infra* Part III (discussing a timeline of the Darfur conflict). For a detailed timelines of the Darfur conflict, see *The crisis in Darfur, a timeline*, CBC NEWS, <http://www.cbc.ca/news/background/sudan/darfur.html> (last visited Feb. 15, 2009).

<sup>75</sup> See *infra* Part IV (discussing the findings of the ICC's pretrial chamber).

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### A. The Conflict in Darfur.<sup>76</sup>

Sudan's government continued to neglect, marginalize, and discriminate against the people of Darfur. In late 2002, the rebel groups, the Sudan Liberation Movement/Army (SLA) and the Justice and Equality Movement (JEM), attacked government sites, mainly police stations.<sup>77</sup> The rebels voiced their concerns about the "socio-economic and political marginalization of Darfur and its people."<sup>78</sup> Sudan's government believed that the people of Darfur supported these rebel groups in their rebellion against the Sudanese government.<sup>79</sup> The rebels wanted everyone in Sudan to have fairer representation even though the majority of the rebel groups were made up of the Fur, Massalit, and Zaghawa tribes.<sup>80</sup> The Sudanese government ignored the rebel groups because it wanted to resolve the situation with the South and did not regard the rebels as a serious military issue.<sup>81</sup>

On April 25, 2003, the rebels attacked the unsuspecting Sudanese government at military installations in El Fashir, the state capital of North Darfur.<sup>82</sup> Because Sudan's military was preoccupied in the South, Sudan lacked the immediate capability to deal with the rebel attack.<sup>83</sup> Sudan also had another complicated problem preventing its military from responding to the attacks: its military consisted mainly of people from Darfur who were reluctant to attack their own people.<sup>84</sup> The Government responded to this challenge by calling upon local Darfur tribes to assist in the fighting against the rebels.<sup>85</sup> Sudan recruited Arab nomadic tribes to join the force, but people from neighboring countries, including Chad and the

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<sup>76</sup> Countless articles, government and NGO reports and whole books have been written about the conflict in Darfur. This article, therefore, does not presume or attempt to fully report on the conflict. For more in depth information and analysis see, e.g., *Report of the High Commissioner*, *supra* note 15; JEN MARLOW WITH AISHA BAIN & ADAM SHAPIRO, *DARFUR DIARIES: STORIES OF SURVIVAL* (Nation Books 2006); ERIC REEVES, *A LONG DAYS DYING: CRITICAL MOMENTS IN THE DARFUR GENOCIDE* (Michael Brassard ed., Key Publishing House, Inc., 2007); and DON CHEADLE & JOHN PRENDERGAST, *NOT ON OUR WATCH: THE MISSION TO END GENOCIDE IN DARFUR AND BEYOND* (Hyperion 2007).

<sup>77</sup> ICOI Report, *supra* note 23, at 22. The SLA and the JEM were formed by different armed village groups around 2001 and 2002 GlobalSecurity.org, Darfur Liberation Front, Sudan Liberation Movement (SLM) Sudan Liberation Army (SLA) Justice and Equality Movement, <http://www.globalsecurity.org/military/world/para/darfur.htm> (last visited Feb. 15, 2009) [hereinafter GlobalSecurity.org]. "Broadly speaking the SLA and JEM share an ethnic background, coming primarily from the Zaghawa, Fur and Masaalit tribes." *Report of the High Commissioner*, *supra* note 15, ¶ 5, at 6. These two main rebel groups have since "fractured into over a dozen groups." *Save Darfur Emergency Briefing* (Save Darfur Coalition, D.C.) July 2007, at 1, available at [http://darfur.3cdn.net/ddc3ff59297f0024eb\\_jum6i624f.pdf](http://darfur.3cdn.net/ddc3ff59297f0024eb_jum6i624f.pdf).

<sup>78</sup> GlobalSecurity.org, *supra* note 77; ICOI Report, *supra* note 23, at 23. *Report of the High Commissioner*, *supra* note 15, ¶ 5, at 4.

<sup>79</sup> Prendergast & Thomas-Jensen, *supra* note 16, at 146.

<sup>80</sup> ICOI Report, *supra* note 23, at 23.

<sup>81</sup> *Id.*

<sup>82</sup> Prendergast & Thomas-Jensen, *supra* note 16, at 148 ("The rebels bombarded and temporarily captured the airport and the local military headquarters . . . destroyed government aircrafts, killed scores of government soldiers, [and] captured the local military commander . . .").  
ICOI Report, *supra* note 23, at 23.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 23-24; ICISS, *supra* note 21, at 23-24.

<sup>85</sup> ICISS, *supra* note 21, at 23-24.

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Central African Republic, also joined in the fighting.<sup>86</sup> By doing this, Sudan intentionally exploited the existing tensions between the different African and Arab tribes.<sup>87</sup> The Arab militia members were dually motivated by ethnic and racial hatred and the Sudanese government's promise of "state-sanctioned robbery of land and booty."<sup>88</sup> In exchange for fighting with the government, Sudan also gave the Janjaweed Arab militias monetary gifts and grants.<sup>89</sup>

Fighting between the rebels and the Sudanese Armed Forces (SAF) and Janjaweed forced hundreds of thousands of refugees into Chad and the Central African Republic.<sup>90</sup> By September 2003, the SLA and the Sudanese government had agreed to a ceasefire while they discussed the underdevelopment of Darfur.<sup>91</sup> Soon after, however, both parties claimed that the other had violated the agreement.<sup>92</sup> In December 2003, the Janjaweed renewed their attacks by burning villages, and murdering and raping civilians.<sup>93</sup> These new Janjaweed attacks forced 100,000 refugees to flee into Chad.<sup>94</sup>

In early 2004, the media began focusing on Darfur<sup>95</sup> and the U.N. called the crisis "one of the worst [humanitarian situations] in the world."<sup>96</sup> The Sudanese government and Janjaweed continued their joint assault on the people of Darfur, causing more refugees to escape into Chad.<sup>97</sup> In April, the rebels and Sudan's government entered into another ceasefire; however, the agreement lasted only one month as a village was attacked in May and both sides quickly blamed each other.<sup>98</sup> In the spring of 2004, the United Nations High Commission for Human Rights (UNHCHR) conducted an investigation into the conflict and issued a report in May 2004.<sup>99</sup> In July and September 2004, two more rounds of peace talks failed as Sudan refused to remove its SAF from Darfur or disarm the Janjaweed.<sup>100</sup>

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<sup>86</sup> ICOI Report, *supra* note 23, at 24.

<sup>87</sup> ICISS, *supra* note 21, at 23-24. Darfur refugees interviewed by staff from the U.N. High Commissioner for Human Rights "described the Janjaweed as being exclusively 'Arab', as opposed to the victims who were described as 'black' or 'African.'" *Report of the High Commissioner*, *supra* note 15, ¶ 33, at 11.

<sup>88</sup> Prendergast & Thomas-Jensen, *supra* note 16, at 148.

<sup>89</sup> ICOI Report, *supra* note 23, at 24.

<sup>90</sup> *The crisis in Darfur, a timeline*, *supra* note 74.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Prendergast & Thomas-Jensen, *supra* note 16, at 146 ("Reports of war crimes and crimes against humanity in Darfur, western Sudan, began appearing in the western news media in early 2004.").

<sup>96</sup> *The crisis in Darfur, a timeline*, *supra* note 74; *World's worst humanitarian crisis unfolding in Darfur, Sudan*, UN NEWS CENTRE, Mar. 19, 2004, <http://www.un.org/apps/news/story.asp?NewsID=10142&Cr=sudan&Cr1=>.

<sup>97</sup> *The crisis in Darfur, a timeline*, *supra* note 74.

<sup>98</sup> *Id.*; *Report of the High Commissioner*, *supra* note 15, ¶ 7, at 6-7.

<sup>99</sup> *See infra* note 133 (discussing some of the report's findings).

<sup>100</sup> *The crisis in Darfur, a timeline*, *supra* note 74; *New Sudan Resolution 'Unbalanced'*, BBC NEWS, Sept. 15, 2004, <http://news.bbc.co.uk/2/hi/africa/3659204.stm>.

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Through the end of 2004 and most of 2005, the U.N. and the United States released statements concerning the atrocities in Darfur, Sudan's involvement, and the worsening situation.<sup>101</sup> Sudan, with the support of China, sluggishly and passively responded to the international community.<sup>102</sup> The Sudanese government stated that they were not intimidated by sanctions or by the U.N.<sup>103</sup> While the United States accused Sudan of genocide, the U.N. imposed travel bans and froze assets of several individuals accused of committing crimes in Darfur.<sup>104</sup> In March 2005, the U.N. Security Council referred the situation to the ICC, hoping to bring the criminals to justice.<sup>105</sup>

In March 2005, Chad began accusing Sudan of supporting Chadian rebels set on overthrowing Chad's government.<sup>106</sup> In September 2005, Sudan and the rebels attempted to achieve peace by engaging in talks in Abuja, Nigeria.<sup>107</sup> Though both the JEM and the SLA joined the talks, a faction from the SLA disagreed to join and boycotted the talks.<sup>108</sup> These talks and a second round of talks in November of 2005 failed to bring about peace.<sup>109</sup> Former U.N. Secretary General Kofi Annan reported to the U.N. that Sudan continually blocked aid from getting to civilians in Darfur.<sup>110</sup> The U.N. tried to rally the international community, specifically the United States, China, and Russia, to take action as the situation deteriorated.<sup>111</sup> The U.N. also called upon Sudan to deliver on its promises to cease attacks on civilians.<sup>112</sup> While the U.N. tried to take action and supply resources and peace-keeping troops, Sudan refused to allow the U.N. to enter claiming that the U.N. had an alternative agenda.<sup>113</sup>

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<sup>101</sup> *The crisis in Darfur, a timeline*, *supra* note 74.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Press Release, Secretary-General, Secretary-General Welcomes Adoption of Security Council Resolution Referring Situation in Darfur, Sudan, to International Criminal Court Prosecutor, U.N. Doc. SG/SM/9797 (Mar. 31, 2005).

<sup>106</sup> *SUDAN-CHAD: Deby accuses Janjawid of killing his civilians, vows punishment*, IRIN NEWS, Sept. 29, 2005, <http://www.globalsecurity.org/military/library/news/2005/09/mil-050929-irin04.htm>; *The crisis in Darfur, a timeline*, *supra* note 74.

<sup>107</sup> *The crisis in Darfur, a timeline*, *supra* note 74.

<sup>108</sup> *Id.* As of early 2008, there are an estimated twenty-seven rebel factions that are roaming around the Darfur region. Zachary Ochieng, *Rebel Factions Thick On the Ground As Hybrid Force Deploys*, E. AFR., Jan. 28, 2008, <http://allafrica.com/stories/200801281522.html>. These factions complicate matters as it becomes more difficult to engage in peace talks and to have all groups approve of the deal. *Id.* The SLA and the JEM both want the groups to reunite before reengaging in peace talks. *Id.*

<sup>109</sup> *The crisis in Darfur, a timeline*, *supra* note 74.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Sudan Rejects 'Colonial' Troops*, BBC NEWS, June 20, 2006, <http://news.bbc.co.uk/2/hi/africa/5097868.stm>.

