



# SUDAN: INTERACTION BETWEEN INTERNATIONAL AND NATIONAL JUDICIAL RESPONSES TO THE MASS ATROCITIES IN DARFUR

BY SIGALL HOROVITZ

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## ABOUT DOMAC

**THE DOMAC PROJECT** focuses on the actual interaction between national and international courts involved in prosecuting individuals in mass atrocity situations. It explores what impact international procedures have on prosecution rates before national courts, their sentencing policies, award of reparations and procedural legal standards. It comprehensively examines the problems presented by the limited response of the international community to mass atrocity situations, and offers methods to improve coordination of national and international proceedings and better utilization of national courts, inter alia, through greater formal and informal avenues of cooperation, interaction and resource sharing between national and international courts.

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## EXECUTIVE SUMMARY

Hundreds of thousands of civilians lost their lives and millions were displaced as a result of the armed conflict in the Darfur region of Sudan, fought between the Sudanese government and its allied “Janjaweed” militia on the one hand, and rebel groups on the other hand. At the time of writing, hostilities are ongoing and civilians continue to suffer from atrocities, after various attempts to end the conflict have failed. In March 2005, the UN Security Council referred the Darfur situation to the International Criminal Court (ICC), pursuant to the recommendation of the UN-appointed International Commission of Inquiry on Darfur. Four Sudanese officials were thus far charged by the ICC for atrocities committed in Darfur, including Sudan’s President Omar Al-Bashir, who was charged with genocide. The ICC also charged three Darfuri rebel leaders for attacking peacekeepers in Darfur, and they appeared before the ICC voluntarily. However, the four Sudanese officials who were charged are at large. Sudan has consistently refused to surrender them or otherwise cooperate with the ICC. Moreover, Sudanese national courts have not been prosecuting the Darfur atrocities. Thus, no one has been held accountable for the mass atrocities committed against the Darfuri population.

This report posits that, given the limited capacity of international courts in terms of the number of perpetrators they can prosecute, an effective fight against impunity requires the international community to adopt a comprehensive approach which promotes the utilization of international and national accountability processes in parallel. However, such a comprehensive approach is difficult to contemplate in cases such as Darfur, where the relevant state authorities fiercely resist the establishment of any form of accountability for the atrocities. What we can and should hope for, in such cases, is that the international judicial involvement will eventually encourage (fair and genuine) national procedures that address the atrocities in parallel to the international process. Assessing whether and to what extent this happened in the Darfur case is the object of this report. To identify ICC impact on judicial developments in Sudan, the author analyzed various legal and other documents, and conducted in-depth interviews with five ICC officials and three UN judicial officials who worked on legal matters in Darfur between 2004 and 2009.

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# LIST OF ABBREVIATIONS

AFA	Armed Forces Act
AU	African Union
AUPD	AU High-Level Panel on Darfur
CPA	North/South Comprehensive Peace Agreement
DPA	Darfur Peace Agreement
HRW	Human Rights Watch
ICC	International Criminal Court
ICID	International Commission of Inquiry on Darfur
JEM	Justice and Equality Movement
NCP	National Congress Party
OTP	The Office of the Prosecutor of the ICC
SCCED	Special Criminal Court for Events in Darfur
SLA	Sudan Liberation Army
SPLM	Sudan People’s Liberation Movement
URF	United Resistance Front
UN	United Nations
UNAMID	United Nations African Union Mission in Darfur

## 1. INTRODUCTION

Hundreds of thousands of civilians lost their lives and millions were displaced as a result of the armed conflict in Darfur, a region in western Sudan. The conflict broke out in 2003, between the Sudanese government and its allied “Janjaweed” militias, on the one hand, and two Darfuri rebel groups, the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM), on the other hand.<sup>1</sup> International pressure led to various peace negotiations, but with little success. At the time of writing, hostilities are ongoing and civilians continue to suffer from atrocities.

In October 2004, the United Nations (UN) appointed an International Commission of Inquiry on Darfur (ICID) to investigate the atrocities and suggest means to hold the perpetrators accountable.<sup>2</sup> The ICID investigation revealed that serious atrocities, including crimes against humanity, were committed in Darfur by members of the Sudanese government and Janjaweed militias.<sup>3</sup> The ICID also concluded that Darfuri rebels committed crimes against civilians which may amount to war crimes.<sup>4</sup> It recommended that the UN Security Council refer the situation in Darfur to the International Criminal Court (ICC or Court) in The Hague.<sup>5</sup> In March 2005, the UN Security Council referred the situation to the ICC through its Resolution 1593.<sup>6</sup>

At the time of writing, the ICC has charged seven individuals for atrocities committed in Darfur, four of them are Sudanese officials and three are Darfuri rebel leaders. The officials include: Sudan’s President Omar Al-Bashir, the first sitting head of state to be charged by the ICC; Sudanese Governor Ahmed Harun; Janjaweed militia leader Ali Kushayb; and Defence Minister Abdel Raheem Muhammad Hussein. The latter three were charged with crimes against humanity and war crimes, and Al-Bashir

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<sup>1</sup> “Darfur: The Quest for Peace, Justice and Reconciliation”, Report of the African Union High-Level Panel on Darfur (AUPD), 29 October 2009, available at <[http://www.universaljurisdiction.org/images/reports/sudan/UJ-AUDP-Final\\_report\\_on\\_Darfur.pdf](http://www.universaljurisdiction.org/images/reports/sudan/UJ-AUDP-Final_report_on_Darfur.pdf)> accessed on 1 September 2012 (hereinafter: “AUPD Report”), pages 19-21.

<sup>2</sup> The International Commission of Inquiry on Darfur (ICID) was appointed by the UN Secretary-General following UN Security Council Resolution 1564 of 18 September 2004. Its members were Antonio Cassese (Chairperson), Mohamed Fayek, Hina Jilani, Dumisa Ntsebeza and Therese Striggner-Scott. On 25 January 2005, the ICID submitted its report to the UN Secretary-General. See UN Doc. S/2005/60, ‘Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council Resolution 1564 of 18 September 2004’ (25 January 2005) <[http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf)> accessed on 23 March 2011 (hereinafter “ICID Report”).

<sup>3</sup> ICID Report (n 2), paras. 237-418, 630.

<sup>4</sup> *Ibid.*, para. 630.

<sup>5</sup> *Ibid.*, para. 647.

<sup>6</sup> UN Security Council Resolution 1593 (2005) adopted on 31 March 2005 <<http://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>> accessed on 23 December 2012 (hereinafter: “UNSC Res 1593”).



was charged with genocide in addition to crimes against humanity and war crimes. The Darfuri rebel leaders charged by the ICC were Bahar Idriss Abu Garda, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus. They were charged with war crimes committed during an attack on African Union (AU) peacekeepers in Darfur, and all three appeared voluntarily before the ICC. In the preliminary hearings, the ICC refused to confirm the charges against Abu Garda but confirmed the charges against Banda and Jerbo, and their trial will commence on 5 May 2014. The ICC has not managed so far to apprehend Al-Bashir, Harun, Kushayb and Hussein.

Sudan has been consistently refusing to surrender its officials to the ICC, or to otherwise cooperate with the Court. Moreover, Sudanese national courts have not been prosecuting the Darfur atrocities (see part 5 below). In 2009, a panel mandated by the AU recommended the establishment of a hybrid court to prosecute the atrocities committed in Darfur (see section 7.2 below), but no such court has been created to date. Thus, no one has been held accountable for the mass atrocities committed in Darfur.

## 1.1 OBJECT OF REPORT

International courts are created to establish accountability in the aftermath of mass atrocities, through fair trials.<sup>7</sup> But they can only prosecute a handful of perpetrators, which in cases of mass atrocities usually represents a small fraction of those involved in the atrocities. Therefore, even if they try the highest level perpetrators, international courts have a greater chance to establish accountability in the countries they address if their process is complemented by national judicial procedures in those countries.<sup>8</sup> Otherwise, an “accountability gap” would remain which could prevent the eradication of impunity.<sup>9</sup> Thus, this report’s position is that the international community, in the wake of atrocities, must adopt a comprehensive approach which actively promotes the parallel

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<sup>7</sup> International courts have other goals as well, but this report focuses on their goal of establishing accountability through fair trials.

<sup>8</sup> See, e.g., William W. Burke-White, ‘Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice’, 49 Harv. Int’l L.J. 53 (2008); Brian Concannon, Jr., ‘Beyond Complementarity: The International Criminal Court and National Prosecutions, a View From Haiti’, 32 Colum. Human Rights L. Rev. (2000) 201. It is noted that national trials can (and do) also take place in third states, for example under the principle of universal jurisdiction. However, it is unlikely that many such prosecutions would take place in the absence of the suspects and evidence in such third states. Even when suspects are present in third states, investigations and prosecutions in these states often face legal, financial, practical and political hurdles. Furthermore, fair prosecutions before the domestic courts of the state of the crimes could also enhance the legitimacy of the post-conflict government and judiciary, and be more sensitive to local nuances than prosecutions by third states.

<sup>9</sup> The phenomenon described by the phrase “accountability gap” is sometimes described as an “impunity gap”.

utilization of international courts and national accountability processes.<sup>10</sup> Until then, accountability may not be achieved even when an international criminal court intervenes.

However, this kind of comprehensive approach is difficult to contemplate in cases such as the Darfur region of Sudan, where the state authorities fiercely resist the establishment of any form of accountability for the atrocities. What we can and should hope for in such cases is that the international judicial involvement will eventually encourage (fair and genuine) national procedures that address the atrocities in parallel to the international procedures. Examining whether and to what extent this happened in the case of Darfur is the object of this report. Taking the ICC's Darfur-related proceedings as a starting point, this report assesses the impact of these international proceedings on (1) the rates and trends of Sudanese atrocity-related proceedings; (2) the application of international legal norms in Sudan; (3) the sentencing practices in Sudanese atrocity-related proceedings; and (4) the judicial capacity of Sudan to handle atrocity-related proceedings. These four areas of focus were chosen for their relevance to an analysis of whether and to what extent the ICC's involvement in Darfur has affected the quality and quantity of Sudanese accountability procedures addressing the Darfur atrocities.

## 1.2 STRUCTURE AND METHODOLOGY

The present report amounts to a case study which provides a broad preliminary assessment (rather than an exhaustive in-depth analysis) of the ICC's impact on judicial developments in Sudan in the four above-listed areas. To be able to provide such an assessment, relevant contextual issues are first examined in parts 2 to 7 of the report. In particular, parts 2 and 3 of the report present a general background on Sudan, its conflict and the atrocities. In part 4, the report outlines the political and legal conditions in Sudan, in an attempt to identify the willingness and ability of the local authorities to prosecute atrocities. Parts 5 and 6 describe the national and international judicial responses to the atrocities, namely, Sudan's approach to atrocity-related accountability and the ICC's involvement in Sudan. In part 7, the relationship between Sudan and the ICC is discussed. Part 8 is the core of this report – it draws on the discussions in the previous parts and identifies the ICC's impacts on Sudan's judicial response to the atrocities, in the four areas listed in section 1.1 above. Part 9 concludes the report and provides some

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<sup>10</sup> To promote accountability, national trials must not amount to "sham" trials or "victor's justice", but should meet minimum fairness and due process standards.

recommendations.

The information for this report was gathered from documents such as UN and NGO reports, international and national legal instruments, academic literature, news articles, etc. In light of the shortage of relevant public materials, this report is also based on information obtained through in-depth interviews with eight legal experts, including five ICC officials and three UN officials who worked on judicial matters in Darfur in the period 2004 to 2009.<sup>11</sup> Since most interviewees did not want the information they provided to be attributed directly to them, they are cited throughout this report with generic references, such as “ICC official” or “UN judicial officer”. A methodology partly based on interviews was utilized to gain a better understanding of the interactions between international and domestic processes, and to supplement existing data. It is acknowledged that this methodological approach is limited in that some observations are based on *perceptions* of interviewees. However, by explicitly noting which information is based on interviews, the report allows the reader to critically reflect on the information. Where possible, the report relies on published documents.

Another methodological weakness stems from the fact that the interviewees are all members of international organizations, who may lack information about certain local developments in Sudan, or downplay local perceptions and positions. To compensate for this limitation, a Sudanese legal expert reviewed this report and his valuable contributions were taken into account.

## 2. COUNTRY BACKGROUND

### 2.1 GENERAL<sup>12</sup>

Sudan, officially called the Republic of Sudan, is one of the largest countries in Africa covering an area of 1,861,484 square kilometers. It is divided into 17 states, with Khartoum as the capital city.<sup>13</sup> Sudan borders the Central African Republic, Chad, Egypt, Eritrea, Ethiopia, Libya, and the newly established Republic of South Sudan (South Sudan). About 70 percent of Sudan’s population of about 36.8 million is considered

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<sup>11</sup> The interviews were conducted by the author from 2008 to 2011, in person or by Skype.

<sup>12</sup> Unless stated otherwise, the information in this section (including in the footnotes) is based on the CIA Factbook <<https://www.cia.gov/library/publications/the-world-factbook/geos/su.html>> accessed on 20 October 2011.

<sup>13</sup> The states are: Red Sea, Gezira, Khartoum, Gedaref, White Nile, Blue Nile, Northern, Southern Kordofan, Kassala, River Nile, Northern Kordofan, Sinnar, Northern Darfur, Eastern Darfur, Central Darfur, Western Darfur, and Southern Darfur.

“Arab”. Other major ethnic groups, categorized as “African”, include the Fur, Beja, Nuba and Fallata. Most of the population is Sunni Muslim, with a small Christian minority. Arabic and English are Sudan’s official languages, but other local languages are also spoken. The average life expectancy at birth in Sudan is 55.42 years. Sudan’s natural resources include hydropower, petroleum, copper, chromium ore, iron ore, zinc, tungsten, mica, silver and gold.

Sudan was a British colony which gained independence on 1 January 1956. Since then, Islamic military regimes have dominated national politics. In June 1989, Omar Al-Bashir assumed power in a military coup. At the time of writing, Al-Bashir still rules the country and his National Congress Party (NCP) dominates the Sudanese government. Shortly after independence, a civil war broke out in Sudan and lasted until 1972. The main cause of the war was the northern domination of the largely non-Muslim south. A second civil war broke out for similar reasons in 1983, and led to the death of over two million people and the displacement of over four million people in a period of two decades. Peace talks eventually led to the North/South Comprehensive Peace Agreement (CPA), signed in January 2005. The CPA granted South Sudan autonomy for six years, after which a referendum on the question of independence would be held. The referendum was indeed held, on 8 January 2011, and the South Sudanese voted almost unanimously (98.83%) for independence. As a result, on 9 July 2011, Sudan’s southern states seceded from the North and formed the independent state of South Sudan (North Sudan continues to be called Sudan). However, certain issues remain to be negotiated, such as the future of the oil-rich region of Abyei, near the border between North and South Sudan.<sup>14</sup>

In 2003, a separate conflict broke out in Darfur, a semi-arid region in western Sudan which consists of five states.<sup>15</sup> Most of Darfur's inhabitants are farmers, and a minority are herders. For many years, competition over land has fed tensions between the farmers, who have been considered “African”, and the herders, who have been considered “Arab”. In 2003, two African rebel groups – the SLA and JEM – began attacking government targets as an expression of their opposition to the government’s

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<sup>14</sup> See, e.g., AllAfrica, ‘Sudan: Key Challenges For Southern Region After Split’ (8 February 2011) <<http://allafrica.com/stories/201102080951.html>> accessed on 23 March 2011; AllAfrica, ‘Sudan: Commission Confirms Vote for Independence’ (7 February 2011) <<http://allafrica.com/stories/201102071879.html>> accessed on 23 March 2011.

<sup>15</sup> The states are: Northern Darfur, Eastern Darfur, Central Darfur, Western Darfur, and Southern Darfur.

marginalization of Africans. In response, the government launched a military campaign in Darfur, which included the arming and utilization of local Janjaweed militias. Further details on the Darfur conflict are available in sections 3.1 and 3.2 below.

## 2.2 POLITICAL AND LEGAL SYSTEMS<sup>16</sup>

Omar Al-Bashir has been serving as the President of Sudan ever since he assumed power through a military coup on 30 June 1989. The first time he was elected president by popular vote was in March 1996. In the most recent national elections, in April 2010, Al-Bashir was re-elected as president, having received 68.2% of the votes.<sup>17</sup> The next elections are scheduled for 2015. The Sudanese Cabinet is called the Council of Ministers. It is currently dominated by the NCP, its members appointed by the President.

Sudan adopted an Interim National Constitution on 5 July 2005, as part of the CPA framework. In light of South Sudan's secession and the termination of the CPA, Sudan is expected to adopt a new constitution. Under the CPA, the Sudan People's Liberation Movement (SPLM) dominated the autonomous government in South Sudan, whereas in Khartoum the NCP and the SPLM shared power in the Government of National Unity (GNU). The GNU was dissolved following South Sudan's secession.

