

# Understanding Sudan

## A Teaching and Learning Resource



### **The International Criminal Court and the Darfur Conflict**

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On July 14, 2008 International Criminal Court (ICC) prosecutor Luis Moreno-Ocampo made headlines by charging Sudanese President Omar Al Bashir with 10 counts of genocide, crimes against humanity, and war crimes relating to the situation in Darfur since 2003. The ICC had previously indicted and issued arrest warrants on 27 February for humanitarian affairs minister Ahmad Muhammad Harun and Janjaweed militia leader Ali Kushayb. Neither has been arrested.

#### **The International Criminal Court**

In 1948 the United Nations General Assembly (UN GA) adopted the Convention on the Prevention and Punishment of the Crime of Genocide, inviting the International Law Commission (ILC) “to study the desirability and possibility of establishing an international judicial organ for the trials of persons charged with genocide.” The ILC drafted such a statute in the early 1950s, but progress stalled in the international environment of the Cold War. It wasn’t until 1989, motivated in part by an effort to curb drug trafficking, that the UN called on the ILC to continue its work. Conflicts in Bosnia-Herzegovina and Croatia as well as in Rwanda lent further weight to the idea of an international court, and by 1994 the ILC presented its final draft statute for an ICC to the UN. The process of transforming this draft into what would eventually come to be known as the Rome Statute took four years, but in July 1998, at the end of the month-long Rome Conference, 120 nations voted in favor of the adoption of the Rome Statute of the ICC. It would take another four years to acquire the necessary 60 ratifications to enter the Rome Statute into force.<sup>[1]</sup>

The ICC has jurisdiction over a number of crimes. They are:

- a) The crime of genocide;
- b) Crimes against humanity;
- c) War crimes; and
- d) The crime of aggression. (RS Article 5)

Each of these crimes is defined in detail in Articles 6 through 8 of the Rome Statute. The ICC has jurisdiction to prosecute for these crimes when at least one of the following is true:

- a) The state to be prosecuted is party to the Rome Statute;
- b) The state on the territory of which the crime occurred is party to the Rome Statute;
- c) The state of which the person accused of the crime is a national is party to the Rome Statute;
- d) A situation has been referred to the ICC by the UN Security Council. (12, 13)

Regarding (d), in the case in which one or more crimes over which the ICC has jurisdiction has been committed by, in, or by a national of a state *not* party to the Rome Statute, the ICC may still prosecute if the state is a member of the UN and the Security Council of the UN has referred the situation to the ICC Prosecutor.

The process of bringing an individual to trial for one or more of these crimes occurs over a number of stages. A situation may come to the attention of the ICC in three ways: by the referral of a state party to the ICC, by the referral of the Security Council, or by the prosecutor’s own initiation of an investigation (13). The Prosecutor must analyze the seriousness of the information received and determine whether there is reasonable basis to proceed with an investigation (15.2). If the Prosecutor determines that reasonable basis exists, he or she must submit to the pre-trial chamber a request for authorization of an

investigation (15.3). At any time after initiating the investigation, if the Prosecutor concludes that there is sufficient basis for a prosecution, he or she will request a warrant for arrest or a summons to appear (58.1, 58.7). Following the appearance of the accused before the court, the Pre-Trial Chamber will hold a hearing to confirm the charges on which the Prosecutor intends to seek trial (61.1) If the accused cannot be brought to the court or chooses to be absent, the hearing shall take place in any case (61.2). After the hearing, the Pre-Trial Chamber will determine if there is sufficient evidence to establish substantial grounds to believe that the accused has committed the crimes charged (61.1). If sufficient evidence is believed to exist, the Pre-Trial Chamber will confirm the charges and the accused will be committed to the Trial Chamber (61.7.a). If the contrary occurs, any warrant issued for the unconfirmed charges will cease to have effect (61.10). The Pre-Trial Chamber may request the Prosecutor to provide further evidence for or amend a charge (61.7.c)

There are two important articles contained in the Rome Statute that allow for a trial to be delayed or not pursued even if there is considered to be sufficient evidence to prosecute. Article 16 allows the UN Security Council to prevent the Court from investigating or prosecuting a case for a period of 12 months, renewable every 12 months. Article 53 affords the Prosecutor the discretion to choose to not initiate an investigation that he or she believes would not serve the interests of justice.

