

SUDAN: JUSTICE, PEACE AND THE ICC

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SUDAN: JUSTICE, PEACE AND THE ICC

EXECUTIVE SUMMARY AND RECOMMENDATIONS

The International Criminal Court (ICC) arrest warrant against President Bashir for atrocity crimes in Darfur has brought Sudan to a new decision point. The long-ruling National Congress Party (NCP) has defied the court, gained African Union (AU) and Arab League pressure on the Security Council to suspend the case and restricted humanitarian aid in Darfur, putting several million internally displaced persons (IDPs) and others at risk. Darfur rebels have been emboldened, reducing prospects for diplomatic progress. Simultaneously, the Comprehensive Peace Agreement (CPA) that ended the North-South civil war is unravelling. As a new U.S. special representative begins to make his mark, the international community may be ready to sacrifice the justice issue for a quick-fix deal that would ensure elections in 2010. But Sudan will have peace only when its impunity system is dismantled. The right course is to build leverage by strongly backing the ICC so as to persuade the NCP that it will only secure the deferral of Bashir's case by adopting and implementing serious reforms.

In 2005, the Security Council gave the ICC jurisdiction over the situation in Darfur. The prosecutor eventually obtained arrest warrants against one mid-level official and one militia commander and then applied in July 2008 for a warrant against the president. The NCP sought to mobilise African, Arab and Islamic help by charging that the court, and its prosecutor in particular, was an instrument of a Western campaign against its Islamic discourse and for regime change. Domestically, it launched the Sudan People's Initiative (SPI), advertised as a broad-based national consultation to come up with Darfur solutions, but it tightly controlled proceedings and has not carried out its recommendations.

Violence intensified in Darfur from September 2008 onwards, with deadly attacks on aid workers and the peacekeepers of the joint UN/AU mission (UNAMID). Inter-tribal clashes and fighting between government and rebel forces continued unabated, creating new civilian displacements. On 4 March 2009, the ICC Pre-Trial Chamber ordered the arrest of Bashir, upon which the NCP retaliated by expelling thirteen inter-

national non-governmental organisations (INGOs) that had been providing vital food and health services. Perceiving Bashir to be weakened by the arrest warrant, opposition and rebel groups hardened their positions and became even more reluctant to engage genuinely with the government. Though the Darfur rebel group JEM signed a "good will" agreement to pursue further talks with the government in February 2009, fighting continued on the ground, and the mediation process set up by Qatar in Doha appears stymied.

Attention has turned increasingly to the overarching threat in Sudan: possible collapse of the CPA, which could mean a return to wider civil war. The NCP has held back the key concessions required for the democratic transformation that agreement appeared to promise, including repeal of repressive laws and restoration of basic freedom of association and expression, and it has blocked the actions necessary for a peaceful referendum, such as a credible census, demarcation of the border, fuller wealth-sharing and de-escalation of local conflicts in the transitional areas of Abyei, South Kordofan/Nuba Mountains and Blue Nile. It appears to have decided to allow neither the secession of South Sudan nor meaningful political reforms in the North. The South's goal is now to maintain its 2011 self-determination referendum.

The international community, including the Obama administration and its new special envoy, Scott Gration, who shows welcome signs of activism, is right to make saving the CPA a priority. But the temptation is to accept a humanitarian, political and security quick-fix on Darfur in order to preserve chances to hold the 2010 general elections on time and move on to the 2011 referendum. Justice for the crimes committed in Darfur would be in danger of disappearing from that kind of peace process, just as it was dropped from the CPA negotiation itself in 2005 and later from the Eastern Sudan and Darfur Peace Agreements.

That would be a mistake. Justice and peace are closely connected in Darfur. Judicial reforms and transitional justice mechanisms leading to reconciliation and a culture of accountability are essential to the success and

sustainability of the peace process there. Nor will there be sustainable peace in northern Sudan if the system of impunity is not done away with and genuine change of governance promoted. If the NCP is allowed to re-legitimise its rule and close the door to political accommodation with Darfur rebels through a fraudulent electoral process in 2010, northern Sudan will likewise face increased turmoil. That turmoil and the failure to deal with census, border and military redeployment issues will also undermine the conditions for a peaceful referendum in the South on the future of that region.

The U.S. and other international partners of the Sudan peace process should increase pressure on the NCP in order to create a chance for meaningful policy changes. The best way to do so is to reconfirm their support for execution of the ICC arrest warrants and to deliver a firm message in Khartoum that they will only consider a Security Council resolution suspending execution (via the procedure for one-year renewable deferral provided in Article 16 of the Rome Statute that established the ICC) if the NCP first takes a series of specific and irreversible steps, including but not limited to acceptance of judicial reforms and transitional justice mechanisms as key elements of a Darfur settlement.

What is needed is not to sacrifice peace in Darfur to save the CPA – in any event a self-defeating proposition – but to strengthen peacebuilding throughout Sudan by taking aim at the system of impunity that has led to and prolonged the country's multiple conflicts.

RECOMMENDATIONS

To the National Congress Party:

1. Implement legal and judicial measures to end impunity in Darfur, such as:
 - a) appointing non-partisan judges, including in the special courts;
 - b) ensuring the independence of courts, reviewing police investigation, arrest and prosecution procedures and replacing the chief justices and police commanders in the three Darfur states;
 - c) holding all government forces and associated militias accountable for their violations of international humanitarian law, such as attacks on civilians; destruction of property, livelihoods and means of sustenance, including wells and granaries; murder; forcible transfer of populations; and inhumane acts such as torture and rape; and
 - d) amending the provisions in the police law, the criminal law and the criminal procedural law that give the police and security personnel immunity.

2. Review the security management committee in each Darfur state and allow UNAMID to participate in it.
3. Replace the governors and their deputies by technocrats to administer the three Darfur states until elections.
4. Persuade President Bashir to step down as soon as possible, and in any event before the general elections.
5. Nominate another presidential candidate and agree with the GNU to postpone the election to 2011, so as to give time for Darfur's stabilisation and allow fair Darfuri participation in the process.
6. Engage genuinely with the ICC.
7. Prosecute officials for whom the ICC has issued arrest warrants, by first suspending Ahmed Haroun, governor of Southern Kordofan state, and then bringing him and militia commander Ali Kushayb to trial in a credibly independent Sudanese court for the alleged crimes that are the subject of the ICC proceedings.
8. Suspend application of any court decisions on political and military prisoners in Darfur pending a final peace agreement there.
9. Establish a Transitional Darfur Task Force (TDTF), a high-level committee comprised of the president, first vice president, special envoy of the UN/AU, chief commander of UNAMID and the justice, interior and humanitarian affairs ministers, to monitor implementation of the above judicial and accountability measures.
10. Accept and implement a comprehensive ceasefire in the three Darfur states through the Doha peace process.

To all Darfur Rebel Movements:

11. Participate in the UN/AU/Qatar-supported Doha peace process and accept and implement a comprehensive ceasefire in Darfur, as well as judicial reforms and transitional justice mechanisms, as key components for settlement of the conflict.

To the Permanent Members of the UN Security Council, particularly the U.S. and China:

12. Affirm their support for the ICC and insist that Sudan and other countries cooperate with the execution of the arrest warrants, unless or until the Security Council defers the prosecutions in accordance with Article 16 of the Rome Statute.

13. Agree to deferral on the basis of Article 16 only on condition that the Government of Sudan first implements the measures set out above.
14. Recommend to the UN/AU special envoy in charge of the Darfur peace process that judicial reforms and transitional justice mechanisms be included as key components of any settlement.

**To the UN and AU Special Envoy,
Djibrill Bassolé:**

15. Put judicial reforms and transitional justice mechanisms such as a truth and reconciliation commission and vetting procedures prominently on the Doha agenda.

**To the Prosecutor of the International
Criminal Court:**

16. Proceed with investigations into crimes allegedly committed by other senior Sudanese officials and rebel leaders in Darfur and consider seriously the option of sealed arrest warrants where appropriate.

To the African Union Panel on Darfur (AUPD):

17. Request the NCP to demonstrate progress in national investigations into the policies that drove the crimes and support the inclusion of judicial reforms, lifting of institutionalised immunities and the establishment of credible transitional justice mechanisms as key elements of the Darfur peace process.
18. Recommend practical measures for transforming the African Court on Human and Peoples' Rights into a court able to conduct trials for atrocity crimes on the continent.

Nairobi/Brussels, 17 July 2009

SUDAN: JUSTICE, PEACE AND THE ICC

I. INTRODUCTION

On 4 March 2009, the Pre-Trial Chamber of the International Criminal Court (ICC) issued an arrest warrant against President Omer Hassan al-Bashir, accepting seven counts of crimes against humanity and war crimes in the prosecutor's application, while rejecting three counts of genocide. Similar arrest warrants had been issued in April 2007 against Ahmed Haroun,¹ a former state minister in the humanitarian affairs ministry and currently governor of Southern Kordofan state, and Ali Abdel Rahman Kushayb, a militia (Janjaweed) commander. In November 2008, applications for arrest warrants were filed against three rebel commanders accused of responsibility for deadly attacks against peacekeepers in Haskanita in 2007. These cases represent efforts by the international community to stop impunity in Sudan and to hold the country's political actors, including at the highest levels of government, responsible for heinous offences against the people of the Darfur region.

The March 2005 referral of the situation in Darfur to the ICC was one of the steps taken by the UN Security Council to stop the violence, along with its decision to support an African Union (AU)-led negotiation process between the National Congress Party (NCP) and rebel groups, support the dispatch of a relatively robust AU peacekeeping force to Darfur and push for implementation of the 2005 Comprehensive Peace Agreement (CPA) designed to bring an end to the lengthy North-South civil war.

Whether the arrest warrants help contain or stop violence in Darfur or serve more generally as a catalyst towards peace in Sudan, largely depends on the response of the NCP, the long-time dominant force in the Khartoum government, and the attitude of the international community. Sudan is not a party to the Rome Statute that established the ICC, but it is a member of the UN and thus obliged to comply with applicable Security Council resolutions adopted under Chapter VII of the Charter. The NCP has rejected the court's jurisdiction over

its nationals and accused the prosecutor, Luis Moreno-Ocampo, of conspiring with its enemies for regime change. The northern opposition parties and rebel groups that were left out of the CPA view the ICC proceedings as welcome leverage that improves their prospects for accessing power.

The Sudan People's Liberation Movement (SPLM), the dominant power in the South, is mostly concerned that because the ICC action increases confrontation between the international community and the NCP, its partner in the present government of national unity, it will further radicalise NCP policies, causing it to move away from the CPA. Soon after 4 March, the NCP expelled thirteen international non-governmental organisations (INGOs) it accused of sharing information with the court. It thereby impeded half the humanitarian aid to Darfur and other parts of the country, in effect punishing millions of IDPs and others it considers sympathetic to the court.

This approach, led by security hardliners and NCP elites, is challenged internally by those concerned that the international credibility of their party is being damaged, Darfur remains unresolved, and Sudan risks dangerous isolation. However, the party's policy, in combination with an absence of political reform and the CPA's problems, encourages rebel groups in Darfur to dismiss peace negotiations. By foreclosing possible alliances, it could reinforce the view among opposition parties that violence is their only way to bring change.

The arrest warrant against Sudan's president has produced intense debates and divisions within the international community. The U.S. and other Western powers have supported the ICC case and say they want genuine policy changes from the NCP before they will consider a Security Council deferral, as permitted under the Rome Statute, but they also are increasingly worried about the CPA. China, as well as African and Arab states, supports a deferral, arguing the ICC prosecution is hindering the peace process and threatening Sudan's stability. The NCP has capitalised on this division of views to gain time to rally more regional support and consolidate its position.

¹ Ahmed Haroun is accused of having coordinated the attacks in Darfur during the period 2003-2005.

This report examines the situation in Sudan in the specific context of the ICC arrest warrants. It analyses in

particular internal NCP dynamics and proposes a dual strategy of supporting the court and crafting a process that addresses the need for accountability and an end to impunity in the country. Subsequent reporting will look more broadly at the requirements for peacebuilding throughout Sudan.

II. DARFUR AND THE ICC

In late 2000, nomadic communities, mostly from the far north of Darfur, with some participation by cattle and camel herders from different parts of the region, used force to access protected grazing land and water in the rich farming lands around Jebel Marra, Darfur's most ecologically stable zone. This aggravated a sensitive situation stemming from numerous clashes and disputes over the years between pastoralists and sedentary communities related to natural resources. As part of its Arabisation and Islamisation project, the present regime has manipulated the concept of the *hakoura* (tribal homeland), in the process arming some Arab groups from Darfur and neighbouring countries and rewarding them with money and administrative power. Their occupation of large areas has changed the demographic nature of the *hakoura*, disempowering the non-Arab landowners.²

²Crisis Group Africa Reports N°125, *Darfur: Revitalising the Peace Process*, 30 April 2007; and N°134, *Darfur's New Security Reality*, 26 November 2007. From the 1950s into the 1970s, Darfur experienced low-intensity violence. This escalated in the 1980s and 1990s and became open conflict in 2003. The slow build-up involved three factors: 1) The local dimension: at the root of much of the conflict is competition over land and water, exacerbated by desertification in northern Sudan and recurrent droughts in Darfur; since the mid-1980s nomadic tribes, mainly Arab, have sought to occupy rich agricultural land in the southern Sahelian region. When herders approached the Jebel Marra area in Darfur, farmers opposed them. 2) In the 1980s, ethnicity became a mobilising factor. In 1987-1989, the conflict pitted the sedentary Fur against the "Arab Gathering" (see fn. 78 below), which claimed the African tribes were expelling Arabs. Deeply alarmed non-Arabs counter-claimed that the Arabs wanted to displace them on their land. 3) Khartoum since the mid-1980s neglected Darfur's development and began to arm tribes of Arab descent to contain the threat that the SPLA rebellion would spread. It redrew administrative boundaries in 1994, dividing the region into Northern, Southern and Western Darfur and splitting Fur land and people. In 1995, the Massalit homeland was divided into thirteen principalities, essentially to reward Arab constituencies. As the Islamic Front in Khartoum began to split and its chief ideologue, Hassan al-Turabi, argued that the NCP was blocking Darfur residents from senior posts, Khalil Ibrahim, an Islamist himself and driving force in the Union of the Marginalised Majority, created the JEM insurgency. All presidents of Chad have started their rebellions against the government in N'Djamena from Darfur, with Khartoum's support. Now each country seeks to topple the other's regime by manipulating proxy rebel groups.

Non-Arabs,³ mainly the Fur, with SPLM support, had already sought in the late 1990s to defend their land and resist government social planning designed to induce demographic change and expand Arab-dominated territories. Inter-communal as well as political conflicts escalated, and within the competing groups, factions calling for a decisive military solution emerged. Between 2000 and 2002, large parties of Arabs began systematically to attack sedentary populations, and Darfur rebel groups, predominantly led by Fur, Zaghawa and Massalit forces, emerged to fight against Khartoum⁴ at the same time as the latter was negotiating a settlement with the SPLM's southern insurgency.

A. THE CRIMES COMMITTED IN DARFUR

On 25 April 2003, one of the new rebel groups, the Sudan Liberation Army (SLA), attacked El Fasher, the capital of North Darfur state. The apparent ease with which it captured a major town sparked fears in Khartoum that the rebels were aided by a fifth column of disaffected Islamist and Darfur elements within the Sudan Armed Forces (SAF). Fearing rebel mobilisation among the Darfur tribes, the government launched a security crackdown on the Fur, Massalit and Zaghawa populations. Those connected by kinship or residence with the rebels and educated young men were detained, intimidated, tortured and, in some cases, killed. Two alleged coup attempts were announced, checkpoints went up around Khartoum, and the government purged the highest ranks of the administration and the military of Darfuris. On 9 May 2003, it fired the governors of North Darfur and West Darfur, Ibrahim Suleiman and Omar Haroun respectively, who had supported a negotiated settlement.

Between July 2003 and February 2004 the government implemented a devastating counter-insurgency campaign; police were withdrawn from rural areas, and a massive mobilisation of paramilitary and tribal militia forces

began.⁵ State ministers, such as Ahmed Haroun, who held the Darfur security file in the interior ministry,⁶ travelled around the region with local executive directors and officers, enlisting the support of tribal leaders.⁷ Recruitment focused on migrant communities and the Northern Rizeigat Arab tribes, known locally as the Abbala (camel herders) – both groups without historically-endorsed customary land rights in Darfur. In July 2003, Musa Hilal, a senior leader of the government-sponsored militias known as the Janjaweed, established a militia base in Misteriha, south east of Kebkabiya in North Darfur.⁸

This extensive recruitment of Arab groups was complemented by support for an Arab supremacist organisation, the "Arab Gathering", which was given arms, communications equipment, light artillery and military advisers. The government allowed, and often encouraged, its regular soldiers and auxiliary forces to ignore the laws of war, resulting in widespread crimes against humanity and war crimes.⁹ These included multiple

⁵ An analysis of the conflict's phases was submitted to the ICC by the Sudan Armed Forces. Although not public, it is referenced in the ICC evidence list. "Situation in Darfur, the Sudan: Prosecutor's Application under Article 58(7)", 27 February 2007, at www.icc-cpi.int/library/cases/ICC-02-05-56_English.pdf.

