

Justice empowered or justice hampered: The International Criminal Court in Darfur

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It came as a surprise to many international observers when, on 31 March 2005, the United Nations Security Council passed resolution 1593, which referred the situation in Darfur to the jurisdiction of the International Criminal Court. Some celebrated this event as initiating a new era in which international criminal justice would prevail, but they might have done well to consider the objections immediately raised by the representatives of the Sudanese government, which was not a party to the ICC, a point that created a series of impediments to the implementation of the resolution. For all that the ICC has been charged with investigating crimes against humanity in Darfur, its investigators are being prevented from seeking the evidence on the ground essential to any successful prosecution. The Sudanese government has so far maintained its obstructive position, arguing that it is capable of handling such cases within its own sovereign jurisdiction. The imperative of excluding the ICC from Darfur has contributed to Khartoum's objections to the deployment of a UN force to replace the African Union mission there. In sum: the challenges faced by the ICC in Darfur demonstrate that international criminal justice does not operate in a political vacuum.

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Introduction

In March 2005, when the United Nations (UN) Security Council decided to refer the situation in Darfur to the International Criminal Court (ICC),¹ supporters of such legal action were quick to celebrate victory and to proclaim the advent of a new era in which international criminal justice would prevail.

Now, a year later, it appears that the ICC's investigators have yet to set foot in Darfur to begin gathering information on the ground.² The ICC prosecutor, Luis Moreno Ocampo, has repeatedly reported to the Security Council the numerous difficulties his team encounters, notably in providing protection to potential witnesses.³

In this context, it may be asked whether the ICC is “justice empowered by the might of international politics”, or “justice hampered by the lack of political will to support it”, notably on the part of Sudan. In light of the limits of the mandate of the ICC, and of the challenges it faces, what can it reasonably be expected to achieve in Darfur?

The ICC's mandate in Darfur

International observers were slightly surprised when, on 31 March 2005, the Security Council of the UN adopted resolution 1593, in terms of which it referred the situation in Darfur to the ICC.⁴ Until then, any issue pertaining to this new international jurisdiction had divided the permanent members of the Security Council. China and Russia had opposed any international jurisdiction mandated to investigate war crimes, crimes against humanity and genocide. The European member states, on the other hand, had been strongly supportive, while the United States of America (USA) had often opposed it. In these circumstances, many had thought that the American delegation would veto the adoption of any resolution reinforcing the relevance of the ICC. Nevertheless, resolution 1593 was adopted, with 11 Security Council members voting in favour of the referral and four abstaining, including China and the US. This marked the first time the Security Council had referred a case to the ICC.⁵ The Security Council's decision to do so was based *inter alia* on the report rendered on 25 January 2005 by a UN Commission of Inquiry it had previously established.⁶

This UN Commission of Inquiry, or so-called Cassese Commission,⁷ had been mandated by the Security Council to investigate reports of crimes committed in Darfur. In its final report, the commission found that:

... the Government of the Sudan and the *Janjaweed* are responsible for serious violations of international human rights and humanitarian law ... Government forces

and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity. The extensive destruction and displacement have resulted in a loss of livelihood and means of survival for countless women, men and children ...⁸

In their discussions with the commission, officials of the Sudan stated that any attacks carried out by government armed forces in Darfur were “for counter-insurgency purposes and were conducted on the basis of military imperatives”.⁹ The commission considered however that “most attacks were deliberately and indiscriminately directed against civilians”.¹⁰

In response to the critical question as to whether Sudan had committed genocide, the commission responded that “the Government of the Sudan has not pursued a policy of genocide ... The Commission does recognise that in some instances individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination that only a competent court can make on a case by case basis.”¹¹ Interestingly, the commission compiled a list of names of individuals identified for their responsibility for serious violations of international human rights law and international humanitarian law, including crimes against humanity or war crimes.¹² Although the list remains officially sealed, it apparently includes government officials, members of militia forces, of rebel groups, and certain foreign army officers acting in their personal capacity.¹³

The commission also considered the best means by which to render justice to the victims in Darfur and to hold accountable those responsible for their crimes. It recommended that the Security Council refer the situation of Darfur to the ICC, finding that:

