

Darfur: A question of Jurisdiction? Can the International Criminal Court pursued Omar Hassan Ahmad AL-BASHIR for crimes of Genocide, crimes against humanity and war crimes?

The Darfur Situation: Brief Review of the Case.

Darfur is a region of Sudan located in the north west of the country. The region is divided into three federal states: West Darfur, South Darfur, and North Darfur. Darfur covers an area of 493,180 square kilometers, approximately the size of Spain; it is largely an arid highland. The region's main towns are Al Fashir, Nyala, and Geneina. The most important tribes of this area are the Fur, the Massalit, and the Zaghawa, the vast majority of them victims of persecution, human rights abuses, as well as systematic and extensive murder, rape, kidnap and forced displacement. According to Amnesty International, since 2003, 400,000 of civilians have died as a result of both premeditated and indiscriminate attacks, and more than 2 million civilians have been forced to flee from their homes.¹ The Sudanese armed forces and Sudanese government-backed militia known as “Janjaweed”² have been fighting two rebel groups in Darfur, the Sudanese Liberation Army/Movement (SLA/SLM) and the Justice and Equality Movement (JEM). The stated political aim of the rebels has been to compel the government of Sudan to address under-development and the political marginalization of the region. In response, the Sudanese government’s regular armed forces and the Janjaweed - largely composed of fighters of Arabic nomadic background- have targeted civilian populations and ethnic groups from which the rebels primarily drew their support, the Fur, the Massalit, and the Zaghawa. The International Commission of Inquiry on Darfur (hereafter The Commission or the

¹ Amnesty international, Eyes on Darfur. (URL: <http://www.eyesondarfur.org/crisis.html>)

² In Darfur the term “Janjaweed” has been used in the past to describe bandits who prey on rural populations through, among other things, the stealing of cattle and highway robbery. The word “Janjaweed” is an Arabic colloquialism from the region, and generally means "a man (a devil) on a horse." The term was used in the tribal conflicts of the 1990s to specifically denote militias from mainly Arab tribes, which would attack and destroy the villages of sedentary tribes. International Commission of Inquiry on Darfur. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (Geneva, 25 January 2005) pag. 32.

ICID) established that the Government of Sudan and the Janjaweed militias are responsible for serious violations of international human rights and humanitarian law. The Commission found that Sudanese forces and militias carried out indiscriminate attacks, including forced displacement, torture, enforced disappearances, killing of civilians, destruction of villages, rape and other forms of sexual violence, and looting, throughout Darfur. These acts were perpetrated on a widespread and systematic basis, therefore crimes against humanity occurred. The extensive annihilation and displacement have resulted in a loss of lives and means of survival of countless women, men and children.

While the killings in Darfur have been called a “**Genocide**” by the president of the United States George W. Bush,³ the International Criminal Court (Hereafter the ICC or the Court) Prosecutor, and many NGO’s working on the issue, the UN has not referred to it as one. Although, the ICID had concluded that, within the Sudanese policy, there are two elements of genocide. The first, “*actus reus*”⁴ consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct.”⁵ The investigation carried out by the ICID suggested that the Security Council resorted the case to the ICC. On March 2005, the Security Council adopted Resolution 1593 referring the situation in Darfur to the Prosecutor. Based on the Rome Statute of the International Criminal Court (Hereafter the Statute or the Rome Statute), Chief Prosecutor Luis Moreno-Ocampo on the 1st of June 2005 opened an investigation in relation to that. After a long investigation into crimes allegedly committed in Darfur since 1 July 2002, the Prosecutor had on 27 February 2007 applied to Pre Trial Chamber I of the ICC (Hereafter PTC I) to issue orders to

³Jim VandeHei, In Break With U.N., Bush Calls Sudan Killings Genocide, Washington Post. Thursday, June 2, 2005; Page A19.

⁴ Torrent Ruiz, Armando, Diccionario de Derecho Romano. Editorial: EDISOFER, S.L. IV Edición. “The external element or the objective element of a crime, is the Latin term for the "guilty act" which, when proved beyond a reasonable doubt in combination with the *mens rea*, "guilty mind", produces criminal liability in the common law-based criminal law jurisdictions.”