### **The ICC in Sudan**

Sudan has not ratified the Rome Statute and is not party to the ICC. Nevertheless UN Resolution 1593 was passed in 2005 referring the situation prevailing in Darfur since 1 July 2002 to the Prosecutor of the ICC. On 27 February 2007 ICC Prosecutor Luis Moreno Ocampo made his first indictments, requesting arrest warrants for state minister for humanitarian affairs Ahmed Haroun and militia commander Ali Mohamed Ali Abdel-Rahman – also known as Ali Kushayb – on 51 counts of war crimes and crimes against humanity. The Pre-Trial Chamber issued arrest warrants on 27 April 2007. However the Sudanese government has refused to recognize the authority of the ICC. Instead, Haroun has been appointed to additional posts; the first in September 2007 to the post of co-President of the National Committee (ironically charged with investigating human rights violations in Sudan), and the second in November 2007 to the UNAMID National Monitoring Mechanism Group responsible for overseeing the deployment of UNAMID forces.<sup>[2]</sup> Neither man has been brought before the ICC.

Ocampo foreshadowed his second case on 5 June 2008. In a statement to the UN Security Council he claimed to have “collected compelling evidence” which would “identify those most responsible for crimes against civilians in Darfur”.<sup>[3]</sup> Following the statement, speculation of an indictment of President Bashir began to develop and a debate over the prudence of such a step took form. On 14 July Ocampo confirmed speculations by announcing his indictment of Bashir on ten counts: three counts of genocide, five counts of crimes against humanity, and two counts of war crimes.

### **The Case Against Bashir**

The Prosecutor’s case against President Bashir is summarized in two documents from the Office of the Prosecutor available on the [website of the ICC](#). The first is the Prosecutor’s application to the Pre-Trial Chamber for an arrest warrant. The second is a statement summarizing this application. Both documents address the following elements of Ocampo’s charges against Bashir:

- 1) Description of the charges
- 2) Evidence for the charges
- 3) Bashir’s responsibility
- 4) Bashir’s mens rea

#### *The Charges*

The charges laid against Bashir are: for genocide: killing members of the Fur, Masalit and Zaghawa ethnic groups, causing serious mental harm, and deliberately inflicting conditions of life calculated to bring about their physical destruction in part; for crimes against humanity: murder, extermination, forcible transfer of the population, torture, and rapes; and for war crimes: intentionally directing attacks

against the civilian population and pillaging. Bashir is not charged with physically or directly carrying out these crimes, but with committing these crimes “through members of the state apparatus, the Army, and the Militia/Janjaweed in accordance with Article 25 (3)(a) of the Statute (indirect perpetration or perpetration by means)”.<sup>[4]</sup> This is not a charge of command or superior responsibility (as in Article 28), nor is it a charge of ‘conspiracy to commit’ war crimes, crimes against humanity, or genocide (which cannot be charged as a distinct and separate crime before the ICC )<sup>[5]</sup>. The crime charged under Article 25 (3)(a) is one of joint criminal enterprise. Article 25 (3)(a) states: “...a person shall be criminally responsible and liable for punishment for a crime...if that person: Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that person is criminally responsible” ().

The time period to which these charges refer spans from March 2003 to the date of filing of the application for Bashir’s arrest, July 14 2008.<sup>[6]</sup>

### *The Evidence*

Evidence for the charges was collected during 105 missions in 18 countries primarily from eye-witness’ and victims’ statements, recorded interviews of GoS officials, statements taken from individuals who possess knowledge of the activities of officials and representatives of GoS and of the Militia/Janjaweed, documents and other information provided by GoS upon request, the report of the UN Commission of Inquiry (UNCOI), the report of the Sudanese National Commission of Inquiry (NCOI) and other materials provided by the NCOI, and documents and other materials obtained from open sources.<sup>[7]</sup> The evidence contained in the application for Bashir’s arrest and the summary of the application should not be considered exhaustive accounts of the evidence collected by Ocampo. The object of the Prosecutor’s application for an arrest warrant is merely to establish substantial grounds to believe that the accused has committed the crimes charged.<sup>[8]</sup>