Sudan's bicameral legislature includes the Council of States and the National Assembly. The Council of States comprises 50 seats and its members are indirectly elected by state legislatures to serve six-year terms. The National Assembly comprises 450 seats (60% from geographic constituencies, 25% from a women's list, and 15% from party lists), and its members also serve six-year terms.

The Sudanese judiciary consists of regular, special and customary courts. Regular courts include a Constitutional Court, a Supreme Court, appeals courts and lower civil and criminal courts.<sup>18</sup> Sudan's legal system is based on Islamic law and English common law. Accordingly, Sudan adopts a dualistic approach to international

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<sup>16</sup> Unless stated otherwise, the information in this section is based on the CIA Factbook <<https://www.cia.gov/library/publications/the-world-factbook/geos/su.html>> accessed on 24 October 2010.

<sup>17</sup> Various reports indicate that the elections were rigged, and boycotted by political parties in the north of Sudan and the SPLM. See The New York Times, 'Opposition Boycotts in Sudan Elections', by Jeffery Gettleman (1 April 2010) <[http://www.nytimes.com/2010/04/02/world/africa/02sudan.html?\\_r=0](http://www.nytimes.com/2010/04/02/world/africa/02sudan.html?_r=0)> accessed on 10 April 2013; The Guardian, 'Omar al-Bashir's re-election in Sudan is a farce', by Louise Roland-Gosselin (27 April 2010) <<http://www.guardian.co.uk/commentisfree/2010/apr/27/omar-al-bashir-election-in-sudan-a-farce>> accessed on 10 April 2013.

<sup>18</sup> U.S. Department of State, 2009 Country report on human rights practices: Sudan (11 March 2010) <<http://www.state.gov/g/drl/rls/hrrpt/2009/af/135978.htm>> accessed on 2 April 2011 (hereinafter: "US Human Rights Report 2009").

law whereby international law provisions apply only when implemented through domestic legislation. Sudan accepts the compulsory jurisdiction of the International Court of Justice.<sup>19</sup> On 8 September 2000, Sudan has signed the Rome Statute of the ICC (Rome Statute), but has not ratified it.<sup>20</sup>

### 3. CONFLICT BACKGROUND

#### 3.1 THE CONFLICT IN DARFUR

The armed conflict in Darfur broke out in 2003 when the government responded militarily to an insurgency launched by the SLA and JEM, two Darfuri rebel groups fighting against the political and economic marginalization of Darfuri Africans. The government recruited and armed Arab groups known as “Janjaweed” militias to suppress the rebellion, exploiting local tensions between African and Arab tribes over land. It also mobilized “self-defence militias”.<sup>21</sup> Additional rebel groups joined the struggle later, including the United Resistance Front (URF) which split from the JEM in 2007.<sup>22</sup>

In 2004, the AU sent peacekeepers to Darfur; the UN took command over these forces on 31 December 2007.<sup>23</sup> This hybrid AU-UN missions is named the United Nations African Union Mission in Darfur (UNAMID). On 5 May 2006, as a result of international pressure, the Darfur Peace Agreement (DPA) was signed by the Sudanese government and a faction of the SLA led by Minnei Minawi.<sup>24</sup> However, weakened by the non-inclusion of other rebel factions, the DPA was ineffective in ending the hostilities.<sup>25</sup> In May 2008, the Darfur conflict reached Khartoum when JEM rebel forces heading to

<sup>19</sup> Sudan submitted its declaration accepting the compulsory jurisdiction of the International Court of Justice on 2 January 1958. See International Court of Justice, Declarations Recognizing the Jurisdiction of the Court as Compulsory <<http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=SD>> accessed on 20 October 2011.

<sup>20</sup> United Nations Treaty Database entry regarding the Rome Statute of the International Criminal Court <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=XVIII-10&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=XVIII-10&chapter=18&lang=en)> accessed on 20 October 2011.

<sup>21</sup> BBC News, 'Quick guide: Darfur' (6 September 2006) <<http://news.bbc.co.uk/2/hi/africa/5316306.stm>> accessed on 28 March 2011.

<sup>22</sup> Sudan Tribune, 'UN-AU joint mediator meets with Darfur URF leader' (30 June 2009) <<http://www.sudantribune.com/UN-AU-joint-mediator-meets-with.31667>> accessed on 17 April 2011.

<sup>23</sup> UNAMID official website <<http://unamid.unmissions.org/Default.aspx?tabid=890>> accessed on 23 March 2011 (hereinafter: “UNAMID official website”).

<sup>24</sup> Council on Foreign Relations, 'Darfur Peace Agreement, 2006' (6 May 2006) <<http://www.cfr.org/sudan/darfur-peace-agreement-2006/p11020>> accessed on 23 March 2011.

<sup>25</sup> Human Rights Watch World Report 2009 (events of 2008) <<http://www.hrw.org/en/node/79212>> accessed on 30 March 2011 (hereinafter: “HRW World Report 2009”) (“The 2006 Darfur Peace Agreement is now widely acknowledged to be defunct. In February, following an offensive by JEM in West Darfur, the government conducted some of the worst attacks on civilians since 2003-2005. Government forces and Janjaweed carried out a series of attacks on villages, killing and injuring hundreds of civilians, and carrying out widespread looting in violation of international humanitarian law. An estimated 40,000 people fled, 13,000 of them to Chad.”).



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the presidential palace clashed with government forces in Khartoum's western suburb of Omdurman.<sup>26</sup> Over 200 persons died in the battle, including about 30 civilians.<sup>27</sup> In the following months, the government arrested hundreds of individuals for allegedly participating in the attack. It eventually tried and executed over 100 of them (see part 5 below).

In 2010, new peace talks between rebels and the government led to a framework agreement and a ceasefire.<sup>28</sup> But the negotiations eventually failed, and the fighting in Darfur intensified in 2010 and 2011.<sup>29</sup> NGOs have expressed concern that the international community has shifted its attention from Darfur to focus on the referendum in South Sudan.<sup>30</sup>

### 3.2 THE MASS ATROCITIES

The Darfur conflict has led so far to the death of between 200,000 to 400,000 individuals and the displacement of over two million.<sup>31</sup> Rapes of women and girls have been committed from the beginning of the conflict and continue to-date.<sup>32</sup> Children have been

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<sup>26</sup> HRW World Report 2009 (n 25) ("The Darfur conflict reached the capital for the first time on May 10-12 when JEM forces attacked Omdurman, a western suburb of Khartoum"). The Economist, 'A bloody tit-for-tat' (15 May 2008) <[http://www.economist.com/node/11376220?story\\_id=11376220](http://www.economist.com/node/11376220?story_id=11376220)> accessed on 30 April.

<sup>27</sup> The Seattle Times, 'Sudan: 200 died in Darfur rebel raid near Khartoum' (By Mohamed Osman, Associated Press Writer, 16 May 2008) <[http://seattletimes.nwsource.com/html/nationworld/2004405342\\_apsudan.html](http://seattletimes.nwsource.com/html/nationworld/2004405342_apsudan.html)> accessed on 30 April 2011 ("More than 200 people were killed in fighting around Sudan's capital over the weekend, the defense minister announced Tuesday in the first official comment on casualties during the assault by Darfur rebels ... The defense minister said 93 soldiers and 13 policemen died in the weekend fighting in Khartoum's twin city, Omdurman, along with 30 civilians. He said 90 rebel bodies had been found so far, but more were scattered outside the city.")

<sup>28</sup> HRW 'UN: Strengthen Civilian Protection in Darfur' (19 July 2010), <<http://www.hrw.org/en/news/2010/07/19/un-strengthen-civilian-protection-darfur>> accessed on 30 March 2011 ("On February 23 [2010], JEM signed a framework agreement with the Sudanese government, which included a ceasefire and was to be followed by a more comprehensive agreement by March 15").

<sup>29</sup> Human Rights Watch World Report 2011 (events of 2010) <<http://www.hrw.org/en/world-report-2011/sudan>> accessed on 30 March 2011 (hereinafter: "HRW World Report 2011") ("Fighting in Darfur intensified in 2010, with armed clashes between government and rebel forces, among rebel factions, and between armed ethnic Arab groups in South and West Darfur ... Meanwhile, the peace process at Doha foundered."); International Federation for Human Rights, 'Deteriorating situation in Darfour of great concern warn NGOs' (8 January 2011) <<http://www.fidh.org/UN-must-step-up-reporting-on-humanitarian-and>> accessed on 30 March 2011. However, there have been attempts by international actors to revive the Doha peace process. See UN Security Council, 'Report of the Secretary-General on the Implementation of the Darfur Political Process' (15 April 2011), UN Doc. S/2011/252 <<http://www.unhcr.org/refworld/docid/4db69b16375.html>> accessed 20 October 2011. For a documentation of the hostilities and human rights crimes in Darfur between January and June 2011 see Human Rights Watch, 'Sudan: Darfur in the Shadows – The Sudanese Government's Ongoing Attacks on Civilians and Human Rights' (June 2011) <<http://www.hrw.org/sites/default/files/reports/sudan0611webcover.pdf>> accessed 20 October 2011.

<sup>30</sup> See, e.g., HRW World Report 2011 (n 29) ("With the focus on the referendum, international attention shifted away from Darfur, despite the deteriorating situation there and lack of progress on a peace deal").

<sup>31</sup> CIA Factbook <<https://www.cia.gov/library/publications/the-world-factbook/geos/su.html>> accessed on 23 March 2011.

<sup>32</sup> UNAMID official website (n 23) ("Displaced women and girls in towns, camps, and villages throughout Darfur continue to experience sexual violence by government forces, allied militia, rebels, and criminal actors. Between April and June 2009, UN human rights monitors documented 21 cases involving 54 victims, 13 of whom were under 18 and most of whom described attackers as wearing military uniforms. Human Rights Watch research on sexual violence against Darfuri women and girls suggests this number represents a small fraction of actual cases").

recruited and used by armed groups in Darfur.<sup>33</sup> Property has been burned and pillaged on mass scale. On 9 September 2004, U.S. Secretary of State Colin Powell declared that the Sudanese government and Janjaweed militias have committed genocide in Darfur and are responsible for rapes, killings, and other atrocities.<sup>34</sup>

In January 2005, the UN-mandated ICID found that members of the Sudanese government and Janjaweed militias in Darfur were committing serious atrocities, including crimes against humanity.<sup>35</sup> While it could not establish that the government had a genocidal policy, the ICID acknowledged that some officials might have committed crimes with a genocidal intent.<sup>36</sup> Furthermore, the ICID found that Darfuri rebels also committed crimes in Darfur, possibly amounting to war crimes.<sup>37</sup> Accordingly, the ICID recommended that the UN Security Council refer the case to the ICC.<sup>38</sup> On 31 March 2005, the UN Security Council indeed referred the situation in Darfur to the ICC,<sup>39</sup> and the ICC's Prosecutor commenced his investigation into the events on 6 June 2005. The ICC has so far charged seven persons for the atrocities committed in Darfur (see section 6.2 below). However, at the time of writing, over seven years after the Security Council referred the situation to the ICC, atrocities are still being committed in Darfur.<sup>40</sup>

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<sup>33</sup> Human Rights Watch World Report 2010 (events of 2009) <<http://www.hrw.org/en/node/87453>> accessed on 30 March 2011 (hereinafter: "HRW World Report 2010").

<sup>34</sup> The Crisis in Darfur: Testimony before the Senate Foreign Relations Commission, 108<sup>th</sup> Cong. (2004) (statement of Colin Powell, Secretary, U.S. Dept. of State) <[www.ithaca.edu/faculty/cduncan/375/powell.doc](http://www.ithaca.edu/faculty/cduncan/375/powell.doc)> accessed on 24 March 2011.

<sup>35</sup> ICID Report (n 2), paras. 237-418, 630.

<sup>36</sup> *Ibid.*, paras. 640-641.

<sup>37</sup> *Ibid.*, para. 630.

<sup>38</sup> *Ibid.*, para. 647. The ICID also recommended that an International Compensation Commission be established to provide reparation victims of atrocities in Darfur (see *Ibid.*, para. 649) but that recommendation was not followed.

<sup>39</sup> UNSC Res 1593 (n 6).

<sup>40</sup> International Federation for Human Rights, 'Deteriorating situation in Darfour of great concern warn NGOs' (8 January 2011) <<http://www.fidh.org/UN-must-step-up-reporting-on-humanitarian-and>> accessed on 30 March 2011 ("A coalition of human rights and advocacy NGOs has today warned of rising levels of violence in Darfur during and after the referendum on southern self-determination, scheduled to begin tomorrow"); HRW World Report 2011 (n 29) ("[In 2010] Darfur, in western Sudan, saw continued large-scale attacks by government forces on rebel forces and civilians, as well as an increase in armed clashes between ethnic groups, particularly in South and West Darfur. The United Nations and humanitarian agencies increasingly came under attack and were targeted for robberies, kidnappings, and killings by armed elements in Sudan's western region ... Government attacks on Jebel Mara [in Darfur] intensified again in September [2010], destroying dozens of villages and causing mass displacements"); US Human Rights Report 2009 (n 18) ("In Darfur government-aligned militias killed and injured civilians, including during attacks on villages; raped women and children; destroyed and looted civilian property; and used child soldiers. Rebel factions and bandits in Darfur killed and abducted civilians, humanitarian workers, and United Nations – African Union Mission in Darfur (UNAMID) personnel; beat and raped civilians; and recruited and used child soldiers").



## 4. CONDITIONS FOR PROSECUTIONS IN SUDAN

### 4.1 LEGAL CAPACITY TO PROSECUTE THE ATROCITIES

To promote an understanding of Sudan's ability to prosecute the Darfur atrocities, the present section will assess its judiciary as well as the relevant Sudanese legal norms and institutions.

#### *Capable but Dependent Judiciary*

The ICC Prosecutor, in his report to the UN Security Council in June 2010, suggested that Sudan has sufficient judicial capacity to prosecute atrocities:

The ability of the Sudanese judicial system to carry out proceedings has been demonstrated inter alia by the decision, announced on 6 May by [...] Justice Minister Abdel-Basit Sabdarat, to prosecute those responsible for investment fraud up to \$175 million in North Darfur. Minister Sabdarat announced that 58 suspects had been taken into custody and would face criminal charges, including two ex-police officers. The case shows that [Sudanese] authorities can prosecute serious crimes where there is willingness to do so. The Prosecution hopes to see similar action for war crimes, crimes against humanity and genocide.<sup>41</sup>

A similar view was expressed by another member of the ICC Prosecution, who explained that while Sudan is capable of prosecuting the atrocities, the government lacks the willingness to do so.<sup>42</sup> The ICC official also noted that some human rights organizations and legal aid lawyers are active in Darfur and Khartoum but are intimidated by the authorities.<sup>43</sup>

UN judicial officials who worked on legal cases in Darfur between 2004 and 2009 also considered that the local justice system was capable of prosecuting atrocities, and noted that some local judges were even willing to do so. However, the UN officials explained that Sudanese judges were subject to political interference which prevented them from prosecuting government and Janjaweed members.<sup>44</sup> Various reports confirm that the Sudanese judiciary lacks independence from the executive branch, adding that it

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<sup>41</sup> ICC 'Eleventh Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)' (17 June 2010) <[www.icc-cpi.int/NR/rdonlyres/A250ECCD-D9E5-433B-90BB-76C068ED58A3/282160/11thUNSCReportENG1.pdf](http://www.icc-cpi.int/NR/rdonlyres/A250ECCD-D9E5-433B-90BB-76C068ED58A3/282160/11thUNSCReportENG1.pdf)> accessed on 7 May 2011 (hereinafter: "ICC Prosecutor's Eleventh Report to the UNSC on Darfur"), para. 52.

<sup>42</sup> Interview notes with author. For a discussion about Sudan's willingness to prosecute the atrocities see section 4.2 below.

<sup>43</sup> Interview notes with author.

<sup>44</sup> Interview notes with author.

is subject to corruption and some courts violate due process norms.<sup>45</sup>

Thus, while the Sudanese judiciary is quite capable, it is compromised by lack of independence and corruption. Overall judicial capacity in Sudan may have also been weakened by the expulsion of human rights and humanitarian organizations in March 2009, following the ICC's issuance of an arrest warrant against the Sudanese president (see section 7.1 below).