⁶ "Man blamed for Darfur says I am at peace with myself", *The Guardian*, 4 December 2008.

⁷ Crisis Group interviews, commissioner of a locality in Darfur and several executive directors in multiple localities, Darfur, 2004-2007.

⁸ Julie Flint and Alex de Waal, "Ideology in arms: The emergence of Darfur's Janjaweed", www.sudantribune.com/spip.php?article11358.

⁹ In its report released on 25 January 2005, the International Commission of Inquiry on Darfur stated: "On the basis of its investigations, the Commission is confident that the large majority of attacks on villages conducted by the militia have been undertaken with the acquiescence of State officials. The Commission considers that in some limited instances militias have sometimes taken action outside of the direct control of the Government of Sudan and without receiving orders from State officials to conduct such acts. In these circumstances, only individual perpetrators of crimes bear responsibility for such crimes. However, whenever it can be proved that it was the Government that instigated those militias to attack certain tribes, or that the Government provided them with weapons and financial and logistical support, it may be held that (i) the Government incurs international responsibility (vis-à-vis all other member States of the international community) for any violation of international human rights law committed by the militias, and in addition (ii) the relevant officials in the Government may be held criminally accountable, depending on the specific circumstances of each case, for instigating or for aiding and abetting the violations of humanitarian law committed by militias". "The Report of the International Commission of

³ There are between 36 and 90 tribes in Darfur, with a history of relatively peaceful inter-ethnic relations and inter-marriage. They form roughly two broad groups: African tribes, dependent on subsistence farming and animal husbandry (among them the Fur, Massalit and Zaghawa) and groups of Arab extraction living on camel herding in North Darfur (the Abbala) and cattle herding in South Darfur (the Baggara).

⁴ According to a list compiled by the Darfur Centre for Human Rights in London and submitted to the Aegis Trust, between 2000 and 2002, 38 Fur villages were evacuated by force in Kas district, 23 in Jebel Marra district, 24 in Kebkabiya district, 41 in Nyala district, 21 in Zallinge district and 42 in Wadi Salih district. "Villages Evacuated by Force 2000-2002", Aegis Trust. www.aegistrust.org/index.php?option=content&task=view&id=192&Itemid=200.

attacks against villagers and destruction of property, livelihoods and means of sustenance, including water wells and food granaries; murder; forcible transfer of population; and torture and rape. Hundreds of villages and towns with no connection to rebel activities were destroyed, their residents forcibly evicted by government troops and affiliated militias.¹⁰

The number of internally displaced persons (IDPs) was estimated to have risen from 250,000 to one million by 2005. The majority of the displaced were around Kutum in North Darfur, and Wadi Saleh in West Darfur¹¹ and mainly from the Zaghawa, Fur and Massalit tribes. This massive displacement triggered deployment of the biggest humanitarian operation in the world today, as well as of AU monitors (later replaced by an AU peacekeeping force, AMIS). The peacekeepers slowed the pace of displacement but did not alter the overall trend, and the number of IDPs in camps inside Darfur and refugees in Chad reached almost two million by February 2005.¹²

By the second half of 2004, Darfur was receiving extensive media coverage and visits of senior officials from Western governments. The reports from international humanitarian agencies and the media of massive war crimes necessitated a response from the Sudanese government, which in August established three committees of judges (all female), prosecutors and police to investigate rape allegations. They concluded that

Inquiry on Darfur to the United Nations Secretary-General”, 25 January 2005, para 125, section (vi), at [www.reliefweb.int/rw/RWFiles2005.nsf/FilesByRWDocUNIDFileName/EVIU-6AGKJW-ici-sud-25feb.pdf/\\$File/ici-sud-25feb.pdf](http://www.reliefweb.int/rw/RWFiles2005.nsf/FilesByRWDocUNIDFileName/EVIU-6AGKJW-ici-sud-25feb.pdf/$File/ici-sud-25feb.pdf).

¹⁰“Prosecutor’s Application”, (2007), op. cit.

¹¹“Darfur Humanitarian Profile”, UN Office for the Coordination of Humanitarian Affairs (OCHA), no. 1, 2004.

¹²In January 2004 the counter-insurgency began attempting to hold territory “liberated” from rebels. The military established five brigade-sized units in the Western Area Command (the three Darfur states) and began operations in West and North Darfur. Government militias, ordered to occupy the areas left by the SLA, opened new camps to prevent SLA return. The crackdown was counterproductive. Extensive pressure on the core of SLA support led it to disperse throughout Darfur, most importantly into South Darfur. SLA units moved south from Jebel Marra and in a broad spiral through North Darfur into Eastern South Darfur, skirting Baggara Arab areas. In April 2004 the SLA reportedly established its first bases in Shearia province, South Darfur. “Prosecutor’s Application”, (2007), op. cit. The same report refers to a government memorandum instructing officials to prepare to settle nomads in areas from which the SLA withdrew. “Entrenching Impunity: Government Responsibility for International Crimes in Darfur”, Human Rights Watch, December 2005.

“... the alleged incidents were in fact ordinary complaints lodged with the authorities, and there were no indications as to violence or rape”.¹³ This conclusion shocked those who worked directly with the victims, such as international and national health agencies, human rights organisations and UN offices. In September 2004, Colin Powell, then U.S. Secretary of State, called the government’s counter-insurgency war “genocide”.¹⁴

While there has been some controversy about the number of deaths caused by the conflict – estimates range from 70,000 to 400,000 – there is no doubt that the ruthless counter-insurgency and terror campaign led by the government forces and the Janjaweed militias involved war crimes and crimes against humanity, most obviously mass displacement. There are still 2.7 million IDPs and refugees in camps today, and displacement continues. Although the causes have changed significantly since 2004/2005 and are now linked to the multiplication of militias and, especially in South Darfur, mainly to fighting along tribal lines over local borders and land, the NCP continues to bear significant responsibility.¹⁵

¹³Crisis Group review of “Darfur: Reality and Accusation”, justice ministry, September 2008.

¹⁴In 2005, the U.S. government began an investigation into what was happening in Darfur that included interviews with more than 1,000 refugees in eastern Chad as well as sophisticated use of satellite imagery. It produced a well-documented report with evidence that war crimes and crimes against humanity, including ethnic cleansing, were going on as early as summer 2004. Most participants in the investigation considered the events met the test for genocide, based on the systematic patterns of abuse and overt statements by perpetrators that their goal was to destroy the local races..This shaped subsequent policy decisions of the Bush administration, including not to veto the Security Council mandate for the ICC investigation, despite U.S. opposition to the court at the time. At a briefing in the State Department on 17 June 2009, General Scott Gration, the Obama administration’s special envoy for Sudan, said he does not characterise the present situation in Darfur as genocide, but “what we see is the remnants of genocide. What we see are the consequences of genocide, the results of genocide”. “US presidential envoy highlights constructive dialogue with Khartoum”, *Sudan Tribune*, 17 June 2009.

¹⁵“Bloody clashes in Southern Darfur”, UN Information Centre, Khartoum, media monitoring report, 11 December 2008 (fighting among the Gimer tribe); “34 people killed during tribal clashes in South Darfur”, *Sudan Tribune*, 22 March 2009 (fighting between Fallata and Habaniya tribes); “Sudan: 130 killed in fighting between Rezeigat and Messeriya”, *Asharq al-Awsat*, 28 May 2009.

B. INTERNATIONAL REACTION

On 18 September 2004, the UN Security Council adopted Resolution 1564 requesting the Secretary-General to establish an international commission of inquiry to investigate reports of violations of international humanitarian law and human rights law in Darfur; to determine whether genocide had occurred; and to identify those responsible with a view to ensuring they were held accountable.¹⁶ On 31 March 2005, in response to the findings of that body and following five months of deadlock over what to do, the Security Council, with China, Algeria, Brazil and the U.S. abstaining,¹⁷ passed Resolution 1593, referring the situation in Darfur to the ICC prosecutor. Benin and Tanzania, the Council's two sub-Saharan African members, voted in favour of the resolution. Sudanese Ambassador El-Fatih Mohamed Ahmed Erwa warned the Council that the "resolution would only serve to weaken prospects for settlement and further complicate the already complex situation".¹⁸

Immediately after, in April-May 2005, the prosecutor conducted a two-month preliminary examination. His office held two exploratory meetings in the Netherlands with Sudanese government officials related to its policies, ICC procedures and the Darfur situation. This was followed by several missions to Khartoum from 2005 to 2007 to assess whether there were relevant

national proceedings related to individuals and crimes. On 14 November 2005, one such mission requested permission to interview a number of persons in Khartoum, including Haroun; in the latter's case, permission was not received. From 25 February to 2 March 2006, a second mission assessed admissibility issues. The office also received a report from the defence ministry explaining the phases of the military operation in Darfur.¹⁹

The prosecutor's office had contact with and reviewed the work of two special courts and numerous committees and commissions the government created in November 2005.²⁰ In a 27 January-7 February 2007 mission to Khartoum, the prosecutor's representatives met with the justice minister and his under secretary, the chief justice of West Darfur and the president of the special court for West Darfur, among others, and interviewed the three special advisers for the Judicial Investigations Committee.²¹

After these missions, the prosecutor assessed that national proceedings in Sudan in relation to the crimes were inadequate – in his words "in accordance with the principle of 'complementarity', the Prosecution has assessed the existence of national proceedings in the Sudan in relation to those crimes. There are none".²² In April 2007, after almost two years of work,²³ the ICC issued arrest warrants for Haroun, a member of the senior policymaking circle in Khartoum, and Kushayb, a prominent leader of the militias that carried out the activities in Darfur, as key suspects on 51 counts of crimes against humanity and war crimes.²⁴

¹⁶The commission concluded that while "government forces and militias conducted indiscriminate attacks ... [that] may amount to crimes against humanity ... the crucial element of genocidal intent appears to be missing". It also concluded that "international offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide". "Report of the International Commission of Inquiry on Darfur", op. cit.

¹⁷The U.S., which is not a party to the Rome Statute and expressed serious reservations about the ICC, especially in the initial years of the Bush administration, had initially threatened to veto Resolution 1593; other members of the Security Council accommodated U.S. concerns by including affirmation of "the exclusive jurisdiction of States non parties to the ICC Statute over the nationals, current or formal officials, and personnel they contribute to operations in Sudan by the Security Council or the African Union". Washington's preference, however, was for an ad hoc special tribunal to exercise jurisdiction in the Sudan case. The U.S. ambassador explained after the vote that while her country strongly supported actions that would bring to justice those responsible for the crimes committed in Darfur, it fundamentally disagreed with "the view that the [International Criminal] Court should be able to exercise jurisdiction over the nationals, including government officials, of States not party to the Rome Statute".

¹⁸"UN Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court", press release SC/8351, www.un.org/News/Press/docs/2005/sc8351.doc.htm.

¹⁹On 3-8 June and 14-21 August 2006, the the prosecutor's office organised a third and fourth mission to Sudan. Crisis Group interview, office of the prosecutor, July 2009.

²⁰The Judicial Investigations Committee, the Special Prosecutions Commission, the Committees against Rape, the Unit for Combating Violence against Women and Children of the Ministry of Justice and the Committee on Compensations.

²¹Crisis Group interview, office of the prosecutor, July 2009.

²²"Prosecutor's Statement on the Prosecutor's Application for a Warrant of Arrest under Article 58 against Omar Hassan Ahmad Al Bashir", The Hague, 14 July 2008.

²³ICC investigators never visited Darfur, because, they explained, the government issued no visas, and they were concerned about witness protection. They visited Khartoum but mainly relied on the testimony of refugees and other sources.

²⁴"Prosecutor's Application", (2007), op. cit, p. 38. Warrants for arrest for Ahmad Harun and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") dated 27 April 2007, at www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc%200205%20107/darfur_%20sudan.

Following the issuance of these warrants, the Sudanese government refused further engagement with the ICC, despite repeated demands from the Security Council and calls from supporters of the court such as France and the UK. It reasserted that the ICC had no jurisdiction over any alleged crimes in Sudan and stated that under no circumstance would Sudanese officials be handed over for trial to an international court.²⁵ Nor did it conduct any credible proceedings against those alleged to have committed atrocity crimes in Darfur.

The reaction to the Haroun case was indicative. In July 2005 he was appointed state minister in the humanitarian affairs ministry. In September 2007, the government placed him at the head of a committee to investigate violations of human rights in Darfur. It also appointed him to a committee overseeing deployment of the combined UN and AU peacekeeping force in Darfur (UNAMID).²⁶ In May 2009, in a ministerial reshuffle, President Bashir transferred him from the humanitarian ministry to Southern Kordofan state, where as governor he will have much to say about the decision expected imminently by the International Court of Arbitration at The Hague on the sensitive Abyei Boundary Commission dispute.

In his December 2007 report to the Security Council, the prosecutor indicated that he was investigating an ongoing pattern of crimes committed with the mobilisation of the whole state apparatus and highlighted that “Ahmed Haroun is still allowed to play a role in this situation. As Minister of State for Humanitarian Affairs, he has been put in a position to control the livelihood and security of those people he displaced. The G[overnment]o[f]S[udan] has maintained him in this position with full knowledge of his past and present activities”. The prosecutor also described his plans to bring two new cases, against those who were protecting Haroun in his new role in charge of IDP camps and against rebel commanders.²⁷

In early 2008, when UN Secretary-General Ban Ki-moon visited Sudan and asked the government to cooperate with the ICC and deal with impunity in Darfur, and again when the Security Council urged this in a Presidential Statement on 16 June of that year, the

message was ignored and the same policies were continued.²⁸

With no tangible progress on the ground or in the peace process, the ICC prosecutor made an application on 14 July 2008 to the court’s Pre-Trial Chamber seeking an arrest warrant for President Bashir on ten counts of genocide, crimes against humanity and war crimes.²⁹ His argument relied on the legal principle of “perpetration through means”, asserting that Bashir committed these offences “through persons, including the state apparatus, the members of the Armed Forces, and Militia/Janjaweed”.³⁰ The arrest warrant was sought against Bashir in three capacities: as president of Sudan, as head of the NCP and as commander-in-chief

²⁸ The Presidential Statement urged the “Government of Sudan and all parties to the conflict in Darfur to cooperate fully with the court, consistent with Resolution 1593 of 2005 in order to put an end to impunity for the crimes committed in Darfur”. www.unmultimedia.org/tv/unifeed/detail/9979.html.

²⁹ Immediately after applying for the arrest warrant, the prosecutor told journalists in The Hague Bashir “personally instructed” his forces to annihilate three ethnic groups in Darfur: “The crime of genocide is a crime of intention. Bashir had the intention to destroy the Fur, Masalit and Zaghawa ethnic groups [engaged in a rebellion in Darfur]. ... His motives were largely political. His alibi was a counter-insurgency. His intent was genocide”. The president ordered his forces “not to bring back any wounded or prisoners”, the prosecutor added. “He wanted to commit genocide”. www.sudantribune.com/spip.php?article27870.

³⁰ The prosecutor is relying not on command responsibility, but on a less common form of criminal responsibility called “perpetration through means”. His argument is that Bashir controls the system, and “[w]hoever controls the system, also controls *the* anonymous will of all its human components”. “Prosecutor’s application”, (2008), op. cit., para 247; see also paras 244-248 and American Society of International Law (ASIL) at www.asil.org/insights080728.cfm, and Alex De Waal’s analysis of the application at www.ssrc.org/blogs/darfur/wp-content/uploads/2009/01/bashir-public-application-critique-d6-250109.pdf. De Waal noted: “Proving that Bashir committed the crimes as an indirect perpetrator in the way proposed is the most difficult of all modes of liability to prove. The reason why prosecutors have preferred ‘common purpose’ liability, including conspiracy and joint criminal enterprise is precisely because it is much easier to prove guilt in this way, inferring responsibility from involvement in an organisation which has committed crimes in a systematic fashion. The avenue of superior or command responsibility also allows for prosecution on the basis that the accused should have known that a crime was going to be committed but took no steps to prevent it, or failed to punish crimes he knew had been committed. It is considerably harder to prove that an individual intended a specific crime and directly instructed others to commit it on his behalf. This is especially the case for genocide, for which proof of intent is all-important”.

²⁵ El-Fatih Mohamed Ahmed Erwa, Sudan’s ambassador to the UN, said, “Sudan was ... not party to the ICC, making the implementation of the resolution fraught with procedural impediments”. “UN Security Council Refers Situation”, op. cit.

²⁶ “What Alternative to UNAMID Will Provide Security for Darfur?”, *Sudan Tribune*, 31 December 2007.

²⁷ “Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)”, 5 December 2007.

of the armed forces.³¹ While many other potential cases could have been brought up the chain of command from the level of Kushayb and Haroun, the prosecutor sought to focus on the political actor personally and ultimately responsible for Sudan's entrenched system of impunity.³²

Members of the government were not the only individuals targeted for prosecution. In November 2008, the prosecutor announced that he had applied for arrest warrants against three rebel commanders for an attack in September 2007, during Ramadan, in which twelve unarmed peacekeepers were killed in Haskanita (South Darfur).³³ In February 2009, the prosecutor informed the court that the three commanders had stated their willingness to appear voluntarily before it. The court issued a summons for one of them, Bahar Idriss Abu Garda, shortly before he arrived in the Netherlands on 17 May.³⁴ He declared his innocence at the first hearing, and the Pre-Trial Chamber scheduled a confirmation hearing in October. It is still examining the allegations relating to the two as yet unidentified rebel commanders.