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On May 8, 2006, an SLA faction and Sudan's government signed the Darfur Peace Agreement (DPA) under strong international pressure.<sup>114</sup> The DPA, however, was flawed and incomplete because it "lacked implementation guarantees" for disarming the Janjaweed; compensating Darfur's victims; facilitating the return of displaced people to their homes; and the peacekeeping handover from the AU to U.N.<sup>115</sup>

Through November 2006, the U.N. continued to call on the international community to take action and for Sudan to cooperate and allow the U.N. to enter.<sup>116</sup> The U.N.'s requests fell on deaf ears and Sudan continued to support the Janjaweed militias and blocked aid from reaching civilians. Not much improved on the ground during 2007 or thus far in 2008.<sup>117</sup> Sudan continued to refuse the U.N. access into Sudan even when it was under agreement with China to do so.<sup>118</sup>

China continued its steadfast support of Sudan with millions of dollars in grants, as well as filling the role of being Sudan's largest trade partner.<sup>119</sup> Beijing also continued to supply weapons to Sudan in blatant violation of the international arms embargo on Sudan.<sup>120</sup> Chinese made and imported weapons were being used by the Janjaweed militias to murder Darfur civilians.<sup>121</sup> These illegally imported weapons included not only small arms and light weapons, but also major weapons systems such as tanks and fighter planes.<sup>122</sup>

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<sup>114</sup> Darfur Peace Agreement, May 5, 2006, *available at* [http://www.africa.berkeley.edu/Sudan/Darfur/DPA\\_ABUJA-5-05-06-withsignatures.pdf](http://www.africa.berkeley.edu/Sudan/Darfur/DPA_ABUJA-5-05-06-withsignatures.pdf) [hereinafter Darfur Peace Agreement].

<sup>115</sup> Prendergast & Thomas-Jensen, *supra* note 16, at 151. *But see* Darfur Peace Agreement, *supra* note 114 ("[The DPA is] a fair agreement that addresses the long-standing marginalization of Darfur, and charts a path for lasting peace for the innocent victims of the crisis.").

<sup>116</sup> *The crisis in Darfur, a timeline*, *supra* note 74.

<sup>117</sup> United States Holocaust Memorial Museum—Committee on Conscience, <http://www.ushmm.org/conscience/alert/darfur/contents/02-current/> (last visited Apr. 20, 2008) [hereinafter USHMM].

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*; CIA Factbook, *supra* note 30.

<sup>120</sup> William D. Hartung, *Deadly Traffic: China's Arms Trade With The Sudan*, ARMS AND SECURITY INITIATIVE POLICY BRIEF (New Am. Found., D.C.) Aug. 2008, at 2, *available at* <http://www.newamerica.net/files/080606PBChinaArmsTrade.pdf>. "Beijing has been by far the most egregious violator of international sanctions on Sudan, providing up to 90 percent of the country's small arms and light weapons between 2004 and 2006 . . . ." *Id.* (citing *Investing In Tragedy: China's Money, Politics, and Arms in Sudan* (Human Rights First, New York, N.Y.), Mar. 2008, at 11-12, *available at* <http://www.humanrightsfirst.info/pdf/080311-cah-investing-in-tragedy-report.pdf>).

<sup>121</sup> *Id.* at 1-2.

<sup>122</sup> *Id.* at 2-3. In June 2008, BBC News documented how China was "training [Sudanese] fighter pilots who fly Chinese A5 Fantan fighter jet in Darfur." Hilary Anderson, *China 'Is Fuelling War In Darfur'*, BBC NEWS, June 13, 2008, <http://news.bbc.co.uk/2/hi/africa/7503428.stm>. The BBC has proven that "Chinese Fanton fighter jets were flying on missions out of Nyala airport in south Darfur in February [2008]," the very same month when "Kaltam Abakar Mohammed, a mother of seven, watched three of her children blown to pieces as they were attacked by a fighter jet on" February 19. *Id.* According to Clare da Silva, an international lawyer, the BBC's evidence means China is violating the arms embargo on multiple levels. *Id.*

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In 2008, Sudan returned to using scorched-earth tactics, thus worsening the humanitarian situation and increasing the violence.<sup>123</sup> In April 2008, Human Rights Watch (HRW) confirmed a U.N. report that claimed soldiers along with the Janjaweed are still raping girls and looting villages.<sup>124</sup> In addition, HRW claims that the risk of rape<sup>125</sup> or assault towards women and girls during periods of calm match the same risk during an attack by the Janjaweed.<sup>126</sup> As recently as early August 2008, reports indicated that Sudan once again was launching attacks on rebels and civilians in northern Darfur, killing an estimated sixteen civilians according to Ibrahim al-Hillo, a commander of the Sudan Liberation Movement.<sup>127</sup> Author and activist Eric Reeves goes as far as to say that the level of ethnically motivated violence in Darfur is back up to the tragic year of 2004.<sup>128</sup>

### IV. Analysis

This Part examines and analyzes the international community's response to the Darfur conflict.<sup>129</sup> First, it looks at the multi-layered U.N. response.<sup>130</sup> Then it discusses the ICC's response, including that of the Chief Prosecutor and Pretrial Chamber.<sup>131</sup> Finally, this Part examines the United States' response to Darfur.<sup>132</sup>

#### A. The United Nation's Response

The U.N. has responded to the genocide in Darfur, albeit slowly, in several different ways. First, the UNHCHR conducted an investigation into the conflict in the spring of 2004 and issued a report in May 2004 documenting the ongoing

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<sup>123</sup> USHMM, *supra* note 117. "Recently, in a campaign reminiscent of the worst military violence of the genocide's early years, Khartoum's regular ground and air forces coordinated with the Janjaweed in massive scorched-earth assaults against civilian villages in West Darfur." *Genocide by Attrition*, *supra* note 5.

<sup>124</sup> James Read, *Darfur Women Still Face Rape Risk*, BBC NEWS, Apr. 7, 2008, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/7333844.stm>.

<sup>125</sup> For more about the use of rape as weapon of war and shame in Darfur see Fidele Lumeya, *Rape, Islam, and Darfur's Women Refugees and War-Displaced*, REFUGEES INT'L, Aug. 24, 2004, <http://www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/e65c85d5058bfd0549256efb0002d443>.

<sup>126</sup> Read, *supra* note 124.

<sup>127</sup> Sarah El Deeb, *Rebels Say Sudanese Government Has Launched New Offensive In Northern Darfur*, YAHOO CANADA NEWS, Aug. 13, 2008, <http://www.paherald.sk.ca/index.cfm?pid=13&cpctat=world&stry=69050035>. Sudan's motivation to clear out the area of its current occupants and "eliminate" any potential obstacles to control of the area seems to lie in a desire for oil. Apparently Sudan's "government has designated the area [of northern Darfur] for future oil exploration." *Id.*

<sup>128</sup> Eric Reeves, *Darfur Boiling Over*, SUDAN TRIB, Feb. 28, 2008, [http://www.sudantribune.com/spip.php?page=imprimable&id\\_article=26172](http://www.sudantribune.com/spip.php?page=imprimable&id_article=26172).

<sup>129</sup> See *infra* Part IV (discussing the response of several key members of the international community).

<sup>130</sup> See *infra* Part IV.A (examining the response of the UNHCR, U.N. Security Council, Secretary-General, and Commission of Inquiry).

<sup>131</sup> See *infra* Part IV.B (analyzing the response of the ICC, its Chief Prosecutor and the Pretrial Chamber).

<sup>132</sup> See *infra* Part IV.C (looking at the United States' response through the State Department, Congress, the White House Administration, and U.S. states).

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atrocities.<sup>133</sup> Second, the U.N. encouraged the Sudanese Government and the two main rebel groups to cooperate in peace talks that the AU mediated between Sudan's government and the two main rebel groups for nearly three years.<sup>134</sup>

Former Secretary-General Kofi Annan has emphasized that real peace in Darfur can only come from a negotiated settlement between all the parties to the conflict.<sup>135</sup> When he was Secretary-General, Annan called on the parties to return to the negotiations in Abuja, Nigeria to bring an end to the violence.<sup>136</sup> By emphasizing the indispensability of peace talks, Secretary General Annan worked towards the critical goals of ending the conflict through diplomatic means and creating a solution to the underlying power and wealth inequities that led to the conflict erupting in 2003.

The U.N. has also responded by passing several resolutions authorizing U.N. and U.N./AU peacekeepers to go into Darfur to stem the violence.<sup>137</sup> U.N. Resolution 1556, passed on July 30, 2004, also imposed an international arms embargo on all non-government individuals and bodies, including the Janjaweed.<sup>138</sup> The U.N. strengthened these sanctions by adopting resolution 1591 in 2005.<sup>139</sup> This resolution broadened the scope of the arms embargo and imposed a travel ban and froze the assets of targeted individuals.<sup>140</sup> Additionally, the U.N. requested and created an International Commission of Inquiry ("ICOI" or the "Commission") to investigate the violence in Darfur.<sup>141</sup> After the Commission documented the ongoing violence in a report on the conflict, the U.N. Security Council referred the situation in Darfur to the ICC.

### 1. The Security Council Authorized Peacekeepers

In 2004, the AU established the African Union Mission in Sudan (AMIS).<sup>142</sup> AMIS' principal mission was to perform peacekeeping operations in Darfur.<sup>143</sup>

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<sup>133</sup> The UHCHR reported that the Janjaweed were engaging in a "reign of terror; that the children are suffering and are dying from starvation and exhaustion; that there is a high prevalence of dysentery, measles and high fever; that Arab African militias with ties to Sudan are destroying food and water supplies; that Sudan is not allowing aid organizations to enter; and that Sudan is complicit in the murder of civilians in the region." See generally *Report of the High Commissioner*, *supra* note 15.

<sup>134</sup> CHAD-SUDAN: President Demands More International Attention On Darfur, IRIN News, Apr. 18, 2006, <http://www.globalsecurity.org/military/library/news/2006/04/mil-060418-irin04.htm>.

<sup>135</sup> Press Release, Secretary-General, Secretary-General Welcomes Adoption Of Security Council Resolution Referring Situation In Darfur, Sudan To International Criminal Court Prosecutor, U.N. Doc. SG/SM9797 (Mar. 31, 2005) [hereinafter Secretary-General Welcomes Referral To ICC].

<sup>136</sup> *Id.*

<sup>137</sup> See *infra* A.1 (discussing U.N. resolutions authorizing peacekeepers in Darfur).

<sup>138</sup> S.C. Res 1556, ¶¶ 7-8, U.N. Doc. S/RES/1556 (July 30, 2004).

<sup>139</sup> S.C. Res 1591, ¶ 7, U.N. Doc. S/RES/1591 (Mar. 29, 2005).

<sup>140</sup> *Id.* ¶ 3(c). Unfortunately, not all countries have abided by the international arms embargo. See notes 120-122 and accompanying text (describing China's continued economic and military support of Sudan and its importation of weapons to Sudan during 2004 – 2006).

<sup>141</sup> ICOI Report, *supra* note 23.

<sup>142</sup> See African Union Mission in Sudan, Mandate, [www.amis-sudan.org/amismandate.html](http://www.amis-sudan.org/amismandate.html) (last visited Feb. 17, 2009).