### *Relevant Legal Norms*

In the past few years Sudan has been creating new legal norms to enable the prosecution of atrocities. Thus, in 2007, Sudan adopted the Armed Forces Act (AFA), which criminalizes genocide, crimes against humanity and war crimes.<sup>46</sup> The AFA applies only to members of the armed forces. In 2009, Sudan introduced similar prohibitions with respect to the general population by amending its Criminal Act of 1991 to cover genocide, crimes against humanity and war crimes.<sup>47</sup> These developments are significant in that they allow Sudanese national courts to prosecute atrocities as international crimes. However, several legal obstacles may impede such prosecutions.<sup>48</sup> First, the definitions of the above international crimes under Sudanese law do not fully conform to their definitions in the Rome Statute.<sup>49</sup> For example, genocide under Sudanese law must be committed through homicide (or murder) and in the context of a widespread and systematic attack.<sup>50</sup> These requirements do not exist under international

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<sup>45</sup> Freedom House, *Freedom in the World 2010: Country Reports: Sudan* <<http://www.freedomhouse.org/template.cfm?page=22&year=2010&country=7923>> accessed on 2 April 2011 (hereinafter: "Freedom House Report 2010") ("The [Sudanese] judiciary is not independent. Lower courts provide some due process safeguards, but the higher courts are subject to political control, and special security and military courts do not apply accepted legal standards"); US Human Rights Report 2009 (n 18) ("Although the Interim National Constitution and the law provide for an independent judiciary, the judiciary was largely subservient to the president or the security forces, particularly in cases of alleged crimes against the state. The judiciary was inefficient and subject to corruption."); Report of the International Commission of Inquiry on Darfur, p. 5 ("Restrictive laws that grant broad powers to the executive have undermined the effectiveness of the [Sudanese] judiciary").

<sup>46</sup> Sudan's Armed Forces Act of 2007, Articles 153 – 163.

<sup>47</sup> Sudan's Criminal Act of 1991 (as amended in 2009), Articles 187 – 189.

<sup>48</sup> For a detailed critical appraisal see Mohamed Abdelsalam Babiker, "The Prosecution of International Crimes under Sudan's Military and Criminal Laws: Development, Gaps and Limitations", in *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (Ed. Lutz Oette, Ashgate UK, 2011).

<sup>49</sup> Submission by the Redress Trust and the Sudanese Human Rights Monitor for Sudan's Universal Periodic Review, November 2010, "Implementing International Human Rights Obligations in Domestic Law" (May 2011) <[http://www.redress.org/downloads/publications/UPR\\_Sudan\\_Nov\\_2010.pdf](http://www.redress.org/downloads/publications/UPR_Sudan_Nov_2010.pdf)> accessed on 6 April 2011 (hereinafter: "Redress, Implementing International Human Rights Obligations") ("The Armed Forces Act of 2007 and the amendment of the Criminal Act of 2009 recognise genocide, war crimes and crimes against humanity. However, the definitions used are not fully in line with internationally recognised ones").

<sup>50</sup> Article 188 of the Sudanese Criminal Act of 1991 (as amended in 2009) provides that genocide is committed by a person who "commits, attempts or abets the commitment of the offence or the offences of homicide against an individual or individuals of a national, ethnic, racial or religious group upon that entity with the intention of exterminating it or destroying it partially or totally in the context of a systematic and widespread conduct directed against that group

law. Further, while Sudanese law covers numerous war crimes, it fails to cover some of the war crimes that are criminalized under international law, such as sexual slavery and other gender related crimes.<sup>51</sup> This may prevent national authorities from charging certain acts as international crimes even though they amount to such crimes under international law.<sup>52</sup> A second category of legal obstacles to national prosecutions of international crimes in Sudan is a system of immunities, which are granted to state officials and soldiers under the AFA and other Sudanese legislations.<sup>53</sup> A third obstacle is the legal defense of obeying orders, which is recognized by Sudanese law.<sup>54</sup>

A fourth obstacle to domestic prosecutions of international crimes is the fact that the national provisions criminalizing international crimes do not apply retroactively.<sup>55</sup> This means that atrocities committed by members of the armed forces before 2007 and those committed by non-members of the armed forces before 2009 can never be prosecuted in Sudan as international crimes. In principle, the atrocities could be prosecuted as domestic crimes, but such proceedings will be hindered by the national immunity regime and the legal defense of obeying orders. In addition, the prosecution of atrocities as domestic crimes may not be meaningful because of the definitions and penalties of

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and commits in the same context any of the following acts: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.” The original Arabic version of the provision is available at <[pclrs.org/english/bills-and-laws#criminal](http://pclrs.org/english/bills-and-laws#criminal)> accessed on 2 October 2011. An English translation is available at Redress and KCHRED, ‘Comments on the Proposed Amendment of the Sudanese Criminal Act – Position Paper’, September 2008 <[pclrs.org/downloads/Miscellaneous/Penal\\_Code\\_Amendment\\_Position%20Paper%202\\_.pdf](http://pclrs.org/downloads/Miscellaneous/Penal_Code_Amendment_Position%20Paper%202_.pdf)> accessed on 2 October 2011. A similar definition is provided under Article 153 (1) of the Sudanese Armed Forces Act of 2007 (although the title of the offence is not “genocide” but rather “offences against civilians during military operations”). See English translation of the Act at <[shrig.org.sd/pdf/the%20Armed%20Forces%20Act%202007.pdf](http://shrig.org.sd/pdf/the%20Armed%20Forces%20Act%202007.pdf)> accessed on 2 October 2011.

<sup>51</sup> See Sudanese Criminal Act of 1991 (as amended in 2009), Article 189, and Sudanese Armed Forces Act of 2007, Articles 154 – 163.

<sup>52</sup> For war crimes which are criminalized under international law see Rome Statute, Article 8.

<sup>53</sup> Redress, Implementing International Human Rights Obligations (n 49) (“The granting of immunities for officials in Sudanese laws is a long-standing concern. Effectively, authorities are given the right to police themselves and the resulting lack of accountability facilitates human rights violations. The UNHRC, the African Commission, various UN bodies, the AU High-Level Panel on Darfur and others have called on Sudan to abolish immunities. Sudan had the opportunity to do so in the Armed Forces Act of 2007, the Police Act of 2008, and the National Security Act of 2010, but has opted not to do so. The Sudanese Constitutional Court has justified immunities by emphasising their conditional nature and the possibility of judicial review. However, in practice, immunities have frequently led to impunity, including for serious human rights violations, and legal remedies are neither clear nor effective. By maintaining the current system, the state fails in its positive obligation to prevent, investigate and prosecute serious violations and in providing effective remedies to victims thereof.” (Footnotes omitted). See also International Center for Transitional Justice, Briefing Paper, “Sudan: Impact of the Rome Statute and the International Criminal Court” (May 2010) <<http://ictj.org/sites/default/files/ICTJ-Sudan-Impact-ICC-2010-English.pdf>> accessed on 1 December 2012 (hereinafter: “ICTJ, Sudan Impact”), p. 3 (“...the Armed Forces Act of 2007 retains provisions that give impunity to members of the military, such as the rule that, for criminal suits against military personnel to proceed, immunities must be first waived by the president”).

<sup>54</sup> ICTJ, Sudan Impact (n 53).

<sup>55</sup> *Ibid.* at the same time, it is acknowledged that the prohibition on retroactive application of the law is an important guarantee and a human right. I thank Prof Harmen van der Wilt for drawing my attention to this point.

certain domestic crimes under Sudanese law. For example, Sudanese law prohibits torture only in so far as it is associated with witness intimidation, and imposes an extremely low maximum sentence of three months of imprisonment for this offence.<sup>56</sup> The penalties imposed under Sudanese law for committing the offences of wounding, hurting and using criminal force against another person, are also relatively lenient and do not amount to the serious punishments that a war-related atrocity should entail.<sup>57</sup>

Theoretically, domestically prosecuting international crimes in Sudan could be meaningful even without applying the relevant laws retroactively. This is because any Sudanese proceedings addressing post-2007 international crimes would have probably dealt with offenders who also committed atrocities before 2007 (assuming most fighters did not resign from the war efforts in 2007 just because a new law criminalized international crimes). However, immunities and other legal obstacles would have to be removed to enable such prosecutions. Finally, it is noted that Sudanese criminal law does not recognize command responsibility, so that even if Sudan were to prosecute the Darfuri atrocities nationally, the top architects of the crimes could be shielded from

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<sup>56</sup> See Article 115 (2) of the Sudanese Criminal Act of 1991 (“Every person who, having public authority entices, or threatens, or tortures any witness, or accused, or opponent to give, or refrain from giving any information in any action, shall be punished, with imprisonment, for a term, not exceeding three months, or with fine, or with both” Interestingly, the only other place the word torture appears in the Sudanese Criminal Act is with regard to the ill-treatment of animals. See Article 87 (1) of the Sudanese Criminal Act (“Whoever treats an animal with apparent cruelty, torture, or wilfully illtreats it, or overburdens, or overuses any animal, which is unfit for work, by reason of age, or disease, or who apparently neglects any animal, shall be punished with fine”). See also Redress, Implementing International Human Rights Obligations (n 49) (noting that “Sudan’s criminal law does not recognize an offence of torture in conformity with international standards”); UN Human Rights Committee, Ninth Session, ‘Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant’, UN Doc. CCPR/C/SND/CO/3/CRP.1, 26 July 2007 <[www2.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.SDN.CO.3.CRP.1.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.SDN.CO.3.CRP.1.pdf)> accessed on 2 October 2011, para. 16 (“The Committee regrets that there is no definition of torture in Sudan’s Criminal Code”).

<sup>57</sup> Articles 138 – 141 of the Sudanese Criminal Act criminalize the causing of “wounds” to another person, including the “loss of an organ in his body, or the mental function or of any of the senses, or limbs, or caus[ing] any fracture, or wound in body” (Article 138). When the wound was caused intentionally, the punishment is retribution (punishing the offended with the same crime he committed), or imprisonment of up to five years and/or a fine (Article 139); if the wound was caused “semi-intentionally”, the punishment is up to three years imprisonment and/or a fine (Article 140); if the wound was caused “by mistake”, the punishment is up to one year imprisonment and/or a fine (Article 141). Article 143 covers the offense of using “criminal force”, an offense which is committed when one “uses force upon another person, without that person’s consent, intending to commit any offence, or to cause harm, or fear, or annoyance to such person”; the maximum penalty for this offence is one year of imprisonment and/or a fine. Article 142 (1) criminalized the act of “hurt”. In particular, it states that: “There shall be deemed to commit the offence of hurt whoever causes any pain, or disease to another person, and shall be punished, with imprisonment, for a term, not exceeding six months, or with fine, or with both.” Article 142 (2) stipulates that “Where hurt has occurred by dangerous means, such as poison, or intoxicating drugs, or where hurt is caused with the intention of drawing a confession from another, or compelling that other to do an act contrary to the law, the offender shall be punished, with imprisonment, for a term, not exceeding two years, and may also be punished with fine.” This last provision may be the closest to the internationally recognized crime of torture (see, e.g., definition of torture in Article 1 of the UN Convention against Torture), as it could apply in cases where an official intentionally hurts a person to get information or confessions (or to punish, intimidate, coerce, etc.). The maximum penalty, however, is only two years imprisonment, hardly reflecting the type of serious punishment that a war-related atrocity should entail.

prosecution.<sup>58</sup> At the same time, Sudanese courts might be able to follow the ICC's approach of charging political leaders with criminal responsibility under the doctrines of Joint Criminal Enterprise, 'perpetration by means' of another person or an organization or co-perpetration.<sup>59</sup> Interestingly, when the Sudanese prosecutor general discussed possible investigations of Darfur atrocities, in April 2009, he suggested that "[n]ational legislation did not allow the application of the doctrine of command responsibility, but those who assisted in committing crimes could face punishment".<sup>60</sup> In any event, as illustrated in part 5 below, Darfur atrocities have not been prosecuted in Sudan.

### *Relevant Legal Institutions*

In recent years, in addition to introducing legal norms that enable the prosecution of atrocities, Sudan has also put in place special courts and a special prosecutor to investigate and prosecute the Darfur atrocities. Already in March 2003, as soon as the armed conflict broke out in Darfur, Sudan created "specialized courts" in Darfur to address war-related crimes.<sup>61</sup> However, pro-government forces were not prosecuted in these courts.<sup>62</sup> The specialized courts were also flawed in that they relied in certain cases on confessions obtained under torture, and applied overly speedy procedures, sometimes taking an hour or less to hold a hearing involving a capital offense.<sup>63</sup> In addition, defense counsel had very limited time to examine witnesses, or visit their clients in detention to prepare their case, and the courts treated adults and minors similarly.<sup>64</sup>

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<sup>58</sup> Redress, *Criminal Law and Human Rights in Sudan – A Baseline Study* (March 2008) <[http://www.redress.org/downloads/publications/BASELINE\\_STUDY\\_FINAL\\_Mar08.pdf](http://www.redress.org/downloads/publications/BASELINE_STUDY_FINAL_Mar08.pdf)> accessed on 30 April 2011. One exception is the AFA, which provides for command responsibility. However, this law's applicability to war related crimes is limited for the reasons noted above.

<sup>59</sup> On the use of these modes of participation by the ICC see Hamen van der Wilt, 'The Continuous Quest for Proper Modes of Criminal Responsibility', 7 JICJ 307 (2009).

<sup>60</sup> ICTJ, *Sudan Impact* (n 53).

<sup>61</sup> These courts were modified versions of special courts which were established in Darfur in 2001 by an executive decree under the State of Emergency in Darfur which was declared in 1999. See ICID Report (n 2), para. 441.

<sup>62</sup> ICID Report (n 2), para. 442 ("The majority of those tried under these courts for possession of arms are said to be from farming communities and practically never from nomadic tribes"). It is noted that these courts were mandated to prosecute armed robbery, banditry, possession of unlicensed weapons, disturbing public order and crimes against the state committed in Darfur.

<sup>63</sup> ICID Report (n 2), paras. 444-445.

<sup>64</sup> *Ibid.*, paras. 446, 448. Moreover, in 2004, Sudan established a National Commission of Inquiry (NCI) to investigate human rights violations by armed groups in Darfur, and Rape Committees to investigate rape crimes in the three states of Darfur. ICID analyzed the NCI report and concluded that "its findings and recommendations are insufficient and inappropriate to address the gravity of the situation". See *ibid.*, para. 462. Regarding the Rape Committees, ICID reported that their mandate and time resources were too limited to engage in any meaningful investigation, and concluded that "[i]f the intention of the Government was to end impunity and to establish a mechanism for facilitating



On 7 June 2005, a day after the initiation of the ICC investigation in Darfur, Sudan established, through an administrative decree, the Special Criminal Court for Events in Darfur (SCCED).<sup>65</sup> The Sudanese Justice Ministry reportedly claimed that the SCCED would substitute the ICC.<sup>66</sup> However, the first defendants before the SCCED were accused of looting vehicles.<sup>67</sup> In November 2005, the government added two more chambers to the originally single-chambered SCCED (the three chambers are often referred to collectively as the “Special Courts for Darfur”).<sup>68</sup> That month, the SCCED’s subject-matter jurisdiction was expanded to cover international humanitarian law.<sup>69</sup> But its proceedings have involved “only a few, largely lower level, perpetrators for a limited number of crimes in Darfur, mainly for common offences in relation to isolated incidents”.<sup>70</sup> Reports also confirm that the SCCED was neither credible nor functional.<sup>71</sup>

A related institutional development in Sudan was the appointment, in August 2008, of Nimr Ibrahim Mohamed to serve as Special Prosecutor for Darfur.<sup>72</sup> This newly

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victims in reporting crime of rape with a view to ensuring that perpetrators are held accountable, the initiative was poorly designed and lacked the potential for achieving this objective”. See *ibid*, para. 487.

<sup>65</sup> ‘Decree Establishing the Special Criminal Court on the Events in Darfur’ (7 June 2005), reprinted in UN Doc S/2005/403, Letter dated 18 June 2005 from the Charge d’affaires a.i. of the Permanent Mission of the Sudan to the United Nations Addressed to the President of the Security Council (22 June 2005) <<http://documents.un.org/default.asp>> accessed on 7 May 2011 (hereinafter: “Decree Establishing the SCCED”). In 1999, Sudan declared a State of Emergency in Darfur, on the basis of which the government regularly issues repressive orders and sets up special courts. The SCCED were set up under the State of Emergency. See U.S. State Department Report on Human Rights Practices 2008, Sudan (25 February 2009) (“Special courts existed in Darfur under the state of emergency to try crimes against the state. There were three such courts, one in each Darfur state capital; however, the courts did not function during the year”).

<sup>66</sup> IRIN Humanitarian News and Analysis, ‘SUDAN: Judiciary challenges ICC over Darfur cases’ (24 June 2005) <<http://www.irinnews.org/report.aspx?reportid=55068>> accessed on 7 May 2011 (hereinafter: “IRIN, Sudan challenges ICC”).

<sup>67</sup> *Ibid*.

<sup>68</sup> ICTJ, Sudan Impact (n 53) (also noting that in November 2005, the government “created special investigative committees—the Judicial Investigations Committee, the Special Prosecutions Commissions, the Committees Against Rape, the Unit for Combating Violence Against Women and Children, and the Committee on Compensations—to also address the crimes committed in Darfur”).

<sup>69</sup> Prosecuting International Crimes in Africa, eds. Chacha Murungu & Japhet Biegon Pretoria University Law Press (2011) <[http://www.pulp.up.ac.za/cat\\_2011\\_04.html](http://www.pulp.up.ac.za/cat_2011_04.html)> accessed on 23 April 2011, p. 263. Previously, the SCCED had jurisdiction over domestic crimes, “violations cited in the report of the [ICID]”, and “[a]ny charges pursuant to any other law, as determined by the Chief Justice of Sudan”. See Decree Establishing the SCCED (n 65), Article 5.