III. REACTIONS TO THE APPLICATION FOR BASHIR'S ARREST

Following the application in July 2008 for an arrest warrant against him and a week of internal consultations, President Bashir visited the three Darfur states, and the NCP, in carefully orchestrated meetings, accused the prosecutor of political manipulation. The party sought to mobilise support in Sudan and the wider region against the possibility of a warrant, even showing new but temporary goodwill on CPA implementation by agreeing to establishment of the Abyei administration. The objective quickly came to be to persuade the Security Council to suspend the case.³⁵

NCP security hardliners believe the case is proof that the international community continues to seek regime change in Khartoum, and no concessions will ever be enough to satisfy it. They consider that no one appreciates the commitment to peace the regime demonstrated by signing the CPA in 2005 and the Darfur Peace Agreement (DPA) and the Eastern Sudan Peace Agreement in 2006, and that the international community has not kept the promises it made during the CPA negotiations, such as lifting sanctions and normalising diplomatic relations. The ICC proceedings are viewed as a conspiracy to weaken them and prepare their removal from power.³⁶ The defensive strategy the NCP put in place by August 2008 consisted essentially of denying the legal arguments against Bashir and others, while undertaking political and diplomatic initiatives to generate national resistance and deflect international pressure.

As part of this strategy, the NCP declared its commitment to engage with national political forces through its Sudan People's Initiative (SPI), and the government restarted negotiations with the Darfur insurgency by participating in a regional initiative led by Qatar that achieved a good will agreement with the JEM insurgency in February 2009. Shuttle diplomacy was intensified with the Arab League and the AU, in which Sudan held out the prospect of dramatic concessions on both Darfur and CPA implementation in exchange for either a deferral or an outright end to the prosecu-

³¹ "Prosecutor's Application", (2008), *op. cit.*

³² Crisis Group interview, ICC, The Hague, December 2008.

³³ Crisis Group interview, ICC, The Hague, November 2008.

³⁴ Abu Garda, from the Zaghawa tribe, is charged with three counts of war crimes allegedly committed during an attack by a Darfur rebel faction on 29 September 2007 against the AU peacekeeping force.

³⁵ Article 16 of the Rome Statute provides that the Security Council may adopt a resolution under Chapter VII of the UN Charter deferring the investigation or prosecution of an ICC case for twelve months, renewable for similar twelve-month periods under the same conditions.

³⁶ Crisis Group interview, Nafie Ali Nafie, presidential assistant and vice president of the NCP for organisational affairs, Khartoum, September 2008.

tor's application.³⁷ After those bodies failed to convince the Security Council to suspend the ICC proceedings, the government feigned loss of interest in the entire process of negotiations.³⁸

A. DIVISIONS WITHIN THE NCP AND THE ISLAMIC MOVEMENT

Disagreements within the NCP on management of the Darfur crisis have been apparent since early 2006, when Vice President Taha was marginalised after hinting that a UN peacekeeping force could be deployed in Darfur if negotiations in Abuja produced an agreement with the rebel groups.³⁹ These internal fractures were accentuated after the ICC issued the arrest warrants against Haroun and Kushayb in 2007, and by August 2008, they had led to widespread speculation of a renewed leadership struggle.⁴⁰ According to a member of the NCP political sector,⁴¹ divisions were evident when members of the political bureau from Darfur, Kordofan and the central states argued for giving the NCP's vice presidency to a Darfur figure,⁴² reunifying the three Darfur states into one, with proper regional authority, and removing land usurpers – concessions that could have led to a final settlement. Senior hardliners rejected them, arguing they would weaken the party ahead of elections that were then anticipated to be held in mid-2009.⁴³

The internal dissent was thus unable to change the policy set by the elites who firmly control the NCP's leadership bureau (*al-maktab al-qiyadi*). Though Bashir's

possible replacement began to be discussed,⁴⁴ the army made it clear that it would not accept a change. The chance for a conciliatory stance also decreased in inverse proportion with the party's growing understanding of the ICC legal process in the months following the prosecutor's application for a warrant against Bashir. Once it was recognised that a new Security Council deferral of the case would have to be sought annually and that in the meantime other regime figures could be vulnerable, any engagement with the ICC appeared less attractive.⁴⁵ The internal debate, which took place through late 2008 and early 2009, thus ended up focusing around how to buy time by working with friendly nations.

Nevertheless, political divisions within the NCP have undoubtedly developed in the past few years between riverine leaders⁴⁶ – Arab tribes originating from the area of the Nile River north of Khartoum and its suburbs – and the vast majority of members from elsewhere. According to Crisis Group sources, this rift widened when the riverines aggressively opposed any concessions on Darfur and continued to take unilateral decisions to protect their interests at the expense of national stability. Party figures from elsewhere feel their opinion is worthless:⁴⁷ “A handful of brothers who made fortunes from Sudan's wealth have thrown our Islamic Movement principles and values to the wall”.⁴⁸

Since the July 2008 application for the Bashir arrest warrant, disagreement between the riverines who dominate the security establishment and party members favouring political engagement as the solution to Sudan's problems has increased. Many NCP members from Darfur and Kordofan feel frustrated, raising the possibility of a new split within the Islamic Movement.⁴⁹ Not

³⁷ Crisis Group review of unpublished paper by an international organisation.

³⁸ “Khartoum requests the ‘cancellation’ and not only the ‘deferral’ of al-Bashir's warrant, as a principle for any Arab-African efforts”, *Asharq al-Awsat*, 9 March 2009.

³⁹ Alex de Waal, “From bad to worse in Sudan”, *Los Angeles Times*, 13 October 2007.

⁴⁰ Media comment speculated in particular on whether either the position of secretary general of the Islamic Movement, held by Vice President Ali Osman Taha, or president of the NCP, held by Bashir, might be contested prior to national elections in 2009. However, the NCP re-nominated Bashir, and on 9 August 2008, Sudan's Islamic Movement again elected Taha.

⁴¹ The political sector includes the permanent members of the political bureau and the heads of other bureaus with political responsibilities, such as the women's, youth and economic bureaus.

⁴² Sudan has two vice presidents: the first is Salva Kiir, the SPLM leader; Taha, the NCP representative, is second vice president.

⁴³ Crisis Group interviews, member of the NCP, Khartoum, September 2008.

⁴⁴ Crisis Group interview, two senior members of the NCP political sector, Khartoum, September 2008.

⁴⁵ Crisis Group interview, UN official, Khartoum, August, 2008.

⁴⁶ The term riverine is used to describe the NCP elites, who come mostly from the three main tribes, Jaaliya, Shaigiya and Danagla, living along the Nile River in Nile state, from north of Khartoum. It is widely used by many politicians and non-politicians alike who oppose these tribes' hegemony over Sudanese politics since independence in 1956. It was also used by John Garang, the late SPLM chairman, and is common among Darfur rebel leaders and many scholars as well.

⁴⁷ Crisis Group interviews, several members of the NCP political sector, Khartoum, September 2008.

⁴⁸ Crisis Group interview, senior NCP member, Khartoum, December 2008.

⁴⁹ The term Islamic Movement (IM) is used synonymously with the National Islamic Front (NIF). It refers to the political movement that came to power in Sudan in June 1989 by

all the NCP riverines support the security establishment, however.⁵⁰ Some are very concerned over the party's future in view of their leader's legal troubles⁵¹ and believe the arrest warrant weakens them. At the same time, many unhappy NCP members feel that in such an uncertain time, their criticism might be interpreted as betrayal and have opted, therefore, to wait for the dust to settle, even though an exit strategy for Bashir is openly discussed.⁵²

On 7 January 2009, the NCP security leaders agreed to remain united behind Bashir for the time being, with Taha continuing as vice president as well as secretary general of the Islamic Movement. The arrangement was reconfirmed in February at a party council (*shura*). According to a senior NCP figure, this "so far has put an end to the so-called internal crack in our top leadership. They know that if they divide now, all of them are gone. They will fight politically, diplomatically and militarily to the end; and we [Islamists], if we die, we die standing".⁵³

However, in the subsequent half-year, fissures have appeared in the united front of the NCP's senior leadership. Over the past two months, major disagreements between Taha and the president escalated over the approach for dealing with the South and the Darfur problem, as well as over the recent reshuffle of NCP members in executive bodies, including the technical committees and the state governors.⁵⁴ An official statement released by the presidency in early June said Taha had left the country for holidays. All his immediate

family accompanied him abroad, where the government has reportedly been unable to reach him. His departure is a significant blow to the NCP at a time when it faces serious political challenges⁵⁵ and raises the question whether the party hardliners will be able to maintain the cohesion of their constituencies in the Islamic Movement and the army.

Top armed forces commanders are significant players in these matters. Most are party members or at least Islamists, and some have acquired economic interests as a result of ethnic favouritism policies, political control and institutionalised corruption.⁵⁶ The majority of the generals own significant shares directly or through close relatives in highly profitable businesses, some closely affiliated to security and military commercial corporations. Bashir and his powerful friends such as Lt. General Abdel Rahim Hussein, the defence minister, General Bakri Hassan Salih, the presidential affairs minister, and Ibn Awf, the military intelligence commander, are seen as the guarantors of these interests.⁵⁷ They need each other to keep power and do not trust the civilians.

The NCP fomented an atmosphere of fear in which dissent was equated to treason. It sought to mobilise its core constituencies – tribal allies and affiliates – and took measures to protect Khartoum, the country's financial and economical centre, and other key economic sites.⁵⁸ Army units were deployed to reinforce posi-

a military coup and that split in October 1999, when Hassan al-Turabi was expelled from the NIF primarily due to a power rivalry with Bashir. At that time the NCP, led by Bashir, and the Popular Congress Party (PCP), led by Turabi, were formed. The NCP says that it still leads the Islamic Movement in Sudan and that Vice President Ali Osman Taha serves as president of that body.

⁵⁰ Crisis Group interview, senior NCP member from Nile state, university scholar, Khartoum, December 2008.

⁵¹ Crisis Group interview, Ghazi Al Atabani, December 2008. Ghazi, a senior, well-respected figure in the Sudanese Islamic Movement and head of the NCP parliamentary group in the National Assembly, wrote in an op-ed in a Sudanese daily after the shura council meeting that a group does not deserve to be described as Islamic if it is not rooted in Islam's values. *Al-Raed*, 20 February 2009. According to many NCP members, he has been marginalised because he disapproves of how the country's affairs are being managed. He supports the idea that those guilty of mistakes and crimes in Darfur should be held accountable in Sudan.

⁵² Crisis Group interview, several NCP members (scholars and army officers), Khartoum, March 2009.

⁵³ Crisis Group interview, senior NCP figure, Khartoum, February 2009.

⁵⁴ Crisis Group interview, NCP member, Khartoum, June 2009.

⁵⁵ These challenges include stalled CPA implementation, a potentially difficult security situation following the imminent Abyei decision by the Permanent Court of Arbitration, the adjournment of the Darfur peace talks, questioning by opposition parties of the legitimacy of the government of national unity beyond 10 July 2009, diminishing prospects that general elections can be held in April 2010 and concern for their ability to cope with multiple potential military confrontations in Abyei, Darfur and eastern Sudan while maintaining security in the capital.

⁵⁶ The army leadership dismissed most Darfur generals or forced them into early retirement. Few now hold any sensitive security positions. The commander of chief, commander of the joint chiefs of staff and the majority of corps commanders are from the riverine tribes closely affiliated to the NCP. The same in different proportions is true among the immediate lower ranks of the armed forces. Crisis Group interview, retired brigadier general, Khartoum, December 2008.

⁵⁷ Crisis Group interview, university scholar, Khartoum, January 2009.

⁵⁸ Among the protective efforts were a roughly 160km trench filled with water, allegedly to expand agricultural schemes west of Omdurman, and installation of more than ten military observation posts: close to Khartoum at Wadi al-Mugadam, Wadi al-Malik and Jebel Issa and to Omdurman at Fatacha and Jibal Markhia, as well as above North Darfur

tions in Darfur, Southern Kordofan (including areas formerly under SPLM control), oil fields and strategic installations around Khartoum and construction sites of dams in the northern states. Special military units under party command and composed of members of Nile state tribal groups were put on special alert in and around the capital.⁵⁹ Some reports also suggested that from April 2008, arms were again distributed to some Arab tribes in South Kordofan/Nuba Mountains and in central/western Darfur, the two areas where the NCP expects the Darfur insurgency to take future military action, as well in areas of possible confrontation with the SPLA.⁶⁰

On 14 January, Hassan al-Turabi, the one-time ideologue of the Islamic Movement, who split from the NCP a number of years ago but remains an important player as leader of the Popular Congress Party (PCP), was arrested on an accusation of supporting JEM in Darfur. This illustrated growing tensions within the elites over the revival of the Islamist agenda as a possible way out of the current deadlock. Though both the PCP and JEM deny it, Khalil Ibrahim, the head of JEM, and Turabi are known to be close. The arrest came a few days after Turabi had sent Ibrahim al-Sanousi, his right hand man in charge of ideology, to attempt a dialogue with the NCP.⁶¹ Some leading figures in both the NCP and PCP thought it was time to reconcile and agree on a course to address deteriorating governance as well as the Darfur insurgency, so that the Islamic Movement could regain its credibility as a national political force and avoid further splits.⁶²

The reconciliation talks failed, however, and a few days later, after Turabi said the president should turn himself over to the ICC for the sake of peace and justice in Sudan, he was arrested. Despite the growing tensions – within the NCP leadership, between

that leadership and party members and between the military and the Islamists – the NCP hardliners have stayed behind Bashir.

B. THE NCP ARGUMENT AGAINST ICC JURISDICTION

The government's initial refusal to deal with the ICC was based on its argument that the court is not impartial and violates Sudan's sovereignty.⁶³ After the prosecutor's application for a Bashir arrest warrant in July 2008, it engaged Eversheds, a British firm specialising in international law, to advise it on how to deal legally with the matter.⁶⁴ In October, the justice ministry published a booklet, "Darfur, The Quest for Peace", that put forward legal defences against Security Council Resolution 1593 (2005) and the ICC's claimed jurisdiction over Sudanese nationals.

The booklet concluded that Resolution 1593 was flawed, incoherent and in contradiction to such instruments as the Vienna Convention on the Law of Treaties (1969). It argued that since Sudan is not a party to the Rome Statute and has not entered into a special agreement for cooperation with the ICC, the Security Council had no legal right to refer alleged atrocity crimes committed in Sudan to the court.⁶⁵ Moreover, it asserted that the West manipulated the Security Council into adopting successive resolutions without giving Sudan adequate time to implement them.⁶⁶ These resolutions were said to have been aimed at putting pressure on Sudan and particularly on the NCP to relinquish its

at Biir Atroon and Malha. Crisis Group interview, SAF officer, Khartoum, December 2008.

⁵⁹ A highly trained, well-equipped armoured unit is stationed at a farm by the White Nile in Khartoum, under the direct command of a senior NCP member and not part of the SAF. Crisis Group interview, NCP senior member, Khartoum, January 2009.

⁶⁰ "The Drift Back to War: Insecurity and Militarization in the Nuba Mountains", Small Arms Survey, 26 August 2008.

⁶¹ Turabi was released on 9 March 2009, after Qatar intervened on his behalf on the margins of the Doha negotiations with JEM and his health began to deteriorate in prison. Afterwards, Turabi reiterated that Bashir was politically culpable for the systematic crimes that have been committed during his presidency and should be removed. "Sudan's Turabi says position unchanged on Bashir and ICC", *Sudan Tribune*, 9 March 2009.

⁶² Crisis Group interview, Khartoum, January 2009.

⁶³ Crisis Group interview, several senior NCP figures, Khartoum, December 2008.

⁶⁴ "Sudan hires UK law firm to handle ICC indictment of Bashir", *Sudan Tribune*, 9 November 2008.

⁶⁵ "Darfur: The Quest for Peace", justice ministry, Khartoum.

⁶⁶ The booklet (*ibid*) argued that the Security Council adopted Resolution 1556 on 30 July 2004, demanding that the government fulfil commitments it had made in a joint communiqué on 3 July, in particular to protect civilians, resume talks with dissident groups and disarm the Janjaweed militias. While these commitments might require months to meet, Resolution 1564 (18 September) was adopted only seven weeks later, expressing grave concern that the obligations had not been fully satisfied and demanding an end to all violence, cooperation with humanitarian and monitoring efforts, assurance of compliance with international humanitarian law and facilitation of the safety of humanitarian staff. On 29 March 2005, Resolution 1591 condemned the government, as well as rebel forces and all other armed militias in Darfur, for failing to comply fully with previous resolutions, mandated travel and asset sanctions against individuals and established a committee to monitor implementation of those sanctions. Only two days later, Resolution 1593 referred the situation in Darfur to the ICC prosecutor.

power, thus weakening the central government, while financial and military support was given to Darfur rebel groups and the SPLM.⁶⁷ Even more than an agent of regime change, the ICC was described as an instrument for the disintegration of Sudan.