<sup>143</sup> *Id.*



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However, due to inadequate human and financial resources, AMIS was unable to effectively implement any of the peace agreements or lessen any of the violence in or surrounding Darfur.<sup>144</sup> As a response, U.N. Security Council resolutions in 2004 and 2005 established the United Nations Mission in Sudan (UNMIS).<sup>145</sup>

In August 2006, the Security Council voted in Resolution 1706 to send U.N. peacekeepers to Darfur to supplement the small AU force.<sup>146</sup> But, because deployment of the force was made contingent on Sudan's consent, this new and much larger peacekeeping mission was blocked by Sudan and never deployed.<sup>147</sup> This should have come as no surprise to the U.N. and the international community since Khartoum, just two years prior, stalled and delayed the deployment of AU peacekeepers in 2004.<sup>148</sup> After a tenuous year-long confrontation, however, Sudan reluctantly agreed to allow an "AU/UN Hybrid operation in Darfur" (UNAMID) only if it consisted mainly of African troops.<sup>149</sup>

In January 2007, the U.N. Security Council approved a plan to send to Darfur about 20,000 peacekeeping troops authorized to use force in the troubled region.<sup>150</sup> The force, currently numbering only 9,000 and far from fully deployed,<sup>151</sup> will, in theory, be a hybrid of U.N. soldiers and AU troops and will be under the command of both the U.N. and the AU.<sup>152</sup>

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<sup>144</sup> Irene Khan, et al., *International NGOs Call For Strong Force In Darfur*: Joint Letter to the U.N. Security Council, May 25, 2006, <http://hrw.org/english/docs/2006/05/25/sudan13462.htm>.

<sup>145</sup> For background on the Mission, see U.N. Mission in Sudan, Mission Background, [www.unmis.org/english/background.htm](http://www.unmis.org/english/background.htm) (last visited Feb. 17, 2009). Specifically, U.N. Security Council Resolution 1590 of March 24, 2005 established the U.N. Mission in Sudan. S.C. Res 1590, U.N. Doc. S/RES/1590 (Mar. 24, 2005).

<sup>146</sup> S.C. Res. 1679, ¶ 3, U.N. Doc. S/RES/1679 (May 16, 2006).

<sup>147</sup> *Sudan: Hybrid Peacekeeping Force for Darfur Must Comply With U.N. Requirements*, REFUGEES INT'L, Nov. 22, 2006, <http://www.refugeesinternational.org/content/article/detail/9673> (last visited Feb. 17, 2009) ("Khartoum is forcing the U.N. to water down its Darfur effort to a level acceptable to Sudan."); *Efforts To Help Darfur Again Reach Dead End*, SUDAN TRIB., Dec. 5, 2006, available at [www.sudantribune.com/spip.php?article19080](http://www.sudantribune.com/spip.php?article19080). Naming any excuse he could, Sudanese President Omar al-Bashir later told reporters that "[i]nternational troops are a colonization of Sudan." *Id.* Colin Thomas-Jensen of the International Crisis Group, a U.S. think tank said that Al-Bashir's excuses and arrogance are "entirely coherent with (Sudan's) pattern of behavior over the last 17 years," since al-Bashir came to power in a 1989 Islamist and military coup. *Id.*

<sup>148</sup> Colum Lynch, *U.N. Envoy Urges Sudan To Let Peacekeepers In*, WASH. POST, Sept. 2, 2004, available at [www.washingtonpost.com/ac2/wp-dyn/A52261-2004Sep1?language=printer](http://www.washingtonpost.com/ac2/wp-dyn/A52261-2004Sep1?language=printer).

The U.N. report calls on Sudan to accept a U.N. proposal to allow about 4,000 African Union peacekeepers and police officers to help monitor a cease-fire between the government and the rebels. Sudan has allowed a contingent of about 300 Rwanda and Nigerian peacekeepers and observers in Darfur, but it refused requests from the African Union to expand the mission and provide them with the authority to protect civilians in Darfur. *Id.*

<sup>149</sup> S.C. Res. 1769, pmbl., ¶¶ 1-2, U.N. Doc. S/RES/1769 (July 31, 2007); S.C. Res. 1706, ¶ 1, U.N. Doc. S/RES/1706 (Aug. 31, 2006); Simon Apiku, *Sudan Bowed to Pressure on Darfur Force—Opposition*, REUTERS, June 19, 2007, <http://www.reuters.com/article/worldNews/idUSL1973884020070619> [hereinafter Apiku 2].

<sup>150</sup> *Security Council Approves Peacekeeping Force In Darfur*, CBC NEWS, July 31, 2007, <http://www.cbc.ca/world/story/2007/07/31/darfur-force.html>.

<sup>151</sup> Apiku 2, *supra* note 149.

<sup>152</sup> *Id.*

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### 2. *The International Commission of Inquiry*

On September 18, 2004, the U.N. Security Council adopted resolution 1564 requesting that the Secretary-General “rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties.”<sup>153</sup> Resolution 1564 required the Commission to determine whether acts of genocide were committed and also to identify the perpetrators “with a view to ensuring that those responsible are held accountable.”<sup>154</sup> The U.N. adopted this resolution just nine days after then-U.S. Secretary of State Colin Powell reported that the U.S. State Department had concluded that Sudan was committing genocide in Darfur.<sup>155</sup>

In October 2004, then Secretary-General Kofi Annan created the International Commission of Inquiry (“ICOI” or “Commission”) on violations of international humanitarian law and human rights law in Darfur and ordered a full report in three months.<sup>156</sup>

#### a. *The Commission’s Findings.*

On January 25, 2005, the Commission issued a 176-page report.<sup>157</sup> The Commission investigated the crisis in Darfur and conducted a thorough analysis of the information gathered from its investigations.<sup>158</sup> The Commission found that Sudan’s government and the Janjaweed Arab militias were responsible for “serious violations of international human rights and humanitarian law amounting to crimes under international law.”<sup>159</sup> The Commission found that Sudanese government armed forces and the Janjaweed militias indiscriminately attacked civilians throughout Darfur.<sup>160</sup>

During these jointly planned and implemented attacks, Sudanese government forces and militia raped, tortured, and killed civilians.<sup>161</sup> The armed forces and militias pillaged and destroyed villages, and forcefully displaced and caused the disappearance of Darfur civilians.<sup>162</sup> The Commission further found that the

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<sup>153</sup> ICOI Report, *supra* note 23, at 2.

<sup>154</sup> *Id.* By seeking the ultimate goal of holding “those responsible accountable,” the Security Council apparently showed where it lies in the debate between criminal prosecution and the argument of “amnesty for the sake of peace.” The authors agree with the Security Council. Amnesty fosters impunity more than peace. In the words of Pope Paul VI, “if you want peace, work for justice.”

<sup>155</sup> Ted Dagne, Cong. Research Serv., CRS Issue Brief for Congress, *Sudan: Humanitarian Crisis, Peace Talks, Terrorism, and U.S. Policy*, at 4 (Nov. 29, 2005), available at <http://www.fas.org/sgp/crs/row/LB98043.pdf>.

<sup>156</sup> ICOI Report, *supra* note 23, at 2.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 3.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* In addition to rape, the forces and militia committed “other forms of sexual violence” against African women and girls. *Id.*

<sup>162</sup> *Id.*

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Government forces and Janjaweed militias deliberately directed most of their attacks against innocent civilians (non-combatants).<sup>163</sup> Supporting the appearance of genocidal intent, the Commission found that the vast majority of the victims belonged to specific African tribes: the Fur, Zaghawa, Massalit, Jebel, and Aranga.<sup>164</sup>

### *b. The Commission's Conclusions*

The Commission concluded that the Government forces and Janjaweed militias' actions could be considered crimes against humanity because they were committed on a widespread and systematic basis.<sup>165</sup> The Commission, however, concluded that they did not have enough evidence to show that the Sudanese government "pursued a policy of genocide," even though "in some instances individuals, including Government officials, may commit acts with genocidal intent."<sup>166</sup> The Commission seemed eager to emphasize that this conclusion should not detract "from the gravity of the crimes perpetrated" in Darfur, including crimes against humanity and war crimes.<sup>167</sup>

### *3. The Security Council Referred Darfur to the ICC*

Two months after the Commission of Inquiry sent its report to the Security Council, the Council adopted Resolution 1593 referring the situation in Darfur to the ICC Prosecutor in accordance with article 13(b) of the Rome Statute.<sup>168</sup> Then U.N. Secretary-General Kofi Annan praised the Council for using its power pursuant to the Rome Statute to create a suitable way to "lift the veil of impunity that has allowed human rights crimes in Darfur to continue unchecked."<sup>169</sup>

On March 31, 2005, Secretary-General Annan called on the Sudanese Government, all parties to the Darfur conflict, and all other States and regional and

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<sup>163</sup> *Id.* at 3-4.

<sup>164</sup> *Id.* at 3. Neither Arab tribes nor non-African tribes were attacked. *Id.*

<sup>165</sup> *Id.* at 3.

<sup>166</sup> The Commission concluded that "the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned." *Id.* at 4. *But see* Human Rights Watch, Presentation of The Smallest Witnesses: The Crisis in Darfur Through Children's Eyes (Human Rights Watch, 2005) (traveling museum presentation of victimized children's drawings in which one 13-year old child described the scene of his drawing, "I am looking at the sheep in the wadi [dry riverbed]. I see Janjaweed coming—quickly, on horses and camels, with Kalashnikovs—shooting and yelling, '**kill the slaves . . .**'" (emphasis added)).

<sup>167</sup> These crimes are "no less serious and heinous than genocide." ICOI Report, *supra* note 23, at 4.

<sup>168</sup> S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005); *see also* Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, To Prosecutor of International Criminal Court., U.N. Doc. SC/8351 (Mar. 31, 2005). The vote was eleven in favor, none against, and four abstentions (Algeria, Brazil, China, United States). *Id.* While this action was certainly significant, some argue that the Security Council actually did "the minimum necessary" in response to mounting pressure after the Commission's report. *See* Jerry Fowler, Conference on International Justice, *supra* note 9 (arguing that the Security Council's resolution was its way of "kicking the can down the road").

<sup>169</sup> Secretary-General Welcomes Referral To ICC, *supra* note 135.

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international bodies to fully cooperate with, and provide assistance to, the ICC and the Office of the Prosecutor (OTP).<sup>170</sup>

### B. The ICC Response

The ICC's response includes the Prosecutor's investigation, the Pretrial Chamber's findings of "reasonable grounds," and the Chamber's issuance of arrest warrants for Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb").<sup>171</sup> And most recently, the ICC continued its courageous response to the genocide in Darfur by indicting the sitting head of state of Sudan, Omar Al-Bashir.<sup>172</sup>

#### 1. The ICC Investigation

On April 5, 2005, the ICOI sent its conclusions to the ICC Chief Prosecutor, Luis Moreno-Ocampo.<sup>173</sup> The Prosecutor acknowledged that the Commission reported "mass killings of innocent civilians, systematic rape of girls and women, and the burning of family homes."<sup>174</sup> Upon receiving the ICOI documents, Prosecutor Ocampo stated that "[w]e all have a common task: to protect life in Darfur, ending the culture of impunity."<sup>175</sup> On June 1, 2005, Prosecutor Ocampo decided to open an independent and impartial investigation<sup>176</sup> into the situation in Darfur.<sup>177</sup>

Prosecutor Ocampo conducted a twenty month investigation into the crimes allegedly committed in Darfur.<sup>178</sup> The investigation included interviews of vic-

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<sup>170</sup> *Id.*

<sup>171</sup> See *infra* Part B.1-3 (discussing the ICC's response to Darfur). The ICC issued its first warrants in 2005 against Joseph Kony, the leader of the Lord's Resistance Army in Uganda, as well as four of his subordinates. The ICC has also issued warrants against Thomas Lubanga Dyilo of the Union of Congolese Patriots, Germain Katanga of the Forces of Patriotic Resistance, and Mathieu Ngudjolo Chui of the National Integrationist Front in the Democratic Republic of Congo.