<sup>70</sup> Lutz Oette, ‘Peace and Justice, or Neither?’ 8 JICJ 345 (2010), p. 347. See also ICTJ, Sudan Impact (n 53) (reporting that “[t]he performance most proceedings [of the Special Court for Darfur and the other investigative mechanisms] dealt with relatively minor crimes, and there is no evidence that any of these bodies have addressed cases under consideration by the ICC”); HRW, “Lack of Conviction: The Special Criminal Court on the Events in Darfur” (June 2006) <<http://www.hrw.org/sites/default/files/reports/Sudan%20court%20paper%200606.pdf>> accessed on 10 July 2012, Executive Summary, p. 1 (“The 13 cases brought before the SCCED to date have involved only ordinary crimes, such as theft, possession of stolen goods or individual murders unrelated to larger attacks. Sudanese authorities have failed to press charges before the SCCED for a single major atrocity committed in Darfur”).

<sup>71</sup> See, e.g., US Human Rights Report 2009 (n 18) (reporting that the Special Courts for Darfur “did not function during [2009]”); Freedom House, ‘Freedom in the World 2009, Country Reports (Sudan)’ <<http://freedomhouse.org/template.cfm?page=22&country=7708&year=2009>> accessed on 2 April 2011 (“In response to the ICC investigation into crimes committed in Darfur, the government created the Special Courts for Darfur; their credibility has been challenged by legal experts”).

<sup>72</sup> ICTJ, Sudan Impact (n 53).

created office was mandated with prosecuting crimes committed in Darfur since 2003. Mohamed's appointment to this position took place about a month after the ICC Prosecutor announced that he would seek an arrest warrant against Al-Bashir (the relevant ICC proceedings are discussed in section 6.2 below). However, despite putting in place special courts and a prosecutor to handle the Darfur atrocities, evidence suggests that Sudan is not establishing accountability for the atrocities (see part 5 and section 8.1 below).

#### 4.2 POLITICAL WILL TO PROSECUTE THE ATROCITIES

In January 2005, the UN-mandated ICID concluded that the Sudanese justice system is unwilling to establish accountability for the atrocities committed in Darfur.<sup>73</sup> Over seven years later, this still remains the case, as suggested by the sharp contrast between, on the one hand, the availability of judicial mechanisms mandated to address the Darfur atrocities (see section 4.1 above), and, on the other hand, the absence of atrocity-related prosecutions in Sudan (see part 5 below). In December 2010, the ICC Prosecutor reported that:

the Government of the Sudan is not cooperating with the Court and is conducting no national proceedings against those responsible for the crimes committed. Since 2005, Sudanese authorities have consistently promised to do justice, creating mechanisms such as Special Courts and Prosecutors, while consistently and deliberately protecting those who commit the crimes. President Al Bashir, in accordance with the Chamber's findings, issued the criminal orders to attack civilians and destroy their communities. President Al Bashir does not want to investigate those who are following his orders.<sup>74</sup>

Media and NGO reports are also skeptical about Sudan's willingness to prosecute

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<sup>73</sup> ICID Report (n 2), p. 5 (executive summary). An examination of Sudan's response to the crimes was necessary in order for ICID to consider what means it would recommend for holding accountable the perpetrators. See also p. 6 therein ("The measures taken so far by the Government to address the crisis have been both grossly inadequate and ineffective, which has contributed to the climate of almost total impunity for human rights violations in Darfur. Very few victims have lodged official complaints regarding crimes committed against them or their families, due to a lack of confidence in the justice system. Of the few cases where complaints have been made, most have not been properly pursued. Furthermore, procedural hurdles limit the victims' access to justice. Despite the magnitude of the crisis and its immense impact on civilians in Darfur, the Government informed the Commission of very few cases of individuals who have been prosecuted, or even disciplined, in the context of the current crisis").

<sup>74</sup> ICC, 'Twelfth Prosecutor's Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, Pursuant to UNSCR 1593 (2005)' (9 December 2010) <<http://www.icc-cpi.int/NR/rdonlyres/23E8008-1E3E-494B-A256-8E69F82B27ED/282820/12thspeechtotheUNSC.pdf>> accessed on 23 March 2011 (hereinafter: "ICC Prosecutor's Twelfth Statement to the UNSC on Darfur"), para. 4. See also ICC Press Office, 'Pre-Trial Chamber I informs the United Nations Security Council about the lack of cooperation by the Republic of the Sudan in the case against Harun and Kushayb' (26 May 2010) <<http://www.icc-cpi.int/NR/exeres/219CA9C9-84C3-4228-BE49-DD9B50683D33.htm>> accessed on 23 March 2011.

the atrocities committed in Darfur.<sup>75</sup> New York Times journalist Elizabeth Rubin, who travelled to Darfur, reported about Darfuri civilians who complained about attacks before the local judicial authorities in their region. Her research revealed that the local investigators dropped the investigations when they realized that all the complaints were against the government, military or Janjaweed militias. Some plaintiffs who complained against specific members of the armed forces were invited to a court hearing, but were arrested when they arrived in court and disappeared for months while the suspects were released.<sup>76</sup>

That the Sudanese justice system is unwilling to establish accountability was also confirmed in interviews with ICC staff members and UN judicial officials who worked in Darfur during the period 2004 -2009.<sup>77</sup>

## 5. NATIONAL JUDICIAL RESPONSE TO THE ATROCITIES

In 2004, the ICID requested information from the Sudanese government about criminal proceedings addressing the atrocities committed in Darfur since February 2003. In response, the government cited only one war-related prosecution, which dealt with a single perpetrator and one criminal event.<sup>78</sup> Since this was the only relevant case mentioned by Sudan, the ICID concluded that the “Government failed to demonstrate that it had taken measures to prosecute those involved in the attacks that had taken place since February 2003”.<sup>79</sup> Six years later, in December 2010, the ICC Prosecutor reported to the UN Security Council that “the Government of the Sudan ... is conducting no national proceedings against those responsible for the crimes committed [in

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<sup>75</sup> Sudan Tribune, ‘Sudanese official admits Darfur war crimes probe a fiasco’ (27 January 2011), <<http://www.sudantribune.com/Sudanese-official-admits-Darfur.37771>> accessed on 28 March 2011 (“The Sudanese government has not conducted serious investigations into the alleged war crimes committed in the western region of Darfur despite assertions by Khartoum to the contrary, a senior official in the justice ministry said today...”); HRW, ‘The Mbeki Panel Report One Year On’ (29 October 2010) <[http://www.hrw.org/node/93935#\\_ftnref18](http://www.hrw.org/node/93935#_ftnref18)> accessed on 28 March 2011.

<sup>76</sup> New York Times, ‘If Not Peace, Then Justice’ (by Elizabeth Rubin, 2 April 2006) <<http://www.nytimes.com/2006/04/02/magazine/02darfur.html>> accessed on 7 May 2011.

<sup>77</sup> Interview notes with author.

<sup>78</sup> ICID Report (n 2), para. 428. The case was against *Jamal Suliman Mohamad Shayeb*, who was charged with killing 24 individuals (including women and children) in the village of Halouf, as well as looting and burning property in that village. The Sudanese government cited two other cases, according to ICID, but these addressed events that occurred in 2002: The case of *Jagre al-Hadi al Makbul and others* before the Special Court of Nyala in South Darfur which concerned events that took place on 18 May 2002 involving 96 defendants, and where the court sentenced 88 persons to death, 1 for 10 years of imprisonment, as well as the confiscation of weapons and return of property; and the case of *Hafedh Mohammed Dahab and others* regarding the attacks on the village of Jugma and Jabra which resulted in the killing of 4 people, including the burning of one individual, injuring others, as well as the looting and burning of houses.

<sup>79</sup> ICID Report (n 2), para. 428.



Darfur]”.<sup>80</sup> Also in 2010, the NGO Human Rights Watch (HRW) reported generally about Sudan that “[a]ccountability for human rights abuses remains practically nonexistent”.<sup>81</sup> This is despite Sudan’s establishment of the SCCED in 2005, appointment of a special prosecutor for Darfur in 2008, and adoption of a legal (normative and institutional) framework for prosecuting international crimes in 2007 (see section 4.1 above).

UN judicial officials who worked in Darfur during the period 2004-2009 suggested that some low-level local officials were tried in Darfur in that period, for various criminal activities, some of which could be related to the conflict.<sup>82</sup> For example, a UN judicial officer recalled that a member of the Central Reserve Police (a regularized form of a Janjaweed militia) was prosecuted before an ordinary court in the Darfuri city of El Fasher and sentenced to an imprisonment term and reparations, for having shot Darfuris who resided in a camp for internally displaced persons. The official explained that the case was prosecuted in the El Fasher court because there were numerous witnesses and a legal aid lawyer who helped bring the case to court.<sup>83</sup> Another UN judicial officer noted that, during the period 2004-2008, the UN Development Programme provided funds and training to a network of about 60 Darfuri lawyers who represented victims in proceedings against policemen, Janjaweed members and “ordinary” criminals before the regular courts and the SCCED. He noted that about 1400-1500 cases were being handled during that period.<sup>84</sup> But it is unclear how many of these cases led to trials or whether the crimes addressed were committed in connection with the conflict. A third UN judicial officer, who also worked in Darfur, explained that local courts administered “sham” proceeding and their sentences were not enforced. For example, in one case three low-ranking military officers were convicted for conflict-related crimes and sentenced to imprisonment by the SCCED, but when the UN official visited the prison to which they were sent, the official was unable to find them.<sup>85</sup>

In any event, the “big fish” (including but not limited to those sought by the ICC)

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<sup>80</sup> ICC Prosecutor’s Twelfth Statement to the UNSC on Darfur (n 29), para. 4. See also U.S. Department of State, Country report on human rights practices-2008-Sudan (25 February 2009) <<http://www.state.gov/g/drl/rls/hrpt/2008/af/119026.htm>> accessed on 2 April 2011 (hereinafter: “US Human Rights Report 2008”) (“In August the Ministry of Justice appointed a special prosecutor for crimes in Darfur, Nimr Ibrahim Mohamed. Human rights observers asserted that the special prosecutor was biased in favor of the ruling party, and that the process was not credible. The special prosecutor did not begin judicial proceedings against any persons for crimes in Darfur by year’s end”).

<sup>81</sup> HRW World Report 2010 (n 33).

<sup>82</sup> Interview notes with author.

<sup>83</sup> Interview notes with author.

<sup>84</sup> Interview notes with author.

<sup>85</sup> Interview notes with author.

were never prosecuted domestically. In October 2008, the Sudanese Special Prosecutor for Darfur, Nimr Ibrahim Mohamed, announced that he arrested and charged three individuals for crimes committed in Darfur, including Janjaweed leader and ICC suspect Ali Kushayb.<sup>86</sup> However, in 2009, the AU High-Level Panel on Darfur (AUPD) reported that despite this announcement, those cases “have not yet come before a court and there was little expectation that they will do so any time soon”.<sup>87</sup> A Sudanese Supreme Court judge was quoted stating, on 6 May 2009, that Ali Kushayb could stand trial “when there is enough evidence”.<sup>88</sup> As of the time of writing, no such trial took place. According to ICC officials, Kushayb was released from custody and was seen participating in a public event in Sudan in 2010. The officials added that it was unclear whether Kushayb was ever arrested.<sup>89</sup>

Interestingly, this was not the first time the Sudanese authorities claimed that they had arrested Kushayb: In February 2007, when he was first named by the ICC Prosecutor as a suspect, the Sudanese Justice Minister stated that Kushayb was already detained in Sudan.<sup>90</sup> An ICC official noted that Kushayb was released shortly afterwards without being tried, and suggested that the arrest lacked a genuine judicial purpose and was only aimed at divesting the ICC of jurisdiction over the case.<sup>91</sup> As explained in section 8.1 below, similar arguments were made about Kushayb’s arrest (or alleged arrest) of October 2008. In March 2009, Sudanese Special Prosecutor Mohamed reportedly stated that he might question Ahmed Harun, a senior Sudanese official who

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<sup>86</sup> NY Times, ‘Sudan Arrests Militia Chief Facing Trial’ (1 October 2008) <[http://www.nytimes.com/2008/10/14/world/africa/14darfur.html?\\_r=1&ref=world&oref=slogin](http://www.nytimes.com/2008/10/14/world/africa/14darfur.html?_r=1&ref=world&oref=slogin)> accessed on 23 April 2011 (hereinafter: “NY Times, Sudan Arrests Militia Chief”); Radio Netherlands Worldwide, ‘Sudan arrests Ali Kushayb’ (14 October 2008) <<http://static.rnw.nl/migratie/www.rnw.nl/internationaljustice/icc/Sudan/081014-kushayb-redirected>> accessed on 23 April 2011 (hereinafter: “RNW, Sudan arrests Kushayb”); ICC, ‘Ninth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)’ (5 June 2009) <[http://www.icc-cpi.int/NR/rdonlyres/B97B3A9C-0C83-4884-881C-70C1C1EEEE53/280448/9th\\_UNSCRReport\\_Eng1.pdf](http://www.icc-cpi.int/NR/rdonlyres/B97B3A9C-0C83-4884-881C-70C1C1EEEE53/280448/9th_UNSCRReport_Eng1.pdf)> accessed on 23 April 2011 (hereinafter: “ICC Prosecutor’s Ninth Report to the UNSC on Darfur”), para. 27. It is recalled that Sudan created the position of Special Prosecutor of Darfur in August 2008, one month after the ICC Prosecutor announced that he would seek an arrest warrant against Al-Bashir. See ICTJ, Sudan Impact (n 53).

<sup>87</sup> AUPD Report (n 1), para. 223. The AU established the AUPD as a result of the ICC indictment against Al-Bashir, mandating it to examine the situation in Darfur and submit recommendations on how to promote peace and justice in Darfur.

<sup>88</sup> ICC Prosecutor’s Ninth Report to the UNSC on Darfur (n 86), para. 27.

<sup>89</sup> Interview notes with author.

<sup>90</sup> BBC News, ‘Court Names Darfur War Suspects’ (27 February 2007) <<http://news.bbc.co.uk/2/hi/africa/6399311.stm>> accessed on 23 April 2011 (hereinafter: “BBC, Darfur War Suspects”). It is noted that in May 2007, the BBC cited a statement by the ICC Prosecutor that Kushayb was wanted by the Court for different incidents than those for which he was detained in Sudan. See BBC News, ‘ICC Issues Darfur Arrest Warrants’ (2 May 2007) <<http://news.bbc.co.uk/2/hi/africa/6614903.stm>> accessed on 23 April 2011 (hereinafter: “BBC, Darfur Arrest Warrants”).

<sup>91</sup> Interview notes with author.

was also charged by the ICC in 2007.<sup>92</sup> But evidence suggests that no such procedure has taken place.<sup>93</sup>

In late 2009, the AUPD recommended the establishment of a hybrid court to prosecute the atrocities committed in Darfur (see section 7.2 below), but no such court has been created to date. Thus, so far, no one has been held accountable for the mass atrocities committed in Darfur. In addition, Sudan has not been cooperating with the ICC (see section 7.1 below). Instead, judicial proceedings were initiated in Sudan against individuals suspected of assisting the ICC. The suspects include activists, journalists, students, policemen and even Sudanese UNAMID staff members. Some of them were detained, tortured and then released,<sup>94</sup> while others faced trials of dubious quality,<sup>95</sup> and were subject to excessive punishments. For example, in 2009, a former policeman was sentenced to 17 years for planning to provide information to the ICC.<sup>96</sup>

Thus, it seems that Sudan is not only unwilling to establish accountability for the Darfur atrocities, but is prepared to use any means to stop those who try to promote such accountability. By contrast, the government has shown great willingness to prosecute and punish Darfuri rebels for attacking government forces. Swiftly responding to the May 2008 rebel attack against government forces in Khartoum, the government arrested and tried alleged members of Darfuri rebel groups, charging and convicting

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<sup>92</sup> ICC Prosecutor's Ninth Report to the UNSC on Darfur (n 86), paras. 27-28. In an interview, an ICC official recalled that Harun said in a press conference in Sudan that Special Prosecutor Mohamed should "know his place", a statement which was later backed by President Al-Bashir. Interview notes with author.

<sup>93</sup> A Sudanese news article from December 2010 noted that "[t]here were no reports of any active cases prosecuted by Mohamed during his tenure. He has made a failed attempt to investigate the current governor of South Kordofan Ahmed Haroun". See Sudan Tribune, 'Mbeki's report shows little success in implementing recommendations on Sudan' (13 December 2010) <<http://www.sudantribune.com/Mbeki-s-report-shows-little.37250>> accessed on 30 March 2011 (hereinafter: "Sudan Tribune, Mbeki's report").