The Sudanese justice system is unable and unwilling to address the situation in Darfur ... [M]any of the laws in force in Sudan today contravene basic human rights standards. Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity, such as those carried out in Darfur [M]any victims informed the Commission that they had little confidence in the impartiality of the Sudanese justice system and its ability to bring to justice the perpetrators of the serious crimes committed in Darfur.¹⁴

In the ensuing resolution 1593, the Security Council, acting under Chapter VII of the UN Charter, recorded its decision that “the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution ...”.¹⁵ Thus, the Security Council made it a legal obligation for Sudan, which is not a state party to the treaty establishing the ICC, to cooperate with this court.¹⁶

Many of the supporters of international criminal justice were so busy celebrating what they saw as a great victory that they may have overlooked the statements made by Sudan's representative when resolution 1593 was adopted: "[O]nce more, the Council had persisted in adopting unwise decisions against [my] country, which only served to further complicate the situation on the ground."¹⁷

The Sudanese representative reminded the Security Council that Sudan was not a party to the ICC, making implementation of the resolution fraught with procedural impediments, and declared that: "As long as the Council believed that the scales of justice were based on exceptions and exploitation of crises in developing countries and bargaining among major Powers, it did not settle the question of accountability in Darfur, but exposed the fact that the ICC was intended for developing and weak countries and was a tool to exercise cultural superiority." He pointed out that the Security Council had adopted the resolution "at a time when the Sudanese judiciary ha[d] gone a long way in holding trials, and [was] capable of ensuring accountability".¹⁸

Whether or not the Sudanese judiciary by then had gone a 'long way' in ensuring accountability, it is clear that the adoption of resolution 1593 prompted the government of Sudan to intensify its efforts in this vein. On 7 and 11 June 2005, only a few weeks after the adoption of resolution 1593, Sudan created a Special Court for Darfur.¹⁹ It was announced that some 160 suspects had been identified for prosecution.²⁰ During the second half of 2005, however, the Special Court conducted only six trials, involving 26 defendants.²¹ Of the latter, 18 were low-ranking members of the armed forces, including eight members of the Popular Defence Forces; the others appear to have been civilians.²² Reportedly, the cases included one charge of intentional wounding, two charges of murder, one charge of rape, three charges of armed robbery, one charge of theft of livestock, and two charges of possession of firearms without a licence.²³ The court has so far convicted 13 of these defendants, including one juvenile.²⁴ In November 2005, just prior to the date on which the ICC prosecutor was due to report to the Security Council on the progress of his work in Darfur, Sudan expanded its Special Court for Darfur to include permanent seats in each of the three Darfur states: two new Special Courts, to sit in el-Geneina and Nyala, were thus established by decree.²⁵ So far, the Special Court in the West Darfur capital el-Geneina appears to have dealt with only one case, that concerning policeman Jamal Zacharia, who was accused of killing a student who tried to demonstrate against an attack by militias on a Darfuri village.²⁶ It was reported that Judge Ahmed Abou Zaid, head of the court, declared: "This is the only case so far before the court."²⁷

In addition, various other mechanisms and committees have been established in Sudan, including centres for the elimination of violence against women, a unit for fighting violence against women within the ministry of justice, and an attorney office for crimes against humanity. The GoS has also pointed to efforts to promote tribal reconciliation.²⁸ In February 2006, the head of the Sudanese Governmental Human Rights Advisory Council, Abdel Monim Osman Taha, handed to the UN

a list of “individuals of the regular services who have been tried for perpetrating crimes connected with the Darfur conflict”.²⁹

Showing that it is indeed able and willing to investigate and try the crimes committed in Darfur is crucial for the Sudanese government if it wants to diffuse pressure from the international community and attempt to avoid the ICC’s intervention. The ICC was conceived as a court of last resort, complementary to national criminal jurisdictions. It can intervene only when there have been no national investigations or prosecutions of the cases selected for prosecution by the ICC, or there has been an investigation or prosecution, but it is vitiated by an unwillingness or inability to carry out the investigation or prosecution in a genuine manner.³⁰ In other words, as stipulated in the ICC Statute, the ICC prosecutor must establish that Sudan is either unable or unwilling to investigate or prosecute those cases selected for prosecution by the ICC.