<sup>172</sup> See generally, *Arrest of Sudanese President Could Have World-Wide Effects*, AUSTL. BROAD. CORP., Feb. 13, 2009, <http://www.abc.net.au/news/stories/2009/02/13/2491424.htm>.

<sup>173</sup> Press Release, ICC, Prosecutor Receives List Prepared by Commission of Inquiry on Darfur (Apr. 5, 2005), available at <http://www2.icc-cpi.int/NR/exeres/3EA00FC5-8337-485B-BB19-54D3CDCDA8D8.htm> [hereinafter ICOI To Prosecutor].

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* The Prosecutor's comments are encouraging in an age where good people suffer from compassion fatigue and donor fatigue. "The people of Africa and the people of the world [however] have impunity fatigue." Gayle Smith, Senior Fellow at the Center for American Progress and Co-Chair of the ENOUGH Project, Conference on International Justice, *supra* note 9.

<sup>176</sup> Press Release, ICC, The Prosecutor of the ICC Opens Investigation in Darfur (June 6, 2005), available at <http://www2.icc-cpi.int/NR/exeres/6840C44E-153F-43F2-9B21-B60F4C756907.htm> [hereinafter Prosecutor Opens Investigation] ("The investigation will be impartial and independent, focusing on the individuals who bear the greatest criminal responsibility for crimes committed in Darfur.").

<sup>177</sup> See *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman* (Prosecutor v. Harun), Case No. ICC-02/05-01/07, Pretrial Chamber I, ¶ 3 (Apr. 27, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc279809.PDF>.

<sup>178</sup> ICC, Fact Sheet: The Situation In Darfur, the Sudan, 1, available at <http://www.adh-geneva.ch/RULAC/news/ICC-OTP-Fact-Sheet-Darfur-20070227-en.pdf> [hereinafter Darfur Fact Sheet].

tims and witnesses from Darfur<sup>179</sup> and a total of five missions by the OTP to Sudan from November 2005 to January/February 2007.<sup>180</sup> During the missions to Sudan, the OTP interviewed and gathered information directly from Sudanese Government officials.<sup>181</sup>

In addition to the five missions to Sudan, the OTP also collected evidence and statements during a total of seventy missions in seventeen countries.<sup>182</sup> The Prosecutor also delivered four reports to the Security Council as required by Resolution 1593.<sup>183</sup> On February 27, 2007, the Prosecution filed an application under article 58(7) requesting that summonses to appear or arrest warrants be issued by the Chamber for Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb).<sup>184</sup>

## 2. *The Pretrial Chamber Findings.*

### a. *ICC Jurisdiction*

The Chamber began its discussion by noting how it had jurisdiction over the Sudanese nationals. Although Sudan is not a State Party to the Rome Statute, Article 12(2) does not apply where the Security Council refers a situation to the Court pursuant to the U.N. Charter Chapter VII and Article 13(b) of the Rome Statute.<sup>185</sup> The Court could, therefore, exercise jurisdiction over crimes committed in the territory of, or by nationals of, a State that is not Party to the Rome Statute.<sup>186</sup>

The Prosecution informed the Court that according to the Judicial Investigations Committee (JIC), Ali Kushayb was arrested on November 28, 2006 by Sudan authorities due to an arrest warrant issued against him by Sudan in April 2005.<sup>187</sup> The JIC indicated that Ali Kushayb was under investigation in relation to five separate incidents from South and West Darfur.<sup>188</sup> The Prosecution argued that the Sudanese authorities' investigation did not encompass the conduct that was the subject of the application before the ICC.<sup>189</sup> In the end, the Pretrial Chamber easily agreed with Prosecutor Ocampo.<sup>190</sup>

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<sup>179</sup> *Id.* at 2. The OTP took over 100 formal witness statements, many from victims. *Id.* Darfur victims "were interviewed in other countries because of the ongoing insecurity in Darfur." *Id.* at 4.

<sup>180</sup> *Id.* at 6.

<sup>181</sup> *Id.* at 2.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 6.

<sup>184</sup> Prosecutor's Application Under Art. 58(7), ICC-02/05-55-US-Exp (Feb. 27, 2007); Prosecutor's Application Under Art. 58(7), ICC-02/05-56.

<sup>185</sup> Prosecutor v. Harun, Case No. ICC-02/05-01/07, ¶ 16.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* ¶ 20.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* ¶ 21.

<sup>190</sup> *Id.* ¶¶ 24-25.

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The Court then discussed whether it had jurisdiction over the alleged crimes. Article 8(2)(c) & (e) of the Rome Statute deals with acts committed in the course of a conflict not of an international character.<sup>191</sup> The Chamber discussed the various actors in the conflict and several of their specific attacks on each other.<sup>192</sup> The Chamber then easily found reasonable grounds to believe that the conflict in Darfur was not of an international character.<sup>193</sup>

### *b. Reasonable Grounds*

The ICC Pretrial Chamber found reasonable grounds<sup>194</sup> to believe that Ali Kushayb was one of the most senior tribal leaders in the Wadi Salih Locality (WSL).<sup>195</sup> Kushayb was the “Aqid al Oqada,” or “colonel of colonels” in the WSL.<sup>196</sup> In August 2003, Ali Kushayb was officially “appointed to a position” in the Sudanese Armed Forces (SAF) and was part of the Sudanese Popular Defense Forces’ (SPD) structure within the SAF.<sup>197</sup> In his positions, Ali Kushayb personally led and commanded thousands of the Janjaweed militia in their internationally criminal attacks against Darfur civilians and villages from August 2003 until March 2004.<sup>198</sup> Kushayb also mobilized, recruited, armed, and fully equipped the Janjaweed militias he commanded.<sup>199</sup>

The Chamber further found reasonable grounds to believe that Ali Kushayb fully implemented the counter-insurgency strategy that was fundamentally grounded on the commission of crimes against humanity and war crimes in the forms of rape, torture, persecution, killing of civilians, and hundreds of attacks on Darfur villages and towns.<sup>200</sup> Darfur witnesses reported that they saw Ali Kushayb and Ahmad Harun physically together in Darfur during the attacks and

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<sup>191</sup> *Id.* ¶ 3. The Court quotes Article 8(2)(f) of the Rome Statute: “Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is a protracted armed conflict between governmental authorities and organized armed groups or between such groups.”

<sup>192</sup> *Id.* ¶¶ 35-42.

<sup>193</sup> *Id.* ¶¶ 17, 35-42. The Chamber found that the conflict was between the Janjaweed and the Sudanese Government, specifically the Sudan People’s Armed Forces and the Popular Defence Forces, on one side, and the two rebel groups, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), on the other side. *Id.* ¶ 36.

<sup>194</sup> Based on Article 21(3) of the Rome Statute, in interpreting and applying the standard of “reasonable grounds to believe,” the Chamber followed the “reasonable suspicion” standard of the European Convention on Human Rights Article 5(1)(c) and the Inter-American Court of Human Rights’ jurisprudence on the fundamental right to personal liberty of the American Convention on Human Rights Article 7. *Id.* ¶ 28.

<sup>195</sup> *Id.* ¶ 95.

<sup>196</sup> Darfur Fact Sheet, *supra* note 178, at 4.

<sup>197</sup> Prosecutor v. Harun, Case No. ICC-02/05-01/07, ¶ 95.

<sup>198</sup> *Id.* ¶ 96.

<sup>199</sup> *Id.* ¶ 105.

<sup>200</sup> *Id.* ¶¶ 97-102. “This strategy became the justification for the mass murder, summary execution, mass rape, and other grave crimes against civilians who were known not to be participants in any armed conflict.” Darfur Fact Sheet, *supra* note 178, at 3.

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violence.<sup>201</sup> And the Chamber certainly found that Harun, as well as Kushayb, were intimately involved in the organized and systematic destruction of Darfur villages and the killing, raping, and persecuting of Darfur civilians.<sup>202</sup>

As to Ahmad Harun, the Chamber found reasonable grounds to believe that from April 2003 until September 2005, Harun served as Minister of State for the Interior of the Sudanese Government.<sup>203</sup> He was in charge of the management of the “Darfur Security desk” and coordinated the Government bodies involved in the counter-insurgency in Darfur, including the SAF, the Police, the National Security and Intelligence Service and the Janjaweed militias.<sup>204</sup>

The Chamber also found reasonable grounds to believe that Ahmed Harun coordinated and personally participated in essential functions of the Security Committees, including recruiting, arming, and funding the Janjaweed militias in Darfur.<sup>205</sup> Ahmad Harun, therefore, intentionally contributed to the commission of crimes against humanity and war crimes against Darfur civilians.<sup>206</sup> Harun knew that his actions would further the shared plan of the SAF and the Janjaweed militias, which consisted of attacking the civilian populations in Darfur.<sup>207</sup>

Harun, by virtue of his position, knew all about the international crimes committed against the Darfur civilian population.<sup>208</sup> And Harun specifically knew about the Janjaweed’s methods.<sup>209</sup> Specifically, Harun’s public speeches proved that he had personal knowledge that the Janjaweed were attacking civilians and pillaging towns and villages.<sup>210</sup> In his public speeches, Harun actually personally encouraged the commission of these internationally criminal acts against civilians; apparently his status as a senior Sudanese Government official did not in any way prevent him from overtly and publicly encouraging these vicious crimes.<sup>211</sup>

In a move that singularly exemplifies Sudan’s arrogant and indignant stance towards the international community’s response to the genocide in Darfur, in 2006, the Sudanese Government actually promoted Ahmad Harun to Minister of State of Humanitarian Affairs.<sup>212</sup> Shockingly, Harun also sits on the committee

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<sup>201</sup> Darfur Fact Sheet, *supra* note 178, at 4.

<sup>202</sup> Prosecutor v. Harun, Case No. ICC-02/05-01/07, ¶¶ 94-99.

<sup>203</sup> *Id.* ¶ 80.

<sup>204</sup> *Id.* ¶¶ 81-82.

<sup>205</sup> *Id.* ¶¶ 82-83.

<sup>206</sup> *Id.* ¶ 88.

<sup>207</sup> *Id.* “When describing Harun, witnesses immediately identified him as the official from Khartoum responsible for mobilising, funding, and/or arming the ‘Janjaweed’ or ‘Fursan.’ Witnesses also often stated that they saw Ahmad Harun meeting with or addressing leaders of the Militia/Janjaweed, including Ali Kushayb.” Darfur Fact Sheet, *supra* note 178, at 4.

<sup>208</sup> Prosecutor v. Harun, Case No. ICC-02/05-01/07, ¶¶ 92-93.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* ¶ 93.

<sup>212</sup> ICC Prosecutor Moreno-Ocampo testified before the Security Council that “[m]aintaining Harun in his position as Minister of State for Humanitarian Affairs was a direct threat to millions of victims and to the humanitarian workers and peacekeepers seeking to protect them.” *Sudan Has Failed to Cooperate*

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responsible for overseeing the deployment of the UNAMID peacekeeping force.<sup>213</sup> Harun's current positions no doubt show that Sudan's Government is wholly complicit in, and approves of, the genocide in Darfur. It represents Sudan's defiance of and disrespect for the international community, including the U.N. and the ICC.

