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THE IMPACT OF THE ICC IN THE SUDAN AND DR CONGO

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I. The Complementarity Debate in Sudan

The referral of the situation in Darfur to the International Criminal Court under Security Council Resolution 1593 (2005) contrasted with the three earlier state referrals of the situations in northern Uganda, the Democratic Republic of Congo (DRC) and Central African Republic (CAR), respectively in December 2003, early 2004 and January 2005. While the three referring states pledged their full cooperation with the ICC, Sudan from the onset challenged the jurisdiction of the ICC on grounds of complementarity and sought to undermine it.

Sudan's legal response consisted of the establishment in June 2005 of the Special Criminal Court for Events in Darfur, days after the ICC Prosecutor had announced the launch of his investigation. The court currently has chambers for each of the three Darfur states. The performance of these courts and the related proceedings of a Judicial Investigation Committee and Special Prosecutions Commissions had failed to persuade local observers and international monitors of the seriousness of the Government of Sudan about ending impunity in Darfur and bringing justice to the victims.

As part of this response, Khartoum has also extended a measure of cooperation to the Office of the Prosecutor. For instance, as the Prosecutor noted in his reports to the Security Council in December 2006 and June 2007, Khartoum authorized representatives of his Office to visit the country on five different occasions and submitted written reports at the OTP's request about national proceedings in relation to Darfur. However, this cooperation stopped short of meaningful facilitation of the ICC investigation in Darfur itself and instead appeared calculated to pre-empt the ICC proceedings and defeat them on technical grounds.

Khartoum's reaction to the ICC's Prosecutor naming of two suspects in late February 2007 was at once a firm rejection of the ICC's jurisdiction in Darfur and the profession of readiness to subject the identified individuals to Sudan's own judicial proceedings. Thus, on 6 March, a week after the Prosecutor had requested the Court to subpoena militia leader Ali Mohammed Ali Abd-al-Rahman, alias Ali Kosheib, Sudan sent that suspect and two other individuals for trial before the West Darfur chamber of the Special Criminal Court.

The government's response could only be understood in the context of the internal political and legal challenges the regime is facing around this issue. In effect, the January 25, 2005 report of the UN Commission of Inquiry on Darfur that recommended the referral of the case to the ICC had named about a dozen regime officials in the inner most circle of power who the Commission believed had planned and ordered the mass

atrocities in Darfur. By initially indicting only mid-level operatives who were carrying out orders to set up militias and jointly engaged in overseeing the commission of war crimes and crimes against humanity, the Prosecutor appeared to be following an incremental strategy aimed at exposing the inherent contradictions of the government's response to the ICC's proceedings.

This strategy appears to be working for the moment. On the legal front, officials of the foreign ministry strived to convey to the world an image of a government cooperating with international justice and actively pursuing accountability through domestic proceedings. At the same time, other government officials relayed a hostile and threatening message about the role of the ICC in statements addressed to the locals. For instance, following his announcement of the arrest and sending to trial of the militia leader wanted by the ICC, the Minister of Justice announced that his ministry had "questioned" former interior minister of State Ahmad Mohammed Haroun, the other suspect wanted by the ICC, and found no grounds to charge him based on the suspect's own statements. The Minister then rejected the considerable amount of evidence compiled by the ICC's Prosecutor against the two suspects as "lies given to him by people who bear arms against the state (...) and kill innocent citizens in Darfur." For his part, President Bashir described the indictments in an exclusive interview with *al-Sudani* newspaper as "the latest of the conspiracies waged against Sudan." He pledged that Haroun, the most prominent of the two suspects, "would not resign or be forced out, and he will not be subjected to additional investigations." These were moderate reactions compared to the Minister of Interior's public threat to "behead" whoever dares extradite a suspected national for trial before the ICC.

Far from strengthening national justice mechanisms, the ICC process has exposed the manipulations of the judiciary by the executive and security branches of government in Sudan. However, the ICC's had developed into a local political reality that's difficult to ignore. Its involvement created space for junior government partners, opposition parties, editorialists and civil society leaders to publicly debate the issue of accountability and press the government to either extend full cooperation to the ICC, or otherwise introduce genuinely transparent and independent national proceedings. Critics convincingly argued that failure to do either would only expose the falsity of the government's claims that it was pursuing accountability domestically.