Ocampo supports his claim that members of the Fur, Masalit, and Zaghawa have been targeted by pointing to the disproportionate percentages of these groups inhabiting refugee and IDP camps. Of approximately 235,000 Darfurian refugees in Chad, 110,000 are Zaghawa and 103,000 are Masalit. Within Darfur’s IDP camps, “the Fur represent 50% up to the totality of some IDP camps...” including approximately 50% Fur in Kalma camp (46 to 50,000), 85% Fur in Hassa Hissa (42,500), 99% Fur in Hamadiya camp (30,000), 90% Fur in Deleig camp (16,000), and “mostly Fur” in Nertiti (32,000).<sup>[9]</sup> Ocampo claims that 98% of land inhabited predominately by the target groups has been attacked.<sup>[10]</sup> He further claims that the prosecution has charted all known attacks between 2003-2008, demonstrating that target groups inhabited the “overwhelming majority” of villages attacked and even that “attackers went out of their way to spare from attack villages inhabited predominately by...tribes considered aligned with the government”. <sup>[11]</sup>

Ocampo justifies his claim of genocide by referring to evidence of killing, serious bodily and mental harm, conditions of life calculated to bring about the physical destruction of groups, and attacks within IDP camps, all directed at “an overwhelming majority of members of the target groups”.<sup>[12]</sup> According to Ocampo, mental harm is inflicted on victims through rape, “the trauma of being forced to witness their own homes and possessions destroyed and/or looted and family members raped and/or killed” (), and the process of learning of the resettlement of their land by members of other communities.<sup>[13]</sup> ‘Conditions of life calculated to bring about the physical destruction of groups’ include the destruction of food, wells, water pumping machines, shelter, crops, and livestock; the spoliation and settlement by other groups of land; and the pursuit of survivors into inhospitable territory.<sup>[14]</sup> Finally, Ocampo claims that circumstances within the camps evince a genocidal plan. These circumstances include refusal by the government to provide meaningful aid, hindrance of efforts to bring humanitarian aid (including delaying the delivery of aid and imposing “unnecessary, bureaucratic requirements on aid workers), blockage of nutritional survey publication, expulsion of relief staff denouncing such acts, and the denial of visa and travel permits.<sup>[15]</sup> He also points to the subjection of IDPs in the camps to abuses (including killing, rape, and other sexual violence) by Militia/Janjaweed stationed outside the camps, specifying that those attacked are unarmed civilians – not armed rebels within the camps.<sup>[16]</sup>

The evidence regarding conditions within the camps apparently seeks to address the January 2005 UNCOI opinion that genocide would not exist if “the populations surviving attacks on villages ... live together in areas selected by the government...where they are assisted”.<sup>[17]</sup>

Ocampo spends more time discussing his genocide charges than either his crimes against humanity or war crimes charges. Of the former he says that “Crimes against humanity are also required to represent the full extent of activity in Darfur since 2003”, that they have been committed against “members of the target groups and other, smaller ethnic groups”, but that “while the attacks against [smaller] groups were carried out on discriminatory grounds, there is insufficient evidence at this time to substantiate a charge of genocide in respect of these groups”. Regarding the latter, he cites the names of a number of villages that were sites of pillaging.<sup>[18]</sup>

#### *Bashir’s Responsibility*

Ocampo does not mince words in presenting his case for Bashir’s responsibility for the crimes charged. He writes of Bashir, “He sits at the apex of, and personally directs, the state’s hierarchical structure of authority and the integration of the Militia/Janjaweed within such a structure. He is the mastermind behind the alleged crimes. He has absolute control” ... “Al Bashir controls and directs the perpetrators. The commission of those crimes...the targeting of civilians...the impunity enjoyed by perpetrators, and the systematic cover-up of crimes...are evidence of a plan based on the mobilization of the state apparatus, including the armed forces, the intelligence services, the diplomatic and public information bureaucracies, and the justice system”.<sup>[19]</sup> In particular, Ocampo focuses on Bashir’s appointment of key personnel to implement crimes, especially Ahmed Haroun. “On various occasions,” he writes, “Ahmad Haroun publically acknowledged his mission to destroy the target groups, stating that Al Bashir had given him the power to kill whomever he wanted and that “for the sake of Darfur they were ready to kill three quarters of the people in Darfur so that one quarter could live.””.<sup>[20]</sup>