### 3. *The Pretrial Chamber Issued Arrest Warrants for Harun and Kushayb.*

On May 2, 2007, the ICC Pretrial Chamber issued arrest warrants for Ahmad Harun<sup>214</sup> and Ali Kushayb<sup>215</sup> for their alleged individual criminal responsibility for crimes against humanity and war crimes under article 25(3)(a)(b) and (3)(d) of the Rome Statute. The arrest warrant for Ahmad Harun lists forty-two counts,<sup>216</sup> while the arrest warrant for Ali Kushayb lists fifty counts.<sup>217</sup> Harun and Kushayb are charged with a combined fifty-one counts of war crimes and crimes against humanity, including murder, rape, torture, and persecution.<sup>218</sup>

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with *International Criminal Court, Prosecutor Says*, U.N. NEWS CENTRE, Dec. 5, 2007, available at <http://www.un.org/apps/news/story.asp?NewsID=24933&Cr=sudan&Cr1=> [hereinafter *Sudan Not Cooperating*].

<sup>213</sup> Luis Moreno-Ocampo, ICC Chief Prosecutor, Conference on International Justice, *supra* note 9 ("He is controlling the fate of his victims.").

<sup>214</sup> Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-Rahman, Case No. ICC-02/05-01/07-2, Warrant of Arrest For Ahmed Harun (Apr. 27, 2007) [hereinafter *Harun Warrant*, Case No. ICC-02/05-01/07-2].

<sup>215</sup> Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-Rahman, Case No. ICC-02/05-01/07-3, Warrant Of Arrest For Ali Kushayb (Apr. 27, 2007) [hereinafter *Kushayb Warrant*, Case No. ICC-02/05-01/07-3]. See also, *Sudan Not Cooperating*, *supra* note 212 (Ali Kushayb, "against whom the Government had previously indicated that there was an investigation" was released on September 30, 2007 for alleged lack of evidence).

<sup>216</sup> See *Harun Warrant*, Case No. ICC-02/05-01/07-2. Twenty counts of crimes against humanity (murder – articles 7(1)(a) and 25(3)(d); persecution – articles 7(1)(h) and 25(3)(d); forcible transfer of population – articles 7(1)(d) and 25(3)(d); rape – articles 7(1)(g) and 25(3)(d); inhumane acts – articles 7(1)(k) and 25(3)(d); imprisonment or severe deprivation of liberty – articles 7(1)(e) and 25(3)(d); and torture – articles 7(1)(f) and 25(3)(d)); and twenty-two counts of war crimes (murder – articles 8(2)(c)(i) and 25(3)(d); attacks against the civilian population – articles 8(2)(e)(i) and 25(3)(d); destruction of property – articles 8(2)(e)(xii) and 25(3)(d); rape – articles 8(2)(e)(vi) and 25(3)(d); pillaging (articles 8(2)(e)(v) and 25(3)(d); and outrage upon personal dignity – articles 8(2)(c)(ii) and 25(3)(d)).

<sup>217</sup> See *Kushayb Warrant*, Case No. ICC-02/05-01/07-3. Twenty-two counts of crimes against humanity (murder - article 7(1)(a); deportation or forcible transfer of population - article 7(1)(d); imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law - article 7(1)(e); tortures - article 7(1)(f); persecution - article 7(1)(h); inhumane acts of inflicting serious bodily injury and suffering - article 7(1)(k)); and twenty-eight counts of war crimes (violence to life and person - article 8(2)(c)(i); outrage upon personal dignity in particular humiliating and degrading treatment - article 8(2)(c)(ii); intentionally directing an attack against a civilian population - article 8(2)(e)(i); pillaging - article 8(2)(e)(v); rape - article 8(2)(e)(vi); destroying or seizing the property – article 8(2)(e)(xii)).

<sup>218</sup> See generally, Amitis Khojasteh, The American Non-Governmental Organizations Coalition For The International Criminal Court [AMICC], *Questions & Answers On The ICC Arrest Warrants In The Darfur Investigation* 1 (June 6, 2007) available at [http://www.amicc.org/usinfo/advocacy\\_materials.html](http://www.amicc.org/usinfo/advocacy_materials.html) [hereinafter *AMICC Q & A*].



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The Chamber issued these arrest warrants because it found reasonable grounds to believe that Harun and Kushayb would not voluntarily turn themselves in to the Court.<sup>219</sup>

### 4. *ICC Indicts and Issues and Arrest Warrant for Sudan President Omar Al-Bashir.*

On July 14, 2008, the ICC Chief Prosecutor requested an arrest warrant from the ICC Pre-trial Chamber for Sudanese President Omar Hassan Ahmad Al-Bashir for ten counts of crimes of genocide, crimes against humanity, and war crimes in Darfur.<sup>220</sup> The ICC Prosecutor explained that Al Bashir's "motives were largely political. His alibi was a 'counterinsurgency.' His intent was genocide." <sup>221</sup> "In the [refugee] camps Al Bashir's forces kill the men and rape the women. He wants to end the history of the Fur, Masalit and Zaghawa people."<sup>222</sup> Prosecutor Moreno left no doubt as to the extent of Bashir's involvement by explaining that "[Bashir] used the whole state apparatus, he used the army, he enrolled the Militia/Janjaweed. They all report to him, they all obey him. His control is absolute."<sup>223</sup>

And on March 4, 2009, the ICC's Pre-trial Chamber issued a historic arrest warrant for Sudan's sitting President, Omar Al-Bashir for five counts of crimes against humanity and two counts of war crimes for his "essential role" in the murder, torture, rape, and displacement of millions of civilians in Darfur.<sup>224</sup> The Chamber found reasonable grounds to believe that in his position as the *de jure* and *de facto* President of Sudan and Commander-in-Chief of the Sudanese Armed Forces, Al-Bashir "played an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation" of systematic and violent attacks against Darfur civilians.<sup>225</sup> Al-Bashir was in "full control of all branches of the 'apparatus' of the State of Sudan," including the Sudanese Armed Forces and their allied Janjaweed Militia.<sup>226</sup> Al-Bashir used this control to ensure implementation of the attacks in Darfur and is there-

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<sup>219</sup> Press Release, ICC, Warrants of Arrest for the Minister of State for Humanitarian Affairs of Sudan, and a leader of the Militia/Janjaweed, ICC-OTP-20070502-214 (May 2, 2007), available at [http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/warrants%20of%20arrest%20for%20the%20minister%20of%20state%20for%20humanitarian%20affairs%20of%20sudan\\_%20and%20a%20leader%20of%20the](http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/warrants%20of%20arrest%20for%20the%20minister%20of%20state%20for%20humanitarian%20affairs%20of%20sudan_%20and%20a%20leader%20of%20the).

<sup>220</sup> Press Release, ICC, ICC Prosecutor Presents Case Against Sudanese President, Hassan Ahmad Al Bashir, For Genocide, Crimes Against Humanity and War Crimes in Darfur, ICC-OTP-20080714-PR341-ENG (July 14, 2008), available at [http://www2.iccpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2008\)/a](http://www2.iccpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2008)/a).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> Bashir Warrant, Case No. ICC-02/05-01/09.

<sup>225</sup> *Id.* at 7.

<sup>226</sup> *Id.*

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fore criminally responsible as an indirect perpetrator or as an indirect co-perpetrator for war crimes and crimes against humanity.<sup>227</sup>

The government of Sudan and its allies certainly attempted to block the issuance of this arrest warrant against Al-Bashir by attempting to convince key African states on the Security Council to request a delay at the ICC.<sup>228</sup> The Security Council recently renewed the mandate for Darfur peacekeepers and refused to delay the ICC legal proceedings against Omar Al-Bashir.<sup>229</sup> This decision by the Security Council came in the face of attempts by Libya and South Africa to include language that would have prevented ICC judges from considering an arrest warrant against Bashir.<sup>230</sup> Richard Dicker, the director of the International Justice Program at Human Rights Watch called the “attempt to halt the ICC’s work . . . blatant political interference with an independent court.”<sup>231</sup> Not only did Sudan attempt to curtail the ICC’s legal processes, but it has also continued its deliberate attacks on Darfur civilians.<sup>232</sup>

While the Prosecutor’s decision to indict Al-Bashir fueled controversy with many, including the Arab League and Africa analysts, claiming the indictment would hamper the peace process and others hailing it as a step in the direction of international justice and the end to impunity, it apparently has had not direct consequences on the people of Darfur or the peace process as of yet.<sup>233</sup> Other critics opined that a Bashir arrest warrant would hurt the deliver of essential humanitarian aid and the much awaited deployment of the full 20,000 U.N. peacekeeping force in Darfur.<sup>234</sup> Both of these critical endeavors, however, are already bogged down by Sudanese obstruction and delay.<sup>235</sup> The Prosecutor’s indictment will affect the ongoing conflict in Darfur. The Prosecutor’s decision to bring the indictment when he had what he believed to be sufficient evidence is a sign that this Prosecutor is not swayed by “politics,” but rather, by his mandate to prosecute international crimes.<sup>236</sup> And the ICC’s subsequent issuance of a

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<sup>227</sup> *Id.*

<sup>228</sup> *UN: Renewed Peacekeeper Mandate for Darfur: US Abstains in Support of ICC Case Against Sudan’s President*, HUMAN RIGHTS WATCH, July 31, 2008, <http://www.hrw.org/english/docs/2008/07/31/sudan19525.htm>.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* (“[E]ver since the prosecutor requested the warrant two weeks ago, there have been reports of at least two attacks, on villages by government forces.”).

<sup>233</sup> See, e.g., R. Green *Controversy in the Arab World Over ICC Indictment of Sudan President Al-Bashir*, MIDDLE E. MEDIA RES. INST., July 24, 2008, <http://www.sudan.net/news/posted/16146.html>; accord Louis Charbonneau, *Sudan’s Bashir Could Escape War Crimes Indictment*, REUTERS, July 16, 2008, available at <http://www.reuters.com/article/worldNews/idUSN1639809920080716?feedType=RSS&feedName=WorldNews>.

<sup>234</sup> Richard Goldstone, *Catching a War Criminal in the Act*, N.Y. TIMES, July 15, 2008, available at [http://www.nytimes.com/2008/07/15/opinion/15goldstone.html?\\_r=1&scp=1&sq=ICC%20al-Bashir&st=cse&oref=slogin](http://www.nytimes.com/2008/07/15/opinion/15goldstone.html?_r=1&scp=1&sq=ICC%20al-Bashir&st=cse&oref=slogin) (Richard Goldstone is the former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

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warrant shows that it too can transcend politics in a pursuit for international justice.

The enduring hope is that Ocampo's courage and integrity and the ICC's permanency can help change the international culture of impunity that is so offensive to the most fundamental notions of justice. Maybe the indictment and arrest warrant for Bashir can help produce long-term systemic change and the fruit of "peace"—if not today, then in the future.<sup>237</sup> This change, however, will not come easily as governments confronted with their own failures and intentional crimes will resist accountability at every turn.