Sudanese rights and justice activists joined efforts with peer organizations regionally and internationally to press the government to comply with its international obligations. Sudanese lawyers and journalists benefited from training opportunities to better engage with the ICC process. The public debate reached such a level of intensity that the government at one point banned the discussion of ICC proceedings in newspapers until further notice, but the internal debate continued unabated nonetheless.

To counter Sudan's challenge of the Court's jurisdiction on the Darfur situation, the Prosecutor had consistently argued that his office wasn't involved in assessing the judicial system in Sudan but was rather examining whether Sudan was investigating individuals identified by the OTP as of interest for the same conduct. The Prosecutor

charged that Sudan's proceedings were selective in their focus on low level operatives and that the OTP's would correct the image by also investigating command responsibilities in government circles. The Prosecutor's strategy should be pursued to its logical end of investigating and eventually indicting those who bear command responsibility in planning and orchestrating the campaign of killings and mass evictions of innocent civilians.

Another dimension of the ICC's impact in Sudan is the role the North Uganda investigation had in curtailing Khartoum's support for the Lord's Resistance Army. Khartoum used this regional context to boost up its image of a state cooperative with the ICC. President Bashir threatened the LRA in early January 07 to pursue a peaceful solution through the ongoing mediation led by the Government of Southern Sudan or be prepared to face joint military action by the national and southern regional governments to evict it from the south. However, credible reports indicate that Khartoum maintained some aide to the LRA in its attempt to destabilize the GoSS ahead of the crucial referendum for self-determination of the south.

II. The Regional Dimension of the DRC Investigation

In neighboring Congo, the impact of the ICC involvement is of a totally different nature. The implosion of central government authority under decades of Mobutu's corrupt rule and similarly autocratic and ineffective governments of his successors, Presidents Laurent and Joseph Kabila, had led to the emergence of alternate power structures in the form of Churches, civil society organizations, and community based associations. These remain the lead actors providing the minimal social and community development services reaching population with the backing of their international partners. They are also the drivers of Congo's grassroots movements for democratic governance and the rule of law.

Civil society and Church representatives in the 2002 Inter-Congolese Dialogue talks adopted multiple mechanisms to uphold accountability in the post-conflict period, such as the creation of Truth and Reconciliation Commission and the exclusion of war crimes and crimes against humanity from the general amnesty provisions that the belligerents adopted in the peace agreement. The ICC was for these influential actors an essential component in the strategy to end impunity in the country. Their lobbying efforts were instrumental in bringing about the DRC's ratification of the Rome Statute and the referral of the situation in the country to the Court. In other words, there is in the DRC an influential constituency supportive of the ICC. It has since pursued the domestication of the Rome Statute into the national criminal law.

My colleague Tatiana Carayannis will detail these developments in her intervention. I would focus here on another aspect of the sub-regional dimension of the ICC's involvement in Africa. For Congolese activists and other rights monitors, the OTP's approach of the Lubanga case as internal to the DRC raised troubling questions. DRC's 1998-2002 war consisted of intimately intertwined local, national and international layers. In Ituri, a key driver for the violence at the local level was the plunder of the region's rich resources by all the parties, foremost the international belligerents. Uganda

was the occupying power in Ituri as defined under the Geneva Conventions, and as later confirmed in a ruling by the International Court of Justice. Local rights groups and international organizations such as Human Rights Watch, Amnesty International, and indeed the U.N. Human Rights Commission's Special Rapporteur for the DR Congo extensively documented the involvement of the occupying Ugandan and Rwandan armies in committing massive atrocities against civilians, their tampering with local administrative boundaries, illicit exploitation of Congolese resources, and training of Congolese children for their local and national proxies.

The recent decision by the ICC's Pre-Trial Chamber characterizing the conflict in the DRC as being of an international nature corrects the historic and legal contextual framework of the conduct under investigation. The amendment of the charges accordingly would go a long way to combat cross-border impunity that had prevailed in the sub-region for far too long.