In assessing the efforts made by Sudan to try cases stemming from crimes committed in Darfur, in his last report the prosecutor sidestepped the issue somewhat, choosing not to address the capability and capacity of the national jurisdictions to handle the cases, but rather to look at issues of security. To quote: “The continuing insecurities in Darfur currently prohibit the establishment of an effective system for the protection of victims and witnesses. This represents a serious impediment to the conduct of effective investigations into alleged crimes in Darfur by national judicial bodies.”³¹ The ICC prosecutor has been careful not to pass judgment on the judicial mechanisms put in place by the Sudanese government. In deciding that there is a reasonable basis to initiate an investigation into the situation in Darfur since 1 July 2002,³² the prosecutor remarked that this decision did not represent a determination upon the Sudanese legal system, but was essentially the result of the absence of criminal proceedings related to the cases on which he would focus.³³ He explained that once specific cases have been selected, he would assess again whether or not they had been the subject of genuine national investigations or prosecutions.³⁴ The ICC is to continue to follow the work of the Sudanese mechanisms dealing with crimes committed in Darfur, and to examine whether or not they have investigated, or are investigating, the cases to be prosecuted by the ICC, and whether such proceedings are genuine.³⁵

At this juncture, it is important to note that the mandate of the ICC is such that it will, in fact, handle only a limited number of cases, as it has jurisdiction for only “the most serious crimes of concern to the international community as a whole”, namely genocide, crimes against humanity, and war crimes.³⁶ The ICC can charge only individuals – physical persons – who committed such crimes, intentionally ordered them, incited or assisted others to commit them.³⁷ It will also be able to judge individuals who, as military commanders or persons effectively acting as military commanders, failed to exercise control over their forces when they committed such crimes. In selecting the cases to be prosecuted, it is clear that the ICC prosecutor, taking into account his limited resources, will concentrate predominantly on those few people who bear the highest level of responsibility for the worst crimes. Thus, the scope of international prosecutions and trials is likely to be restricted

to a handful of high-ranking leaders, in line with the legacy of the UN International Criminal Tribunals for the former Yugoslavia and for Rwanda, and of their forefathers, the Nuremberg and Tokyo International Military Tribunals.

In this context, if Sudan wishes to avoid the reach of the ICC, it will have to demonstrate not only that it is trying some of the crimes committed in Darfur, but also that its judicial system is able and willing to successfully investigate and prosecute persons further up the hierarchy: those who ordered or failed to exercise control over the worst crimes committed in Darfur. Failure to do so would expose it to further international investigations and eventually prosecutions by the ICC.

The challenges faced by the ICC in Darfur

With Sudan construing international investigations and prosecutions as a form of imposed judicial intervention, as highlighted above, Khartoum's cooperation with the ICC may not be forthcoming. This could well hamper the ICC's progress, and raise evident practical concerns for its effective functioning.

According to the media, the GoS has repeatedly indicated that it would refuse to allow any Sudanese citizen be tried outside its national courts.³⁸ Recently, Reuters reported that: "Sudan says it will not allow ICC investigators to work on its soil, but will allow the ICC to visit its own national courts in Darfur, which it says are capable of prosecuting those responsible for war crimes."³⁹ This seems to confirm the statement made by the ICC prosecutor to the Security Council last December. He reported that Sudanese officials had agreed in November 2005 to receive ICC officials to Sudan, notably to visit the Sudanese Special Courts and other relevant judicial bodies, in order to assess national proceedings in relation to the alleged crimes.⁴⁰ He also indicated that another visit was due to take place by the end of February 2006. That a team from the ICC would visit Sudan by the end of February was recently confirmed by a British minister, who added that the visit would be the second visit by the ICC to Sudan.⁴¹

It would thus appear that, nearly a year after the ICC formally opened its investigation in Darfur, while some ICC officials may have been to Sudan, its investigators may yet have to set foot in Darfur itself.⁴² Indeed, in December 2005, the ICC prosecutor indicated that all the investigative activities had so far taken place outside Darfur.⁴³ Interestingly, he mentioned on this occasion that he also had contacts with the principal rebel groups in Darfur, notably the Sudan People's Liberation Movement/Army (SPLM/A).⁴⁴