### 5. *Sudan Has Refused to Execute Any of the Warrants*

Sudan has continually rejected the ICC's jurisdiction over the Darfur situation since the Security Council adopted Resolution 1593.<sup>238</sup> Almost one year after the ICC issued the two arrest warrants, testimony by ICC Prosecutor Moreno-Ocampo before the Security Council revealed that Sudan's Government continued to refuse to arrest or prosecute either Harun or Kushayb indicted by the ICC for war crimes and crimes against humanity Sudan,<sup>239</sup> although it has all the power to do so.<sup>240</sup> Sudan has, instead, responded to the ICC's arrest warrants by suspending its cooperation with the ICC Prosecutor and by saying that it will not surrender the indictees to the ICC.<sup>241</sup>

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<sup>237</sup> It is also worth considering what the ramifications might be if the ICC prosecutor decided not to bring charges against Bashir just because Bashir threatened more "bloodshed" or because it was controversial. Every dictator and violent head of state and every terrorist leader or criminal could always threaten "more bloodshed" and scare off public prosecutions. What kind of a precedent does that set for international justice or any justice for that matter? Would it make the people of Africa safer if Bashir and his cronies are assuaged? No. Rather, it would make those most in need of international intervention increasingly more unsafe and insecure because they know that the international community (the ICC, the U.N., and others) will not intervene if their perpetrator threatens more violence.

<sup>238</sup> AMICC Q & A, *supra* note 218, at 2.

<sup>239</sup> *Sudan Not Cooperating*, *supra* note 212; see also Save Darfur Pushes Sudan Sanctions, ICC Actions With The Security Council: Coalition 'The Security Council Is Abdicating Its Responsibility To Ensure Security In The World,' available at [www.savedarfur.org/newsroom/releases/save\\_darfur\\_pushes\\_sudan\\_sanctions\\_icc\\_action\\_with\\_security\\_council/](http://www.savedarfur.org/newsroom/releases/save_darfur_pushes_sudan_sanctions_icc_action_with_security_council/) ("I report today to the Security Council that the Government of the Sudan has not complied with its legal obligations. The Government of the Sudan has not complied with Resolution 1593. The Government of the Sudan is not cooperating with my Office, or the Court.").

<sup>240</sup> Press Release, Security Council, International Criminal Court Prosecutor Tells Security Council Sudan's Government 'Not Cooperating' in Darfur Investigation, Massive Crimes Continue, U.N. Doc. SC/9186 (Dec. 5, 2007) [hereinafter Security Council, 'Not Cooperating' in Darfur Investigation]. ICC Prosecutor Moreno-Ocampo testified before the Security Council that "[t]he Government of the Sudan is not cooperating with my Office, or the Court." *Id.* See also Darfur Fact Sheet, *supra* note 178, at 5 (noting that the "Sudanese Government, as the territorial State, has both the legal responsibility" and ability to facilitate the appearance of the individuals).

<sup>241</sup> AMICC Q & A, *supra* note 218, at 2. The African Union recently passed a resolution indicating that it will not assist in the arrest of Bashir, although it is unclear whether all 30 African state signatories to the Rome Treaty will abide by this resolution and thereby ignore their responsibilities under international law. *African Move On Bashir Dismissed*, BBC News, July 5, 2009 (noting that Botswana's refusal to abide by the resolution). Bashir and Sudan's continued defiance to the ICC arrest warrants is clearly and deliberately contrasted by the voluntary surrender of rebel leader Badr Idriss Abu Garda. In response to an ICC court summons, the United Resistance Front leader turned himself into the Hague to face war crimes charges for his alleged involvement in the 2007 killing of 12 AU peacekeepers. A member of the

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Instead of cooperating with the ICC, Sudan's armed forces targeted civilians in air and ground attacks on villages in Darfur in the winter of 2008, according to a report issued in Geneva by the office of the U.N. High Commissioner for Human Rights, and the joint mission in Darfur, UNAMID.<sup>242</sup> Sudanese officials have also purposefully restricted and impeded access to humanitarian groups trying to provide relief to the civilian population,<sup>243</sup> and even attacked them.<sup>244</sup> And in a blatant move of disrespect and scoff at UNAMID, the Sudanese Government on November 18, 2007 announced on its official website that Ahmad Harun was appointed to the UNAMID national monitoring mechanism group and was overseeing that force's deployment.<sup>245</sup>

There were also reports that Sudan painted their army aircrafts with U.N. and AU colors and then used them on attacks in Darfur.<sup>246</sup> This action may have led to the murder of eight AU peacekeepers in Sudan by rebel forces.<sup>247</sup>

Sudan's government has similarly responded with defiance to the ICC's arrest warrant for Bashir. Addressing a government-organized rally in Khartoum, Bashir raised his arms with a big smile in complete defiance of the ICC's reasoned decision.<sup>248</sup> Instead of responding to the accusations in court, Bashir ac-

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Darfurian delegation traveling with Abu Garda, Tadjadine Niam, said "We want to set an example to the Sudanese leadership and others accused in Sudan. We believe the court is independent and impartial. Let the others also come to the court." Marlise Simons, *Darfurian Rebel Commander to Face War Crimes Charges*, N.Y. TIMES, May 17, 2009.

<sup>242</sup> Robert Evans, *U.N. Says Sudan Targeted Civilians In Darfur*, REUTERS, Mar. 21, 2008, <http://www.reuters.com/article/latestCrisis/idUSL20508924>. Attacks were on the village of Saraf Jidad in January, and the villages of Sirba, Sileia and Abu Surouj on February 8. *Id.* These attacks came "during a major military push by the Sudanese government against rebels in the area." *Id.* In February 2008, U.N. Secretary General Ban Ki-moon condemned the bombing of a displaced person's camp in by Sudanese government aircrafts in Jebel Moun. *See also, Fighting Traps Darfur Refugees*, BBC NEWS, Feb. 21, 2008, <http://news.bbc.co.uk/2/hi/africa/7255750.stm>. Eyewitnesses and rebels said Sudanese army helicopters, Antonov aircrafts, and state-backed militias "carried out a three-pronged offensive."

<sup>243</sup> Jerry Fowler noted that in 2003 and 2004 Sudan had an active effort to impede humanitarian NGOs from delivering aid to Darfur's displaced and hungry population. At one point, there were 1 million displaced civilians and only 100 humanitarian aid workers. Simply put, the "people can not survive without outside humanitarian aid." He reports that humanitarian access has decreased over the last six months from November 2007 to April 2008. Apparently, Sudan is determined to commit genocide against the people of Darfur in every way practically and legally possible. The Rome Statute defines genocide as:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Rome Statute, *supra* note 9, art. 6.

<sup>244</sup> Oxfam's Sudan representative, Alun MacDonald, reported in December 2007, that Oxfam "staff are being targeted on a daily basis. They are being shot, robbed, beaten and abducted." Mike Thomson, *Wave of Violence Threatens Darfur Camps*, BBC NEWS, Dec. 4, 2007, <http://news.bbc.co.uk/2/hi/africa/7125209.stm>.

<sup>245</sup> *Sudan Not Cooperating*, *supra* note 212.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> Neil Macfarquhar & Marlise Simons, *Bashir Defies War Crime Order*, N.Y. TIMES, Mar. 5, 2009, <http://www.nytimes.com/2009/03/06/world/africa/06sudan.html>.

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cused the ICC of colonialism and attempting to steal Sudan's oil resources.<sup>249</sup> Almost immediately after the warrant was issued, Bashir expelled thirteen international aid organizations that were a life-line for the people in Darfur.<sup>250</sup> The European Commission has called on Sudan to immediately reverse the expulsion orders, with EC spokesman for humanitarian aid John Clancy saying that "the lives of hundreds of thousands of people are at stake."<sup>251</sup> U.S. Secretary of State Hillary Clinton made clear that President Bashir and the government in Khartoum "will be held responsible for every single death that occurs" because of these expulsions.<sup>252</sup>

The United States has also sought to persuade entities with influence over Sudan, such as the Arab League, the African Union, and China, to pressure Bashir to reverse his expulsion of these critically needed humanitarian agencies. In a March meeting with Chinese Foreign Minister Yang Jiechi, President Barack Obama expressed his "deep concern" about the current humanitarian crisis in Darfur and asked Beijing to pressure Sudan's government.<sup>253</sup> Whether these U.S. efforts will actually bear tangible results in time to prevent an even greater humanitarian crisis is yet to be seen.

With respect to the outstanding warrants, it remains unclear how can they will be executed when the ICC lacks its own police force or marshal service. The answer is simply but complex: the Court relies on States' cooperation in securing the custody of wanted individuals.<sup>254</sup>

### C. The United States Response

In 1997, long before the conflict in Darfur escalated to its current state, the United States classified Sudan as a state sponsor of terrorism based on the prevalence of human rights violations, including slavery and severe restrictions on religious freedom in Sudan.<sup>255</sup> The United States also took some military action in 1998 when it launched missiles on a Sudanese site suspected of produced

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<sup>249</sup> *Id.*

<sup>250</sup> Xan Rice, *Sudan Aid Purge Puts Thousands At Risk*, Mar. 5, 2009, <http://www.guardian.co.uk/world/2009/mar/05/sudan-aid-purge-darfur-khartoum>.

<sup>251</sup> *Id.*

<sup>252</sup> *U.S. Increases Pressure On Sudan After Expulsions*, Mar. 17, 2009, REUTERS, [http://www.savedarfur.org/newsroom/clips/us\\_increases\\_pressure\\_on\\_sudan\\_after\\_expulsions/](http://www.savedarfur.org/newsroom/clips/us_increases_pressure_on_sudan_after_expulsions/).

<sup>253</sup> *Id.* See Jim Wallis & John Prendergast, *Obama Can Make A Difference In Darfur: Solving The Crisis Will Require U.S. Leadership*, WALL ST. J., Apr. 12, 2009 (laying out concrete action President Obama and Special Envoy Gen. Gration should take to end the genocide). Thus far, Obama and Gration have had some success as Sudan allowed four of the thirteen expelled humanitarian agencies back into Darfur just one week after Gration met with Sudanese officials to press them on the crisis. Peter Baker, *Obama Urges Sudan to Allow Aid Groups Back Into the Country*, N.Y. TIMES, Mar. 30, 2009; *Sudan 'Allows Aid Agencies Back'*, BBC NEWS, June 12, 2009.

<sup>254</sup> Court Issues Bashir Arrest Warrant, Mar. 5, 2009, ALJAZEERA.NET, <http://english.aljazeera.net/news/africa/2009/03/20093412473776936.html> (quoting Stuart Alford of the War Crimes Committee at the International Bar Association as saying that "the court doesn't have a police force and therefore relies on those countries who have signed up to the court . . . to use their power and their police forces to make the arrest").

<sup>255</sup> International Emergency Economic Powers Act, 50 U.S.C §1701.