In its argument related to the principle of complementarity entrenched in the Rome Statute, the government argued that Sudan's judicial system had a proven record of high professional independence and integrity, such that there was no need for ICC involvement on Darfur. In reality, however, as part of its effort to control the country, the regime has since 1989 replaced most non-Islamic members of the judiciary with its partisans. Judicial reform was included in the CPA, as well as the agreement between the NCP and the Democratic Union Party (DUP) in Cairo in 2006 and the matrix signed by the NCP and SPLM after the latter's temporary withdrawal from the unity government in December 2007.⁶⁸ However, none of the promised reforms have been implemented.⁶⁹

A few months after the adoption of Resolution 1593, and immediately after the prosecutor announced he was opening an investigation, the government established special criminal courts to handle Darfur prosecutions locally. The main court is based in Geneina (West Darfur). This could have been an opportunity to demonstrate a genuine willingness to deal with the alleged crimes domestically, but that has not occurred. These courts have thus far tried thirteen cases,⁷⁰ all related to theft or individual murders, none involving crimes covered by the Rome Statute. They have failed to prosecute any high official within the chain of command, and Sudan's laws have not been amended to allow such a possibility. Broad immunity provisions remain in place, creating obstacles to the prosecution of members of the armed forces (including the Popular Defence Forces and some militias), national security agencies and the police.⁷¹ The National Assembly debated a

new police law but did not amend the articles that give the police and its associated entities immunity.⁷²

The key impediment to an impartial judicial system in Sudan is the discrepancy between what is on paper (laws and the interim constitution) and the reality that most judges (except a few from the South) are affiliated with the NCP. During the regime's early days, many judges affiliated to the National Islamic Front (now the NCP) voluntarily joined the Popular Defence Forces (PDF) in the fight against the South.⁷³ One of their colleagues told Crisis Group, "many of these judges are now holding senior positions in different courts in Sudan including Darfur".⁷⁴

In the current political context, such judges are not independent when dealing with cases that have implications for their political party and/or leadership, because their loyalty is with the party that guarantees their employment and other financial incentives.⁷⁵ It is not surprising that investigations headed by such judges found no rape in Darfur.

telligence services' extra-judicial powers of detention and the number of deputy directors. The NCP wants a detention period from a minimum of 30 days up to two years, while the SPLM called for a maximum period of one to three years, with a clause obligating the services to present the detained to a judge or prosecutor to then decide whether further detention is required. Bills already adopted are also contentious, such as Article 45 (2) of the Police Forces Act (2008), stipulating that no police officer is to be subjected to legal proceedings "if the legal affairs department [of the police] deems that he committed an act which constitutes a crime during or as a result of carrying out his duties or following a legal order [from superiors], save with an authorisation issued by the [interior] minister".

⁷²The central contingency force, part of the police, is better trained and equipped than most army units and has taken a major part in Darfur combat.

⁷³After Bashir took power in 1989, the regime established popular militias composed of people from different professional groups and backgrounds to fight alongside the Sudan Armed Forces (SAF) against the SPLM/A, and later on the eastern front and in Darfur. These militias are organised under an institution called the Popular Defence Forces (PDF). The recruits, mainly from the Islamist Movement or otherwise sympathisers of the regime, received military training in various parts of the country with the PDF, before being dispatched to war areas. Upon their return from the fighting, they would receive rewards from the government, such as jobs, promotions and support in business. The CPA prescribed the dissolution of the PDF, but it still operates in Darfur and Southern Kordofan.

⁷⁴Crisis Group review of an English translation of an article by Abdel Gadir M. Ahmed, provided by a member of the judiciary; Crisis Group interview, member of the judiciary, December 2008.

⁷⁵Abdel Gadir M. Ahmed, op. cit.

⁶⁷Crisis Group interview, senior NCP figure, Khartoum, December 2008.

⁶⁸After the SPLM withdrew from the federal cabinet in October 2007 because of unresolved issues with the NCP, the two parties signed what they called a matrix for moving forward on those issues, including Abyei, troop redeployment, security system reform, border demarcation, rule of law, judicial independence and harmonisation of laws consistent with the interim constitution.

⁶⁹Crisis Group interview, member of the judiciary and three lawyers, Khartoum, December 2008.

⁷⁰"Darfur: The Quest for Peace", op. cit.

⁷¹On 3 June 2009, the CPA partners admitted failure to compromise on the national intelligence and security service law. The NCP is now likely to use its parliamentary majority to pass its own version. The main differences concern the in-

Per the CPA and the interim national constitution, the judiciary is managed by a special national commission for judiciary services, a supposedly independent body. Besides managing the judicial system, it is authorised to protect the courts from political interference and to ensure their independence. The commission is composed of members from the judiciary and the finance and justice ministers and includes the head of the lawyers' union. It is chaired by the chief justice. However, the chief justice is an active member of the NCP and a former member of its political bureau,⁷⁶ which undermines the credibility of the institution.

Delicate issues of internal party balance would present substantial obstacles to credible national trials of prominent NCP members, even if political will existed. A Sudanese prosecutor would find it very difficult to deal with the charges against Haroun, a member of the NCP establishment from Kordofan, or Kushayb, a leader of the Janjaweed Arab militia,⁷⁷ since either trial could trigger a party crisis. According to a senior Darfur figure from the Arab Gathering,⁷⁸ for example, bringing Kushayb before a court might cause the Janjaweed to turn against the NCP. The trial of Haroun could lead to similar problems between the Kordofanians and the riverines.

After the ICC arrests warrants were issued, the government reportedly considered holding pro forma trials in Sudan. However, many Kordofanians objected strongly that even that would unacceptably make the men scapegoats for crimes that were committed in Darfur to preserve the riverine elites' interests.⁷⁹ A frustrated politician and NCP member told Crisis Group, "the NCP rejects and defies the international will [the ICC], but at the same time, they are not capable of genuinely providing justice in the country".⁸⁰ If such justice is to be provided domestically, including in the Haroun and Kushayb cases, Sudan will need to take legal and ju-

dicial measures to dismantle the prevailing system of impunity, including by strengthening the independence of the judiciary, as described in the Recommendations above and further discussed below.

Eventually the NCP sought indirect engagement with the ICC in an effort to block the arrest warrants. Sir Geoffrey Nice QC, who prosecuted Slobodan Milosevic before the International Criminal Tribunal for the former Yugoslavia (ICTY), and Rodney Dixon, a former legal adviser in the ICTY prosecutor's office who has represented various Sudanese organisations,⁸¹ filed an application on 11 January 2009 relating to the proposed warrants against Bashir and some rebel leaders. It requested the Pre-Trial Chamber to factor in the political consequences in Sudan of its decision, notably an undermining of the democratic process and risk of upheaval were the CPA to collapse. The application appealed for suspension of pre-trial proceedings⁸² but did not cite credible measures by the government to reverse the system of impunity in Darfur and address the cases presented by the prosecutor, and the court rejected it. Indeed, at no time since the first arrest warrants were issued has the prosecutor or the court received a communication from the government that indicates intention to investigate or prosecute the cases.⁸³

C. A FAILED POLITICAL RESPONSE

To solidify Sudanese unity and create a national political consensus for rejection of the ICC process, the NCP tried also to revamp national politics, by goodwill gestures on CPA implementation and its "Sudan People's Initiative" (SPI). On 14 July 2008, the evening of the prosecutor's application for the arrest warrant, President Bashir signed the long-delayed National Elections Act into law. Shortly after, an emergency National Assembly session authorised the government to condemn

⁷⁶The political bureau, the second highest party organ, develops and analyses policy and prepares principles for consideration by the highest organ, the leadership bureau (*al-maktab al-qiyadi*).

⁷⁷Crisis Group interviews, NCP member from Darfur, Khartoum, October 2008.

⁷⁸The Arab Gathering is a group of Darfur Arab tribal leaders and elites formed in the mid-1990s around the ideology of Arab supremacy. It significantly aggravated conflict dynamics and gave the NCP's security strategy crucial support; for more information, see Crisis Group Africa Report N°76, *Darfur Rising: Sudan's New Crisis*, 25 March 2004, and Crisis Group Report, *Darfur: Revitalising the Peace Process*, op. cit.

⁷⁹Crisis Group interviews, scholars, NCP members, Darfur and Kordofan politicians, Khartoum, September 2008.

⁸⁰Crisis Group interviews, lecturer, Khartoum, October 2008.

⁸¹These include the Sudan Workers Trade Unions Federation (SWTUF), which brings together 25 state unions and 22 professional federations, including the State Trade Unions for the whole of Darfur. Its covers the vast majority of the country's organised working people, some two million from the government, private and informal sectors. Another is the Sudan International Defence Group (SIDG), a non-governmental committee of Sudanese citizens established out of concern for the negative effects that ICC arrest warrants could have on the peace process in Sudan and on ordinary Sudanese. Sudanese unions and the SIDG, like other bodies affiliated to the NCP, are led by senior figures who are either party members or strong associates of the NCP regime. www.icc-cpi.int/library/cases/ICC-02-05-170-ENG.pdf.

⁸²Crisis Group review of document, available at www.icc-cpi.int/library/cases/ICC-02-05-170-ENG.pdf.

⁸³Crisis Group interview, office of the prosecutor, July 2009.

the prosecutor's application, with statements coming from the opposition and the SPLM, as well as NCP parliamentarians. This was followed by several confidence-building gestures toward Sudanese political groups. On 8 August, the presidency sought to mollify the SPLM by appointing a long-overdue civilian administration for Abyei,⁸⁴ and the NCP-SPLM Joint Executive Political Committee announced a full review of CPA implementation, as had been agreed in December 2007.⁸⁵

The SPI, the centrepiece of the domestic political strategy, was presented as a new Darfur policy that would lead to a national conference to identify long-term political solutions. President Bashir was appointed chair of the conference on 10 August.⁸⁶ Escalation of military activity in Darfur soon diminished optimism,⁸⁷ but the initiative was launched on 16 October in Khartoum with the blessing of many foreign countries, the Arab League and the AU. In his speech opening the conference, Bashir said the solution for Darfur was a decentralised system of governance. On 29 October, seven committees formed to review the root causes of the crisis recommended the following:⁸⁸ Janjaweed disarmament; release of Darfuri political prisoners; establishment of a fund to facilitate IDP return and promote tribal reconciliation; a Darfur visit by members to meet

⁸⁴ The delay in appointing Abyei's administration harmed the security situation and considerably slowed all projects for improving services and citizen income; see Crisis Group Africa Briefing N°47, *Sudan: Breaking the Abyei Deadlock*, 12 October 2007.

⁸⁵ Political observers in Sudan argued this NCP move was intended to gain SPLM support on the ICC.

⁸⁶ Many political parties and the Darfur rebel movements rejected this appointment, arguing that Bashir cannot be accused and judge at the same time, and demanded an independent lead the initiative. The NCP replied the outcome of the initiative would be the subject of negotiation between the government and the rebel groups, so the president should logically lead the process.

⁸⁷ In August 2008, the Sudan Armed Forces (SAF) attacked SLA-held areas north of Kutum, North Darfur. On 25 August, government forces killed at least 28 IDPs in Kalma camp. The political fallout, less than a month after announcement of the SPI, included numerous SPLM resignations from the government of South Darfur, rebel anger and opposition party criticism.

⁸⁸ The committees are solutions (chaired by Second Vice President Taha); justice, reconciliation and social peace (chaired by senior assistant to the president Minni Minawi, SLM/MM, with Musa Hilal as deputy); services and development (chaired by Pagan Amum); IDPs, refugees and voluntary return (chaired by Prof. Abdullah Abdullah); external dimensions (chaired by Abdul Nabi Ali Ahmed, National Umma Party); security (chaired by Maj. Gen. Osman Abdullah, former defence minister, 1985-1986); and information (chaired by Dr Jalal al-Dighier).

the IDPs and hear their demands; replacement of Nafie Ali Nafie by Vice President Taha as lead negotiator with the rebel movements; improved relations with Chad and security on the Chad border; and improvement of the police so they can better protect IDPs.⁸⁹

Throughout the deliberations, a majority supported appointment of a Darfuri as vice president and creation of a unified Darfur region, but the NCP leaders insisted that more discussion was needed on these ideas and blocked their inclusion in the recommendations. They, as well as the issue of power sharing at various governmental levels, were referred to the presidency and so shelved indefinitely.⁹⁰ While visiting Darfur on 27 October, Nafie Ali Nafie, presidential adviser and deputy NCP chairman for organisational affairs, called the one-region demand "a tool for the disintegration of Sudan" that also threatened the authority of state governors and their security personnel.⁹¹

Some sixteen political parties opposed to the SPI, including Turabi's PCP, the communist party of Ibrahim Nugud and the Baath (Sudan), boycotted the forum and accused the regime of embarking on "numerous initiatives of limited value designed to cloud the issues and to create a fake national support against the ICC, while offering only empty solutions that fail to address the root cause of the crises at hand".⁹² They called for a phased power transition, the immediate formation of a transitional government, including the Darfur rebels, and recognition of Darfur's right to a vice presidency and reunification, as well as of the South's CPA rights.⁹³

The SPI was supposed to be a mechanism by which the Sudanese could propose a Darfur settlement, but the NCP leadership, concerned with losing power in the North, sought to control the forum, thereby alienating

⁸⁹ The full deliberations and recommendations are collected in a document available at the foreign ministry and distributed to all diplomatic missions in Sudan.

⁹⁰ Nafie's statement was supported by Abdallah Masar, a presidential adviser and member of the Arab Gathering, who said the demand for one Darfur region would lead to serious violence, because many (mainly Arab) tribes want instead further sub-division into more states so they can rule themselves. Sudan TV, local newspapers, *Al-Ayyam*, *Al-Sahafa*, *Akhbar al-Youm*, Khartoum, October 2008.

⁹¹ Alaa Shahine, "Concessions needed to end Sudan's Darfur crisis", Reuters, 29 October 2008; www.alraynews.com/News.aspx?id=129743.

⁹² Crisis Group interviews, several members of opposition parties, Khartoum, September 2008.

⁹³ On 21 October 2008, one day after the SPI forum ended, national media reported that 43 opposition parties criticised its lack of inclusiveness and formed the "Sudan Coalition House" as an alternative.

opposition parties and Darfur's rebel factions and undermining the initiative. None of the key recommendations have been implemented, despite government promises. The NCP thus lost an opportunity to put the onus of a constructive response on the Darfur rebels and to regain some domestic and international credibility alike.

The SPLM's position is extremely delicate, as it is expected to partner with the NCP in the national unity government pursuant to the CPA at the same time as many Sudanese would like it to simultaneously lead the northern opposition. Many members do not believe that the Bashir arrest warrant should cause the CPA to break down, pointing out that the SPLM survived the death in 2005 of its leader, John Garang, and continued to participate in the CPA.⁹⁴ However, the NCP has directly warned the SPLM against trying to make political capital from the warrant. Of greatest concern has been the threat to reimpose the national state of emergency that was lifted in 2005, a few months after the CPA was signed. That could herald the end of that agreement and so of the SPLM's legally recognised route to an independent South Sudan.⁹⁵

The SPLM's initial response to the prosecutor's application for the arrest warrant was one of uncertainty. Locked in internal meetings in Juba during July 2008, Salva Kiir, the movement's leader, conspicuously delayed almost a week before saying that the accusations against President Bashir endangered the CPA and would affect Sudan's democratic transition. Simultaneously, the SPLM insisted it would maintain impartiality: not condemning the ICC's actions but also continuing cooperation with the NCP.⁹⁶ In January 2009, Salva Kiir again warned of possible difficulties if the case against Bashir went ahead, telling CPA fourth anniversary celebrations in Malakal that "the problem we have here in South Sudan is what would happen to the CPA if Bashir is charged by the court?" "What about the outstanding items in the peace agreement? Will they be implemented afterwards? Will we have a referendum in 2011? These are urgent questions that everyone should pay attention to".⁹⁷

In the end, the SPLM has provided cautious but critical support to the NCP. It proposed a three-step approach: engage with the ICC on the Haroun and Kushayb cases; pursue a dialogue with the Security Council on the benchmarks for a one-year (renewable) deferral of the case under Article 16 of the Rome Statute; and, finally, make it a priority to resolve the Darfur crisis prior to national elections.⁹⁸ In offering this proposal, the SPLM insisted on maintaining the CPA-endorsed principle of a bipartisan relationship with the NCP, thus refusing to join more radical proposals from the northern opposition parties.⁹⁹

The rebel groups have long argued that justice is an essential element for a settlement of the Darfur crisis. Of course, there is a strong degree of self-interest at play. They consider that the ICC has given them leverage that earlier Western sanctions and diplomatic pressure on Khartoum did not. Abdel Wahid al-Nur, the leader of a part of the Sudan Liberation Movement (SLM/AW), called the court proceedings the Darfur people's only hope.¹⁰⁰ With fewer forces on the ground than JEM, he continues to claim that he commands the support of large numbers of Fur IDPs in Darfur, though many local observers believe he has written himself out of politics by staying in Paris and refusing to engage in any meaningful dialogue.¹⁰¹ At the least, his popularity trails that of Khalil Ibrahim, whose military reputation rose after JEM's attack on Omdurman in May 2008. Maintaining his profile while the number of IDPs continues to grow, he is counting on the NCP to be much weakened by the court cases and eventually forced to make concessions on power sharing.¹⁰²

⁹⁴ Crisis Group interviews, senior SPLM official, Juba and Addis Ababa, September 2008 and February 2009.