<sup>94</sup> HRW World Report 2010 (n 33) ("The African Union-United Nations Mission in Darfur (UNAMID) documented 16 cases of arrest and detention by government security forces of people alleged to support the ICC or to have provided information to international interlocutors. In April-May 2009 security officials arrested some 20 members of a student group affiliated with a faction of the Sudan Liberation Army (a Darfur rebel movement), which openly supported the ICC indictment by organizing events at various universities"); US Human Rights Report 2009 (n 18) ("On April 11 [2009], two other UNAMID national staff members were arrested [in Sudan]. They were accused of helping the ICC and were beaten, deprived of sleep, threatened with death, subjected to painful positions, and later released"); HRW World Report 2011 (n 29) ("Between October 30 and November 3 [2010], Sudanese national security officials arrested and detained more than 10 Darfuri activists and journalists in Khartoum, and continue to hold them in unknown locations without access to family or lawyers. The arrests were widely viewed as a means to suppress information and advocacy on Darfur").

<sup>95</sup> *Ibid.*

<sup>96</sup> Report of the Special Rapporteur on the Situation of Human Rights in the Sudan (June 2009) <[http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/AHRC.11.14\\_AUV.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/AHRC.11.14_AUV.pdf)> accessed on 3 April 2011, para. 38 ("ICC-related prosecutions, marked by unfair trials, were also documented. On 28 January 2009, a former Popular Police Forces official was found guilty of espionage for allegedly planning to provide information to the ICC, and sentenced to 17 years imprisonment. He was held without charge or access to legal counsel for over three months. Once appointed, his defence lawyers were denied access to the principal material evidence submitted by the prosecution. The court also based its judgment partly on an allegedly coerced confession").

them of terrorism and sentencing over a hundred of them to death.<sup>97</sup>

## 6. INTERNATIONAL JUDICIAL RESPONSE TO THE ATROCITIES: ICC

### 6.1 ICC BACKGROUND<sup>98</sup>

The ICC is the first permanent international court mandated to prosecute the most serious crimes of international concern. The Court is based in The Hague and was established by the Rome Statute - a multilateral treaty that was adopted on 17 July 1998 and entered into force on 1 July 2002. The ICC is a treaty-based international organization which is independent from (although cooperative with) the UN. As of October 2012, as many as 121 states joined the Rome Statute. These do not include Sudan, which has signed but did not ratify the Rome Statute.<sup>99</sup>

The Rome Statute grants the ICC jurisdiction over the gravest manifestations of genocide, crimes against humanity and war crimes perpetrated since 1 July 2002, that were either (1) committed on the territory or by nationals of a State that joined or otherwise accepted the Court's jurisdiction, or (2) referred to the ICC by the UN Security Council.<sup>100</sup> Consistent with the "principle of complementarity", the ICC is a court of last resort and is complementary (or residual) to the jurisdiction of national courts.<sup>101</sup> This

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<sup>97</sup> In May 2008, over 200 persons (including about 30 civilians) were killed during hostilities between JEM rebels and government forces in Omduman in western Khartoum. The government responded by arbitrarily arresting at least 300 individuals suspected of participating in the JEM attack, including women and children. It reportedly subjected the detainees to torture and inhumane treatment, and failed to reveal the whereabouts of many of them. See HRW World Report 2009 (n 25); HRW World Report 2010 (n 33). In June 2008, special courts were established by the government under Sudan's 2001 Anti-Terrorism Law to try the suspects. By late 2009, over 100 persons, including several children, were tried and sentenced to death by these special courts. See IOL News, 'Sudan punished children for rebel raid – UN' (23 November 2009) <<http://www.iol.co.za/news/africa/sudan-punished-children-for-rebel-raid-un-1.465403>> accessed on 30 April 2011; HRW World Report 2009 (n 25); HRW World Report 2010 (n 33). The defendants were charged with terrorism and illegal possession of weapons, and prosecuted under the terrorism Act and the Criminal Act 1991. See, e.g., France24, 'Court sentences 11 more Darfur rebels to death' (27 April 2009) <<http://www.france24.com/en/20090426-court-sentences-death-11-more-darfur-rebels-sudan>> accessed on 30 April 2011. According to various reports, the trial proceedings seriously violated minimum due process standards, for example, the defendants had no access to lawyers before their trial and claimed they had to confess under duress. HRW World Report 2010 (n 33); US Human Rights Report 2009 (n 18); The NY Times, 'Sudan Sentences 8 Rebels to Death for Khartoum Raid' (17 August 2008) <<http://www.nytimes.com/2008/08/18/world/africa/18sudan.html>> accessed on 30 April 2011.

<sup>98</sup> Unless stated otherwise, the information in this section is based on information available at the official website of the ICC <[www.icc-cpi.int](http://www.icc-cpi.int)> accessed on 10 December 2010.

<sup>99</sup> See note 20 above.

<sup>100</sup> The Rome Statute has recently been amended to cover the crime of aggression, but the amendment will only enter into force when several conditions are met and not before several years from now.

<sup>101</sup> Article 17 of the Rome Statute enshrines the principle of complementarity by providing that a case is inadmissible before the ICC when it is being investigated or prosecuted by a state which has jurisdiction over the case and which is willing and able to genuinely carry out the proceedings, or when the case has been investigated by such a state but a decision was made not to prosecute the suspects (and such decision did not result "from the unwillingness or inability of the State genuinely to prosecute"). Article 17 provides two additional grounds of inadmissibility: (i) when the case is

means that it will not act if the case concerned is investigated or prosecuted at the domestic level, unless the national proceedings are not genuine (for example if they are intended to shield a person from prosecution by the ICC). Pursuant to the Rome Statute, the ICC's Office of the Prosecutor (OTP) can initiate an investigation *proprio motu* (on his own initiative),<sup>102</sup> or on the basis of a referral from the UN Security Council or from a State Party to the Rome Statute.<sup>103</sup>

## 6.2 ICC CASE CONCERNING SUDAN<sup>104</sup>

As noted above, following the recommendation of the UN-mandated ICID, the UN Security Council referred the situation in Darfur to the ICC on 31 March 2005. Consequently, the ICC Prosecutor opened an investigation into the situation on 6 June 2005. After almost two years of investigating, in February 2007, the OTP named two suspects and requested the ICC Pre-Trial Chamber to issue arrest warrants against them for crimes committed in Darfur. The first suspect was Ahmed Harun, who at the time of the crimes was Sudan's Interior Minister and allegedly responsible for organizing and funding the Janjaweed militia. By the time the ICC issued the arrest warrant against him, Harun was Sudan's Minister for Humanitarian Affairs. He currently serves as the Governor of South Kordofan, a new conflict area with crimes that may amount to war crimes and crimes against humanity.<sup>105</sup> The second suspect was Janjaweed leader Ali Muhammad Ali Abd-Al-Rahman, commonly known as Ali Kushayb. On 27 April 2007, following the OTP's request, the ICC judges issued arrest warrants against both suspects. Kushayb was said to be in the custody of Sudanese authorities at the time, for reasons unrelated to the ICC case.<sup>106</sup> The two Sudanese officials were charged by the ICC with a total of 51 counts of crimes against humanity and war crimes committed in Darfur, including murder, torture and mass rape of innocent civilians.

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insufficiently grave to be addressed by the ICC, (ii) when the suspect has already been tried for the alleged crimes (reflecting the prohibition of double jeopardy).

<sup>102</sup> Initiation by the OTP of a *proprio motu* investigation is subject to the authorization of the ICC Pre-Trial Chamber.

<sup>103</sup> For a State Party's referral (or a Prosecutor's *proprio motu* investigation) to trigger the ICC's jurisdiction, it must relate to ICC-crimes committed on the territory or by the national of a State Party to the Rome Statute. These restrictions do not apply in cases where the Security Council refers a situation to the ICC, which may concern any UN Member State, including those which are not parties to the Rome Statute.

<sup>104</sup> Unless stated otherwise, the information in this section is based on information available at the official website of the ICC <[www.icc-cpi.int](http://www.icc-cpi.int)> accessed on 10 December 2010.

<sup>105</sup> South Kordofan borders South Sudan and includes the disputed oil-rich region of Abyei, which may succeed from Sudan and join South Sudan (see section 2.1 above).

<sup>106</sup> BBC, Darfur Arrest Warrants (n 90) (citing a statement by the ICC Prosecutor that Kushayb was wanted by the Court for different incidents than those for which he was detained in Sudan).

On 4 March 2009, the ICC issued its third arrest warrant in the Darfur situation, against Sudanese President Omar Al-Bashir. He was charged with seven counts of crimes against humanity and war crimes committed in Darfur. It was the first time the ICC charged an incumbent head of state. The ICC judges issued the warrant following a request made in July 2008 by the ICC Prosecutor. The Prosecutor's request also asked the Court to charge Al-Bashir with the crime of genocide, but the Pre-Trial Chamber rejected this part of the request. The OTP appealed against this rejection. Consequently, the ICC Appeal Chamber found that the standard of proof which the Pre-Trial Chamber applied in deciding whether to include genocide charges was too high, and remanded the matter to the Pre-Trial Chamber for its re-consideration. This time around, having applied the standard of proof which the Appeals Chamber required, the Pre-Trial Chamber approved the genocide charges and issued a second arrest warrant against Al-Bashir, on 12 July 2010, charging him with three counts of genocide committed in Darfur (in addition to the other charges).

On 1 March 2012, the ICC issued an arrest warrant against Sudanese Minister of Defence Abdel Raheem Muhammad Hussein (formerly Sudan's Minister of Interior and the President's Special Representative in Darfur), for seven counts of crimes against humanity and six counts of war crime committed in Darfur.

Besides charging the above four Sudanese officials, the ICC charged three Darfuri rebel leaders with war crimes committed during an attack against UNAMID peacekeepers in Darfur in September 2007. The first rebel leader who was charged was Bahar Idriss Abu Garda, a senior commander in the URF (an armed group which split from the JEM – see section 3.1 above). On 7 May 2009, the ICC issued a summons for his appearance.<sup>107</sup> In compliance with the summons, Abu Garda appeared voluntarily before the ICC, on 18 May 2009, and was officially informed of the charges against him as well as his rights under the Rome Statute. From 19 to 29 October 2009, the ICC held a confirmation hearing in his case.<sup>108</sup> On 8 February 2010, the ICC Pre-Trial Chamber decided not to confirm the charges against Abu Garda, effectively preventing the case from proceeding to trial.<sup>109</sup> The Prosecutor requested leave to appeal this decision, but

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<sup>107</sup> The summons was first issued under seal on 7 May 2009, and later unsealed on 17 May 2009.

<sup>108</sup> Such hearings take place before the ICC to ensure that no case goes to trial unless there is sufficient evidence to establish substantial grounds to believe that the person committed the crime with which he or she has been charged.

<sup>109</sup> *The Prosecutor v. Bahar Idriss Abu Garda*, Case no. ICC-02/05-02/09, 'Public Redacted Version - Decision on the Confirmation of Charges' (PTC I), 8 February 2010.



the Pre-Trial Chamber denied this request on 23 April 2010.<sup>110</sup> In an interesting turn of events, he subsequently became a federal health minister in Sudan.

On 27 August 2009, the ICC charged two additional Darfuri rebel leaders in connection with the September 2007 attack against UNAMID: Abdallah Banda Abakaer Nourain, a commander of a group within the URF, and Saleh Mohammed Jerbo Jamus, a commander of the SLA-Unity (a group which split from the SLA). The ICC issued summonses for their appearance, and, on 17 June 2010, they both appeared voluntarily before the ICC.<sup>111</sup> On 7 March 2011, the Pre-Trial Chamber confirmed the charges against Jerbo and Banda. Their trial is scheduled to commence on 5 May 2014. Banda and Jerbo are expected to argue in their defense that the peacekeepers were allied with the Sudanese government and were therefore a legitimate military target.<sup>112</sup>

## 7. ICC - SUDAN RELATIONS

### 7.1 SUDAN'S NON-COOPERATION WITH THE ICC

Under UN Security Council Resolution 1593 of 31 March 2005, which referred the Darfur situation to the ICC, Sudan is obligated to cooperate with the ICC.<sup>113</sup> Indeed, Sudan initially cooperated with the Court: Between 2005 and early 2007, the Sudanese government allowed ICC staff members to visit Khartoum on five occasions, and access people and documents.<sup>114</sup> An ICC official recalled being permitted to inspect the Special Courts for Darfur (the three SCCED chambers). However, to the official it was clear that Sudan's cooperation was not meant to facilitate ICC proceedings, but rather to convince

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<sup>110</sup> *The Prosecutor v. Bahar Idriss Abu Garda*, Case no. ICC-02/05-02/09, 'Decision on the Prosecution's Application for Leave to Appeal the Decision on the Confirmation of Charges' (PTC I), 23 April 2010.

<sup>111</sup> The summonses were first issued under seal on 27 August 2009, and later unsealed on 15 June 2010. Banda and Jerbo were then officially informed of the charges against them and of their rights under the Rome Statute. Confirmation hearings in their cases took place, in their absence, on 8 December 2010. Both suspects waived their rights to be present at their confirmation hearing, in accordance with Article 61 of the Rome Statute, but were represented by counsel during the hearing.

<sup>112</sup> ICC Prosecutor's Twelfth Statement to the UNSC on Darfur (n 29), para. 10.

<sup>113</sup> UNSC Res 1593 (n 6), para. 2. See also UN Security Council, Presidential Statement, Security Council 5912th Meeting, 16 June 2008 (reiterating Sudan's obligation to "cooperate fully with the Court, consistent with resolution 1593 (2005), in order to put an end to impunity for the crimes committed in Darfur").

<sup>114</sup> See, e.g., ICC Prosecutor's Eleventh Report to the UNSC on Darfur (n 41), para. 25 ("Judicial records and other documents were shared under Article 53 of the Rome Statute, including the report of the Sudanese National Commission of Inquiry and the report from the Sudanese Ministry of Defence on its operations, GoS officials were interviewed in Khartoum under Article 55 of the Rome Statute as potential witnesses, and 5 missions were undertaken to Khartoum, the last in January/February 2007"). It is interesting to note that during that time, Sudan was also cooperating with the ICC in relation to its investigations in Uganda.

the Court that its own judicial authorities are responding well to the atrocities.<sup>115</sup>

The Sudanese government stopped cooperating with the ICC once the Court's Prosecutor announced, in February 2007, that he would seek arrest warrants against Harun and Kushayb. Sudan immediately rejected the charges and announced that it will not hand over the suspects.<sup>116</sup> The Sudanese government insisted that Harun had no links to the Janjaweed.<sup>117</sup> At a later stage, Al-Bashir denied altogether that his government armed the Janjaweed.<sup>118</sup> In any event, Sudan maintained that the ICC lacked jurisdiction over the alleged crimes and that its own domestic courts can handle the case.<sup>119</sup> Harun claimed that the arrest warrant against him was "political".<sup>120</sup> In June 2007, Al-Bashir publically stated that he would never surrender Harun to the ICC, and that Harun would continue to implement his orders. Al-Bashir later added that he would not surrender any Sudanese to the ICC.<sup>121</sup> In September 2007, Harun was appointed by the government to head a committee mandated to investigate human rights abuses in Darfur.<sup>122</sup> The government took this step, claimed a Sudanese lawyer and human rights activist, in order to show that it does not recognize the ICC's decision.<sup>123</sup> Kushayb, on the other hand, was already detained in Sudan when the ICC Prosecutor requested an arrest warrant against him. He was soon after released but, reportedly, was re-arrested subsequently. However, many commentators believe that his arrest was intended only to divest the ICC of jurisdiction over the Darfur situation (see section 8.1 below).

When the ICC Prosecutor announced that he is seeking an arrest warrant against Al-Bashir, an advisor to the Sudanese president stated that "[t]here will be no direct cooperation with the International Criminal Court and no sending any Sudanese citizen to The Hague".<sup>124</sup> Sudan requested the AU, the League of Arab States, and individual states to seek a Security Council Resolution suspending the ICC proceedings against Al-

<sup>115</sup> Interview notes with author.

<sup>116</sup> BBC, Darfur War Suspects (n 90).

<sup>117</sup> *Ibid.*

<sup>118</sup> This took place immediately following the second ICC arrest warrant against Al-Bashir (of July 2010). See BBC News Africa, 'Darfur Warrant for Sudan's Bashir: ICC Adds Genocide' (12 July 2010) <<http://www.bbc.co.uk/news/10603559>> accessed on 23 April 2011 (hereinafter: "BBC, ICC Adds Genocide").

<sup>119</sup> BBC, Darfur Arrest Warrants (n 90) ("Sudan says the ICC has no jurisdiction to try Sudanese and that its own courts are capable of prosecuting suspects ... Sudan has said it is capable of trying alleged war criminals without any help from the ICC").

<sup>120</sup> *Ibid.*

<sup>121</sup> ICC Prosecutor's Ninth Report to the UNSC on Darfur (n 86), para. 26.

<sup>122</sup> Sudan Tribune, 'Darfur War Crimes Suspect Leads Sudan Rights Probe' (5 September 2007) <<http://www.sudantribune.com/Darfur-war-crimes-suspect-leads.23616>> accessed on 23 April 2011.