#### *Bashir’s mens rea*

The *mens rea*, or ‘criminal intent’, of Bashir is inferred from the utterances of perpetrators during attacks (recalled by victims) in addition to “the systematic targeting of victims based on their [ethnicity]; the actual destructions; the deliberate failure to differentiate between civilians and persons of military status; the perpetration of acts which violate the very foundation of the groups [e.g. rape and expulsion from land]...the sophisticated strategy of concealing crimes; and the evidence of a plan”. Writes Ocampo: “Assessed against all those factors, the only reasonable inference available based on the evidence is that Al Bashir intends to destroy substantial parts of the Fur, Masalit, and Zaghawa groups, as such”.<sup>[21]</sup>

### **Controversy Over the Indictment**

The process that has begun with Ocampo’s indictment of Bashir is certain to pose many challenges. Advocates of the decision believe that the benefits of indicting Bashir are worth the difficulty of achieving them, but critics question Ocampo’s approach and contend that his timing threatens an already tenuous peace. Deferral of the case under Article 16 remains a possibility and is generally sought by critics of Bashir’s indictment.

#### *Concerns About the Prosecutor’s Timing*

Concerns about the timing of Bashir’s indictment generally follow the heuristic of “justice at the cost of peace”. Many fear that seeking to punish Bashir for his crimes while he remains in office will complicate efforts to achieve peace and stability politically. Michael Davies echoed a sentiment shared by many regarding the stability of GONU when he posed the question, “How can the SPLM participate in a presidency with a counterpart for whom there is an arrest warrant and an indictment for war crimes?”<sup>[22]</sup> In the same posting on the SSRN blog *Making Sense of Darfur*, he went on to hypothesize that the effect of the looming indictment would be to alter the NCP’s political strategy from the current multi-year process of democratization and normalization enshrined in the CPA to one of short term survival characterized by increased recalcitrance and hard-liner policies. Celia McKeon noted that “punitive

international action can often entrench the symbolic politics of conflict” as well.[23] These concerns are shared ostensibly by various governments and international organizations. Among these, China, the African Union (AU), and the Arab League have all criticized the indictment of Bashir roundly, including in their objections concerns about the stability of the peace process.[24] Secretary General of the UN Ban Ki Moon said prior to the July 14 that he was “very worried” by the possibility of Sudan’s president being indicted and that “it would have very serious consequences for peacekeeping operations including the political process” (although he also said that in principle peace and justice should go hand in hand).[25] Even Sudan’s opposition parties have issued statements objecting to the indictment. The Umma Party has stated, “If any indictment is issued about the head of state this will create a constitutional collapse in Sudan.”[26] The Democratic Unionist Party (DUP) has said that the indictment “will reflect very badly on the peace process in Darfur and in the south” and that “[it] must be stopped and we must look for another compromise.”[27] From the NCP itself, vice president Ali Osman Taha has stated, “We can’t go along with implementing the CPA or other agreements with a president that is subject to international trial”.[28]