⁹⁵ "Saving Sudan from Disaster: Memorandum from al-Sadiq al-Mahdi", at www.ssrc.org/blogs/darfur/2008/07/17/saving-sudan-from-disaster-memorandum-from-al-sadiq-al-mahdi/.

⁹⁶ Crisis Group interview, SPLM official, Khartoum December 2008.

⁹⁷ "Sudan: 'Anything is possible' if ICC indicts president", IRIN, 22 January 2009.

⁹⁸ Crisis Group interviews, senior SPLM officials, Juba, September 2008.

⁹⁹ The SPLM began to engage the opposition parties, after the elections were confirmed for February 2010 and disagreements with the NCP increased dramatically. On 24 May 2009, the SPLM and seventeen opposition parties started a series of meetings in Khartoum to crystallise their views on various issues. Stating that after July the interim constitutional framework formed under the CPA will expire, they called for a "genuine" National Transitional Government to resolve Darfur and oversee elections. "Opposition parties call for a coalition government and affirm that the current government's time has expired", Sudanese Online, 25 May 2009.

¹⁰⁰ www.sudantribune.com/spip.php?article27854.

¹⁰¹ His visa expired on 27 April 2009, and he is now an illegal resident in France, subject to arrest and expulsion. Paris would be unlikely to send him to Sudan, however. In mid-June, 70 of his commanders and staff were stranded in Chad, unable to return to Jebel Marra after they went to Switzerland for training.

¹⁰² Crisis Group interview, Ibrahim Derieg, ex-governor of Greater Darfur, chairman of the National Redemption Front

When the prosecutor brought his case against three rebel commanders in November 2008, all rebel groups expressed support and said they would cooperate with the ICC, including by producing members against whom arrest warrants were issued.¹⁰³ As noted above, the leader of the United Revolutionary Front (URF) and ex-JEM commander did turn himself over to the court in May 2009. The Army of the Democratic Popular Front, an Arab rebel group, even stated that ex-militia members of its movement were ready to testify against Bashir and explain how they had been ordered by the government to commit atrocities.¹⁰⁴

D. THE NCP AND ARTICLE 16

Warning of negative impacts on stability in Sudan and of a “tsunami reaction” that could destabilise the entire region, President Bashir sought to rally allies in Africa, Asia and the Arab world in what he described as defence of national sovereignty.¹⁰⁵ China, the Arab League, the AU and the Organisation of the Islamic Conference publicly rallied behind Khartoum and criticised the ICC for endangering ongoing peace initiatives and the security of peacekeepers. Yet, with the exception of China and Russia,¹⁰⁶ few questioned the idea of an ICC indictment as such. Khartoum’s staunchest allies, the AU and the Arab League, provided diplomatic support, questioned the timing and manner of the arrest warrant and sought deferral of the case. However, they did not deny that the ICC is an instrument of justice and called for legal mechanisms to end impunity in Sudan.

1. Mobilisation of regional support

The Arab League was the first to support calls for a Security Council resolution to defer the ICC proceed-

ings.¹⁰⁷ In an emergency session convened by Sudan on 19 July 2008, it declared its “non-acceptance of the unbalanced, not objective position of the prosecutor general of the International Criminal Court”.¹⁰⁸ This public rejection was coupled with an attempt at mediation. On a visit to Sudan the next month, Secretary General Amr Musa proposed the appointment of a special court with Arab League and AU monitors to try Darfur war crimes suspects.¹⁰⁹ Sudan’s justice minister, Abdel Basit Sabdarat, rejected the idea, while the ICC said the decision as to whether such a process met the requirements of the Rome Statute would rest with its own prosecutor and judges.¹¹⁰

During an emergency session on 28 July, the AU Peace and Security Council requested the UN Security Council to defer the ICC process.¹¹¹ On a visit to Sudan in August, the chairman of the AU Commission and former Gabon foreign minister, Jean Ping, emphasised that a deferral should be simultaneous with establishment of a mechanism to restore accountability in Darfur.¹¹² Similarly, on 4 August, an emergency session of the Organisation of the Islamic Conference called by Khartoum in Jeddah criticised the arrest warrant as “unwarranted and unacceptable” and emphasised concerns

(NRF), London, December 2008. www.sudantribune.com/spip.php?article25544.

¹⁰³ Abdel Wahid al-Nur of the SLM told the *Sudan Tribune* in June: “We are unconditionally committed to cooperating with the ICC from junior members to the most senior in the movement including my humble self. The cases investigated by the court are legal ones and not political. They should not be mixed”.

¹⁰⁴ www.alertnet.org/thenews/newsdesk/L22832812.htm.

¹⁰⁵ “Darfur’s human shield protects al-Bashir”, *Sudan Tribune*, 1 October 2008.

¹⁰⁶ “Russia, China not in favour of action against Bashir”, *Indian Express*, 16 July 2008. “Kremlin skeptical about al-Bashir arrest warrant”, *Earth Times*, 4 March 2009. “World divided on ICC warrant for Sudan’s President”, *Deutsche Welle*, 5 March 2009.

¹⁰⁷ Despite frequent criticism of its support for Khartoum, the Arab League has sought to use that support to leverage concessions from the NCP. Following the 1995 assassination attempt against President Mubarak in Addis Ababa, Egypt effectively used its ties with the U.S. and Arab world to make Khartoum recognise that “the solution of the sanctions problem at the UN Security Council will begin in Cairo”. *Al-Wasat*, 8 July 1996. The Arab League is attempting a somewhat similar strategy.

¹⁰⁸ Arab League communiqué, 8 August 2008, www.arableagueonline.org/las/arabic/details_ar.jsp?art_id=2869&level_id=177.

¹⁰⁹ The Arab League’s special envoy in Khartoum, Ambassador Salah Halima, as well as the AU, advanced this option after the prosecutor’s application for an arrest warrant. To encourage Sudan, the Arab League resolution called the Sudanese judiciary capable of prosecuting Darfur war crimes suspects. www.sudantribune.com/spip.php?article27937.

¹¹⁰ Crisis Group interview, office of the prosecutor, July 2009.

¹¹¹ In an interview, Ping emphasised “there is no problem of principle”, only of timing and procedure. He said the AU’s stance was due to “what could happen to our troops”. “A Ping for peace”, *Mail and Guardian* (South Africa), 12 August 2008.

¹¹² Ping has repeatedly made clear his opposition to the ICC’s involvement in Sudan; see, for example: “AU backs Sudan president in ICC row; Khartoum rejects hybrid court”, *Sudan Tribune*, 3 February 2009. Colum Lynch, “International Court under unusual fire”, *The Washington Post*, 30 June 2009.

about its impact on peace negotiations.¹¹³ Vice President Taha gained support against the court's action from the African, Caribbean and Pacific Group (ACP) and, during the 2008 UN General Assembly, from the Group of 77 non-aligned countries.

In September 2008, Sudan submitted a report to the AU Peace and Security Council detailing its claimed progress in a number of areas, including implementation of the CPA and DPA, deployment of UNAMID in Darfur, the humanitarian and human rights situation and impunity in Darfur, as well as relations with Chad. The Peace and Security Council forwarded the report with a supportive letter from AU Chairman Ping to the members of the UN Security Council, arguing that it showed commitment to continued cooperation on peace and security.¹¹⁴

That letter also appealed to the Security Council to invoke Article 16 to suspend the ICC proceedings against President Bashir. The failure of the request to gain the necessary support in New York has upset the AU, but Khartoum's most important allies on the Security Council (and fellow non-parties to the Rome Statute), China and Russia, have been restrained, supporting deferral of prosecution while committing to work with the other permanent members (the P5) to find a solution.¹¹⁵

At the February 2009 AU summit in Addis Ababa, both the Executive Council and individual African leaders reiterated their support for a one-year deferral of the Bashir case, while also asking Khartoum to find a solution to the Darfur crisis and deal with impunity. The Executive Council requested former President Thabo Mbeki of South Africa to head an AU High-Level Panel on Darfur (AUPD)¹¹⁶ to develop recommenda-

tions on reconciliation and ending impunity.¹¹⁷ It visited Darfur in March and May and returned to Sudan in June to meet all stakeholders, both in Darfur again and in Khartoum. Mbeki chaired a discussion in the capital with all political parties. He has also met with the ICC prosecutor and sought submissions from a range of NGOs and other interested parties.

2. Negotiations with the P5

Despite his continued accusations that Western countries are trying to topple his regime, President Bashir in October 2008 conducted a low-key dialogue with the UK and France, dispatching senior envoys to London, Paris and Washington in a seemingly last ditch attempt to identify the concessions required for an Article 16 deferral of the case against him and persuade them to support that action.¹¹⁸ After their return, Bashir was visited by the Chinese envoy to Sudan, Liu Guijin, who had previously also toured the U.S., UK and France.¹¹⁹ Cognizant of the importance of preserving the credibility of a nascent international justice institution, France and the UK are strong Security Council allies of the ICC, at the same time as they have also been most active in outlining the conditions for a deferral.

Although the U.S. recognises the importance of the ICC as a lever over Khartoum and has been willing to use its threat of veto to retain leverage, it is considered unlikely to take a leadership role on the deferral question, since it is not a party to the Rome Statute. The NCP calculated that Washington would acquiesce if its European partners concluded enough progress was being made on implementation of existing commitments, particularly regarding the CPA. It believed France would take the lead and bring the U.S. along. However, outgoing U.S. Special Envoy Williamson said such progress had not been made, and the U.S.

¹¹³“Islamic countries ask UN to defer ICC move against Sudan President”, *Sudan Tribune*, 4 August 2008.

¹¹⁴Sudan's report was submitted pursuant to the AU Peace and Security Council communiqué of 21 July 2008. Ping forwarded it to the UN Security Council on 31 July 2008. His letter requested application of Article 16 of the Rome Statute with respect to the Bashir case, as urged by the AU, the Arab League, the Organisation of Islamic Conference, the Non-Aligned Movement and others, so that the AU could continue to build on the progress made by Sudan to obtain lasting peace, justice and security in Darfur and Sudan as a whole.

¹¹⁵In 2005, China abstained on the resolution authorising the ICC to investigate the Darfur conflict; Russia voted in favour.

¹¹⁶The panel's mandate is to recommend to the AU by 18-19 July 2009 what should be done to accelerate peace, reconciliation and justice in Darfur. Supported by the Darfur-Darfur Dialogue and Consultation (DDDC) in Khartoum and Darfur, it toured Darfur for four days, meeting repre-

sentatives of stakeholders and promised to discuss its findings with the various political forces.

¹¹⁷The panel is composed of former President of South Africa Thabo Mbeki; former President of Nigeria Alhaji Abdulsalami Abubakar; former President of Burundi Pierre Buyoya; Alhaji Kabir Abdulfatai, former Nigerian state house counsel; Professor Jean Emmanuel Pondi of the Cameroon International Institute; Justice Florence Ndepele Mwachande Mumba, Zambia supreme court; Justice Maitre Aref Mohamed Aref, Djibouti; Professor Salaheddine Mohmoud Fawzy Amer, Ethiopian National Council for Human Rights; and Professor Tiyanjana Maluwa, a university dean in the U.S.

¹¹⁸The emissaries were senior NCP figures Ghazi Salahudin, Ali Osman Taha and Nafie Ali Nafie.

¹¹⁹Alaa Shahine, “China says working with West to avoid Darfur strife”, Reuters, 26 October 2008.

would veto a deferral resolution.¹²⁰ This stance has been maintained by the Obama administration.

Both France and the UK recognise a deferral as possible in principle but say they will not sacrifice the ICC case on “the altar of Sudanese politics”.¹²¹ They are unwilling to accept a suspension of the court proceedings without a clear change of policy from Khartoum, in particular the establishment of credible legal mechanisms capable of ending impunity in Darfur. Both governments consider this requires at a minimum that Sudan “engage” with the ICC, though they have deliberately left open the nature and degree of engagement they seek. While they appear not to insist that Haroun or Kushayb be handed over in The Hague in compliance with the arrest warrants,¹²² the UK in particular has emphasised its reluctance to link deferral to a peace initiative that does not include a justice component.¹²³

Concerned as well with the situation in Chad and Sudan’s role in that country’s politics, France has discussed conditions for a deferral with Khartoum.¹²⁴ In September meetings there, it laid out five benchmarks: an end to the proxy conflict with Chad; full deployment of UNAMID; return to political negotiations with the Darfur rebel groups; Haroun’s removal from government; and Sudanese engagement with the ICC, directly or indirectly.¹²⁵

¹²⁰ The State Department spokesperson, Robert Wood, said after the closed-door meeting between the joint Arab League/AU delegation and Security Council members that the U.S. wants those who committed atrocities and crimes held accountable. “Arab-African delegation fails to convince UNSC on Darfur ICC deferral”, *Sudan Tribune*, 12 February 2009.

¹²¹ Crisis Group interview, diplomat, Khartoum, 15 August 2008.

¹²² Crisis Group meetings, senior French and UK officials, 2008 and 2009.

¹²³ “International court likely to seek arrest of Sudan’s president for war crimes in Darfur”, *The Guardian*, 11 July 2008 (online).

¹²⁴ Crisis Group interview, French government official, Paris, November 2008.

¹²⁵ President Nicolas Sarkozy declared that “France wants the Sudanese authorities to radically change their policies. It is now up to Mr Al-Bashir to determine what exactly he wants.... We want to deploy the international force in Darfur to stop the scandalous situation in which tens of thousands are dying in this part of Africa. We want peace in Sudan as well as peace and the territorial integrity of Chad ... people in Darfur have the right to live, and we cannot accept the situation as it is currently. ... if Sudanese authorities do change, totally change their policies then France would not be opposed to using Article 16”. “France softens stance on ICC indictment of Sudan president”, *Sudan Tribune*, 24 September 2008. In December 2008, Sarkozy reit-

On 4 September 2008 in a summit with France, Turkey and Syria, Qatar announced its willingness to support the peace process in Darfur. Paris declared its unconditional support for the initiative, and two weeks later Qatari representatives went to Khartoum to discuss the conditions for a Security Council deferral.¹²⁶ In early December 2008, the Chad-supported JEM rebel group led by Khalil Ibrahim agreed to cooperate with the initiative. Abdel Wahid of SLM/AW maintained a boycott of the peace talks, insisting among other conditions that Khartoum first disarm the Janjaweed, end impunity and compensate IDPs.

In February 2009, in the presence of the UN/AU mediator, Djibrill Bassolé, the Sudanese government and JEM held a series of meetings in Doha, signed an “Agreement of Good Will and Confidence Building” and agreed to discuss the details of a framework agreement in talks to last not longer than three months. That same month, JEM turned 38 government prisoners over to the International Committee of the Red Cross (ICRC), and President Bashir released 24 JEM prisoners by decree.¹²⁷

Three months after the French submitted their benchmarks to it, the government claimed to have done the following: a) kept its promise not to allow the Chadian rebel groups to attack N’Djamena through the end of 2008; b) started the SPI forum; c) declared a unilateral ceasefire in Darfur; d) accepted the Qatari initiative in principle; e) ended obstruction of UNAMID deployment,¹²⁸ and f) signed an early extension of the humanitarian moratorium, though NGOs were still being seriously harassed in Darfur. While there has been progress on all these issues, even if not as much as asserted, the government continued to refuse to engage with the ICC and did not suspend Haroun. There were also unconfirmed rumours that Kushayb was free, despite government claims he was in detention.

Consequently, France disappointed Khartoum’s hopes that it would take the lead in moving a deferral through

erated his position on the margins of the UN General Assembly.

¹²⁶ Crisis Group interview, foreign ministry, Paris, December 2008.

¹²⁷ “Sudan to release 24 Darfur rebels”, *Sudan Tribune*, 21 February 2009.

¹²⁸ Poor logistics are now said to be the main impediment to UNAMID operations. Force Commander General Martin Luther Agwai cited “the critical operational need for reconnaissance and troop transport”, explaining that 64 per cent of his forces are deployed but lack sufficient equipment. “[O]ut of twelve battalions on the ground, only one has received 90 per cent of its equipment”. “UNAMID leaders meet U.S. diplomat in Khartoum”, *Sudan Tribune*, 16 March 2009.

the Security Council.¹²⁹ In December 2008, President Sarkozy reiterated his government's position that Sudan should first change its policies, particularly by dismantling the system of impunity in Darfur. In January, the spokesperson of the Sudanese foreign ministry, Ali al-Sadig, replied to Sarkozy's demand that Turabi be released from arrest by stating that France should stop setting conditions and making statements, and start pressuring Abdel Wahid to engage in the peace process. If Paris could not even deliver that, it should not get involved in Sudan's affairs, he added.¹³⁰

Other permanent members of the Security Council kept a relatively low profile. After the prosecutor applied for the arrest warrant in July 2008, China asked Bashir to seek a settlement to the Darfur problem but did not appear disturbed by the case.¹³¹ Indeed, such a prosecution would probably not have a dramatic impact on its interests. According to a Sudanese scholar, those interests are looked after by the finance minister (the ex-energy minister) in the North,¹³² and in the South they are beyond the NCP's control:

The Chinese should not be worried for their investment; Awad al-Jaz is the caretaker and not al-Bashir, and many [in the elite] benefit from the business of oil. Today if we [the NCP] decided to remove Bashir, their interests would remain intact in Sudan, North and South; that is what they want, that is what we want, and that is what the SPLM wants. Their support to us is just mutual business, but not a principled one; it can change.¹³³

China's special envoy, Liu Guijin, reiterated in January 2009 that his government does not intend to introduce a deferral resolution, though it would support one. The ambassador to Sudan, Li Chengwen, said China and Russia have similar views on the Sudan ICC issue, but he also emphasised the need for more extensive coordination among the P5 to develop a common response.¹³⁴

¹²⁹ Crisis Group interview, presidential adviser and foreign ministry official, Paris, December 2008.