⁵ International Commission of Inquiry on Darfur. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (Geneva, 25 January 2005) pag. 4.

appear against Ahmad Harun (Former Secretary of State for the Interior, head of the Darfur Security Desk.) and Ali Muhammad Ali Abd-Al-Rahman (also known as Ali Kushayb. Head commander of the Janjaweed militias). Between the months of May and September 2007 The Chamber issued Warrants of Arrest against them. The interaction between the government of Sudan and the ICC evolved into outright hostility after the ICC judges issued Arrest Warrants for the two men.⁶ Sudan has emphatically rejected the jurisdiction of the ICC over the cases and called the Prosecutor “junior employee doing cheap work.”⁷In 2008 the Prosecutor office has carried out an extensive investigational work on the Darfur situation. On the 14th of July ICC Prosecutor presented a case against the Sudanese President, Omar Hassan Ahmad AL-BASHIR, for genocide, crimes against humanity and war crimes in Darfur. The Prosecutor has concluded there are reasonable justifications to believe that Omar AL-BASHIR “bears criminal responsibility in relation to 10 counts of genocide, crimes against humanity and war crimes.”⁸ An important step without precedents due to the fact that AL-BASHIR is still in office. However, the PTC I has asked the Prosecutor to contribute more evidence in order to issue the warrant of arrest required. According to the ICC Prosecutor Office the warrant of arrest order will be issued before the end of this year.

A matter of Jurisdiction.

As stated by the Sudanese Government the Statute of Rome and the ICC have not been recognized nor ratified by Sudan; consequently, a problem about bringing the head of a the Sudanese State before the ICC. Even though, there are other ways, which may allow the Prosecutor to do so. First, by being part of the United Nations the Sudanese Government faces international responsibility in cases of crimes against humanity, genocide, war crimes and other atrocities. If the ICC can prove that it has jurisdiction on Darfur, a process against Omar AL-BASHIR can be carry out.

⁶ Omer Y. Elagab The Darfur Situation and The ICC: An Appraisal. Journal of Politics, Vol. 1 No. 3. September 2008.

⁷ Minter K. ICC Prosecutor Reports on Sudan's Obstructionism. December 2007. (URL: <http://www.humanrightsfirst.org/media/ij/2007/statement/393/>).

⁸ International Court of Justice. The Hague, 14 July 2008, Press release, ICC-OTP-20080714-PR341-ENG. (URL: http://www.icc-cpi.int/pressrelease_details?id=406&l=en.html)

The problem of Jurisdiction must always be considered in terms of (a) subject-matter (*ratione materiae*); (b) temporal (*ratione temporis*); (c) space (*ratione loci*); and (d) jurisdiction over individuals (*ratione personae*). This paper will analyze the four criteria's in order to proof that the ICC has Jurisdiction on the Darfur conflict.

Jurisdiction Ratione Materiae, as stated in the Rome Statute in Article 5(1) (a) to (d), the ICC has jurisdiction over four categories of international crimes, namely genocide, crimes against humanity, war crimes and crimes of aggression. The Statute adopts the definition of the Convention on the Prevention and Punishment of the Crime of Genocide and defines Genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”⁹ Also the word is derived from the Greek word *genos* meaning “race or tribe” and the Latin word *cide* meaning “killing.”¹⁰ As stated above Sudanese government together with Janjaweed militias are aiming to rape, displaced, murder, and destroy the three main tribes of the Darfur area, the Fur, the Massalit, and the Zaghawa. A clear threat against certain tribes that nowadays are targets for the Sudanese armed forces and the Janjaweed militias. For that reason genocide has been committed in Darfur; consequently, the ICC has jurisdiction *ratione materiae*.

Jurisdiction Ratione Temporis, the Statute says that the ICC has no jurisdiction retrospectively: it can only prosecute crimes committed on or after 1 July 2002, the date on which the Rome Statute entered into force. The ICC has completed the requirements of the article 11 of the Statute because the case was opened in June 2005 almost three years after the Rome Statute entered into force.