In this light, it seems reasonable to wonder how much access the ICC investigative and prosecutorial teams will have in Darfur. To what extent can the ICC proceed with its work – investigate

the crimes committed in Darfur, identify those bearing the highest level of responsibility and indict them – without actually physically operating in Darfur? Even assuming that it proved possible for the ICC to complete its investigations and indict individuals without setting foot in Darfur, who would take the responsibility to arrest and transfer these persons to The Hague without the full cooperation of Sudan, and how would they carry out these tasks? Moreover, even if this hurdle were to be overcome, what is the likelihood of then being able to secure the appearance of Sudanese witnesses in court? The list of questions is endless, and all revert to the same single most critical issue for the ICC success in Darfur: the cooperation of Sudan. As amply demonstrated by the UN International Criminal Tribunal for Rwanda, the issue of cooperation lies at the heart of an international criminal jurisdiction's capacity to execute its mandate. To complete its work, the ICC will most probably have to rely on the GoS at each stage of the investigative and judicial proceedings, from allowing ICC personnel to travel to Sudan and Darfur to enabling them to collect crucial evidence – including meeting key witnesses, local officials, and searching through government archives – to arrest those accused, and secure the appearance of witnesses in court.

Furthermore, the cooperation of Sudan is vital to the ICC if it is to overcome the fundamental obstacles that are the sheer size of Darfur, the lack of even the most basic facilities, the remoteness of many areas. As these very obstacles hampered a military operation such as the African Union Mission in Sudan (AMIS), they are bound to cause logistical difficulties to the ICC, which does not benefit from the capacities available to a military operation.⁴⁵ Additionally, the prevailing insecurity not only makes the work of ICC investigators challenging, but also impacts on the safety of victims and other potential witnesses. There are serious risks that witnesses, including women and children who have been victims of terrible crimes, including rape and sexual violence, could face retaliation if they are seen to cooperate with the ICC. The ICC, which does not have its own police force, is at this stage apparently not in a position to provide any serious guarantees of protection to those potential witnesses located in Darfur. The ICC prosecutor has confirmed that the volatile security situation in Darfur, with continuing violence and attacks, has so far made it extremely difficult for the ICC to establish an effective system of witness protection.⁴⁶ Such a system is a vital precondition for the conduct of successful international investigations in Darfur. Consequently, without its own police force, the ICC will have to rely extensively on the support of the GoS to establish a system of witness protection, in the same way that the ICC will probably need its cooperation to secure the arrest of suspects or those accused. The operational paradox for the ICC is therefore apparent: on the one hand, it is expected to intervene in countries that are either unable or unwilling to investigate and prosecute those responsible for the worst crimes, while on the other, by its very nature, it has to rely heavily on the support of those very states to carry out its mandate. The unfortunate character of international criminal jurisdictions is that they are “giants without legs and arms” to use an expression coined by Professor Cassese.⁴⁷ In the absence of cooperation on the part of the state concerned, the only possible source of support that these giants can receive must be

the international community. This was demonstrated in the case of the UN International Criminal Tribunal for the former Yugoslavia, whose work, notably in Bosnia-Herzegovina, was supported by international military operations, from the United Nations Protection Force (UNPROFOR) to the current European Union Force in Bosnia and Herzegovina (EUFOR), through the North Atlantic Treaty Organisation (NATO)-led operation, which *inter alia* searched for and arrested several indictees. Is there an international force in a position to provide this type of support to the ICC in Darfur?

Despite its limited capacity, the 6,964-strong AMIS force, which began its operations in Darfur in August 2004, has been credited with helping to restore some calm to certain areas of Darfur, and allowing for the delivery of humanitarian assistance to the most affected populations. Ambassador Baba Gana Kingibe, representing the AU, explained that AMIS has been “the first ever African initiative by Africans in solidarity with their African brothers and sisters under the new principle of non-indifference”.⁴⁸ However, the narrowly defined mandate of AMIS and its limited capacity do not leave scope for supporting the work of the ICC in Darfur.⁴⁹

Change may be forthcoming, however, bringing good news for the ICC. Indeed, as AMIS’ current mandate was to expire on 31 March 2006, the AU Peace and Security Council expressed its support in principle for a transition from AMIS to a UN operation.⁵⁰ Consequently, in early February, the UN Security Council asked the Secretary-General to begin contingency planning on options for a possible handover. The UN has suggested a peacekeeping force of up to 20,000 troops to disarm militias and provide security so that more than two million people can return home. Jan Pronk, the Special Representative of the UN Secretary-General in Sudan, noted recently that the UN had “the moral and political obligation to respond positively” if the AU decides to opt for the transition, because it forms part of the UN’s mandate.⁵¹