¹³⁰ Crisis Group interview, French diplomat, Paris, March 2009.

¹³¹ Crisis Group interview, representative, China's permanent mission to the UN, New York, April 2009.

¹³² Unconfirmed information suggests that the finance minister, Awad al-Jaz, also jointly commands with Abdel Rahim Hussein, the defence minister, the party militias and selected army and associated troops at oil installations. Crisis Group interview, SAF member, December 2008.

¹³³ Crisis Group interview, scholar and NCP member, Khartoum, January 2009.

¹³⁴ "China will respond 'appropriately' to ICC decision on Bashir warrant: official", *Sudan Tribune*, 18 January 2009.

IV. AFTER BASHIR'S INDICTMENT

Losing hope for suspending ICC Pre-Trial Chamber proceedings, the NCP political bureau reviewed its strategy in February. While rewarding supportive domestic constituencies by commissioning and expediting important development projects in the North, it showed defiance internationally. Simultaneously, Bashir consolidated his grip on power, particularly in the Khartoum security sector, to eliminate any elements that might threaten his personal security.

A. THE NCP'S IMMEDIATE REACTION

Apparently not wanting to burn bridges with the new Obama administration, the NCP opted for carefully measured confrontation with the ICC when the court's Pre-Trial Chamber issued the arrest warrant against Bashir on 4 March 2009.¹³⁵ In a show of defiance, however, it orchestrated public support for the president in Darfur and Khartoum, and without consulting the SPLM, it expelled thirteen international aid and service NGOs and dissolved three local NGOs on the grounds that they had been cooperating with the ICC.¹³⁶

1. The INGO expulsion

While a strong reaction was expected, the expulsion of many humanitarian organisations took international actors by surprise. According to the UN, these were covering in Darfur alone almost half the food survival needs of 1.1 million people, health care for 1.5 million and access to safe drinking water for more than a million.¹³⁷ They also were helping 240,000 in eastern Sudan (Kassala and Red Sea states) and in the transitional areas of Abyei, Southern Kordofan and Blue Nile. By 9 March most of their personnel had left the

¹³⁵ The Pre-Trial Chamber rejected the genocide charges, however. Two judges, Akua Kuenyehia (Ghana) and Sylvia Steiner (Brazil), voted to oppose that part of the prosecutor's application; one judge, Anita Usacka (Latvia), voted to approve it.

¹³⁶ Action Contre la Faim (ACF), Care International, CHF International, International Rescue Committee (IRC), Mercy Corps, MSF Holland and France, Norwegian Refugee Council, Oxfam GB, Solidarite, PATCO and Save the Children Fund UK and U.S. "UN to see if Sudan's aid group ban is war crime". Agence France-Presse, 6 March 2009.

¹³⁷ "UNAMID peacekeepers shot, as concern grows over humanitarian aid", UN News Centre, 10 March 2009.

country, and the government had confiscated their offices and equipment, including personal electronics.¹³⁸

This action generated strong criticism from the NCP's allies, Sudan's neighbours, the UN and the wider international community, thus weakening the African and Arab front that the NCP had temporarily built against the ICC. Ignoring calls to reverse the decision, President Bashir announced on 16 March that all international NGOs would have to phase out their operations in the North within one year and threatened to expel diplomats if "they over-stepped the line of their duty". The SPLM allowed these organisations to continue to operate in the South and, when possible, also in the transitional areas.

Soon after a joint UN-Sudanese government assessment was conducted in the three Darfur states on 11-19 March, the UN humanitarian coordinator for Sudan confirmed that about 1.1 million people would receive food in March and April in a one-time, ad hoc distribution by local committees. The government said the gap left by the expulsions would be filled by 200 Sudanese organisations, including the Red Crescent Society, but the UN and international aid agencies expressed doubt they had the capacity to meet the long-term food, health, shelter and water sanitation needs the joint assessment had identified for the 4.7 million conflict-affected Darfuris assisted by INGOs.¹³⁹

The expulsions and anti-INGO rhetoric, as well as increased control by intelligence and security services of the humanitarian assistance coordination (HAC) department mandated to deal with international agencies and aid, created an even more hostile environment for foreign relief operations. On 11 March, unknown men in Saraf Umra¹⁴⁰ kidnapped three expatriates from Médecins Sans Frontières (MSF) and demanded a ransom and cancellation of the Bashir arrest warrant.¹⁴¹ This occurred in an area controlled by government militias, suggesting that all INGOs in Darfur could be targeted.

Whatever the facts of that kidnapping, the international relief effort and its beneficiaries had been taken hostage by the NCP security apparatus, to be used for negotiating leverage with its perceived foreign enemies.¹⁴² The targets were probably chosen in part for the impact on Western public opinion and in part to provide an entry point for talks with the Obama administration. The NCP also wanted to regain some control over the IDP camps well in advance of any elections and to do so without awkward witnesses.

According to Darfuris from Nyala and Geneina, government media explained the ICC actions as part of a Western and Zionist agenda to destroy Sudan, because of its natural resources and Islamic faith.¹⁴³ Many NCP sympathisers, who were told that the SLM/AW had opened an office in Israel and that some Darfuris sought refuge in that country, were persuaded to view IDPs as supporters of this agenda. Darfuris told Crisis Group: "It is the IDPs who brought the *khawaja* (foreigners, westerners) and the ICC".¹⁴⁴ The risk of assaults on IDPs was thus heightened, increasing the need for protection from UNAMID but also putting the peacekeepers at risk of retaliation. Eight unidentified armed men killed a peacekeeper in an ambush that targeted a UNAMID patrol returning to its base in Nyala, South Darfur, and in a separate attack, four peacekeepers were injured (one seriously), while returning to their base in Geneina, the capital of West Darfur state.¹⁴⁵

Since early March, such incidents involving peacekeepers and relief workers have increased dramatically. A statement vowing to conduct 250 attacks against nations supporting the ICC by a "jihadist" Darfur militia believed to be government-sponsored was published in an NCP-affiliated newspaper on 10 March. Among the signatories was Musa Hilal, the notorious militia leader and ministerial adviser. Before midnight on 24 March, four armed men broke into the Abu Zor camp, close to Geneina – home to about 6,000 people, mostly Massalit IDPs – and set a fire that destroyed nearly a quarter of the camp, killed at least two people and injured four peacekeepers. JEM blamed state-backed militias. Four Sudanese staff working in West Darfur for the Fellowship for African Relief (FAR) and Tearfund were ambushed by armed men on camels on 21 March. One was beaten, another robbed. Two days later,

¹³⁸ Crisis Group interview, expelled expatriate, Kenya, April 2009.

¹³⁹ "Sudan: NGO expulsion to hit Darfur's displaced", IRIN, 9 March 2009.

¹⁴⁰ Saraf Umra in West Darfur state is part of a sector commanded by Musa Hilal, a notorious Janjaweed and tribal leader and presidential adviser.

¹⁴¹ "Foreign aid staff freed in Darfur", BBC, 30 April 2009. According to one of the kidnapers, the two abducted aid workers, Claire Dubois (France) and Stephanie Jodoin (Canada), were released because their health deteriorated during the three weeks of their captivity.

¹⁴² Crisis Group interview, brigadier general, SAF, Khartoum, March 2009.

¹⁴³ Crisis Group interviews, citizens from Darfur, Nyala, Geneina, December 2008.

¹⁴⁴ Crisis Group interview, Nyala and Khartoum, January 2009.

¹⁴⁵ "UNAMID peacekeepers shot", op. cit.

another Sudanese FAR staffer was shot dead in Kango Haraza, West Darfur.¹⁴⁶

2. Anti-ICC mobilisation and defiance

The NCP stepped up its anti-Western campaign, under a “struggle against neo-colonialism” banner, while simultaneously attempting to intimidate and embarrass the pro-ICC national opposition by labelling them collaborators and traitors. On 16 March, Bashir addressed a rally organised by the army, police and intelligence services to offer him *baiat al-mawt* (an oath of allegiance to death). The government security apparatus adopted a tough approach to any display of public support for the ICC arrest warrant. In a crackdown following such a demonstration in Kordofan, one student from the University of Deling was reportedly killed and several injured.¹⁴⁷

As noted above, the NCP warned the SPLM that any sympathy it showed for the court would be at the expense of CPA implementation, but at the same time, it accelerated the work of the high-level joint committee to resolve outstanding CPA issues. The draft press and publication law was discussed by the cabinet on 19 March, but other bills stalled in the National Assembly due to disagreements between the two major parties. Both government and SPLA troops finally pulled out of Abyei and were replaced by Joint Integrated Units (JIUs) of the two forces.

The NCP resumed its diplomatic campaign for total rejection of the ICC with Arab, African and Islamic states, as well as with China and Russia. President Bashir travelled to Eritrea, Egypt and Libya within three weeks of the issuance of the arrest warrant to show that it had not diminished his standing in the region.¹⁴⁸ He attended the Arab League Summit in Qatar on 29 March, stopped in Mecca for a short pilgrimage and flew to Ethiopia for bilateral talks on 21 April.

Khartoum had expected that the June 2009 ministerial meeting in Addis Ababa would produce the withdrawal of a number of AU member states from the Rome Statute. That would have been a severe blow to the ICC’s standing, since the Africans are the most numerous group of regional states party to that agreement. However, the session limited its reaction to a renewal of the AU’s request to the Security Council to suspend the Bashir arrest warrant. The AU summit in Libya the following month went a step farther, taking a decision to oppose the execution of the arrest warrant on the continent, although this was resisted by several parties to the Rome Statute, including amongst others Uganda, Botswana and Chad.¹⁴⁹

In the meantime, relations continued to deteriorate with the UK and in particular France. On 21 April, after an initial visit by Salah Gosh, director of the National Intelligence and Security Services (NISS), Nafie Ali Nafie and Mustafa Ismail met unsuccessfully with the French and the British governments in Paris, where they defended the expulsion of the aid agencies.¹⁵⁰

A new attempt at improving relations with Chad led to signature on 3 May in Doha of the fourth in a series of “good neighbours” agreements. Though brokered by Libya and Qatar, and supported by Paris, it did not last 24 hours. On 4 May, Chadian rebels of the Union des Forces de Resistance (UFR) coalition, armed and supported by the Sudanese military, crossed the border from Sudan. After losing over half their force in a few days of combat, they retreated back into Sudan, where on 14 May the Chadian air force bombed them, 60 kilometres south of Geneina, marking a new bilateral escalation and a new Franco-Libyan failure to contain the war.¹⁵¹

The growing unease within the NCP over Darfur surfaced in the local media on 15 May. The justice minister, Abdel Basit Sabdarat, and the government-appointed special prosecutor for Darfur crimes announced that Haroun and Kushayb were still under investigation by the authorities. Haroun, in a joint press conference with the governor of North Darfur, Osman Kiber, replied that the minister was “unaware of the policy on this issue”, while adding that “if there is a change of policy ... regarding himself, he will not hide behind the

¹⁴⁶ Crisis Group telephone interview, government official, Darfur, April 2009.

¹⁴⁷ On 11 March 2008, students from Deling University and members of the United Democratic Front (UDF), a student organisation supporting the Sudan Liberation Movement (SLM) led by Abdel Wahid al-Nur, organised a meeting inside the university to explain their support for the arrest warrant against President Bashir. The meeting was interrupted by NCP militias – the Popular Defence Force and Popular Police – that shot at the podium. Three students were seriously injured. www.sudantribune.com/spip.php?article30524. One subsequently died from his wounds. Crisis Group telephone interview, government official, Kordofan, April 2009.

¹⁴⁸ None of these countries are parties to the ICC; they thus have no obligation under the Rome Statute to arrest Bashir.

¹⁴⁹ “Uganda says committed to ICC as Sudan’s Bashir plans a visit”, *Sudan Tribune*, 11 July 2009.

¹⁵⁰ Crisis Group interview, French diplomat, Paris, April 2009.

¹⁵¹ “Chad admits attacks inside Sudan”, BBC, 18 May 2009.

immunity provided to him by his post, and he will undergo any investigation".¹⁵²

Signalling the growing mistrust between the president's camp and members of the NCP's second- and third-tier leadership, Bashir issued a decree on 7 May replacing a number of ministers and state governors, including Haroun, who, as described above, was moved to South Kordofan as governor.¹⁵³ Reportedly fearing a possible coup, Bashir fired the director general of police, replacing him with General Hashim Osman, for the previous seven years manager of the presidential office. He also changed all assistant directors general – the heads of various police departments – thus strengthening his grip on the security services.

Despite their show of public support for Bashir during the Doha summit, Arab leaders stopped short of any practical measures. The INGO expulsion was perceived as a political mistake that had backfired against Khartoum. Some, seeing the dangers of an endless confrontation, quietly urged the NCP to change course. Senior Egyptian envoys in particular lobbied for reversal of the decision on INGOs and for the convening of an international conference to revamp the peace process and discuss all outstanding issues, including the arrest warrant. When both requests were rejected,¹⁵⁴ the defiance began to irritate African members of the UN, as well as some members of the Arab League, who planted word in the Arab media of their reluctance

to host Bashir at future international events.¹⁵⁵ This criticism forced the NCP to try to show an appearance of good faith with the Doha peace initiative.

With the support of Scott Gration, the new U.S. special envoy, the Doha talks between the government and JEM resumed on 28 April but were halted without progress after a few days. JEM insisted on a review of implementation of the January agreement – mainly the POW releases but also the return of the aid organisations – before it would discuss a cessation of hostilities. The NCP sought a cessation of hostilities as a first step and said discussion of other issues, including the POWs, would depend on its progress. At the same time, it gave death sentences to some of the POWs. On 17 May, JEM fighters based in Chad attacked Sudanese army positions in Karnoi and Umm Baru, northwest of Kutum, North Darfur, and held the towns for a few days before they were driven out. In the process, they captured more than 30 soldiers, ammunition and food.¹⁵⁶

3. First dealings with the Obama administration

The NCP viewed the entry of the Obama administration into the Sudan equation as another opportunity to undermine the ICC.¹⁵⁷ It was initially concerned that during the Clinton administration (1993-2001), the Democratic Party had been strongly critical of its record regarding terrorism and the civil war. But the NCP was relieved that individuals known for their sympathy with the SPLM were not given influential positions for Sudan policy. It welcomed Obama's professed interest in engaging openly with even hostile leaders of the Muslim world and perceived the appointment of Gration, a former air force general with no personal history in Sudan, as a constructive sign.

Engagement with Washington is potentially beneficial to the NCP, not least because the U.S. signed but did not ratify the Rome Statute, so is not legally bound to

¹⁵² Sudanese daily newspapers, *Al-Ayyam*, *Akhbar al-Youm*, *Al-Sahafa*, Khartoum, March 2009. On 22 March 2009, Haroun told *Asharq al-Awsat* that he "was leading his life in a normal way" and felt confident his head of state, Bashir, would keep his word not to extradite him. Haroun also accused both the Special Prosecutor for Darfur, Nimr Ibrahim Muhammad, and Justice Minister Abdel Basit Sabdarat of taking positions "inconsistent with the state position [of] refusing to deal with the ICC".

¹⁵³ The removal of Haroun from his Darfur humanitarian portfolio and Khartoum and his shift to Southern Kordofan may be intended in part to portray NCP sensitivity to international concerns. His background and prior involvement in Southern Kordofan make him knowledgeable about its problems. His appointment as governor and that of the SPLM's Abdel Aziz al-Hilu as his deputy may produce new synergy for CPA implementation there. Most observers view the presence of two heavyweights as positive for the state. The appointments come at a critical time, in advance of the imminent decision of the Permanent Court of Arbitration on Abyei, which will have long-term implications for the wider region. Also, JEM infiltration and recruitment has become more frequent.

¹⁵⁴ "Sudan brushes aside Egyptian proposal for international conference", *Sudan Tribune*, 13 March 2009.

¹⁵⁵ "Egyptian sources: Sudan's rejection of holding an 'international conference for resolution' could isolate it within Arab countries. Fears of repetition of the Saddam experience in Sudan. Bashir's movements within Arab capitals may cause them embarrassment", *Asharq al-Awsat*, 9 March 2009.

¹⁵⁶ By 21 May large numbers of army reinforcements had assembled in El-Fasher and moved south of Karnoi, while JEM regrouped in a valley on the outskirts. The army retook the towns with the aid of extensive bombardments. Crisis Group telephone interview, member of government, El-Fasher, North Darfur, May 2009.