<sup>123</sup> *Ibid.*

<sup>124</sup> Reuters, 'Sudan rules out deal with ICC over Bashir warrant' (17 July 2008) <<http://reliefweb.int/node/273702>> accessed on 7 May 2011.



Bashir.<sup>125</sup> But when Western diplomats suggested, in July 2008, that they would act to suspend the ICC proceedings against Al-Bashir if Sudan surrendered Harun and Kushayb to the ICC, Sudan rejected their proposal.<sup>126</sup>

It is recalled that Sudan has signed the Rome Statute on 8 September 2000 but did not ratify it. On 26 August 2008, the Government of Sudan informed the Secretary-General that “Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000.”<sup>127</sup> Interestingly, between August and November 2008, the Sudanese president suggested that he would enter into peace talks with the Darfuri rebels and even announced a ceasefire with them.<sup>128</sup> The rebels did not take the government seriously and claimed that it was “only interested in securing a deferral of the ICC investigation”.<sup>129</sup> NGOs and media reports also suggest that these government gestures were only meant to garner international support for suspending the ICC proceedings.<sup>130</sup>

Notwithstanding the above developments, in March 2009, the ICC issued the arrest warrant against Al-Bashir. In response, the Sudanese government expelled 13 international humanitarian organizations from its territory, and shut down three national human rights NGOs.<sup>131</sup> This had a devastating impact on the humanitarian situation in

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<sup>125</sup> *Ibid* (“Sudan has asked Russia, China and members of the Arab League and the African Union to help it pursue a Security Council resolution suspending a warrant for Bashir for 12 months”).

<sup>126</sup> *Ibid* (“Western diplomats in New York have said a deal could be struck to drop or suspend the warrant for Bashir if he agreed to hand over Humanitarian Affairs State Minister Ahmed Haroun and militia leader Ali Kushayb, indicted by the ICC last year ... A senior Sudanese government official ... ruled out [such] a deal”).

<sup>127</sup> United Nations Treaty Database entry regarding the Rome Statute of the International Criminal Court <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en)> accessed on 20 October 2011.

<sup>128</sup> See, e.g., HRW World Report 2009 (n 25) (“In August [2008] President Bashir announced a “Sudan People’s Initiative” to draw up a proposal for resolving the conflict, and in October expressed willingness to attend talks slated to take place in Qatar at the end of the year. On November 12, Khartoum also announced a unilateral ceasefire in advance of those talks”).

<sup>129</sup> *Ibid* (“However, rebels refused to engage in either the People’s Initiative or the Qatar talks, arguing that the government is not serious about either the peace process or the ceasefire, but only interested in securing a deferral of the ICC investigation.”)

<sup>130</sup> *Ibid*. See also Payam Akhavan, ‘Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism’, 31 Hum. Rts. Q. 624 (2009) (hereinafter “Akhavan, a *Disincentive*”), p. 650 (stating that the BBC reported that “the [Sudanese] government hopes this plan will be enough to convince the international community to defer to case against Mr. Bashir”).

<sup>131</sup> US Human Rights Report 2009 (n 18) (“Immediately following the March 4 ICC announcement of the arrest warrant for President Bashir, the Humanitarian Affairs Commission (HAC) ordered 13 NGOs to depart the country within 24 hours. The government also shut down three Sudanese NGOs in March”). See also HRW World Report 2010 (n 33) (“The closure of three Sudanese human rights organizations after the ICC’s Al-Bashir arrest warrant contributed to an atmosphere of oppression in Darfur and throughout the northern states that prompted more than a dozen lawyers and activists to leave the country”). According to interviews with ICC officials, the three local NGOs that were shut down by the Sudanese government in 2007 were the following: “Khartoum”, “Sudo” and “AMAL”. Most of the lawyer working for AMAL had to leave Sudan, and the government confiscated files and funding from AMAL. Interview notes with author.

Darfur.<sup>132</sup> Sudan's justification for this move was that these organizations were providing information to the ICC.<sup>133</sup> Al-Bashir publicly stated that the ICC arrest warrant against him would "not be worth the ink it is written on", and according to the BBC, he then "danced for thousands of cheering supporters who burned an effigy of the ICC chief prosecutor".<sup>134</sup> Nonetheless, since that moment, out of fear of being arrested, Al-Bashir has been unable to visit several countries,<sup>135</sup> including in connection with an EU-Africa summit.<sup>136</sup> Reacting to the arrest warrant, a Sudanese government representative claimed on Sudanese TV that the ICC "was created to target Sudan and to be part of the new mechanism of neo-colonialism".<sup>137</sup> Sudan expert Alex de Waal confirms that the Sudanese government perceives the ICC as a political instrument of the West.<sup>138</sup>

## 7.2 THIRD PARTIES' INFLUENCE ON ICC-SUDAN RELATIONS

The AU, arguing that an arrest warrant against Al-Bashir would undermine efforts to resolve the Darfur conflict, requested the UN Security Council to suspend the ICC proceedings against Al-Bashir, in accordance with Article 16 of the Rome Statute (which authorizes the Security Council to suspend ICC proceedings for a renewable period of 12 months).<sup>139</sup> The League of Arab States and the Organisation of the Islamic Conference also objected to the ICC proceedings against Al-Bashir.<sup>140</sup> In July 2009,

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<sup>132</sup> Akhavan, *a Disincentive* (n 130), p. 648 ("As an immediate reaction to the arrest warrant, the Sudanese government expelled more than a dozen humanitarian aid organizations, leaving more than one million people without access to food, water, and healthcare services"); HRW World Report 2010 (n 33) ("The government's expulsion of 13 international humanitarian organizations following the ICC arrest warrant for al-Bashir has seriously undermined provision of humanitarian aid to Darfur"); US Human Rights Report 2009 (n 18) ("The expulsions reduced the access of 1.5 million persons to healthcare; 1.16 million to water, sanitation, and hygiene; and 1.1 million to food aid. While some programs were able to continue by utilizing local staff and government assistance, the expulsions dramatically decreased nonemergency humanitarian services.")

<sup>133</sup> Akhavan, *a Disincentive* (n 130), p. 648.

<sup>134</sup> BBC News, 'Warrant issued for Sudan's leader' (4 March 2009) <<http://news.bbc.co.uk/2/hi/africa/7923102.stm>> accessed on 23 April 2011 (hereinafter: "BBC, Warrant Issued").

<sup>135</sup> BBC, ICC Adds Genocide (n 118) (noting that "Sudan's leader has been unable to visit several countries for fear of being arrested since the first warrant was issued"). Nonetheless, following the issuance of an ICC arrest warrant against him, Bashir travelled to several African states, including States Parties to the Rome Statute (see note 147 below and attached text).

<sup>136</sup> ICC Prosecutor's Ninth Report to the UNSC on Darfur (n 86), para. 19.

<sup>137</sup> BBC, Warrant Issued (n 134) (quoting the government representative as having said on Sudanese TV that "[t]his decision [to issue an arrest warrant against Al-Bashir] is exactly what we have been expecting from the court, which was created to target Sudan and to be part of the new mechanism of neo-colonialism").

<sup>138</sup> Alex de Waal, 'Darfur, the Court and Khartoum: The Politics of State Non-Cooperation', in *Courting Conflict? Justice, Peace and the ICC in Africa* (Eds. Nicholas Waddell and Phil Clark, Royal African Society, March 2008), p. 29.

<sup>139</sup> ASIL, Reports on International Organizations (by Konstantinos D. Magliveras, August 2009) <[http://www.asil.org/rio/africanunion\\_sum09.html#footnotes](http://www.asil.org/rio/africanunion_sum09.html#footnotes)> accessed on 23 April 2011. It is noted that the AU asked the UN to suspend the ICC case against Al-Bashir already in July and in September 2008, following the announcement by the ICC Prosecutor that he would seek an arrest warrant against Al-Bashir. The AU repeated this request in February 2009. After the arrest warrant was issued against Al-Bashir, in March 2009, the AU again requested the UN to suspend the ICC proceedings under Article 16 of the Rome Statute.

<sup>140</sup> *Ibid.*

absent a Security Council response to its request, the AU issued a decision calling on its member states not to cooperate with the ICC in Al-Bashir's arrest and surrender, stressing that the legal basis for such non-cooperation was found in the immunity-related provisions of Article 98 of the Rome Statute.<sup>141</sup> Article 98 (1) of the Rome Statute provides that “[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to ... diplomatic immunity of a person ... of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity”. According to the plain reading of this provision, the ICC must first obtain Sudan’s cooperation in waiving Al-Bashir’s immunity before another state can be expected to arrest and surrender him to the Court. By referring to this provision in its decision of July 2009, the AU sought to satisfy its member states that are also States Parties to the Rome Statute that not cooperating with the ICC on this matter would be consistent with their obligations under the Statute.

However, Article 27 (2) of the Rome Statute provides that international immunities do not bar the ICC from exercising jurisdiction.<sup>142</sup> It follows from this provision that States Parties to the Statute must enable the ICC to exercise jurisdiction over its suspects, including by arresting and surrendering them to the Court, even when other international norms grant these suspects immunity. But what would then be the significance of Article 98 (1)? To resolve this apparent conflict between Article 27 (2) and Article 98 (1), it has been suggested that the phrase “third State” in Article 98 (1) refers to a state that is *not* a party to the Rome Statute. Since Sudan is not a party to the Rome Statute, and the ICC cannot obtain Sudan’s cooperation in waiving Al-Bashir’s immunity, other states (including States Parties to the Rome Statute) are not obligated to arrest and transfer him to the ICC.<sup>143</sup> At the same time, it could be argued that since Sudan is obligated to cooperate with the ICC by virtue of UN Security Council Resolution 1593 (which referred

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<sup>141</sup> Assembly/AU/Dec.245(XIII) Rev.1, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII), Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People’s Libyan, Arab Jamahiriya on 3 July 2009 <[http://www.africa-union.org/root/au/Conferences/2009/july/summit/decisions/ASSEMBLY%20AU%20DEC%20243%20-%20267%20%28XIII%29%20\\_E.PDF](http://www.africa-union.org/root/au/Conferences/2009/july/summit/decisions/ASSEMBLY%20AU%20DEC%20243%20-%20267%20%28XIII%29%20_E.PDF)> accessed on 10 July 2012, para. 10 (where the AU Assembly “Decides that in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan”).

<sup>142</sup> Article 27 (2) of the Rome Statute stipulates: “Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”

<sup>143</sup> Paola Gaeta, ‘Does President Al Bashir Enjoy Immunity from Arrest?’, 7 JICJ 315 (2009).

the Darfur situation to the ICC and was issued under Chapter VII), Sudan's cooperation with the Court, including in terms of waiving Al-Bashir's immunity, can be presupposed.<sup>144</sup> Following this construction, under both 27 (2) and Article 98 (1) of the Rome Statute, States Parties to the Statute (even if they are AU members) must arrest and surrender Al-Bashir to the ICC. This obligation, however, does not apply to states that are not party to the Rome Statute.<sup>145</sup>

This background sparked a heated debate among experts on the nature and scope of state obligations under international law to arrest and surrender Al-Bashir to the ICC.<sup>146</sup> Whatever the case may be, following the AU decision of July 2009, Al-Bashir travelled to Kenya, Chad, Djibouti and Malawi, all of which are States Parties to the Rome Statute, and his immunity was respected by those states.<sup>147</sup> In January 2012, the AU reiterated its request of its member states to refuse to cooperate with the ICC on the issue of Al-Bashir's arrest and transfer.<sup>148</sup> In July 2012, the AU requested the UN Security Council once again to suspend the ICC proceedings against Al-Bashir.<sup>149</sup>

However, another AU response to the ICC proceedings was to appoint, on 21 July 2008, the above-mentioned AUPD (chaired by former South African president Thabo Mbeki). The AUPD was mandated to "examine the situation in Darfur in depth and submit recommendations on how best to effectively and comprehensively address the issues of accountability and combating impunity, on the one hand, and peace, healing

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<sup>144</sup> UNSC Res 1593 (n 6), para. 2. It is noted that Resolution 1593 does not obligate other states to cooperate with the ICC but only "urges" them (as well as regional and international organizations) to cooperate. *Ibid.*, para. 2. But for the purposes of Article 98 of the Rome Statute, what matters is that Sudan is obligated to cooperate with the ICC.

<sup>145</sup> However, since customary international law recognizes that heads of state immunity does not apply before international criminal courts, it can be argued that states that are not party to the Rome Statute would *not be violating* international law if they arrest and surrender Bashir to the ICC. However, they are not *obligated* to do so.

<sup>146</sup> See, e.g., Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', 7 JICJ 333 (2009); Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', 7 JICJ 315 (2009); Göran Sluiter, Obtaining Cooperation from Sudan—Where Is the Law?, 6 JICJ 871 (2008). Also see discussion with "Invited Experts on Darfur Question" <<http://iccforum.com/darfur>> accessed on 9 April 2013.

<sup>147</sup> Sudan Tribune, 'Djibouti becomes third ICC member to receive Sudanese president' (8 May 2011) <<http://www.sudantribune.com/Djibouti-becomes-third-ICC-member.38809>> accessed on 9 May 2011; HRW World Report 2011 (n 29) (noting that "Kenya and Chad - both states parties to the ICC - allowed al-Bashir to enter their territories in July and August [2010], citing the AU decision"). It is noted that the ICC has issued non-compliance decisions vis-à-vis some of these states. See, e.g., *The Prosecutor v. Omar Hassan Ahmad al Bashir*, Case no. ICC-02/05-01/09, 'Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir' (PTC I), 12 December 2011.

<sup>148</sup> African Union, Assembly of the Union, Eighteenth Ordinary Session, 29 - 30 January 2012, Addis Ababa, Ethiopia, Assembly/AU/Dec.397 (XVIII), para. 8. The AU also reiterated this request following the second ICC arrest warrant against Al-Bashir (of July 2010).

<sup>149</sup> African Union, Assembly of the Union, Nineteenth Ordinary Session, 15 - 16 July 2012, Addis Ababa, Ethiopia Assembly/AU/Dec.419 (XIX), para. 4.

and reconciliation, on the other.”<sup>150</sup> In its report of 29 October 2009, the AUPD recommended the establishment of a hybrid court of Sudanese and international judges to prosecute the most serious crimes committed in Darfur, the creation of a truth and reconciliation commission, and the awarding of reparations to the victims.<sup>151</sup> The AUPD further recommended that Sudan reform some of its laws to enable atrocity-related judicial processes to take place in a credible and effective manner.<sup>152</sup> The Sudanese government did not consider the AUPD’s recommendations seriously.<sup>153</sup> Instead, the government claimed that its national judiciary was capable of bringing war crime perpetrators to justice.<sup>154</sup> In 2010, the AU appointed a panel (also headed by Mbeki) to examine Sudan’s progress in implementing the AUPD’s recommendations of 2009.<sup>155</sup>

## 8. ICC’S IMPACT ON SUDAN’S JUDICIAL RESPONSE TO THE ATROCITIES

Drawing on the discussions so far, this part of the report assesses the impact of the ICC on Sudan’s judicial response to the atrocities. It focuses, in particular, on the ICC’s influence in the following four areas: (1) rates and trends of domestic prosecutions of Darfur atrocities; (2) domestic application of international norms in atrocity-related proceedings; (3) domestic sentencing practices in atrocity-related proceedings; and (4) domestic capacity to handle domestic atrocity-related proceedings. As explained in section 1.1 above, these four areas of focus were chosen for their relevance to an analysis of whether and to what extent the ICC has impacted the quality and quantity of domestic accountability processes in Sudan. It is noted that this part does not analyze the ICC’s impact on socio-political developments in Sudan, such as peace negotiations or national reconciliation processes.

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<sup>150</sup> See AUPD Report (n 1), first page titled “Introductory Note by the Chairperson of the Commission”.

<sup>151</sup> AUPD Report (n 1). See also US Human Rights Report 2009 (n 18).

<sup>152</sup> Sudan Tribune, Mbeki’s report (n 93) (“The most high profile aspect of Mbeki’s recommendations was establishment of a hybrid court consisting of Sudanese and foreign judges to try the Darfur war crimes suspects. He also called for changes in Sudanese laws in order to make the process of bringing justice in Darfur more credible and effective”).

<sup>153</sup> See, e.g., HRW World Report 2011 (n 29) (“The Sudanese government made little progress in implementing recommendations of the AU High Level Panel on Darfur; the AU and other influential leaders did not press the government to do so. In general, the key stakeholder countries engaged on Sudan continued to be divided in approach and willingness to use pressure to influence the Sudanese government”).

<sup>154</sup> Sudan Tribune, Mbeki’s report (n 93) (“The Sudanese government has given a lukewarm reception to the idea and later Sudanese president Omer Hassan Al-Bashir voiced his rejection saying that local judiciary is capable of bring war crime perpetrators to justice. ...”).

