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LEGITIMIZING THE ICC: SUPPORTING THE COURT'S PROSECUTION OF THOSE RESPONSIBLE IN DARFUR

MARY T. REYNOLDS*

Abstract: The conflict in Darfur is one of the world's worst humanitarian disasters. The fact that the Sudanese government, including its current sitting head of state, played a critical role in orchestrating the murder, rape, and displacement of hundreds of thousands of people in the region makes the violence perpetrated in this region particularly egregious. In an effort to address these problems, the U.N. Security Council referred the matter to the International Criminal Court (ICC). After its investigation, the ICC granted an arrest warrant for President Bashir, which charged him with crimes against humanity. Under the Rome Treaty, the U.N. Security Council can delay prosecution of President Bashir indefinitely, and certain sectors of the international community are pressuring it to do just that. Those that support the delay fear that allowing the prosecution to move forward will derail potential peace negotiations and result in more violence in the country. To support their contention, they cited threats made by the Sudanese government to escalate attacks. While the U.N. must address these threats, delaying prosecution is the wrong solution. This Note argues that allowing threats of violence to derail the pursuit of justice could irreparably damage the court's international reputation and credibility. To bolster the legitimacy of the ICC, strengthen international criminal justice, and deter future leaders from following President Bashir's destructive example, the U.N. and the rest of the international community must support the ICC in its apprehension of President Bashir and support the court in holding him accountable for his crimes.

INTRODUCTION

Since January 2008, more than 230,000 civilians [from Darfur] have been forced to flee violence, at a rate of nearly 1,000 per day. Many of them have fled to overcrowded camps near large towns or in some cases sought shelter in the desert until clashes subsided. As attacks on humanitarian agencies also

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continue[] to climb, incidents of violence against aid workers in the first eight months of 2008 have already surpassed the total records in 2007.

—Report of United Nations Secretary General Ban Ki-moon¹

[E]ven in Darfur, you can say most of it is safe. There are no problems and life is very normal.

—Sudanese President Omar al Bashir²

The conflict in Darfur has resulted in one of the most atrocious humanitarian disasters the international community has witnessed.³ Erupting in 2003, the armed conflict between the Sudanese government forces and local militia called “Janjaweed,” against rebel factions known as the Sudanese Liberation Army (SLA) and the Justice and Equality Movement (JEM), caused the destruction of hundreds of villages, tens of thousands of civilian deaths, the displacement of millions of people, and assaults of thousands of women and girls.⁴ Although the international community has been slow to respond to the crisis, the United Nations (U.N.) Security Council made history when it referred the conflict to the International Criminal Court (ICC) for investigation on March 31, 2005.⁵ The ICC is a treaty-based institution resulting from the Rome Statute enacted on July 17, 1998.⁶ This is the first time that the U.N. Security Council has referred a matter to the ICC.⁷ The three other referrals to the ICC since its inception were state initiated.⁸ As

¹ The Secretary General, *Report of the Secretary-General on the Deployment of the African Union—United Nations Hybrid Operation in Darfur*, ¶ 60, delivered to the Security Council, U.N. Doc. S/2008/659 (Oct. 17, 2008).

² *Channel 4 News: Sudan President: No Mass Rape* (BBC Channel 4 television broadcast Oct. 9, 2008).

³ See Philipp Kastner, *The ICC in Darfur—Savior or Spoiler?*, 14 ILSA J. INT’L & COMP. L. 145, 146 (2007).

⁴ Human Rights Watch, *Q & A: Crisis in Darfur*, HUM. RTS. WATCH NEWS, Apr. 25, 2008, <http://www.hrw.org/en/news/2008/04/25/q-crisis-darfur>.

⁵ See Kastner, *supra* note 3, at 146, 161; Nsongurua J. Udombana, *Pay Back Time in Sudan? Darfur in the International Criminal Court*, 13 TULSA J. COMP. & INT’L L. 1, 1–2 (2005); Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Doc. SC/8351 (Mar. 31, 2005).

⁶ See COAL. FOR THE INT’L CRIMINAL COURT, *THE ROAD TO ROME AND BEYOND: KEY MOMENTS IN THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT A TIMELINE OF THE ESTABLISHMENT AND WORK OF THE INTERNATIONAL CRIMINAL COURT 2* (2008), available at http://www.iccnw.org/documents/ICC_Timeline_updated_0708.pdf.

⁷ See Udombana, *supra* note 5, at 2.

