This is not the first International Criminal Court (I.C.C.) case involving Sudan. Nor is it the first request for an arrest warrant naming a Sudanese government official. It is the first application by the I.C.C. Prosecutor for the arrest of a sitting president of a country. This is a U.N. Security Council driven prosecution. It therefore engages the entire international community—as opposed to the more familiar arrest warrant disputes between two nations [text §2.6.A.3 Arrest Warrant principal case].

The Court’s response will likely symbolize the twenty-first century reaction to: (a) the former rule of sovereign immunity for heads of State; (b) lack of a meaningful integration between the United Nations and a State-driven international criminal tribunal; and (c) national reticence about characterizing genocide as “genocide.” The work of the I.C.C. regarding Sudan is destined to become the genocide cause célèb of international jurisprudence [possibly replacing text §10.1.B. *Bosnia v. Serbia* principal case].

This ILM Introductory Note thus traces the historical significance and context of two ground-breaking documents. The *first* is the Statement of Mr. Luis Moreno Ocampo, Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1593 (2005) (5 June 2008). Three years earlier, the Security Council resolved that “the situation in Sudan continues to constitute a threat to international peace and security,” and thus “[a]cting under Chapter VII of the Charter of the United Nations,” decided to “refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court…” [reprinted in text §8.5.D.3].

The *second* document addressed in this ILM Introductory Note is the Situation in Darfur, The Sudan: Prosecutor’s Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad al Bashir (July 14, 2008). As Article 58 of the Rome Statute provides: “[a]t any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: […] There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.”

As the work of the I.C.T.Y. and I.C.T.R. draw to a close, the I.C.C. provides the last frontier for overcoming the inertia associated with the 1948 Genocide Convention [textbook §10.1.B] It’s [I.C.C.] Rome Statute disavows any categorical immunity from its chargeable crimes of Genocide, Crimes against Humanity, and War Crimes [quoted in this chapter’s opening textbox]. The I.C.C. Statute embodies the treaty-based consent of (now) 106 parties, so as to function as the first “truly” international criminal court approved by the 106 State Parties.

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Sudan’s government has defiantly protested the current I.C.C. prosecutions of senior Sudanese officials. One of the claimed justifications is that Sudan is not a party to the I.C.C. Statute. Article 12 of the Rome Statute generally contemplates the targeted individual being a national of a State that is either a party to the Statute; or alternatively, “by declaration lodged with the Registrar, [a non-party State] accept[s] the exercise of jurisdiction by the Court with respect to the crime in question.” As explained to the Security Council in the I.C.C. Prosecutor’s above Statement of June 5, 2008: “The Sudan [in 2005] claimed that it would investigate and prosecute perpetrators of crimes. Various Courts and investigative mechanisms were created. However, the [Prosecutor’s] Office has found no trace of Sudanese proceedings during the last three years in relation to our case. The Government itself has clarified that there were none.”

But there is another triggering mechanism. Under the I.C.C. Statute, the U.N. Security Council may refer a case to the I.C.C., … if a matter that has come to its attention is not being effectively investigated or prosecuted by the relevant government. The Article 13(b) option applies when “one or more of such crimes appears to have been committed [and] is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations…. In the I.C.C. Prosecutor’s words: “the Government of the Sudan is not cooperating with the Court …is not complying with Resolution 1593 … [and] does not recognize the jurisdiction of the Court … over Darfur.”

On August 21, 2008, Sudanese President al-Bashir directly responded to Prosecutor Ocampo’s above presentations to the Security Council (June) and the I.C.C. (July). Sudan’s leader chose not to surrender the Sudanese government’s two lesser indictees. Al Bashir chose not to allow the I.C.C. to commence proceedings regarding what one might (almost naively) characterize as the two comparatively lesser crimes of Crimes against Humanity and War Crimes. President Al-Bashir did decide that, if the I.C.C. judges choose to issue an arrest warrant for him—which would focus on the supreme crime of genocide—he will ask the U.N. and African Union (A.U.) forces to leave Sudan. A month earlier, al-Bashir’s presidential adviser foreshadowed this prediction, when stating that the Sudanese government “can’t be responsible for the well-being of foreign forces in Darfur.” In the interim, Khartoum denied any such intentions.