<sup>155</sup> *Ibid.*



## 8.1 IMPACT ON NATIONAL PROSECUTION RATES AND TRENDS

It is recalled that Sudan created the SCCED in June 2005, and appointed a Special Prosecutor for Darfur in August 2008. Both mechanisms were purportedly meant to establish accountability for the Darfur atrocities (see section 4.1 above). The SCCED was established one day after the ICC initiated its investigation in Darfur, and the position of Special Prosecutor was created one month after the ICC Prosecutor announced that he would seek an arrest warrant against Al-Bashir. These timings suggest that the above mechanisms were created in response to the ICC's involvement in Sudan. Indeed, this has been the view of many commentators.<sup>156</sup> Even the Sudanese Justice Minister indicated that the SCCED was intended to substitute the ICC.<sup>157</sup> A UN judicial official who monitored the developments at the SCCED also confirmed that this court was set up because of the threat of ICC proceedings. The UN official added that the expansion of the SCCED from one to three chambers was also a result of international pressure: In October 2005, certain UN agencies indicated to the Sudanese government that the SCCED might not be able to satisfactorily address the crimes committed in all three states of Darfur, since it only had one chamber based in one state. The following month, Sudan modified the SCCED to include three chambers, one for each Darfuri state.<sup>158</sup> However, the UN official added that the SCCED administered "sham" justice and its sentences were not enforced.<sup>159</sup>

Indeed, as explained in section 4.1 above, the SCCED did not prosecute the atrocities, and is considered neither credible nor functional. In an interview given to the New York Times, a local prosecutor in Darfur explained that he did not refer serious cases to the SCCED for various reasons including that "it was too difficult to arrest the accused", "victims never identified their attackers", and "witnesses never showed up".<sup>160</sup>

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<sup>156</sup> See, e.g., ICTJ, Sudan Impact (n 53), pp. 3-4 ("As the prospects of international investigations materialized with the Security Council's referral, the period 2004-05 witnessed the creation of several investigative and judicial entities to uncover crimes that occurred in Darfur. These included a new Special Criminal Court for Events in Darfur (SCCED) on June 7, 2005, only one day after the Prosecutor opened his investigation ... In mid-July 2008, the ICC Prosecutor announced that he would seek an arrest warrant against President al-Bashir. In response, in early August 2008 the Minister of Justice appointed Nimir Ibrahim Mohamed as prosecutor general for the crimes committed in Darfur since 2003.")

<sup>157</sup> IRIN, Sudan challenges ICC (n 66).

<sup>158</sup> Interview notes with author.

<sup>159</sup> For example, explained the interviewee, in one case three low-ranking military officers were convicted and sentenced to imprisonment by the SCCED for conflict-related crimes, but the UN official was unable to find them in the prison to which they were sent. Interview notes with author.

<sup>160</sup> New York Times, 'If Not Peace, Then Justice' (by Elizabeth Rubin, 2 April 2006) <<http://www.nytimes.com/2006/04/02/magazine/02darfur.html>> accessed on 7 May 2011.

In mid-2010, the NGO International Center for Transitional Justice (ICTJ) reported that “[t]he performance of the Special Court for Darfur as well as that of the other investigative mechanisms failed to persuade locals and international monitors that these were genuine efforts to end impunity in Darfur and to bring justice to victims”.<sup>161</sup> Based on this information, an analysis from 2011 concludes that the cases brought before the SCCED were “a ploy by Sudan to circumvent the ICC jurisdiction”.<sup>162</sup> An ICC official explained that the SCCED was established to create an impression of atrocity-related judicial activity, rather than to actually prosecute them.<sup>163</sup> According to the ICC official, the SCCED chambers merely took cases from the dockets of the regular courts, and thus dealt with any crime in Darfur, including ordinary theft. Even if they addressed acts that could amount to ICC-crimes, they did not address the system of crimes, or prosecute those with the greatest responsibility. The ICC official further added that the Sudanese military authorities prevent soldiers from testifying before the SCCED, thereby undermining its process, which often requires evidence of military personnel.<sup>164</sup>

Sudan’s appointment of a Special Prosecutor for Darfur in 2008 (see part 5 above) has also been considered by various commentators as “cosmetic” rather than genuine. For example, according to a 2010 report by the ICTJ, this appointment “had mainly helped the government argue that it had put in place domestic mechanisms to prosecute perpetrators of crimes against humanity. In reality, very little has been done”.<sup>165</sup> In 2009, the U.S. State Department asserted that the Special Prosecutor for Darfur was “biased in favor of the ruling party, and that the process was not credible”.<sup>166</sup> The same year, HRW reported that despite the appointment of Nimr Ibrahim Mohamed several months earlier as Special Prosecutor for Darfur, Sudan made no significant progress in establishing accountability for the atrocities.<sup>167</sup> It is also recalled that although Mohamed announced

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<sup>161</sup> ICTJ, Sudan Impact (n 53).

<sup>162</sup> Benson Olugbuo, “Positive Complementarity and the Fight Against Impunity”, in Africa in *Prosecuting International Crimes in Africa* (eds. Chacha Murungu & Japhet Biegon, Pretoria University Law Press, 2011) <[http://www.pulp.up.ac.za/cat\\_2011\\_04.html](http://www.pulp.up.ac.za/cat_2011_04.html)> accessed on 23 April 2011, p. 263.

<sup>163</sup> Interview notes with author.

<sup>164</sup> Interview notes with author.

<sup>165</sup> ICTJ, Sudan Impact (n 53).

<sup>166</sup> US Human Rights Report 2008 (n 80) (this finding by the U.S. State Department was made in reliance on human rights observers). See also ICTJ, Sudan Impact (n 53) (“In its second report to the AU on domestic proceedings dated February 2, 2009, Sudan stated that the prosecutor general for crimes committed in the course of the Darfur conflict and members of the Investigation Committee attached to his office had conducted five visits to Darfur during which they interviewed witnesses and conducted investigations on incidents in West Darfur. Sudan has yet to report any meaningful progress in the conduct of its domestic proceedings”).

<sup>167</sup> HRW World Report 2009 (n 25) (“Also in response to the threat of a warrant, Khartoum appointed another special prosecutor to try crimes committed in Darfur. However, at the time of writing, Sudan has made no significant progress toward domestic accountability for serious crimes”).

in October 2008 that he arrested Kushayb and two others for crimes committed in Darfur, no trials ever took place and Kushayb has since been seen in public (see part 5 above). The announcement about Kushayb's arrest was made three months after the ICC Prosecutor declared his intention to charge Al-Bashir. In this light, commentators have suggested that the move was not meant to genuinely achieve justice, but rather to divest the ICC of jurisdiction over the events in Darfur by showing that they are being investigated by Sudan.<sup>168</sup>

In September 2010, prosecutor Mohamed expressed his intention to investigate an atrocity event that took place earlier that month in Darfur.<sup>169</sup> However, two weeks later he was released from his position as Special Prosecutor for Darfur and replaced by justice ministry undersecretary Abdul-Dayem Zamrawi. An ICC OTP report notes that Zamrawi did not investigate the above event or any other Darfur atrocity.<sup>170</sup> Around that time, Sudan's Justice Minister announced that his ministry would focus in the coming year on investigating and prosecuting the atrocities committed in Darfur, but commentators expressed skepticism about the genuine nature of this announcement.<sup>171</sup> In any event, five months after Zamrawi's appointment as Special Prosecutor, he resigned from the post.<sup>172</sup> Soon after his resignation, in April 2011, a local newspaper claimed that "no progress has been reported in the work of the special prosecutor since establishing the post".<sup>173</sup> Recently, Judge Hayder of the Sudanese judiciary was appointed as the Special Prosecutor for Darfur.<sup>174</sup>

The analysis above suggests that the SCCED and Special Prosecutor for Darfur have not pursued the goal for which they were established, namely, to promote genuine prosecutions of the atrocities committed in Darfur. In this light, it is difficult to say that the

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<sup>168</sup> NY Times, Sudan Arrests Militia Chief (n 86) ("[Kushayb's arrest] is widely being interpreted as a way for Sudan to improve its image abroad and attempt to head off the possible genocide prosecution of the country's president, Omar Hassan al-Bashir"); RNW, Sudan arrests Kushayb (n 86) ("The move to arrest Kushayb seems a way for Sudan to improve its image abroad and try to head off the potential prosecution of the country's president"); Akhavan, a *Disincentive* (n 130), p. 649.

<sup>169</sup> This was the attack on 2 September in Tabra, where at least 37 individuals were reportedly killed and at least 50 were injured. See ICC Prosecutor's Twelfth Statement to the UNSC on Darfur (n 29), para. 12.

<sup>170</sup> ICC Prosecutor's Twelfth Statement to the UNSC on Darfur (n 29), paras. 12-13.

<sup>171</sup> HRW, 'The Mbeki Panel Report One Year On' (29 October 2010) <[http://www.hrw.org/node/93935#\\_ftnref18](http://www.hrw.org/node/93935#_ftnref18)> accessed on 28 March 2011.

<sup>172</sup> Sudan Tribune, 'Darfur's special prosecutor asks government to accept resignation' (13 April 2011) <<http://www.sudantribune.com/Darfur-s-special-prosecutor-asks.38551>> accessed on 7 May 2011.

<sup>173</sup> *Ibid.* In December 2010, in light of the absence of national criminal proceedings addressing the atrocities in Darfur, the ICC Prosecutor reported to the UN Security Council that "[u]ntil the orders to Government of Sudan forces to commit crimes in Darfur cease, there is no possibility of justice for Darfur". See ICC Prosecutor's Twelfth Statement to the UNSC on Darfur (n 29), paras. 12-13.

<sup>174</sup> I thank the anonymous reviewer for this information.



ICC had any impact on rates and trends of domestic prosecutions. Nevertheless, it is significant that the above mechanisms were established as reactions to the ICC's involvement in Darfur. This is mainly because of the chance that these mechanisms could still be utilized in the future to achieve their stated purpose of prosecuting the Darfur atrocities. Such future developments could take place in light of AU pressure on Sudan to establish accountability for the atrocities (see section 7.2 above), or international pressure such as economic sanctions. It is also possible that after the conflict is resolved politically, the SCCED and Special Prosecutor will be used to mete out post-conflict justice (despite not being mentioned as part of the DPA or Doha peace agreement). Thus, their establishment, which was an impact of the ICC, should not be dismissed as insignificant.

A second potentially positive impact of the ICC on prosecution trends in Sudan stems from its more general effect of drawing international attention to the need for accountability in relation to the Darfur conflict. This has led various international actors, including the AU, to apply pressure on Sudan to pursue justice. In April 2009, a month after the ICC issued the arrest warrant against him, Al-Bashir announced that Sudan would investigate and prosecute the crimes in Darfur once reconciliation was achieved.<sup>175</sup> Scholar Payam Akhavan considers that these developments suggest that thanks to the ICC's involvement in Sudan "the issue of justice and accountability is on the table and is being discussed more seriously in Sudan".<sup>176</sup> Others argue that the ICC adversely affected the peace process, and exacerbated the humanitarian crisis in Darfur by leading to the expulsion of humanitarian NGOs from the area.<sup>177</sup> However, they offer no evidence that peace and humanitarian activities would have been promoted in Darfur had the ICC not been involved.

The ICC may have another impact on prosecution trends in Sudan: It may encourage national proceedings against Janjaweed members. This assessment is based on the possibility that the ICC's involvement created tension between the government

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<sup>175</sup> It is also recalled that around that time he was making proposals for peace negotiations, which some sources suggested were "sham" attempts to resolve the conflict in hope to secure international support for the deferral of the ICC's investigation in Darfur (see section 7.1 above).

<sup>176</sup> Akhavan, *a Disincentive* (n 130), p. 650 (also noting that "[t]his trend is illustrated by the proposal of the leader of the opposition Umma party, Sadiq al-Mahdi, to establish a hybrid court consisting of Arab, African, and Sudanese judges, while the most prominent opposition leader, Hassan Al-Turabi from the Popular Congress Party, was detained for two months after openly calling on Bashir to surrender to the Court").

<sup>177</sup> See, e.g., Alexis Arieff, Rhoda Margesson, Marjorie Ann Browne, Matthew C. Weed, 'International Criminal Court Cases in Africa: Status and Policy Issues', Congressional Research (22 July 2011), p. 29.

and the Janjaweed militia. It is recalled that when Kushayb and Harun were named as ICC suspects, in February 2007, Kushayb was purportedly already under arrest in Sudan, while the Sudanese government insisted that Harun had no links with the Janjaweed.<sup>178</sup> Around that time, according to a news report from March 2007, Janjaweed members became suspicious that the Sudanese government would surrender their commanders to the ICC.<sup>179</sup> While this contradicts Al-Bashir's position that he would not surrender any Sudanese to the ICC, it is still possible that he would hold domestic trials against Janjaweed members (especially since this may relieve some of the international pressure laid on him to establish accountability for the Darfur atrocities). Such national proceedings against the Janjaweed could significantly narrow the accountability gap in Sudan (even if the government would still enjoy impunity). If indeed the ICC's involvement in Darfur stimulated tension between the government and the Janjaweed, then any national proceedings against Janjaweed members in Sudan may eventually be (at least partly) attributable to the ICC. However, with the Janjaweed under the complete control of the government of Sudan, this possibility may still be far from materializing.

It is also interesting to note that the ICC proceedings against Darfuri rebels were initiated (in late 2008; see section 6.2 above) around the same time that Sudan prosecuted Darfuri rebels in special terrorism courts (in 2008-2009; see part 5 above). The national trials addressed an attack by Darfuri rebels against government forces, and the ICC proceedings concern an attack by Darfuri rebels against peacekeepers, which the rebels claim were collaborating with the government. However, despite these similarities and their contemporaneous existence, there is no evidence of a causal relationship between the ICC proceedings and these national trials.

Finally, it is recalled that criminal proceedings were initiated in Sudan against individuals suspected of cooperating with the ICC (see part 5 above). While this worrying trend can be seen as an "impact" of the ICC in Sudan, it is more precise to attribute it to

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<sup>178</sup> BBC, *Darfur War Suspects* (n 90). Subsequently, after Al-Bashir was named as a suspect by the ICC Prosecutor, Al-Bashir denied that his government armed the Janjaweed. See BBC, *ICC Adds Genocide* (n 118).

<sup>179</sup> Akhavan, *a Disincentive* (n 130), p. 649, referring to Alex Perry, *Defections in Darfur?*, *Time*, 21 March 2007, at 42–43 <<http://www.time.com/time/world/article/0,8599,1601495,00.html>> accessed on 1 December 2012 ("Cracks are beginning to appear in the ranks of Darfur's feared Janjaweed militia" as a result of "fear that the Sudan government may betray Janjaweed commanders to the [ICC].") A Darfur rebel leader remarked, "Khartoum hired the Janjaweed to kill their brother Darfurians. Now the Janjaweed have found out they were deceived—and they suspect the government will sell them out to the I.C.C. We are expecting the number of defectors to increase by the day").

the general state of oppression in Sudan,<sup>180</sup> and to Sudan's fear of ICC proceedings against its officials.

## 8.2 NORMATIVE IMPACT

When the ICC began its investigation into the situation in Darfur, in June 2005, Sudanese national law did not cover war crimes, crimes against humanity or genocide. These international crimes were criminalized for the first time in Sudan under the 2007 AFA, and later under the 2009 amendment to the Criminal Act (see section 4.1 above). In addition, in November 2006, Sudan has ratified the Additional Protocols to the Geneva Conventions. The analysis in the previous section shows that Sudan is investing resources in order to undermine the ICC's jurisdiction over Darfur rather than to establish accountability. Based on this conclusion, the new Sudanese norms criminalizing international crimes could also be considered as measures intended solely to deprive the ICC of jurisdiction over crimes committed in Darfur (on the basis that Sudanese law covers such violations). The conceptual gaps between the relevant national and international norms (see section 4.1 above), and the legal obstacles to applying the national norms (e.g. immunities, defense of obeying orders), support the conclusion that Sudan introduced the new norms in order to invoke their existence rather than to genuinely use them to achieve accountability. This was also the view of an ICC official, who noted that the expansion of the SCCED's jurisdiction to cover international humanitarian law was done for "appearance" purposes only.<sup>181</sup> Still, if the norms were introduced by Sudan as a reaction to the ICC's involvement in Sudan, even if they have not been applied in practice, these domestic norms reflect an impact of the ICC in Sudan.<sup>182</sup>

On a more optimistic note, future legal reforms may take place in Sudan as a result of pressure by the AU (and other international actors) to implement the AUPD recommendations, a change of the national leadership, or the development of a more open political system. Such legal reforms could be influenced by ICC norms. In addition,

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<sup>180</sup> See, e.g., HRW World Report 2010 (n 33) ("The closure of three Sudanese human rights organizations after the ICC's Al-Bashir arrest warrant contributed to an atmosphere of oppression in Darfur and throughout the northern states that prompted more than a dozen lawyers and activists to leave the country").

<sup>181</sup> Interview notes with author.