The potential for the ICC, in having a new international force deployed in Darfur, with a broader mandate, was clearly understood by Human Rights Watch and the International Crisis Group. On 31 January 2006, they voiced their concerns in a joint letter to the Security Council, asking:

... that the Security Council authorize, on an urgent basis, a transition of the African Union force in Darfur to a UN mission under Chapter VII of the UN Charter. Such a mission should have a strong and clear mandate that will allow it to protect itself and civilians by force if necessary ... The mission should also be specifically empowered to provide appropriate assistance to the International Criminal Court’s investigations in Darfur including the arrest of individuals indicted for crimes against humanity and war crimes ... These measures should be part of a larger strategy that includes support for the International Criminal Court investigation in Darfur (as the Security Council has already agreed).⁵²

It is indeed interesting to note that a new UN operation, which would be deployed at the request or with the authorisation of the Security Council, could put the giant back on its feet – or at least may make sure that it does not have to scrape around on its knees.

In this context, the continuing discussions pertaining to the possible replacement of AMIS by a UN peace operation established under Chapter VII of the UN Charter take on a new dimension. Recent statements by both the President and the Vice-President of Sudan underscore the fact that Khartoum rejects the replacement of AU forces with a UN peace operation.⁵³ “The government of Sudan strongly rejects the proposal of international forces to be deployed to Darfur and rejects the transition of operation in Darfur from AU to UN,” Foreign Minister Lam Akol told a parliamentary session on 22 February 2006. “The UN has no mandate in Darfur, it is the AU that has the mandate there”.⁵⁴ President Omar al-Beshir described plans for the UN to take over security responsibility from the AU as “dangerous” and warned that Darfur would become a “graveyard” for any foreign military contingent entering the region against Khartoum’s will.⁵⁵ He declared that: “If the AU forces cannot carry out their mission because of financial problems, they should leave without looking for a substitute”,⁵⁶ and called on the world to be aware of “the need for respecting the peoples’ sovereignty”.⁵⁷

This opposition to a UN force can also be analysed in the light of the ICC investigations. Indeed, on the one hand, it is unlikely that the mandate of any AU operation would be widened to include assisting the ICC in its work in Darfur; on the other, it would be difficult to envisage that a new peace operation mandated by the Security Council in Darfur could not ultimately play a *de jure* or at least a *de facto* role in enforcing the terms of an earlier resolution adopted by the Security Council under Chapter VII, such as resolution 1593, according to which “the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution”.⁵⁸

Conclusion

Although there are reasons to be concerned about the seemingly slow progress on the part of the ICC in Darfur, there is hope that, were it to receive more support from Sudan or the international community, its work would become more expeditious. In any case, the referral by the Security Council of the Darfur situation to the ICC is already a success to the extent that it has undermined the prevailing impunity in the region. The referral sends out a strong signal to all those who bear the greatest responsibility for the worst crimes known to mankind, that, wherever they may be, and irrespective of whether their state is party to the ICC Statute, they could be held accountable for their crimes. It also sent a clear message to the peoples of Darfur that their sufferings are not ignored and that those at whose hands they suffer will be held criminally liable.

The challenges faced by the ICC in Darfur demonstrate that international criminal justice does not operate in a political vacuum. On the contrary, its success depends very much on the good will and cooperation of states. The ICC experience illustrates that political expediency weighs heavily in the balance of international justice. Ultimately, the support the ICC receives from Sudan, as well as from other states, the AU, and the international community as a whole, will determine in large part the extent to which the ICC achieves its goals in Darfur. If – as the current trend suggests – the ICC continues to be hampered by the lack of political support, notably on the part of Sudan, it may unfortunately become irrelevant to the victims of the terrible crimes committed in Darfur. If, however, the ICC is empowered by an international force intervening in Darfur, thus enabling it to meet the challenge of rendering justice, it will hopefully contribute to stabilising the situation in Darfur, as well as to possibly playing an important role in post-conflict reconstruction efforts, in Sudan and beyond.