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chemical weapons.<sup>256</sup> Two years before the conflict began, Nina Shea, commissioner of the U.S. Commission on International Religious Freedom, expressed the Commission's view that "the government of Sudan is the world's most violent abuser of the right to freedom of religion and belief."<sup>257</sup>

Shortly after the start of the Darfur conflict, the United States issued statements reflecting their concern about the situation. In early 2004, the United States warned that it saw warning signs of genocide.<sup>258</sup> On September 9, 2004, former U.S. Secretary of State Colin Powell, speaking to the Senate Foreign Relations Committee, said that the Government of Sudan and the government-sponsored Arab Janjaweed Militias was committing genocide and "bear responsibility" for rapes, killings and other abuses that have displaced 1.2 million Black Africans.<sup>259</sup> Colin Powell was the first to call the Darfur violence "genocide," and he did so when both the African Union and Arab League denied that genocide was occurring.<sup>260</sup> Moreover, this was the first time any government had accused another of committing genocide.<sup>261</sup> Powell's bold statement, however, ultimately returned void and the U.S. State Department argued that the finding of genocide did not impose any obligation on the United States to stop the killing.<sup>262</sup>

In addition to Powell's statements, the U.S. State Department released a report that found a "consistent and widespread pattern of atrocities committed against non-Arab villagers."<sup>263</sup> This report, based on 1,136 interviews with refugees during the summer of 2004, found that "sixty-one percent had witnessed the killing of a family member and sixteen percent had been raped or had heard about a rape victim."<sup>264</sup> Later that year, the U.S. Congress urged President George Bush to "seriously" consider "unilateral intervention to stop [the] genocide in Darfur, Sudan should the United Nations Security Council fail to act."<sup>265</sup> At the same time, the U.S. House of Representatives unanimously passed a resolution calling the situation in Sudan genocide.<sup>266</sup>

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<sup>256</sup> *Timeline: Sudan*, *supra* note 41.

<sup>257</sup> AMBASSADOR SHIRIN TAHIR-KHELI, HEAD OF THE U.S. DELEGATION, Item 9: Violation of Human Rights and Fundamental Freedoms in Any Part of the World, Mar. 30, 2001, <http://geneva.usmission.gov/humanrights/2002/statements/0330item9.html>.

<sup>258</sup> *The crisis in Darfur, a timeline*, *supra* note 74.

<sup>259</sup> Gleen Kessler & Colum Lynch, *US Calls Killings in Sudan Genocide*, WASH. POST, Sept. 10, 2004, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A8364-2004Sep9.html> [hereinafter Kessler & Lynch] ("We concluded — I concluded — that genocide has been committed in Darfur and that the government of Sudan and the Janjaweed bear responsibility — and genocide may still be occurring.").

<sup>260</sup> *Id.* (writing that at that time the European Union said it had insufficient evidence to conclude a genocide was being committed).

<sup>261</sup> Prendergast & Thomas-Jensen, *supra* note 16, at 150.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> Kessler & Lynch, *supra* note 259.

<sup>265</sup> H.R. Con. Res. 467, 108th Cong. ¶ 10 (2004).

<sup>266</sup> U.S. Congress Terms Situation in Darfur "Genocide," U.S. Department of State, <http://usinfo.state.gov/is/Archive/2004/Jul/26-233176.html> (last visited Apr. 20, 2008).

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Three years after the House of Representatives passed its resolution, the United States provided over four billion dollars in “assistance to the people of Sudan and Eastern Chad.”<sup>267</sup> Currently, the United States provides a quarter of the cost of up-keep for the U.N./AU hybrid force.<sup>268</sup> In addition, the United States constructed and still maintains thirty-four bases for AU peacekeepers.<sup>269</sup> The United States also contributes the largest amount of food aid by donating 40,000 metric tons of food a month.<sup>270</sup> President Bush, dissatisfied with the Sudanese government’s total failure to end the violence, imposed sanctions on thirty one companies owned or operated by the Sudanese government, along with three individuals.<sup>271</sup> Today, the United States is almost the only nation taking this type of action.<sup>272</sup> China, along with several other countries, criticized the United States.<sup>273</sup> Britain, though it considered supporting U.S. sanctions and imposing their own, chose not to and refused to impose any sanctions.<sup>274</sup>

In addition to the U.S. federal government taking action, many U.S. states have joined the divestment movement. In 2005, Governor Blagojevich of Illinois approved a bill from the Senate prohibiting the state from investing in the government of Sudan or with any companies with business ties to Sudan.<sup>275</sup> Governor Blagojevich urged other states to follow their example and divest in a similar fashion.<sup>276</sup> As of the spring of 2008, twenty-two U.S. states and over fifty universities have adopted Sudan divestment policies.<sup>277</sup> And many U.S. and international corporations have also divested from Sudan.<sup>278</sup>

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<sup>267</sup> The United States Response to the Darfur Crisis, U.S. Department of State, <http://www.state.gov/r/pa/scp/92492.htm> (last visited Apr. 20, 2008).

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*; See also U.S. Imposes New Sanctions Against Sudan, CNN NEWS, May 29, 2007, <http://www.cnn.com/2007/POLITICS/05/29/bush.sudan/index.html> (last visited April 20, 2008).

<sup>272</sup> The crisis in Darfur, a timeline, *supra* note 74.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> Lucien J. Dhooze, *Darfur, State Divestment Initiatives, and the Commerce Clause*, 32 N.C. J. INT’L L. & COM. REG. 391, 391 (2007).

<sup>276</sup> *Id.* at 392.

<sup>277</sup> Sudan Divestment Task Force, <http://www.sudandivestment.org/home.asp> (last visited Apr. 20, 2008).

<sup>278</sup> “Nine major foreign companies—CHC Helicopter, ABB, Siemens, Rolls Royce, ICSA of India, Schlumberger, Weatherford International, Weir Group and La Mancha Resources—have ceased problematic operations in Sudan or significantly changed their behavior in the country since the proliferation of the Sudan divestment movement.” *Cooley and the Genocide Intervention Network Mark Passage of Sudan Accountability and Divestment Act*, REUTERS, Jan. 11, 2008, <http://www.reuters.com/article/pressRelease/idUS135165+11-Jan-2008+MW20080111>). In July 2005, the European Parliament unanimously adopted a resolution calling on European Union members to support targeted Sudan divestment efforts. Press Release, Sudan Divestment Task Force, Senate Banking Committee Sends Messages to Sudan 2 (Oct. 17, 2007), [http://sudandivestment.org/docs/SADA\\_Passes\\_Senate\\_Committee\\_on\\_Banking\\_PR\\_10-17-07.pdf](http://sudandivestment.org/docs/SADA_Passes_Senate_Committee_on_Banking_PR_10-17-07.pdf). In addition, many NGOs have taken the initiative to start divestment campaigns in several countries, to convince companies and governments that they should divest. See Sudan Divestment Task Force, Divestment Statistics, <http://www.sudandivestment.org/statistics.asp> (last visited Apr. 20, 2008); Darfur Divestment Worldwide, <http://www.darfurdivestment.org/> (last visited Apr. 20, 2008).

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Most recently, on March 18, 2009, President Barack Obama and Secretary of State Hillary Clinton named Major General J. Scott Gration as the special envoy for Sudan.<sup>279</sup> Obama called the appointment “a strong signal of my Administration’s commitment to support the people of Sudan while seeking a lasting settlement to the violence that has claimed so many innocent lives.”<sup>280</sup> Obama called Sudan a priority for his Administration that “cries out for peace and for justice.”<sup>281</sup>

### V. Proposal

#### A. The International Community Should Enforce All Three Outstanding ICC Warrants

Under the Rome Statute, State Parties agree to use their respective national authorities to arrest suspected perpetrators and transfer them to the Court.<sup>282</sup> Although Sudan is not a State Party to the Rome Statute, U.N. Security Council Resolution 1593, which referred the situation in Darfur to the ICC, requires all parties to the Darfur conflict, including the Sudanese Government, to fully cooperate with Court.<sup>283</sup> So, in theory, Sudan could be pressured to comply with Resolution 1593 and enforce the ICC warrants.<sup>284</sup>

U.N. Resolution 1593 was adopted under U.N. Charter chapter VII which authorizes the Security Council to make recommendations or decisions to maintain and restore international peace and security.<sup>285</sup> Chapter VII resolutions, such as Resolution 1593, are binding on all U.N. members.<sup>286</sup> Additionally, when the Security Council refers cases to the Court, the Council has the power to require U.N. Member States, whether States Parties or non-States Parties to the ICC, to cooperate with the Court in specific situations. The Council specifically did so in Resolution 1593.

However, one year after the issuance of the arrest warrants, U.N. Member States, and the five permanent members of the Security Council—China, Russia, United States, Britain, and France—have failed to affect the arrest of the

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<sup>279</sup> White House, Office of the Press Secretary, Announcement of Special Envoy for Sudan: Sudan Is a Priority for Obama Administration, Mar. 18, 2009, <http://www.america.gov/st/texttrans-english/2009/March/20090318171308xjsnommis0.326687.html&distid=ucs>.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> Rome Statute, *supra* note 9.

<sup>283</sup> S.C. Res. 1593, *supra* note 168.

<sup>284</sup> Security Council, ‘Not Cooperating’ in Darfur Investigation, *supra* note 240 (ICC Prosecuting stating that Sudan must “remember . . . that this issue is a part of their duties now that we have these global legal standards” enshrined in the ICC. . . “[t]he responsibility to execute the warrant is for the Government of Sudan.”).

<sup>285</sup> U.N. Charter, art. 39, para. 1.

<sup>286</sup> *Id.* art. 43, para. 1.



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criminals.<sup>287</sup> Opportunities remain, however, for all these nations and others to make the human rights of the people of Darfur of utmost priority.<sup>288</sup>

There are several ways that members of the international community can and should help enforce the ICC warrants.<sup>289</sup> We propose that every international actor pursue all legal means available to enforce the ICC warrants and to bring Harun and Kushayb to the ICC to face their charges, and hopefully, be held accountable.

The international community should take additional steps to exert pressure on Sudan's Government to effectuate the Court's arrest warrants.<sup>290</sup> The ICC should also report Sudan's failure to cooperate to the U.N. Security Council and the Council should take measures such as sanctions against Sudan.<sup>291</sup> Individual States should also introduce non-humanitarian-aid related sanctions targeted at the Sudanese Government and military to demand compliance.<sup>292</sup>

Neighboring African countries should also exert diplomatic pressure on Sudan in order to persuade the Government to cooperate with the ICC.<sup>293</sup> It is in the best interest of all African countries that the perpetrators of Darfur's genocide be held accountable for their crimes and brought to justice. Surely, this will produce some deterrent effect on future would-be international criminals in war-torn Africa.

Finally, AU and U.N. peacekeeping forces in Sudan should be authorized to execute the arrest warrants if the Sudanese Government continues to fail to do

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<sup>287</sup> The United States did issue a strong statement following the ICC Prosecutor's December 2007 report to the Security Council, stating:

The United States is particularly troubled by the Prosecutor's report that the Government of Sudan is still not cooperating and has taken no steps to arrest and surrender the two individuals that are subject to ICC arrest warrants: current Minister of State for Humanitarian Affairs Ahmad Muhammad Harun and the Janjaweed leader known as Ali Kushayb. We call on the Sudanese Government to cooperate fully with the ICC as required by resolution 1593.

Press Release, United States Mission to the United Nations, Statement by Jeffrey DeLaurentis, U.S. Advisor, on the report of the ICC prosecutor Mr. Luis Moreno-Ocampo on Sudan, Dec. 5, 2007, *available at* [http://www.usunnewyork.usmission.gov/press\\_releases/20071205\\_353.html](http://www.usunnewyork.usmission.gov/press_releases/20071205_353.html).