<sup>182</sup> It is relevant to mention in this context that the amended Criminal Act bans criminal proceedings outside the country against Sudanese nationals accused of violating international humanitarian law, and prohibits persons in Sudan from helping to extradite Sudanese national requested abroad for international crimes. This is another impact of the ICC in Sudan (even if not entirely positive). See ICTJ, Sudan Impact (n 53).

the secession of South Sudan and termination of the CPA requires the adoption of a new constitution in Sudan, offering an opportunity for legal reform inspired by international norms, including ICC norms.<sup>183</sup>

### 8.3 IMPACT ON DOMESTIC SENTENCING PRACTICES

In the absence of national prosecutions addressing the Darfur atrocities, it is difficult to determine whether the ICC and its normative framework have had an impact on sentencing practices in Sudanese atrocity cases. It is noted that the death penalty, which is excluded by the Rome Statute and is therefore inapplicable to cases before the ICC, applies to various crimes under Sudanese law and may accordingly be imposed in domestic atrocity-related trials.<sup>184</sup> The death penalty was recently imposed on over 100 Darfuri rebels who were convicted for participating in the 2008 JEM attack against Sudanese government forces in Khartoum (see part 5 above). The Sudanese penalty regime is based on Islamic law. Thus, besides the death penalty, it includes other penalties that may violate international law, such as flogging, stoning and amputation.<sup>185</sup> Moreover, in accordance with Islamic law, Sudanese law permits the payment of “blood money” in lieu of death sentences and allows the victims, in certain cases, to pardon the perpetrator. These principles may not conform to punishment theories in international law.

As noted in section 8.2 above, future legal reforms in Sudan may be influenced by ICC norms. Thus, although there are currently no sentencing impacts of the ICC in Sudan, international norms may still influence sentencing norms in Sudan (applicable not only in atrocity cases but also in other criminal cases). However, it must be borne in mind

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<sup>183</sup> However, it is noted that after the secession of South Sudan, the NCP controls 99% of the Parliament seats, which may result in the adoption of bad laws.

<sup>184</sup> See, e.g., Redress, *Implementing International Human Rights Obligations* (n 49), p. 3 (“The Child Act of 2010 has seemingly abolished the death penalty for children. However, the death penalty for adults still remains in force for numerous offences, including those that cannot be considered to be the most serious. Sudan’s courts have imposed the death penalty in several instances where the defendants alleged that they had been tortured into making confessions. An example illustrating this practice is Opinion No.38/2008 of the Working Group on Arbitrary Detention, which concerned the trial of ten defendants accused of the murder of Mohamed Taha. This case, as well as convictions pursuant to trials under the anti-terrorism law, raise serious concerns over their compatibility with the right to life, which requires that the death penalty should only be imposed following a fair trial”).

<sup>185</sup> Freedom House Report 2010 (n 45) (“Sudanese criminal law is based on Sharia and allows punishments such as flogging and amputation...”). See also Redress, *Implementing International Human Rights Obligations* (n 49) (“Sudan’s system of punishment is characterised by the large number of offences which carry the punishment of whipping. This form of punishment, which is considered cruel, inhuman and degrading under international law, is applied with casual frequency, often following summary trials. The Human Rights Committee requested Sudan to abolish corporal punishment, which violates article 7 and 10 of the ICCPR (as well as article 5 of the ACHPR) but no steps have been taken towards this end”).

that Sudanese sentencing norms are largely influenced by Islamic law and hence are inconsistent with ICC norms both in their form and philosophical justifications.

#### 8.4 CAPACITY BUILDING IMPACT

As discussed in section 4.1 above, even with a relatively capable judiciary to begin with, Sudan has been continuing in recent years to improve its judicial capacity by developing institutions and laws enabling domestic atrocity-related proceedings. Sections 8.1 and 8.2 above suggest that Sudan undertook these measures in response to the ICC's proceedings. Such capacity developments in Sudan should not be underestimated: Effective international pressure (by the AU and other actors) may eventually lead Sudan to utilize these new norms and institutions to deliver accountability for the Darfur atrocities. It is also possible that once the conflict is resolved politically, this infrastructure will be used to mete out post-conflict justice as a complementary measure to a political agreement.

But besides the above-mentioned capacity developments, the capacity-building impact of the ICC in Sudan is limited, largely because Sudan refuses to cooperate with the ICC (see section 7.1 above). For example, an ICC official noted that the Court was unable to set up a witness protection system in Sudan because of Sudan's lack of cooperation, and was thus prevented from transferring knowledge in this area to national authorities.<sup>186</sup> This was different in Uganda and the Democratic Republic of the Congo, where the ICC has helped develop local knowledge about witness protection issues by collaborating with national authorities in setting up its own witness protection program.<sup>187</sup>

The ICC can also increase local capacity to handle atrocity-related proceedings through its outreach activities, which aim to sensitize local authorities and lawyers to international norms. However, as with witness protection issues, Sudan's lack of cooperation with the ICC limits the ability of the Court to have a capacity building impact on the national justice system through outreach activities. ICC officials noted that the Court set up a field office in Chad, a neighboring country to Sudan which hosts many

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<sup>186</sup> Interview notes with author. The ICC official also noted that as a result of not having a witness protection system in Sudan (and due to the lack of Sudanese cooperation), the ICC did not contact witnesses in Darfur to avoid risking their security. Instead, the ICC Prosecutor collected evidence from the many Darfuri refugees residing in Chad and other countries, and was satisfied that the evidence provided a sufficient basis for initiating proceedings against Sudanese individuals.

<sup>187</sup> See, e.g., Sigall Horowitz, 'DR Congo: Interaction between International and National Responses to the Mass Atrocities' (DOMAC Report, 2012); Sigall Horowitz, 'Uganda: Interaction between International and National Responses to the Mass Atrocities' (DOMAC Report, 2013). Both reports are available at [www.domac.is/reports](http://www.domac.is/reports).

Darfuri refugees, and from there it conducts outreach activities with Sudanese victims, civil society members and journalists. While the ICC may have some impact on these actors, its lack of direct contact with Sudanese prosecutors and judges limits a priori its potential impact on judicial capacity in Sudan.<sup>188</sup>

To put things in perspective, it should be recalled that Sudan's judicial capacity is not a serious impediment to atrocity-related prosecutions. It is rather the government's lack of political will to fight impunity which prevents atrocity trials (see sections 4.1 and 4.2 above). In this context, an ICC official stressed that while training lawyers in Sudan on ICC norms and procedures may increase their awareness to these issues, it will not be sufficient to promote national prosecution of atrocities.<sup>189</sup>

## 9. CONCLUSION AND RECOMMENDATIONS

At the time of writing, the conflict in Darfur is in its ninth year. Between 200,000 to 400,000 civilians died and over two million were displaced. Scores of victims are still being raped, tortured, killed and displaced, children are being used as fighters, and the pillage and burning of property continues. In 2005, the UN Security Council referred the case to the ICC. The Court has since charged seven Sudanese individuals for atrocities committed in Darfur, including Sudan's president Al-Bashir, its Defence Minister, the Governor of South Kordofan (a new conflict area with crimes that may amount to war crimes and crimes against humanity), the top commander of the pro-government Janjaweed militia, and three rebel leaders. Out of these seven, so far only the three rebel leaders appeared before the ICC, having surrendered themselves voluntarily to the ICC (the charges against one of them were not confirmed and he subsequently became a government federal health minister in Sudan). Sudan has adamantly refused to transfer anyone to the ICC for trial, or to cooperate in any manner with the Court. Al-Bashir, Hussein and Governor Harun continue to serve in their leadership positions in Sudan. Janjaweed leader Kushayb was supposedly detained in Sudan in October 2008, but evidence suggests he is currently at large.

Local courts in Sudan, although mandated to prosecute atrocities, have not

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<sup>188</sup> Interview notes with author.

<sup>189</sup> Interview notes with author. The ICC official also noted that there are many justice institutes and human rights activists in Sudan, but they are not effective. In addition, the official considered that awareness to the ICC is high in Sudan, although there are some misunderstandings about its mission.



delivered accountability for the crimes committed in Darfur.<sup>190</sup> The AU recommended creating a hybrid court composed of Sudanese and foreign judges to prosecute the Darfur atrocities, but Sudan has so far rejected the idea. Instead, the Sudanese authorities are arresting individuals suspected of cooperating with the ICC. The government has also been using courts to fight the rebels: The only significant war-related event prosecuted so far in Sudan is a rebel attack on government forces, which took place in 2008 in Khartoum. Over 100 suspected rebels were accused of terrorism and sentenced to death after being tried by special courts of questionable credibility, which the government established for this purpose. But the atrocities committed against civilians in Darfur remain unaddressed by the Sudanese judicial authorities.

The ICC Prosecutor, believing in the importance of holding national proceedings in parallel to international trials, adopted a policy of “positive complementarity” which requires the OTP to “encourage genuine national proceedings where possible, including in situation countries”.<sup>191</sup> An ICC official explained that while the Court cannot directly participate in domestic investigations or prosecutions, it could encourage other actors, such as the EU or development agencies, to promote domestic proceedings.<sup>192</sup> Thus the positive complementarity approach is not relevant exclusively to cases where states willingly submit situations to the ICC, or are party to the Rome Statute. Reflecting this approach, Security Council Resolution 1593 (which referred the Darfur situation to the ICC) “encourages the Court, as appropriate and in accordance with the Rome Statute, to support international co-operation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur”.<sup>193</sup>

The international peacekeeping missions that have operated in Darfur since 2005

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<sup>190</sup> Perhaps one exception is a single trial held early in the conflict, in 2003, which involved only one defendant and a relatively minor incident (see part 5 above regarding the *Shayeb* case).

<sup>191</sup> ICC OTP Prosecutorial Strategy (2009-2012) <<http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf>> accessed 20 December 2010, para. 17 (see also paras. 15-16 therein); ICC, ‘Paper on Some Policy Issues before the Office of the Prosecutor’ (September 2003), p. 3 <[http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf)> accessed on 20 December 2010, p. 2 (“To the extent possible the Prosecutor will encourage States to initiate their own proceedings”); ICC Press Release ICC-CPI-20100603-PR537 (3 June 2010), ‘Review Conference: ICC President and Prosecutor participate in panels on complementarity and co-operation’ <[http://www.icc-cpi.int/Menu/ASP/ReviewConference/PressReleaseRC/Review+Conference+ICC+President+and+Prosecutor+participate+in+panels+on+complementarity+and+co\\_oper.htm](http://www.icc-cpi.int/Menu/ASP/ReviewConference/PressReleaseRC/Review+Conference+ICC+President+and+Prosecutor+participate+in+panels+on+complementarity+and+co_oper.htm)> accessed on 5 March 2011 (“ICC Prosecutor Luis Moreno-Ocampo highlighted that ‘Positive complementarity is about States assisting one another, receiving additional support from the international Criminal Court itself as well as from civil society to meet Rome Statute obligations’”).

<sup>192</sup> Interview notes with author.

<sup>193</sup> UNSC Res 1593 (n 6). The resolution also calls on the ICC and the AU to “discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity”.

could have offered such “international co-operation” encouraging domestic judicial efforts. However, while these missions supported local judicial procedures, they refrained from proactively encouraging local atrocity-related proceedings. A UN judicial official who worked in Darfur in 2005-2006 noted that after the establishment of the SCCED, but before any ICC arrest warrants were issued against Sudanese officials, there was a window of opportunity for UN agencies to strengthen the capacity of the Darfuri judicial authorities to hold local criminal proceedings against atrocity perpetrators. However, the UN agencies did not explicitly mandate their missions in Darfur to engage in such capacity building activities. That was somewhat of a missed opportunity, as some of the staff of the UN agencies had access to the local prosecution offices and courts. The official added that other international organizations operating in Darfur also refrained from developing local judicial capacities.<sup>194</sup>

In any event, since relevant legal norms and institutions exist in Sudan, international efforts must focus on *incentivizing* Sudan to prosecute the atrocities rather than on developing its judicial capacity. Thus, if the UN Security Council really wanted to encourage accountability in Darfur, then perhaps, in parallel to referring the case of Darfur to the ICC, it should have set up structures intended to motivate Sudan to initiate atrocity-related proceedings irrespectively of the ICC’s process. This would have been warranted given the high likelihood (even at that time) that Sudan would not cooperate with the ICC or with other organizations which may assist the Court. Perhaps it is not too late to adopt such an approach.

For example, the EU encourages developing countries to cooperate with the ICC and conform to its norms by offering them financial aid on the condition that they take “steps towards ratifying and implementing the Rome Statute and related instruments”.<sup>195</sup> This “ICC cooperation clause” is part of the ACP-EC Cotonou Agreement, which reflects the EU development cooperation policy.<sup>196</sup> Having considered the matter, Sudan eventually decided not to ratify the Cotonou Agreement because of the ICC cooperation

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<sup>194</sup> Interview notes with author.

<sup>195</sup> Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Members States of the Other Part, Signed in Cotonou on 23 June 2000 (and revised in Luxembourg on 25 June 2005 and in Ouagadougou on 22 June 2010) <[http://ec.europa.eu/europeaid/where/acp/overview/documents/devco-cotonou-consol-europe-aid-2012\\_en.pdf](http://ec.europa.eu/europeaid/where/acp/overview/documents/devco-cotonou-consol-europe-aid-2012_en.pdf)> accessed 1 December 2012 (aka “ACP-EC-Partnership Agreement” or “Cotonou Agreement”), Article 11.7.

<sup>196</sup> *Ibid.* It is noted that the agreement includes provisions on good governance, human rights, democratic principles and rule of law.

clause, even if this meant depriving itself of EU development aid.<sup>197</sup> Still, the EU and other international actors have other assistance programs in Sudan.<sup>198</sup> These programs could be linked to a request that Sudan prosecutes the Darfur atrocities (even without asking it to actively cooperate with the ICC). However, it seems that international organizations have prioritized securing South Sudan independence and did not want to irritate the Sudanese government by raising accountability issues.

In light of the above, the lack of national atrocity-related proceedings in Sudan can be explained (at least in part) by the failure of the international community to adopt a comprehensive approach in addressing the Darfur atrocities, an approach which involves the activation of national courts in parallel (but not necessarily linked) to the ICC. Nonetheless, this report has shown that the ICC's involvement in Sudan had some impact on legal normative and institutional developments in Sudan. In the long run, these developments may enable national judicial responses to atrocities, especially in light of AU pressure on Sudan to establish accountability for the crimes committed in Darfur. AU pressure (which started in light of the ICC's arrest warrant against Al-Bashir) may lead to the creation of a hybrid court for Darfur and the permeation of international norms into Sudanese national law.

It is hoped that this report, as well as other DOMAC case-study reports, by identifying the impacts of international proceedings on national judicial developments (in the countries most affected by the crimes), will help policy makers design measures that will increase the likelihood that national trials will be encouraged by the activities of international courts in future mass atrocities cases. Such measures may include specifically mandating an international court to proactively encourage national

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<sup>197</sup> EU Website, 'Non-ratification of the revised Cotonou Agreement by Sudan FAQ' (August 2009) <[http://ec.europa.eu/development/icenter/repository/sudan\\_final\\_non-ratification\\_faq\\_200908.pdf](http://ec.europa.eu/development/icenter/repository/sudan_final_non-ratification_faq_200908.pdf)> accessed 1 December 2012 ("Since Cotonou provides the legal framework for relations between the EC and ACP states, non-ratification by Sudan prevents the EC from implementing bilateral development cooperation in Sudan under our main financial instrument for development assistance to developing countries, the 10th European Development Fund (EDF). This means that the EC will not be able to disburse the €300 million pledged at the May 2008 Sudan Consortium for the period 2008-2013. The funding was intended to contribute to the sustainable, pro-poor development of Sudan, to the achievement of the MDGs and to gradual democratic transformation – thus helping to consolidate the CPA and sustain peace and stability").

<sup>198</sup> *Ibid* ("However, the EC will not cease all development assistance to Sudan. EC funding disbursements continue to rise over the next year or so on the strength of previous commitments (9th and previous EDFs), and these remain unaffected by the legal situation. This will allow us to continue to fund ongoing projects and programmes: for example, the extensive programmes in the fields of education, health, disarmament, etc. in South Sudan will continue. The EC is also looking at ways to channel at least some funding to the Sudanese (for instance through the Instrument for Stability or the European Instrument for Democracy and Human Rights) in order to support the implementation of the CPA and to foster development and democratic transformation across Sudan. Humanitarian assistance will also continue as necessary").

proceedings (while providing it with the necessary resources), or any other measures intended to both incentivize and capacitate national courts to prosecute atrocities in parallel to international courts. The present report can also be helpful in demonstrating that in some cases, where it is clear that international courts will not receive cooperation from the relevant national systems, other measures must be employed by the international community to encourage national accountability processes. This may involve understanding the specific nature of the relevant national jurisdictions, including their prosecution philosophies and sentencing policies. As mass atrocities have a significant impact on the community level, traditional judicial approaches may also be helpful in this regard, as they enjoy local legitimacy and can be more attentive to community imperatives than national or international justice mechanism.