Whatever happens, the obligations of the international community in Darfur do not stop with supporting justice efforts. As pointed out by Tod Lindberg in an editorial in the *Washington Times* just ahead the adoption of resolution 1593:

There are some who would be content to let an ICC referral mask inaction to prevent mass killing in Darfur. That is unacceptable. A war crimes investigation makes moral sense only in the context of international action to halt the killing there. Otherwise, it is just a self-satisfied fig leaf ... Darfur is about the challenge of keeping people alive – which in turn will entail being in a position to punish those guilty of war crimes to date.⁵⁹

According to UN estimates, some 3.4 million people are affected by the Darfur crisis. An estimated 1.8 million people have been internally displaced and 200,000 have fled to Chad. The challenge is thus not only to try those responsible for the crimes committed, but also to halt these crimes. Indeed, the real urgency in Darfur is to keep people alive and to protect them. This clearly goes beyond the mandate of the ICC. But this falls squarely within the pledge made by the world's leaders when they assembled at the UN last September to abide by their 'responsibility to protect' the peoples of the world.

Notes

1 The ICC is the first permanent international criminal jurisdiction mandated to investigate and prosecute individuals responsible for the gravest international crimes: genocide, crimes against humanity and war crimes. It is a treaty-based jurisdiction, and its jurisdiction and functioning are governed by the

provisions of its statute, adopted on 17 July 1998 in Rome, and often referred to as the Rome Statute. The Statute entered into force on 1 July 2002, and persons committing crimes after this date may be liable under certain circumstances for prosecution by the court.

- 2 See Second Report of the Prosecutor of the International Criminal Court, Mr Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005), 13 December 2005, p 4.
- 3 Ibid.
- 4 Resolution 1593 (2005), 31 March 2005. In paragraph 1 of this resolution, the Security Council decided “to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court”.
- 5 The two other members which abstained during this vote were Algeria and Brazil. See UN Press Release SC/8351. The US Ambassador declared that it was important “that the international community spoke with one voice in order to help promote effective accountability. The United States continued to fundamentally object to the view that the Court should be able to exercise jurisdiction over the nationals, including government officials, of States not party to the Rome Statute. Because it did not agree to a Council referral of the situation in Darfur to the Court, her country had abstained on the vote. She decided not to oppose the resolution because of the need for the international community to work together in order to end the climate of impunity in the Sudan, and because the resolution provided protection from investigation or prosecution for United States nationals and members of the armed forces of non-State parties.”
- 6 The UN Commission of Inquiry was established by the Secretary-General pursuant to Security Resolution 1564 (2004) of 18 September 2004.
- 7 The commission was named after its president, Professor Antonio Cassese, a renowned professor of international law, who also served as the first president of the first UN International Criminal Tribunal for the former Yugoslavia.
- 8 Report of the International Commission of Inquiry on Darfur to the UN Secretary-General, S/2005/60, 25 January 2005, p 3.
- 9 Ibid.
- 10 Ibid.
- 11 Ibid, p 4.
- 12 Ibid, pp 4–5. It was subsequently revealed by the ICC prosecutor that this list contains the names of 51 individuals.
- 13 This list was later transmitted to the ICC prosecutor. It has been the object of many rumours, and some of the names allegedly appearing on this list have been revealed in media reports.
- 14 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, op cit, pp 5–6.
- 15 Resolution 1593 (2005), op cit, para 2.
- 16 For a legal analysis of this issue, see Luigi Condorelli and Annalisa Ciampi, Comments on the Security Council referral of the situation in Darfur to the ICC, *Journal of International Criminal Justice* 3(2), July 2005, pp 590–599. The government of Sudan has signed but not ratified the treaty establishing the ICC. Human Rights Watch noted in its 2005 Annual Report that the adoption of Resolution 1593 “means that the ICC henceforth has become a realistic option for prosecuting even tyrants whose governments have not ratified the ICC treaty”.
- 17 See statements of the Representative of Sudan, Mr Elfatih Mohamed Ahmed Erwa, UN Press Release SC/8351.
- 18 Ibid.
- 19 See Second Report of the Prosecutor of the International Criminal Court, op cit, p 5.
- 20 Ibid.
- 21 Ibid.
- 22 Ibid.
- 23 Ibid.
- 24 Ibid.
- 25 Ibid.
- 26 Reuters, 14 January 2005.
- 27 Ibid.
- 28 Second Report of the Prosecutor of the International Criminal Court, op cit, pp 5–6.
- 29 Agence France Presse (AFP), 27 February 2006. The list apparently did not detail who the individuals were or what had been the nature of their trials.
- 30 See Article 17 of the Statute of the ICC.
- 31 Second Report of the Prosecutor of the International Criminal Court, op cit, p 6.
- 32 Decision to initiate an investigation, ICC Doc ICC-02/05-2, 1 June 2005.
- 33 UN Press Release SC/8429, 29 June 2005.
- 34 Ibid.
- 35 Report of the Prosecutor of the International Criminal Court, Mr Luis Moreno Ocampo, to the Security Council Pursuant to UNSC 1593 (2005), 29 June 2005, p 3, and Second Report of the Prosecutor of the International Criminal Court, op cit, p 5.
- 36 Article 5 of the Statute of the ICC. The ICC will also have jurisdiction over the crime of aggression, once this crime is defined.
- 37 Articles 25, 27 and 28 of the Statute of the ICC.
- 38 According to several press agencies, including AFP and Reuters, Sudan’s President Omar al-Beshir vowed in April 2005 never to hand over any Sudanese national to international jurisdiction.