¹⁵⁷ On his first visit to Sudan, Gration met with government officials and AU-UN Joint Chief Mediator Djibrill Bassolé. "U.S. envoy says open to stronger relationship with Sudan", *Sudan Tribune*, 2 April 2009.

enforce ICC decisions. Although the U.S. has publicly threatened to veto a Security Council resolution on deferral of the Bashir case, it has never pressed strongly in public for execution of the arrest warrant.¹⁵⁸ Khartoum also believes that no final solution on either the ICC or the wider problem of its relations with the West can be achieved without the involvement of Washington, whose key cards include the ability to maintain or lift economic sanctions and keep Sudan on or remove it from its terrorism list, as well as the threat of military action.¹⁵⁹

The U.S. returned to the centre of talks after France and the UK failed to achieve a breakthrough with the NCP during the period of government transition in Washington. Graton has initiated something of a “diplomatic blitz”,¹⁶⁰ beginning with an effort to establish common positions with countries that have a direct economic stake in Sudan’s stability, such as China and Egypt.¹⁶¹

The first major attempt by the Americans was to obtain a reversal, or at least an accommodation, on the INGO expulsions. This effort was supported by a 15 April 2009 visit of Senator John Kerry, the former presidential candidate and current chair of the Senate Foreign Relations Committee, to Sudan seeking progress on the humanitarian crisis. The U.S. mediation led to an agreement on deployment of three new INGOs, thus narrowing the humanitarian gap at least temporarily, particularly with respect to medical services and clean water.¹⁶²

In his 22 April State Department briefing to NGOs, Graton outlined his priorities: 1) resumed humanitarian assistance to Darfur; 2) a sustainable JEM-government ceasefire and support for the Doha process; and 3) implementation of the CPA provisions for a peaceful referendum on the South’s future in 2011.¹⁶³ Neither justice for crimes in Darfur nor support for the ICC arrest warrant featured on this list, giving the NCP some hope that it might be able to remove judicial aspects of the peace process and the Bashir case from the international agenda.¹⁶⁴

Graton’s forward-leaning approach on engagement appears driven partly by his apparent view that sanctions have not and will not work, at least to the point of achieving their objectives. He reportedly believes that an effort to develop a new bilateral relationship would lose nothing, and if it failed to produce serious movement from Khartoum, the administration would be in a stronger position to gain support for additional sanctions and other pressure, perhaps also from Africa. His approach also seems driven by concern that the NCP is presently unwilling to fulfil its CPA commitments to permit a self-determination referendum and accept its result. If this view prevails in the administration – by no means a given – it implies that in order to improve the prospects for CPA implementation, it will be necessary to make some concessions with respect to Khartoum’s demands on Bashir’s indictment and, more broadly, on Darfur.¹⁶⁵

B. PROSPECTS FOR DARFUR PEACE AND THE CPA

The Bashir arrest warrant has raised the stakes for the entire Sudan peace process. The NCP feels under greater pressure but remembers it survived previous crises by stalling, diverting attention and taking advantage of the divisions among its international opponents. While it could continue to prop up Bashir and defy international opinion, however, it might yet accept an exit strategy for its leader, particularly if his departure from office becomes the price to pay to maintain its own power to and beyond elections. If it comes to that, then the prosecution may well force the departure of a head of state, but Bashir is unlikely in the foreseeable future ever to be tried in The Hague or, unless the system of impunity is dismantled, face a court in his own

¹⁵⁸ However, Graton and the new U.S. Assistant Secretary for State for African Affairs, Johnnie Carson, have both said that Bashir should do the “right thing” and face the ICC charges. www.sudantribune.com/spip.php?article31686 and www.sudantribune.com/spip.php?article31768.

¹⁵⁹ See a shortlist of possible punitive U.S. actions advocated by former Special Envoy Williamson in Nicholas D. Kristof, “A new Chance for Darfur”, *The New York Times*, 28 December 2008, including: jamming electronic communications in Khartoum, blocking oil exports from Port Sudan and destroying the air force. During Bashir’s recent visit to Eritrea, he discussed with President Afeworki a proposal to open the border for visa-free travel and free flow of goods. Sudan believes that if its confrontation with the international community over the ICC and humanitarian issues escalates, new sanctions including blockade of its Red Sea ports may be imposed, in which case use of Eritrea’s Red Sea ports would become a necessity.

¹⁶⁰ “U.S. envoy to begin diplomacy blitz”, *Sudan Tribune*, 23 May 2009.

¹⁶¹ “Current Status of the Comprehensive Peace Agreement and His Recent Travels”, Scott Graton, press release, Washington, 17 June 2009.

¹⁶² *Ibid.*

¹⁶³ Crisis Group staff attended this briefing on 22 April 2009.

¹⁶⁴ Graton also did not appear to raise justice and the arrest warrant as key issues at meetings on the peace process in May in Doha and June in Washington.

¹⁶⁵ Crisis Group interviews, senior Obama administration officials, Washington, June 2009.

country. Ultimately, the NCP will probably do whatever it takes to survive, even if it means taking Sudan toward disintegration.

1. Impact on the Darfur peace process

Many Darfur IDPs and refugees regarded the Bashir arrest warrant as a signal their hardships at the hands of NCP-sponsored militias were being recognised and acted upon. The Darfur rebel groups saw it as further isolating and delegitimising the NCP and a sign of support for the military option and regime change.¹⁶⁶ Their negotiating position may harden in consequence.¹⁶⁷ They continue rearming and mobilising, notably in Um Garas in Chad, and preparing for a possible resurgence of violence similar to what happened in the first years of the Darfur crisis.¹⁶⁸

There is an increased risk that these groups will seek a military alliance with the northern opposition or groups such as those in Kordofan that are disaffected because of the lack of progress on CPA implementation and governance reforms, as well as the SPLM's shift of focus from national politics to southern self-determination. If the trends continue, many more youths in Darfur and Kordofan might join the rebels, who may try to carry the struggle to Khartoum and Sudan's far north. A new joint resistance against the NCP would escalate the conflict,¹⁶⁹ spreading the fighting to new areas and causing the NCP to further ratchet up its policies of militia rearmament and mobilisation against IDPs in the camps and any perceived supporters of insurgency.

Darfur tribal groups are also further dividing along ethnic lines. Many residents perceive the Zaghawa-dominated JEM as having an agenda to rule Darfur and dominate the other tribes, a perception reinforced by government propaganda. Current divisions in Darfur are thus likely to deepen, with potentially more tribal violence further fragmenting the region's social fabric. Instead of extending their campaign to Khartoum, rebel factions would then be tempted to win their own Darfur civil war first, actively encouraged by the NCP's

¹⁶⁶ Khalil of JEM said the ICC arrest warrant delegitimised Bashir as president. If he did not cooperate with the ICC, JEM would intensify the war. "Darfur rebels vow full ICC cooperation ahead of ruling on Bashir case", *Sudan Tribune*, 2 March 2009.

¹⁶⁷ Crisis Group interviews, NCP and SPLM officials, European diplomat, Khartoum and Paris, June 2009.

¹⁶⁸ Crisis Group interviews, senior member of JEM, Darfur member of the National Assembly, Geneina, Khartoum, December 2008.

¹⁶⁹ Crisis Group interview, NCP member of South Darfur legislature, Nyala, March 2009.

divide-and-rule tactics and at a heavy new human cost. The Chad border area would become even more volatile, and more Darfuris would become refugees in that country.¹⁷⁰

In such conditions, UNAMID would be unable either to protect civilians or fulfil its political mandate and would come under increased attacks.¹⁷¹ Its credibility with Darfur's armed groups is already badly damaged by its support for the ill-fated DPA. In August 2008, its helicopters were fired on over rebel-held areas of West Darfur. In reaction to such incidents, the UN increased its security precautions, evacuating non-essential personnel, restricting movement and reducing operations throughout Darfur.¹⁷² An escalation of fighting would nearly paralyse the mission.

All this suggests that the situation on the ground and the lack of substantive progress in the Doha talks alike risk bringing catastrophic new violence to Darfur. For Djibrill Bassolé, the AU/UN mediator trying to mitigate the dangerous situation and get Sudan to elections, the Bashir arrest warrant is another complicating factor. It also presents an opportunity for all sides to pressure the NCP. JEM, for example, has raised its demands to what amounts to almost a new CPA.¹⁷³ Nevertheless, concentration on a quick-fix agreement before the elections that leaves accountability for Darfur crimes out of the equation would benefit only the NCP.

2. Impact on the CPA

The SPLM is concerned about a possible collapse of the CPA and is preparing to fight if necessary to protect the right of Southern self-determination.¹⁷⁴ Most in the South view the CPA as primarily the conveyor belt to the 2011 referendum and that referendum as the hard-earned mechanism to produce their own independent state. Democratic transformation and "making unity attractive" were John Garang's agenda. After

¹⁷⁰ "AU chief expresses concern over Chad-Sudan", Agence France-Presse, 1 March 2009.

¹⁷¹ On 8 July 2008, seven UNAMID peacekeepers were killed and 22 wounded following an attack by unknown assailants in Um Hakibah, North Darfur. "UNAMID stresses peacekeeping operations will continue throughout Darfur" UNAMID press release, 12 July 2008. <http://unamid.unmissions.org/Default.aspx?tabid=56&ctl=Details&mid=393&ItemID=166>.

¹⁷² Of UNAMID's authorised 21,000 force, only 9,666 were deployed at the time, primarily from Nigeria (3071), Rwanda (2671), Egypt (508) and South Africa (711). China had committed 147 troops.

¹⁷³ Crisis Group interview, senior JEM member, London, May 2009.

¹⁷⁴ Crisis Group interview, SPLM, Juba, February 2009.

his accidental death in 2005, the unitary political project quickly died, and self-determination became the main and possibly sole objective of most SPLM leaders. Any NCP effort to block the referendum would be taken as a declaration of war.¹⁷⁵

Nevertheless, there are indications that the NCP may have taken the grave decision in effect to allow neither the secession of South Sudan nor meaningful political reforms in the North. Unable to sustain a new conflict with the South while Darfur is burning and its own constituencies are divided over its management of affairs, the party leadership has kept the CPA on life support. It has implemented it selectively but held back the key concessions required for democratic transformation – repeal of repressive laws and restoration of basic freedoms of association and expression – and for creation of the conditions necessary for a peaceful referendum – a credible census, border demarcation, wealth-sharing formulas and de-escalation of local conflicts in the transitional areas of Abyei, South Kordofan/Nuba Mountains and Blue Nile.

Since early 2009, the SPLM has faced serious budget deficits related to delayed remittances from Khartoum and, most importantly, the decline in oil prices. Without these remittances, the SPLM cannot pay Government of South Sudan (GoSS) employees or meet recurrent expenditures.¹⁷⁶ It believes clashes in Malakal on 23 February between southern militias affiliated to Khartoum's army and its own SPLA that resulted in more than 50 killed and more than 100 injured – a majority of whom were civilians¹⁷⁷ – were orchestrated by the NCP through military intelligence channels in order to destabilise the South. In June, Khartoum was again accused of distributing arms to the Nuer tribes in the Upper Nile State and thus being behind the fighting that erupted on 12 June close to the town of Nasir. The charges came from both Salva Kiir, who three days later at the opening session of the southern parliament, blamed "outside forces" for exacerbating traditional rivalries,¹⁷⁸ and Pagan Amum, the secretary

general of the SPLM, who declared that the CPA's spirit had been "assassinated".¹⁷⁹

Trust between the two CPA parties is, therefore, at its lowest level since the end of the war. The most recent meetings of the Joint Executive Political Committee attended by the two vice presidents, Taha of the Khartoum government and Riek Machar of the GoSS, produced no substantial progress on the CPA. According to an SPLM official, the NCP has used the ICC issue to divert attention from implementation and blackmail the SPLM into public support of Bashir.¹⁸⁰ The essential benchmarks for the elections and referendum, such as the general housing and population census, demarcation of the North-South border and revision of the laws needed for democratic transition are still not met. There are major disagreements on most if not all the following: the laws on the human rights commission, national land commission, national intelligence and security services, the referendum, the media, the criminal code and criminal procedure, and the public consultation in the transitional areas.¹⁸¹

The SPLM also insists that credible elections require cancellation of the public order, police and popular defence forces laws. It argues that all security entities exclusively controlled by the NCP should be abolished, but the NCP is resisting, because it wants to be able to control the electoral process in the North. In December 2008, SPLM members threatened to pull out of the National Assembly if the NCP would not extend the session until these laws were dealt with.¹⁸² The NCP assembly speaker refused and threatened not to renew members' ID cards. He finally agreed to give the government one additional month to introduce the laws, but the Assembly remained in recess until April, and the laws have not yet been introduced.

On 19 May, the SPLM parliamentary caucus withdrew temporarily from the National Assembly, in protest

¹⁷⁵ Crisis Group interview, SPLM member of National Assembly, Khartoum, December 2008.

¹⁷⁶ Some reports suggest that the GoSS has already been forced to cover some monthly expenses from reserves. Teachers and other social sector employees have not been paid for several months. This coincides with increased tribal and community violence that is consuming much of the GoSS president's and vice president's time.

¹⁷⁷ "Sudan's Machar confirms 57 people died in Malakal fighting", *Sudan Tribune*, 27 February 2009.

¹⁷⁸ "Sudan: Mounting ethnic tensions in the south – analysis", IRIN, 24 June 2009.

¹⁷⁹ "Khartoum arms 'used in UN raid'", BBC, 15 June 2009.

¹⁸⁰ Crisis Group interview, senior SPLM figure, Juba, February 2009.

¹⁸¹ The criminal procedure law was submitted to the National Assembly but pulled back due to SPLM objection to some parts.

¹⁸² In a press conference in December, the assembly speaker, Ahmed al-Tahir, said the legislature could not resume an emergency session before April, and the laws were not necessary for elections. The National Electoral Commission said that if the laws were not passed by the elections, the interim constitution would provide guidance. Under the current media and security and intelligence service laws, a candidate or his representative may be detained or denied access to the media during the campaign without the authorities having to give a reason. *Ray al-Shaab*, 22 February 2009.

over NCP refusal to allow further discussion of the press and printed material bill. The National Democratic Alliance (NDA) parliamentary bloc¹⁸³ also withdrew to protest the speaker's refusal to allow introduction of its alternative. The NCP's version was passed by the party's majority on a second reading, escalating the crisis between the CPA partners.

The NCP sees elections, now scheduled for April 2010, as a way to legitimise its power independently of its relationship with the SPLM and also to further challenge the ICC arrest warrants. Bashir is the party's declared presidential candidate. His victory, even if the election is less than free and fair, would likely complicate any effort to hold him to account by a court. State and parliamentary elections would probably be used to further weaken the SPLM's cohesion and capacity to resist NCP manipulation. The elections could potentially also help the NCP close the door to any significant negotiations on power-sharing with the Darfur rebels, since the region would have newly chosen representatives.

It is unlikely, therefore, that the NCP will accept any change in the status quo before these elections,¹⁸⁴ and there is a high risk that they are already being rigged, notably by manipulation of the census results and keeping Darfur in turmoil. The census is supposed to determine the allocation of seats throughout the country, but the exercise was badly flawed, with large parts of the population not counted, especially in Darfur and the Nuba Mountains. On 12 May 2009, the SPLM rejected the official results, arguing that imperfections in the process had produced seriously inaccurate and uncorrected data.¹⁸⁵

It is still unclear whether this rejection will affect election preparations, but unless the SPLM gets specific new guarantees on the referendum, it has a strong interest in refusing to accept an electoral process that would aid NCP efforts to negotiate about the referendum at a later date from a position of greater strength. The Bashir arrest warrant has complicated the equation by

increasing the NCP's sense of insecurity. Conscious of its CPA partner's tactics, the SPLM is preparing to impose self-determination by force if necessary in a worst-case scenario.¹⁸⁶

¹⁸³ The NDA is an umbrella grouping of several opposition parties. Before the CPA, it was the major forum for all Sudanese opposition parties, including the SPLM/A and the Eastern Front, and was based in Asmara, chaired by al-Merghani of the DUP, with John Garang as deputy. After the CPA, it shrank and eventually signed an agreement with the NCP in Cairo. Its members belong to the legislative branch of the government of national unity, rather than acting as an opposition caucus.

¹⁸⁴ Crisis Group interview, senior NCP leader, Khartoum, January 2009.

¹⁸⁵ "Former Sudanese rebels reject census", Voice of America, 22 May 2009.

¹⁸⁶ On 25 September 2008, Somali pirates seized the *MV Faina*, a Ukrainian-flag ship, revealing in the process that it carried weapons, bound officially for Kenya but probably destined in fact for South Sudan. "Hijacked tanks 'for South Sudan'", BBC, 7 October 2008.

V. ACHIEVING BOTH JUSTICE AND PEACE?

A pervasive culture of impunity has worsened conflict in Darfur and elsewhere in Sudan. The ICC Pre-Trial Chamber's decision to issue the arrest warrant for President Bashir is an important step towards challenging this impunity. But the court is in a difficult position, as it has no capacity to execute its decisions independently. However, the manner in which the prosecutor has sought to bring first Haroun and Kushayb and then Bashir to justice has risked politicising his office, thus threatening to undermine its authority.

It remains unclear how the effort to hold Bashir responsible for atrocity crimes will play out in the context of the conflicts in Sudan. At best, the prosecution may provide others with leverage to resolve the Darfur conflict, make Bashir a sufficient liability to his party to cause his resignation and possible exile, and possibly prevent further violence in Sudan by showing there is a price to be paid for heinous crimes. At worst, the main national and international actors will see the cause of justice in Darfur as a complicating factor for an already difficult problem and will sacrifice it, as happened during the negotiation of the CPA and the Eastern Sudan Peace Agreement, as well as the abortive Darfur Peace Agreement.