<sup>288</sup> "[In December 2007] Britain introduced a toughly worded Presidential Statement at the U.N. Security Council, demanding that Khartoum's National Islamic Front regime turn over two génocidaires [Ahmed Haroun and Ali Kushayb] to the International Criminal Court. The Presidential Statement should've easily passed: The evidence against both men is strong, and because of U.N. Security Council Resolution 1593, the ICC has jurisdiction over the matter. What ended up happening, though, was hardly a surprise to anyone who has watched Darfur closely over the last five years. China threatened to veto the non-binding declaration unless its language was essentially gutted, and rather than force the issue, Britain, France, and the U.S.—as well as the other Security Council members—quietly decided to drop the matter. As a result, not only will Haroun and Kushayb remain free, but the government in Khartoum will feel as if it can block the extradition of those subsequently accused by the Court. The ICC just lost its teeth. This under-reported development provides yet another example of China's enabling role in the Darfur genocide." Eric Reeves, *Partners in Genocide*, THE NEW REPUBLIC, Dec. 18, 2007, <http://www.nmr.com/politics/story.html?id=1f4269dd-9d4f-4911-891f-57ae85d66b70>.

<sup>289</sup> AMICC Q & A, *supra* note 218, at 2.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

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so.<sup>294</sup> No legal instrument in place prevents the U.N. from authorizing AU and U.N. peacekeepers to arrest people named in an ICC arrest warrant.

Testifying before the Council, ICC Prosecutor Moreno-Ocampo asked: “When will be a better time to arrest Harun? How many more women and girls have to be raped? How many persons have to be killed?”<sup>295</sup> The answers to Ocampo’s questions are simple: “Immediately” has always been, and continues to be, the best time to arrest Harun and Kushayb. We do not need another rape or murder to be committed to act on these warrants.

What purpose would arresting Harun and Kushayb serve? First, it would help realize the ICC’s potential to be an international legal institution that punishes severe international crimes.<sup>296</sup> In the words of the ICC Prosecutor Ocampo directed to the ears and hearts and minds of the U.N. Security Council members: “It would send a signal to the perpetrators of crimes in Darfur that the international community was not only watching, but would hold them accountable for their actions.”<sup>297</sup> As such, it could deter future criminals.

But Prosecutor Ocampo points to another reason; one even more immediate and pressing: “What is at stake is, simply, **the life or death of 2.5 million people.**”<sup>298</sup> He states that “arresting Harun today will help peace, the political process, and the deployment of peacekeepers.”<sup>299</sup>

It is clear that, although the international community succeeded in ending the North-South civil war, it utterly failed to hold any of its perpetrators accountable. That is exactly the kind of impunity that fueled Sudan’s boldness to start the genocide in Darfur even before the North-South conflict was over. And unless Harun, Al-Kushayb, and Al-Bashir are brought to account, Khartoum’s regime and Arab militias will be emboldened to stoke the flames of suffering in the South as the South seeks to secede in 2010 from the genocidal regime called Khartoum.

History still waits patiently for someone to write this chapter; the chapter that ends with two key perpetrators of the horrendous atrocities in Darfur being brought to justice in a permanent international tribunal named the International Criminal Court; the chapter that says that 2.5 million displaced Darfuris were saved from ultimate death.

### B. Make R2P A Binding International Norm

In 2000, in his Millennium Report to the General Assembly, U.N. Secretary-General Kofi Annan confronted a key criticism of humanitarian intervention with these words: “[I]f humanitarian intervention is, indeed, an unacceptable assault

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<sup>294</sup> *Id.*

<sup>295</sup> Security Council, ‘Not Cooperating’ in Darfur Investigation, *supra* note 240.

<sup>296</sup> Fanton, *supra* note 19.

<sup>297</sup> Security Council, ‘Not Cooperating’ in Darfur Investigation, *supra* note 240 (telling Security Council members that “[y]ou can make a difference, you can break the criminal system”).

<sup>298</sup> *Id.* (emphasis added).

<sup>299</sup> ICC Chief Prosecutor, Luis Moreno-Ocampo, Conference on International Justice, *supra* note 9.

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on sovereignty, how *should* we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?”<sup>300</sup> In response to this challenge by Secretary-General Annan,<sup>301</sup> the Canadian government created the International Commission on Intervention and State Sovereignty (ICISS).<sup>302</sup> The ICISS completed its report, *Responsibility to Protect* (R2P), in September of 2001.<sup>303</sup>

The 108-page R2P report is very detailed and comprehensive. The R2P Report lays out the responsibilities to prevent, to react, and to rebuild.<sup>304</sup> The Report emphasizes the need to prevent international crimes from happening in the first place.<sup>305</sup> States also have a responsibility to react if crimes against humanity or large scale atrocities are being committed.<sup>306</sup> Finally, the international community must rebuild communities broken by war through reconciliation and reconstruction efforts.<sup>307</sup>

With regard to intervention, the R2P Report, importantly, calls for military intervention as a remedy of last resort.<sup>308</sup> The only just cause for military intervention is to prevent or stop “large scale loss of life” or “large scale ‘ethnic cleansing.’”<sup>309</sup> The intervention’s main purpose must be to prevent or stop human suffering.<sup>310</sup> The military intervention must be only that which is necessary for the humanitarian purpose, and actions taken must be proportional to the end goal.<sup>311</sup> The intervention requires Security Council authorization.<sup>312</sup>

Based in large part on the R2P report by the ICISS, the R2P principle was formally endorsed by the U.N. General Assembly at the 2005 World Summit:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

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<sup>300</sup> The Millennium Assembly of the United Nations, *Report of the Secretary-General, We the Peoples: The Role of the United Nations in the Twenty-First Century*, ¶ 217, U.N. Doc. A/54/2000\* (Mar. 27, 2000).

<sup>301</sup> U.N. GAOR, 54th Sess., 1st plen. mtg. (Sept. 20, 1999) (statements by Secretary-General Kofi Annan, [http://www.un.org/News/press/docs/1999/statements\\_search\\_full.asp?statID=28](http://www.un.org/News/press/docs/1999/statements_search_full.asp?statID=28)). Annan also challenged the international community to “find common ground in upholding the principles of the Charter, and acting in defence of our common humanity.” *Id.*

<sup>302</sup> ICISS Report, *supra* note 21, at vii. The ICISS was co-chaired by International Crisis Group’s President Gareth Evans and Algerian diplomat Mohamed Sahnoun.

<sup>303</sup> *Id.* at ix.

<sup>304</sup> *Id.* at xi.

<sup>305</sup> *Id.* (noting also the need for an “early warning system”).

<sup>306</sup> *Id.* at 29-37.

<sup>307</sup> *Id.* at 39-45.

<sup>308</sup> ICISS Report, *supra* note 21, at 36-37.

<sup>309</sup> *Id.* at xii, 32.

<sup>310</sup> *Id.* at xii, 35.

<sup>311</sup> *Id.* at xii, 37.

<sup>312</sup> *Id.* at xii, 50. Should the Council reject a proposal or take an unreasonably long time to respond, the “Uniting for Peace” procedure permits the General Assembly in Emergency Special Session to consider the case, and regional organizations could also act after receiving Security Council authorization. *Id.* at 53-54.

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This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>313</sup>

Before this declaration, several other integral members of the international community embraced R2P, including the AU, EU, former U.N. Secretary-General Kofi Annan,<sup>314</sup> and the U.N. High-Level Panel on Threats, Challenges and Change.<sup>315</sup> The U.N. Security Council also recently reaffirmed the R2P principles in a 2006 resolution.<sup>316</sup> Current Secretary-General Ban Ki-moon strongly supports the concept of the responsibility to protect, especially in situations like Darfur.<sup>317</sup> And even Pope Benedict XVI, in a recent speech to the U.N., explicitly affirmed the R2P principle by saying that while “every state has the primary duty to protect its own population from grave and sustained violations of human rights. . . [i]f states are unable to guarantee such protection, the international community must intervene with the juridical means provided in the United Nations charter and in other international instruments.”<sup>318</sup>

We call on the U.N. to continue to affirm and implement the principle of R2P. We call on every U.N. Member State and every State Party to the Rome Statute, to do likewise. No longer should the notion of “sovereignty” tie the hands of the international community while vulnerable girls and women are systematically raped, and gang raped; while families and ethnic groups are destroyed; while those with power callously and fearlessly crush the lives of the oppressed.<sup>319</sup>

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<sup>313</sup> G.A. Res 60/1, ¶¶ 138, 139, U.N. Doc. A/60/L.1 (Sept. 14-16, 2005).

<sup>314</sup> General Assembly, Report of the Secretary-General, In Larger Freedom: Towards Development, Security And Human Rights For All, ¶¶ 132, 135, U.N. Doc. A/59/2005 (Mar. 21, 2005).

<sup>315</sup> The Secretary-General, Report of the High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility, ¶¶ 201-203, delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter A More Secure World]; *but see* Michael Clough, Darfur: Whose Responsibility To Protect?, HUMAN RIGHTS WATCH, <http://hrw.org/wr2k5/darfur/1.htm> (last visited May 1, 2009). In December 2004, the High Level Panel on Threats “acknowledged the failure of the U.N. to prevent atrocities against civilians and recommended reforms to enhance the U.N.’s capacity to carry out its collective security mandate. The High Level Panel also strongly endorsed the emerging norm that there is an international responsibility to protect civilians in situations where governments are powerless or unwilling to do so. So far, however, these initiatives have afforded no protection to the people of Darfur.” *Id.*

<sup>316</sup> S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

<sup>317</sup> Warran Hoge & Ian Fisher, In Speech, Pope Urges Promotion of Human Rights, N.Y. TIMES, Apr. 18, 2008, *available at* [http://www.nytimes.com/2008/04/18/us/nationalspecial2/18cnd-pope.html?\\_r=1&hp&oref=slogin](http://www.nytimes.com/2008/04/18/us/nationalspecial2/18cnd-pope.html?_r=1&hp&oref=slogin).

<sup>318</sup> *Id.*

<sup>319</sup> For some, the new interventions herald a new world in which human rights trumps state sovereignty; for others, it ushers in a world in which big powers ride roughshod over the smaller ones, manipulating the rhetoric of humanitarianism and human rights. ICISS Report, *supra* note 21, at 2. Pope Benedict also noted that international intervention to stop human rights abuses “should never be interpreted as an unwarranted imposition or a limitation of sovereignty” but rather “[o]n the contrary, it is indifference or failure to intervene that do [sic] the real damage.” UN Has Duty to Protect, But Should

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The international community has a moral and legal responsibility to protect civilians from crimes against humanity, genocide, and war crimes when their governments refuse to; this universal truth should become a binding rule of international law.

### VI. Conclusion

There is hope that the ICC and international community will respond to genocide and crimes against humanity by holding those most responsible accountable for their crimes, and, by doing so, end the epidemic of impunity. There is hope that the notion of a responsibility to protect will become a binding rule of international law.

What the international community needs now is less talk, less resolutions, less declarations, and more action, more intervention, more protection; and more justice. Today, we need national and international leaders of integrity and courage to rise up, speak out, and *act* to execute the ICC arrest warrants for Ahmad Harun, Ali Kushayb, and Al-Bashir. These historic acts constitute the next chapter in the enforcement and advancement of international law and international justice. The chapter is still being written.

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Not Violate Sovereignty, Says Pope, CATHOLIC NEWS AGENCY, Apr. 18, 2008, <http://www.ewtn.com/vnews/getstory.asp?number=87737>.