The political implications for peace of indicting Sudan’s sitting head of state engender one set of fears related to Bashir’s indictment. A separate but related fear is that Bashir will lash out violently against AU-UN peacekeepers, humanitarian workers, and his own people. Prior to Ocampo’s official announcement on 14 July, UNAMID feared this possibility enough to evacuate non-essential personnel from Darfur.[29] Predictions of a violent outburst were put forth by numerous commentators prior to July 14, including Alex de Waal and former US Special Envoy for Darfur Andrew Natsios. De Waal commented, “It is precisely because this is a man with a proven record of inflicting extreme violence on his own population that you have to be very careful when antagonizing him”.[30] International Crisis Group expressed concerns about an increase in violence as well.[31] In spite of these concerns, the announcement on July 14 produced no major outbreaks of violence. On the contrary, Davies has described the government’s reaction as a ‘charm offensive’.[32] Nevertheless, both he and de Waal warn that the moment of truth did not pass with Ocampo’s July 14 announcement, but will arrive upon either the issuance of an arrest warrant for Bashir or a clear signal regarding the Security Council’s decision on whether or not to invoke Article 16.[33] Fears of a violent outburst persist particularly in light of thinly-veiled threats from the NCP. Although the NCP has made statements indicating its commitment to cooperate with the UN, it has also sought to raise the specter of instability. Days prior to July 14, Abdel-Mahmoud Mohamed, Sudan’s Ambassador to the UN, warned, “All options are open for us. All reactions are open ... The limit is the sky.”[34] Vice president Taha was reported on July 15 saying “nobody can guarantee full security because this announcement will definitely lead to a series of actions and reactions that may impede or have negative impacts.”[35] Bona Malwal, advisor to Bashir, warned that international peacekeepers would be the second casualty of an arrest warrant for Bashir (following international operations in Darfur).[36]

#### *Concerns About the Prosecutor’s Approach*

Ocampo’s timing is not the only feature of Bashir’s indictment that has led to controversy; his approach has drawn scrutiny as well. Julie Flint, while acknowledging that Sudan’s leaders have committed many crimes, has written that “unless the prosecutor is moving away from assertions about a two-stage plan to destroy entire communities, he may be about to indict them for one they didn’t [commit].”[37] The concerns regarding Ocampo’s approach to Bashir’s indictment have to do with the allegations themselves. Some question whether his description of the situation in Darfur is entirely accurate and, if it is not, whether that may hurt his case. Flint raises cautionary notes for the following elements of Ocampo’s characterization of the situation in Darfur:

- 1) His apparent use of hyperbole in characterizing the “entire Darfur region” as a “crime scene”;
- 2) His portrayal of conditions within the IDP camps;
- 3) His portrayal of the security situation in and around the camps;
- 4) His accusation that “destitution is organized”;
- 5) His claim that the commission of crimes in Darfur “has required the sustained

mobilization of the entire state apparatus”.

Regarding (1) and (5), Flint and others are worried that Ocampo has substituted provocative imagery for verifiable facts. Flint points to plans to develop humanitarian activities in *villages spared from destruction* (as a means of counteracting the ‘pull-factor’ of the camps) as plain evidence that *all of Darfur* is not a crime scene.[38] As for Ocampo’s claim that the commission of crimes in Darfur “has required the sustained mobilization of the entire state apparatus”, Flint asserts that the image of the Sudanese state as “an efficient and coordinated machine with all its parts operating in pursuit of a single objective” is one that “few who have lived in Sudan would recognize”. [39] De Waal has criticized in like fashion Ocampo’s portrayal of Bashir as having total command over the organs of the state.[40] Regarding (2), (3), and (4), Flint draws heavily from an MSF (Doctors Without Borders/Médecins Sans Frontières) report (accessible [here](#)) that describes humanitarian conditions and dilemmas in Darfur. While recognizing fully the “degrading, dangerous, and dehumanizing” conditions of IDP camps,[41] she finds Ocampo’s position that conditions within IDP camps are a calculated to facilitate genocide unconvincing. The MSF report cites UN agency and Sudanese government surveys that report that crude and under five mortality rates are below emergency thresholds and dropping and reports that without registration or payment, water, immunization, primary and secondary health care, nutrition supplements for pregnant or nursing women and moderately undernourished children, public latrines, trash collection, vector control, primary school or kindergarten, and detection and early response to epidemics are all available in the camps.[42] Flint cites MSF as characterizing primary health services in the camps as “mediocre, but not disastrous”. [43] She also argues that the rising and above-emergency-threshold malnutrition rates are not solely the fault of government obstruction of humanitarian work, but are also due in part to shortcomings within the aid system itself – in particular “its inflexibility, refusal to register part of the new arrivals in camps, and failure to reach those most in need”. [44] Regarding the security situation in and around the camps, Flint contends that it is more complicated than it appears at first glance. Drawing on an excerpt from the MSF report which claims that “army, police, and paramilitary rarely venture into the camps” which are “patrolled by youth placed under [the rebels’] authority” and “tightly controlled politically”, [45] Flint claims that the government has placed militia forces outside the camps because the camps are filled with “angry populations that are beyond its control”, not because it is intent on destroying the communities.[46] This does not directly address Ocampo’s contention that civilians, rather than rebel forces, are attacked by the militia’s, but it raises the question of whether militia presence outside of camps evinces a genocidal scheme.