A. THE ICC AND THE FIGHT AGAINST IMPUNITY IN SUDAN

The ICC prosecutor was mandated by Security Council Resolution 1593 to investigate the crimes committed in Darfur and determine whether prosecutions were required. Prosecutor Moreno-Ocampo and his team have taken this mandate seriously. However, the manner in which Moreno-Ocampo has carried out the mandate has been controversial.¹⁸⁷ After initially pursuing an approach aimed at achieving cooperation from the regime,¹⁸⁸ the prosecutor's tactics, and particularly his

public advocacy, have become increasingly confrontational.¹⁸⁹ Yet, the rhetoric has not always been matched with consistent action, and the perception of the divergence between the two has risked undermining the prosecutor's efforts to rally international backing for execution of the arrest warrants.

After the Pre-Trial Chamber issued arrest warrants for Haroun and Kushayb in May 2007, the prosecutor's efforts were geared towards ensuring the warrants' execution.¹⁹⁰ At this stage he had not exhausted hope that Sudan could be pressured to comply with the warrants. During late 2007, the prosecutor indicated to diplomats and UN officials that if Haroun and Kushayb were surrendered to the Court, he would not open a further investigation into the crimes the subject of those proceedings. They were not handed over, and in the prosecutor's appearance before the Security Council in December 2007, he made it clear that he would go after the person responsible for protecting Haroun in particular, namely the person "who is maintaining Haroun in a position to commit crimes; who is instructing him. This is my second case".¹⁹¹

gree of cooperation in response to the Prosecution's requests". See "Prosecutor's application", (2007), op. cit.

¹⁸⁹ A recent example was the prosecutor's disclosure of a plan to divert a plane carrying Haroun so he could be arrested. www.sudantribune.com/spip.php?article27422. It is unclear what benefit was to be gained from making public plans that by their nature depended on the target being unaware of them. Ocampo-Moreno has subsequently also warned Bashir that he could be arrested if he travels in international airspace. www.npr.org/templates/story/story.php?storyId=101443123.

¹⁹⁰ The prosecutor's office argues out that it is part of the prosecutor's job to generate support for execution of the arrest warrants. The NCP has pointed to this aspect of the prosecution's activities to argue for the political nature of the exercise. Crisis Group interview, office of the prosecutor, July 2009.

¹⁹¹ Ocampo-Moreno statement to UN Security Council on 5 December 2007 at www.amicc.org/docs/LMO%20Security%20Council%20Briefing%205%20December%202007.pdf. Even after announcing his intention to pursue this second case, the prosecutor indicated to diplomats and UN officials in early 2008 that if Haroun and Kushayb were handed over to the ICC, he would not need to proceed with an indictment in the second case. Crisis Group interview, senior government official, June 2008; see also "Sudan's Bashir could escape ICC indictment – diplomats", Reuters, 16 July 2008, at www.alertnet.org/thenews/newsdesk/N16398099.htm. The indication of conditionality in proceeding to a second case, which turned out to be a case alleging ongoing genocide against the head of state, may have engendered a degree of scepticism among some parties whose support the prosecutor has sought.

¹⁸⁷ For a particularly critical assessment, see Julie Flint and Alex de Waal, "Case Closed: A Prosecutor Without Orders", *World Affairs Journal*, spring 2009.

¹⁸⁸ For example, the prosecutor sought summonses to appear for Haroun and Kushayb instead of pursuing the more forceful option of arrest warrants, because "[t]he Prosecution's present assessment is that a summons could prove sufficient to ensure the persons' appearance. In particular, the Prosecution considers worthy of the Chamber's consideration that the Government of the Sudan, which would serve the summons, and would have to facilitate and follow up on the summons, thus far has in practice provided a de-

The prosecutor's decision in July 2008 to charge Bashir with genocide has also drawn serious criticism from legal and humanitarian experts. Many simply do not recognise as accurate the picture the prosecutor paints of the facts on the ground and feel rather that he joined in common cause with Western public advocacy groups with insufficient regard for either the facts or the law.¹⁹² Genocide is a particularly difficult charge to establish, requiring proof of a specific intent on behalf of the alleged perpetrator, and the Pre-Trial Chamber of the ICC (by a two to one vote) dismissed the charge.¹⁹³ It is also surprising that the prosecutor made a public application against Bashir, instead of seeking a sealed (confidential) warrant. Such a warrant would likely have preserved the element of surprise, or at least uncertainty, and hence had a better chance to be executed, as happened in the case of former Congo Vice President Jean-Pierre Bemba, who was arrested in Brussels in 2008 and transferred to The Hague.

A less controversial and potentially more productive option might have been to go first after lower-ranking, but still senior officials for easier-to-prove atrocity crimes. Had such applications, and any resulting warrants, been sealed there may have been a greater chance of arresting the alleged perpetrators, without giving credence to the claims of those who asserted that the court's objective was not justice but regime change. This approach would have reduced the risks of a public dispute with the AU and some African states that are parties to the Rome Statute, are disturbed by the mass atrocities perpetrated by NCP-supported militias in Sudan and support the prosecution of Africans responsible for atrocity crimes.¹⁹⁴

Some countries – notably Senegal, Djibouti and the Comoros – have threatened to withdraw their ratifica-

tion of the Rome Statute, but there is no AU consensus. The majority of members and officials, including Commission Chair Ping, reaffirmed their commitment to oppose genocide, war crimes and crimes against humanity and support the ICC at the June 2009 Addis Ababa ministerial.¹⁹⁵ But they regard the prosecutor's public posture as counterproductive, criticise the timing of the arrest warrant as complicating already difficult diplomacy and argue that the case either is not warranted by the current level of conflict in Darfur or could have waited. Finally, they resent what they consider was the Security Council's failure to give their position on a deferral due consideration.¹⁹⁶

In many ways the prosecutor is in a difficult position. He needs to rally international support for the execution of the warrants, yet has limited tools at his disposal. One tool he has used with enthusiasm is that of public diplomacy – regularly condemning the atrocities committed by the regime and demanding international action.¹⁹⁷ In fact, Moreno-Ocampo at times has appeared torn between the roles of prosecutor and public advocate seeking to create political leverage.¹⁹⁸ While it is entirely appropriate for the prosecutor to use a public platform to advance and explain his mission, it

¹⁹⁵ See "Report of the Meeting of African State Parties to the Rome Statute of the International Criminal Court (ICC)", African Union, Addis Ababa, 8-9 June 2009, MinICC/Rpt.

¹⁹⁶ Crisis Group interview, former senior AU official, Zanzibar, April 2009; "Concept note for the meeting of African States Parties to the Rome Statute", op. cit.

¹⁹⁷ For example: "President al-Bashir will deny his crimes and will offer a few words. President al-Bashir will insist to get your protection. But the international community cannot conceal the crimes. President al-Bashir's criminal actions should not be ignored; statements of ceasefires followed by bombings, denial of massive rapes or promises of justice while torturing the witnesses should not be supported. The international community cannot be part of any cover-up of genocide or crimes against humanity". "Statement to the United Nations Security Council on the situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005)", New York, 3 December 2008. "As of today, 5,000 people are dying each month in Darfur" [a controversial figure]. ... Women and girls are systematically raped in and around the camps. Mental health clinics, the last lifeline for traumatised women, are closed down by the authorities. This is a different way to commit genocide, they are not using gas chambers or machetes. Based on the evidence, and the law, the Prosecution alleges that fear, rape and hunger are the weapons to destroy Darfur communities". Speech at Yale University, 6 February 2009, at www.miafarrow.org/2009/02/luis-moreno-ocampo-yale-speech-feb.html. See also speech at the Council on Foreign Relations, New York, 17 October 2008, at www.cfr.org/publication/17580/session_three.html.

¹⁹⁸ See, for instance, his answers to the press after briefing the UN Security Council, 5 June 2009.

¹⁹² The prosecutor submitted his application without having been able to conduct a first-hand investigation in Darfur. Some legal experts were surprised that "in order to substantiate the genocide charge, and in particular to show genocidal intent, the Prosecutor sought to rely on evidence of attacks that were committed after the report of the International Commission", and, therefore, after the peak of the government militia campaigns. "Concept note for the meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)", Addis Ababa, 8 June 2009, MinICC/Legal/3, p. 7. The prosecutor has not pursued Haroun or Kushayb for genocide.

¹⁹³ The prosecutor has appealed against this part of the Pre-Trial Chamber's decision. It remains possible that the Appeals Chamber will reinstate the charge of genocide.

¹⁹⁴ For detailed discussion of the prosecutor's options and the concerns about the Bashir case of African states that are parties to the Rome Statute, see "Concept note for the meeting of African States Parties to the Rome Statute", op. cit.

is a means to an end and has to be judged by whether it furthers or hinders his objectives.

To the extent that African opponents of the court have been able to paint his efforts against a fellow African head of state as a Western political crusade, it has not advanced that objective and in fact may have contributed to dividing African and Arab from Western public opinion. It is possible, however, that more concentrated efforts by the prosecutor to rally African and Arab support behind the scenes, as was done with some success in the lead-up to the June 2009 Addis Ababa ministerial, would achieve greater success.

Regardless of any shortcomings in the prosecutor's approach and the counterproductive debate that has developed, it remains essential to obtain major policy changes in Sudan. For this to happen, the fight against impunity should remain at the centre of the peace process, deceptively easy trade-offs between peace and justice should be refused, and political and economic accommodation at the expense of genuine national judicial processes for the crimes committed in Darfur should be avoided. The ultimate aim of both the Sudan peace process and the fight against impunity is not the exit of Bashir or cosmetic and reversible concessions by the NCP but structural reform of the repressive system of governance currently in place in Sudan. The arrest warrant against Bashir is an irreversible fact, but it can only be an effective tool if the threat of its execution is credible, so that major reforms become an acceptable price for the NCP to pay for deferral of the case.

B. KEEPING JUSTICE AT THE CENTRE OF THE PEACE PROCESS

1. Supporting the ICC

There is a chance the NCP will reach that conclusion, but only if the ICC receives strong support from parties to the Rome Statute and others that share their objectives, and the Security Council sends a clear signal that major reforms in Darfur and a serious approach to impunity are required to justify an Article 16 deferral. France, the UK and the U.S. (the P3) must continue to demonstrate support for the Court's actions and insist that Sudan and other countries cooperate with it, as required by UN Security Council resolution and the Rome Statute. They also need to continue engaging with the AU, the Arab League and those organisations' member states and get beyond concerns over the prosecutor's tactics, so as to discuss the ICC's value in the global fight for justice and options to strengthen legal institutions on the continent that would facilitate action

against atrocity crimes there and make ICC intervention unnecessary under the complementarity principle.

The panel chaired by Thabo Mbeki should propose to the AU and its international partners ways and means to reinforce legal mechanisms, including steps that could empower the African Court on Human and Peoples' Rights to take on responsibilities as a regional justice mechanism complementary to the ICC. It is not currently a criminal court. It cannot conduct trials of individuals and impose sentences; it may only make findings of state responsibility, and it has yet to handle its first case. It will not be in a position to provide justice for Darfur atrocities anytime soon. However, as recommended by the February 2009 AU summit, a possible future role should be explored and the concrete requirements for transforming it into a criminal trial court determined.

Simultaneously, the ICC prosecutor should continue his investigations into responsibility for atrocity crimes in Darfur since 2003. He should seriously consider sealing any request for new arrest warrants to increase the chances for arrest and minimise new political controversy. The arrest, detention and trial of Sudanese officials in The Hague would increase judicial pressure on the regime, show Bashir the court means business and increase leverage to obtain genuine policy changes.

2. Changing institutions and policies that drive impunity and conflict

The issue of justice for crimes committed during the conflict, already excluded from the CPA, as well as the Eastern Sudan Peace Agreement and the abortive 2006 Darfur Peace Agreement, should not be removed from the present Darfur peace project. Reparations are needed, but they alone cannot produce sustainable reconciliation or dismantle the system of repression and impunity in place in Darfur.

A more systemic approach should be developed within a conflict resolution framework (Doha or elsewhere), so as to advance improvements on impunity and reformed governance. This is essential to foster the kind of sustainable peace that cannot be built by temporary ceasefires, cooption of spoilers into state institutions and quick-fix power-sharing agreements. Justice requires not only the criminal prosecution of individuals, but also the establishment of a credible system and culture of accountability through transitional justice mechanisms that make the fight against impunity a key component of a reformed governance system.

Some tailored form of a truth and reconciliation commission (TRC) is needed for long-term stabilisation in

Darfur, as suggested in Resolution 1593. A thorough vetting process to remove human rights abusers from the security forces and state administration should also be central to a broader process of institutional reforms and need not create additional political tensions if implemented gradually and in a fair and transparent manner. These and similar measures should become key objectives of the Doha peace process and ideally should be preceded by consultations with victims and civil society. The Doha process should also aim to integrate any jointly-agreed transitional justice recommendations that result from the work of the parallel AUPD process.

While supporting execution of the Bashir, Haroun and Kushayb arrest warrants and continuation of investigations against any individual involved in atrocity crimes, international partners in the Sudan peace process and the P3 in particular should ensure that tackling impunity remains an important element of the Darfur agenda. They will need to impress on the government the requirement to establish credible legal accountability as part of the political reforms mandated in the CPA. Deferral of the Bashir case should only be considered in response to an NCP demonstration of good faith that includes all the following:

- ❑ genuine cessation of hostilities and political accommodation with the rebel groups through the UN/AU- and Qatari-led negotiations to guarantee Darfur participation in the general elections, which will need to be postponed to 2011, concurrent with the referendum;
- ❑ credible domestic measures to ensure accountability for crimes in Darfur and other conflict regions, starting by bringing Haroun and Kushayb to trial in courts whose independence has been strengthened and appointing non-partisan judges in Darfur, including to the special courts; no political interference with court proceedings; review of police investigation and arrest procedures; and replacement of the chief justices and police commanders in Darfur;
- ❑ opening the three Darfur state security committees to UNAMID participation and replacing the three governors and their deputies by technocrats to administer the states until elections;
- ❑ status review of Darfur political prisoners by the special courts, once their independence is established;
- ❑ assurance Bashir will step down and not stand for president in the next presidential election;
- ❑ a decree establishing a Transitional Darfur Task Force (TDTF), a high-level monitoring committee (president, first vice president, UN/AU special

envoy, UNAMID commander and justice, interior and humanitarian affairs ministers) to monitor the above measures; and

- ❑ amendment of the legal authorities of the national security and intelligence agencies to make them accountable to other national institutions.

If the regime refuses to take these steps, the international community should take all measures available to enforce the ICC arrest warrants.

The Darfur rebel groups should demonstrate equal commitment to a peaceful settlement in Darfur and national judicial reforms. They should support transitional justice mechanisms as a key objective in the Doha talks. The SPLM should not support elections in February 2010 if they cannot be held in a free and fair environment nationwide. China, Russia, Egypt, Qatar, the AU and the Arab League should use their ties to the regime and its increased dependence on their support following the Bashir arrest warrant to press for the above changes.

Sadig al-Mahdi, leader of the National Umma party, the Arab League and others have proposed that a mixed court of Sudanese and international judges handle the Bashir case.¹⁹⁹ This might meet the requirements of complementarity under Article 17 of the Rome Statute and/or justify the Security Council to defer ICC proceedings under Article 16, but only if the court dealt with the same charges as have been brought at the ICC²⁰⁰ – a prospect Bashir would likely find not much more acceptable than standing trial in The Hague.

¹⁹⁹ Moreno-Ocampo has said it is not necessary to have international judges but that a “genuine” investigation or trial is required, as provided in Article 17 of the Rome Statute. In May 2004, the government established a national fact-finding committee to investigate allegations of human rights violations headed by former Chief Justice Daifallah al-Haj Yousif, but Moreno-Ocampo has said that none of the seven cases Sudan cited to the UN to demonstrate its judicial processes are relevant to whether a genuine national effort is being made to deal with Darfur conflict crimes. Statements at the Sudan All Parliamentary Group, London, 7 October 2008.

²⁰⁰ www.economist.com/world/international/displaystory.cfm?story_id=12777952.

VI. CONCLUSION

At the root of Sudan's many crises is the reluctance of the NCP, the dominant member of the government of national unity, to engage seriously in any reform of its centralised, exploitative and unaccountable governance. The warrant issued by the ICC for the arrest of President Bashir on crimes committed in Darfur has created a critical dilemma for his party that must now decide to genuinely work to resolve the crisis there and elsewhere in the country if it is to escape pariah status.

Frustrated by the Security Council decision to ignore its request for a suspension of the arrest warrant, the AU decided at its July 2009 summit to shield Presi-

dent Bashir from prosecution on African soil. They did this invoking the requirements of the peace process, even though Bashir and the NCP have made no policy changes that genuinely advance the prospects of peace in Darfur or significant implementation of the CPA. There is no justification for withdrawing the justice issue from the Sudan peace process agenda. Short-term deals and quick fixes that ignore a core issue cannot advance a sustainable political settlement to the country's conflicts. Only structural institutional reforms and new policies directed at instituting a culture of accountability can do that. And they need support from both Africa and Sudan's other international friends.

Nairobi/Brussels, 17 July 2009

APPENDIX A

MAP OF SUDAN



APPENDIX B

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