- 39 Reuters, 22 February 2006.
- 40 Second Report of the Prosecutor of the International Criminal Court, *op cit*, p 9.
- 41 Reuters, *op cit*.
- 42 Second Report of the Prosecutor of the International Criminal Court, *op cit*, p 4.
- 43 *Ibid*.
- 44 *Ibid*, p 9. The ICC prosecutor explained that he intends to keep open channels to offer an opportunity for all parties involved in the conflict to provide information and evidence to the court during its investigation.
- 45 See notably Seth Appiah-Mensah, AU's critical assignment in Darfur: Challenges and constraints, *African Security Review* 14(2), 2005, pp 7–21.
- 46 Second Report of the Prosecutor of the International Criminal Court, *op cit*, p 4.
- 47 As indicated *supra*, Professor Antonio Cassese served as the first president of the UN International Criminal Tribunal for the former Yugoslavia and as the president of the UN International Commission of Inquiry on Darfur.
- 48 AU Official Press Release, No 32.
- 49 Among other reasons, AMIS has been limited by its recurrent financial difficulties. In December 2005, the AU said that it needed an extra US\$130 million to meet the demand of peacekeeping in Darfur.
- 50 12 January 2006. The Council was to hold another ministerial meeting in Addis Ababa on 10 March to discuss proposals for the UN takeover.
- 51 IRIN, 23 February 2006. In the meantime, consultations are taking place between the UN and the AU to ensure that the AU could stay as long as possible in Darfur, Pronk noted, “hopefully to the end of this year, at least”. Referring to what he described as the misconceptions and concerns surrounding the proposed transition, Pronk emphasised that the UN would, in principle, not move in without the approval of the GoS, a peace agreement, or at least, a working and holding ceasefire agreement. Pronk underlined that it might take up to nine months to build up the 15,000-strong force that would be needed by the UN. Such a force, he stressed, would have an African character, and would not exclude troops from the existing AMIS forces.
- 52 Joint Human Rights Watch and International Crisis Group Letter to the Members of the UN Security Council Regarding Darfur, Security Council must take action to protect civilians in Darfur, 31 January 2006, <<http://hrw.org/english/docs/2006/01/31/sudan12577.htm>>.
- 53 AFP reported on 4 March 2006 that President Omar al-Beshir repeated his country's refusal to allow a UN-led troop intervention in Darfur: “We are opposed to foreign intervention in Darfur although we remain committed to cooperation with the international community.” Vice-President Ali Osman Mohamed Taha made similar declarations.
- 54 IRIN, *op cit*.
- 55 AFP, 4 March 2006.
- 56 Xinhua, 25 February 2006.
- 57 AFP, *op cit*.
- 58 Resolution 1593, *op cit*, para 2.
- 59 T Lindberg, ICC offers Darfur hope, *Washington Times*, 15 March 2005.