The implication of the skepticism shared by Flint and others is that Ocampo has “over-extended” his case by attempting to characterize the post 2003-2004 period (that is, the period following the heavy violence of 2003-2004) as a pre-meditated ‘second phase’ of a genocidal agenda orchestrated by Bashir. The strong statements that he has made in implicating Bashir and interpretation of the government’s actions as a two-stage genocide have prompted concern amongst those who otherwise agree that Bashir deserves to be sentenced in a court of law. They worry that by framing his case in such a manner, Ocampo will have a difficult time proving it in court.

### *Support for Bashir’s Indictment*

Supporters of Ocampo’s decision to prosecute Bashir emphasize a number of positive effects that will or may result from the process. They point out that an arrest warrant for Bashir would:

- 1) contribute to long-term stability by sending a clear signal to future leaders about impunity;
- 2) provide the UN, SPLM, and opposition parties with a point of leverage in negotiations;
- 3) possibly encourage moderates within the Sudanese government to oust Bashir from office; and
- 4) begin to provide justice to those who have suffered at the hands of Bashir’s regime.

David Crane, former Chief Prosecutor against Charles Taylor of Liberia, has commented that concern about the destabilization of Sudan is a short-term perspective and that the indictment of Bashir

will form the cornerstone by which true peace may be achieved.[47] In a similar vein, Chad Hazlett's article *A Long-term, Much Needed Shift in Norms Weighed Against Short-term Instability* argues that "short-term negative consequences, while entirely reasonable, do not justify worsening...long-term prospects for obtaining a justice system that actually works".[48] He suggests that the fear of subsequent indictments will pressure politicians and rebels to facilitate peace.[49] He also points out that inaction may simply prolong the status quo, writing, "The current state of affairs does not inspire confidence that peace or security will be achieved so long as the quest for justice does not interfere. The political process has failed to a greater degree than most predicted ... In short, it is not clear that any process is "on the rails" in order for it to be derailed." [50]

Leverage stemming from the indictment of Bashir has been recognized as a tool to be used in negotiating the peace process. John Prendergast, co-founder of the Enough group, has said of the peace process, "Everyone knows what the issues are that need to be addressed. What has been missing is leadership and leverage. Suddenly, we have one of the two." [51] Michael Davies has suggested that the indictment of Bashir in conjunction with use of Article 16 could hold the NCP on "probation". [52] Hazlett makes this point as well, but tempers it by questioning whether Bashir would be willing to make political deals in return for impunity that could only be guaranteed one year at a time. [53] Discussion has also circulated of using Bashir's indictment as leverage to secure the arrests of the two other ICC's targets in Sudan: Ahmed Haroun and Ali Kushayb. [54]

The possibility that moderates (and/or non-moderates) in the government might see Bashir as expendable has been proposed by Omer Ismail and M.W. Daly. [55] Politicians and army officers eager to extricate themselves from Bashir, and possibly wishing to prevent Sudan from plunging into chaos, could attempt to oust Bashir from office. As Daly points out, it would be easy for a successor government to blame the atrocities on the former regime and "the international community's willingness to support such a new government...in an announced attempt to open new talks...would help it to solidify its position in Khartoum". [56]

Finally, the importance of justice itself for the victims of Bashir's policies constitutes an argument in favor of Ocampo's indictment of Bashir. Human rights activists have typically been the most vocal in championing the importance of justice for the victims of violence committed under Bashir's regime. Foregoing the current opportunity to put Bashir on trial would risk undermining the tragic events and circumstances imposed on civilians by agents of Bashir.

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