President Al-Bashir’s not-so-veiled threat is not a first. In 2006, he issued a formal order, asking the A.U. to withdraw, after the U.N. Security Council adopted resolution 1706. It authorized 26,000 U.N. peacekeepers for the Darfur region. The Sudanese government backed down from this earlier threat. Nevertheless, only a small and extraordinarily undermanned peacekeeping force is present in Sudan today.

This ILM Introductory Note dedicates scant attention to the likely outcome. No reader could be unfamiliar with the case against Sudan’s leadership for what has happened, and is still happening, in Darfur. Perhaps the quality of the evidence is best captured by the statement of the I.C.C.-indicted Sudanese Minster of State for the Interior. Per the Prosecutor’s al Bashir arrest warrant summary to the court, that high-ranking government official, operating under direct supervision of President Al Bashir:

recruited and mobilized the Militia/Janjaweed…. On various occasions, Ahmad Haran publicly acknowledged his mission to destroy the target [ethnic] 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.”

The Prosecutor’s summary of the evidence convincingly illustrates the requisite facts to support a case of genocide that would readily pass muster under even the most demanding of the I.C.T.Y., I.C.T.R. and I.C.J. genocide precedents. Many eye witnesses, interviewed in some eighteen countries, have corroborated what they were brazenly told when al Bashir’s plan to destroy the targeted groups was being executed by his military and paramilitary commanders: “You are blacks, no blacks can stay here, and no blacks can stay in Sudan…. The power of Al Bashir belongs to the Arabs and we will kill you until the end;” [and] “we will kill all the black[s];” [and] “we will drive you out of this land,” [and] “we are here to eradicate blacks (nuba);” [and] “This is your end…."

Many non-African countries are comparatively blessed with the ability to focus on problems with the economy, the environment, a presidential election, etc. They have not endured the situation that has ravaged Darfur throughout much of this decade: relentless government-sponsored attacks against its own civilian population (which, when ignored in another era, spawned a continental Holocaust); the internal displacement of 2,500,000 people; continuous attacks on displaced people which are “calculated to drive entire groups into inhospitable areas, where they die immediately, or into camps, where they die slowly”—often referred to as “Slow Motion Rwanda.” For those not directly affected by this atrocity, it could be all too easy to forget—per the I.C.C. Prosecutor’s classic articulation to the U.N. Security Council this June—that “[t]he entire Darfur region is a crime scene. Despite promises and denials, over the last five years, millions of civilians have been targeted by officials who vowed to protect them. Impunity reigns.”

The three-judge Trial Chamber will likely take months to render its unique decision.26 The International Criminal Court (ICC) will not rush to judgment. Its first trial ended with the July 2008 release of The Congo’s militia leader, on lack of fair trial grounds (with transfer to a suitable national court to be determined). One can assume that the I.C.C.’s Trial Chamber I will ultimately issue the arrest warrant against Sudan’s President al-Bashir. That will, one hopes, be accompanied by the international community’s portraying the kind of resolve that forced Serbia to turn over Slobodan Milošević for his genocide trial at the I.C.T.Y., and Bosnia’s Republika Srpska “President” Radovan Karadžić, who awaits trial for his role in the Srebrenica massacre. Sudan’s President al Bashir, having been charged with genocidal crimes, now faces the prospect of the I.C.C. issuing a warrant for his arrest. One would expect that, assuming the requested arrest warrant is issued by the I.C.C., al Bashir will visit (and travel via) only the minority of countries that are not parties to the I.C.C. statute.


Previous national reticence about calling genocide “genocide” was conveniently masked by the vintage Charter limitation that the U.N. should not “intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter…” Issuance of the al Bashir arrest warrant will give incredible substance to the sentence that immediately follows this Charter admonition: “this principle [non-intervention in domestic matters] shall not prejudice the application of enforcement measures under Chapter VII.”

There is an electrifying conduit between the U.N. Security Council and this first truly international tribunal, which is a state—as opposed to exclusively Security Council-driven tribunal. The international flash will be ignited by the I.C.C.’s issuance of the first arrest warrant for a sitting president. This particular proceeding—with its roots in the U.N. Security Council’s referral of The Situation in Darfur to the I.C.C. Prosecutor—will provide a viable means for making our world a safer place. Like Sudan’s President al Bashir, those national leaders who protest the supposed loss of national sovereignty will hopefully reconsider the vintage adage: “A smart man learns from his mistakes; a wise man learns from the mistakes of others.”