Jurisdiction Ratione Loci, the controversy related to the jurisdiction of the court

⁹ Rome Statute of the International Criminal Court. Article 6.

¹⁰ David L. Nersessian, *The Razor's Edge: Defining and Protecting Human Groups Under the Genocide Convention*, 36 *Cornell Int'l L.J.* 294, 296 (2003); Shah, *supra* note 26, at 353-54; Nersessian, *supra* note 26, at 246.

mainly focus on the space that the ICC regulates having as an excuse by the Sudanese that article 12 of the Statute only allows the court to investigate in the states that have ratified it or expressly recognized the ICC. But a big mistake is made by the Sudanese because the next article of the Statute clearly says “Exercise of jurisdiction: The Court may exercise its jurisdiction with respect to a crime **referred to in article 5** in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations;(...).”¹¹ Article 13 allows the ICC to know about a case if genocide has been committed and also if the Security Council have resorted the case to the ICC. Both alternatives apply for the Darfur case; hence, the jurisdiction *ratione loci* has been obtained.

Jurisdiction ratione personae, the ICC satisfied the personal jurisdiction requirement on March 31, 2005 when the U.N. Security Council officially “referred the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court in Security Council Resolution 1593.¹² The resolution reiterated that the Darfur situation was a “threat to international peace and security” and commanded all parties to assist the ICC and its Prosecutor. Also according to the statute “a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.”¹³ The Jurisdiction of the ICC has been proofed and the crimes within its jurisdiction must be pursued.

An approximation to the End of the Conflict

The current situation in Darfur affects the entire world. A global economy growing and natural resources scaring make people from all over the world be dependant one from another. Also, our direct relation to the African people of Darfur

¹¹ Rome Statute of the International Criminal Court. Article 13.

¹² Jamie A. Mathew, THE DARFUR DEBATE: WHETHER THE ICC SHOULD DETERMINE THAT THE ATROCITIES IN DARFUR CONSTITUTE GENOCIDE, Florida Journal of International Law, August, 2006.

¹³ Rome Statute of the International Criminal Court. Article 25.

is deeper than what we think. Since 2001 with the discovering of the Human Genome it was proof that all human beings are 99,9% alike, no matter what race a person belongs to; therefore, an atrocity against thousands of humans cannot be tolerated. Once it was the Holocaust that involved all continents in a war against genocide, now an African country needs the intervention of the international community and the support of its institutions. Darfur is a vulnerable region of Sudan which eradication of the Fur, the Massalit, and the Zaghawa, can only be prevented with the involvement of every nation. The delegate countries that belong permanently to the Security Council should follow the example of the United States and stand up against genocide. Countries like China and Russia must respect the United Nations arms embargo imposed to Sudan. This two have been accused by Amnesty International of providing to the Sudanese armed forces weapons that are being used to fuel deadly violence in the Darfur region.¹⁴ The UN Security Council embargo against supplying these weapons was extended in 2005 to involve all parties in the conflict, including the Sudanese government. But if two of the countries with veto power in the Security Council support the crimes conducted in Darfur, how can the problem come to an end?

The International Criminal Court has a very important roll in the solution. As it was said, the ICC must issue an arrest warrant against Omar al-Bashir but this will only be the first step because an arrest warrant without international support cannot do much. Therefore, unconditional back up for the decisions of the Court and the activities that the Prosecutor carries out, will be an asset in taking down the government of terror that the Sudanese “President”(Dictator) has been carrying out since he took power in 1989. The international Community as a penalty for the atrocities conducted in Darfur should suspend any kind of commercial relation, and stop providing grants and economical help to Sudan until the genocide issue is resolved. The juridical way to solve the problem is the one defended in this paper, bringing Omar al-Bashir before the International Criminal Court.

¹⁴ International Herald Tribune, China and Russia accused of breaking UN arms embargo in Sudan, 9/May/2007

Changes in society require a lot of courage and the decision to take actions that may be seen as over the line. But with actions like this, one without precedents, a new era in the international human rights and humanitarian law will be born. An era where crimes perpetrated by Government officials will not be tolerated just because the fact of their immunity while they are still in power.

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