



## ***ICC ARREST WARRANT FOR OMAR AL BASHIR ON CHARGES OF CRIMES AGAINST HUMANITY AND WAR CRIMES***

On March 4, 2009 Pre-Trial Chamber I of the International Criminal Court (ICC) issued an arrest warrant for Omar Hasan Ahmad Al Bashir, president of Sudan, on seven charges of crimes against humanity and war crimes, including murder, extermination and rape. This is the first time that the Court has issued a warrant for a head of state. In issuing the warrant, the Court is functioning as designed by the Rome Statute. As in other cases, the Pre-Trial Chamber, on the application of the Prosecutor, has issued a warrant of arrest since it determined that there are reasonable grounds to believe that Mr. Bashir has committed crimes within the jurisdiction of the Court and that his arrest is necessary to ensure his appearance.

Since 2003, more than 200,000 people have reportedly been killed in Darfur and 2.5 million displaced. Although Sudan is not a State party to the Rome Statute, the UN Security Council, acting pursuant to Article 13(b) of the Statute, passed Resolution 1593 on March 31, 2005 referring the situation in Darfur to the ICC. After evaluation of the situation and the information then available, Chief Prosecutor Luis Moreno Ocampo decided to accept the referral and start a formal investigation. On July 14, 2008, he requested Pre-Trial Chamber I to issue an arrest warrant for Mr. Bashir. In 2007, the Prosecutor requested and secured arrest warrants for Ahmad Muhammad Harun, Minister of State for Humanitarian Affairs, and Ali Muhammad Ali Abd-Al-Rahman (also known as Ali Kushayb), a Janjaweed militia leader, and in 2008 opened a third Darfur investigation into rebel attacks on African Union peacekeepers. The arrest warrant for Mr. Bashir is the first the ICC has issued for a head of state, although other international tribunals have named sitting heads of state such as Slobodan Milosevic of Yugoslavia and Charles Taylor of Liberia.

President Bashir came to power by force in 1989, and over the years he has allegedly resorted to force to maintain his position. According to evidence gathered by the Office of the Prosecutor (OTP), he developed a policy exploiting real or perceived differences between tribes in order to destroy those ethnic groups which represented a greater threat to his power – the Fur, Masalit and Zaghawa tribes. Consequently, two main rebel groups – the Justice and Equality Movement (JEM) and the Sudan Liberation Movement/Army (SLM/A) – emerged in opposition to the government and combated joint actions of the Armed Forces and the Janjaweed militias. The clashes have caused extended armed conflict and serious atrocities. Furthermore, widespread rape and pillaging were part of the attacks, which also took place in the refugee camps, which under the Rome Statute are war crimes and crimes against humanity.

The refusal of the Government of Sudan to cooperate with the Court in the case of Darfur and the high probability of its retaliation against informants inside Sudan led the OTP to gather evidence outside the country and in refugee camps. However, based on the evidence collected, the prosecution concluded that three types of crimes had been committed: genocide, crimes against humanity or war crimes. It was then up to the Pre-Trial Chamber to decide on the charges to be brought against Mr. Bashir. Although all three categories of crimes constitute a similar conduct and are equally serious, genocide is very difficult to prove due to its intent element. The Pre-Trial Chamber did not include genocide because it considered that not all of the elements had been established.

Under the Rome Statute, genocide is “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” Intent is the key element of genocide, thus the extent of the results of the crimes is





less significant than actual intentions. Moreover, although intent can be inferred from the circumstances, it is also the most difficult element to prove because it relies heavily on witness testimony or documentation, the availability of which depends greatly on the circumstances.

Since Prosecutor Ocampo decided to submit an application for a warrant of arrest for the Sudanese President, some have opposed it. There is an ongoing debate about whether the pursuit of justice in a conflict situation might clash with peace processes. Some worried that the negotiations for peace between the Government and the JEM rebels were put at risk by the actions of the Prosecutor. Moreover, some blamed the warrant for violence against UN peacekeepers and the refusal of the Government of Sudan to allow them into the country. Many stated that the issuance of the warrant would be a destabilizing factor of the already fragile situation in Darfur and attributed the failure to reach a peace agreement to the action of the ICC.

However, according to the Prosecutor and other supporters of the Court, the peace and justice issue is a highly political question that should be dealt with by the Security Council, the highest political body in the international system. The ICC, as a judicial institution, has emphasized it will not make political decisions. In those cases where a choice must be made, it is not for the Court to decide which should prevail, peace or justice. The Registrar of the Court, Silvana Arbia, repeated this in the press conference on March 4 which announced the decision, emphasizing that the ICC is a judicial institution.

Nonetheless, the issuance of the arrest warrant could renew the efforts of the African Union and the Arab League, who are supported by China and Russia, for a Security Council article 16 deferral. Under Article 16 of the Rome Statute, the Security Council may adopt a resolution under Chapter VII of the UN Charter, which deals with international peace and security, requesting the Court to defer an investigation or prosecution for a period of 12 months. It would take nine affirmative votes to defer an ICC action without a “no” vote by a permanent member vetoing the resolution. A resolution with respect to the Bashir case or the Darfur situation would require the ICC to halt all relevant proceedings. In addition, the Council could renew the deferral every 12 months, with no limit on the number of renewals. Nevertheless, the failure of the strong efforts to obtain a deferral so far due to the opposition of France, the US and Britain suggests that they will not succeed in future. The US has recently announced that it will continue to strongly oppose such efforts.

Now that the Court has issued an arrest warrant for Mr. Bashir, it faces new difficulties because it is unclear how an arrest warrant against a sitting head of state might be implemented. The arrest warrant will be transmitted to all ICC States Parties, members of the UN Security Council and the Government of Sudan. The ICC has called on nations to fulfill their obligations under the Rome Statute, Security Council Resolution 1593 and applicable international law. There are different possible scenarios, including the removal of President Bashir from power by his own government or by the rebels; or he decides to flee to a neighboring country which will protect him. It is possible that other countries will collaborate to isolate Sudan and thus international pressure may push members of Sudan’s government to take steps which could lead to the arrest of Mr. Bashir.

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