⁸ *Id.* In December 2003, the situation concerning the Lord’s Resistance Army was referred to the ICC Prosecutor by Ugandan President, Yoweri Museveni. See *id.* In early 2004, the President of the Democratic Republic of Congo referred crimes committed in the

opposed to the cases where the state itself initiated a referral to the ICC, the Government of Sudan has continuously refused to cooperate with the ICC or even to fully acknowledge the extent of the problems.⁹

The ICC made history when Prosecutor Luis Moreno-Ocampo requested a warrant for the arrest of Sudan's President, Omar Bashir, on July 14, 2008.¹⁰ This is the first time that the court has pursued the arrest of a sitting head of state, as well as the first time that the court has sought an indictment for genocide, the most serious of all international crimes.¹¹ In response to the warrant request, the Sudanese government proclaimed threats of violence.¹² Despite these threats, and after months of deliberation, the ICC formally ordered the arrest of President Bashir on March 4, 2009.¹³ The President was charged with war crimes and crimes against humanity for his role in the atrocities in Darfur.¹⁴ The court did not, however, charge the President with genocide as originally requested by Prosecutor Moreno-Ocampo.¹⁵ In retaliation

territory of DRC to the ICC Prosecutor. *See id.* Also, in January 2005, the Government of the Central African Republic referred crimes to the ICC. *See id.*

⁹ *See Channel 4 News*, *supra* note 2 (noting Bashir's denial of mass rape and his claim that the charges of genocide and crimes against humanity were fabricated); Letter from Justice for Darfur Campaign to the U.N. Security Council: Insist on Justice for Darfur, (May 29, 2008) (on file with Human Rights Watch) (noting the Sudanese government's public refusal to cooperate with the court in surrendering two suspects with outstanding arrest warrants issued by the ICC for crimes in Darfur).

¹⁰ *See Sudan's Leader Is Accused, but Others Can Expect to Follow*, *ECONOMIST*, July 19, 2008, at 55 [hereinafter *Sudan's Leader Is Accused*]; Human Rights Watch, *Q & A: International Criminal Court's Action Against al-Bashir*, *HUM. RTS. WATCH NEWS*, July 14, 2008, <http://www.hrw.org/en/news/2008/11/02/q-international-criminal-court-s-action-against-al-bashir>.

¹¹ *See Sudan's Leader Is Accused*, *supra* note 10, at 55.

¹² *See Andrew Heavens, Sudan Says Indicting President Would Risk Bloodshed*, *REUTERS*, Jan. 5, 2009, <http://www.reuters.com/article/africaCrisis/idUSL5223746>.

¹³ *See Marlise Simons & Neil MacFarquhar, Warrant Issued for Sudanese Leader over Darfur War Crimes*, *N.Y. TIMES*, Mar. 5, 2009, at A6; *Arrest the President*, *ECONOMIST.COM*, Mar. 4, 2009, http://economist.com/world/mideast-africa/displayStory.cfm?story_id=13217676&source=features_box_main.

¹⁴ *See Simons & MacFarquhar*, *supra* note 13.

¹⁵ *See id.* The court found insufficient data to support a charge of genocide. *See id.*; *Democracy Now!*: *HRW's Richard Dicker and Scholar, Mediator Alex de Waal Debate International Criminal Court Indictment of Sudanese President for Mass Killings in Darfur* (Democracy Now! radio and television broadcast Mar. 6, 2009) (on file with author) [hereinafter *Democracy Now!*]. The question of whether to include a charge of genocide was controversial, but the judges ultimately ruled 2 to 1 that Prosecutor Moreno-Ocampo "had not provided sufficient evidence of the president's specific intent to 'destroy, in whole or in part, a national, ethnical, racial or religious group,' the most crucial issue in determining genocide." Simons & MacFarquhar, *supra* note 13 (quoting the ICC's decision on the warrant for Bashir). The prosecutor had argued that the killing and displacement of three ethnic groups—the Fur, Masalit, and Zaghawa groups—amounted to genocide and that this campaign continued in refugee camps through the assault of these ethnic women. *See id.* The

to the issuance of the arrest warrant, Sudanese officials expelled many Western aid groups.¹⁶

These threats of violence and retaliatory tactics by the Sudanese government against humanitarian agencies have instigated the familiar debate in international criminal justice between justice and peace.¹⁷ Those that support the ICC's decision contend that allowing impunity for these horrific crimes will encourage other murderous regimes, while others argue that indicting a sitting Sudanese President will destroy all hope of fostering peace negotiations to end the violence.¹⁸

term genocide was also used by former U.S. Secretary of State Colin Powell during a high profile testimony to the Senate Committee on Foreign Relations on September 9, 2004. See GERARD PRUNIER, *DARFUR: THE AMBIGUOUS GENOCIDE* 140, 157 (2005). Additionally, former President George W. Bush similarly stated: "Our conclusion is that a genocide is underway in Darfur." See *id.* at 157. Despite this, Alex de Waal, a Harvard scholar and former advisor to the African Union mediation team for the Darfur conflict, noted that "about 150 people are being killed every month in Darfur. And that's bad. . . . But that does not amount to an ongoing genocide." *Democracy Now!*, *supra*. In response, Richard Dicker, Director of Human Rights Watch's International Justice Program, contended that while Human Rights Watch also has not found genocide, "widespread or systematic murder, torture or rape doesn't amount to a parking violation[. . .]. These are the most serious crimes under [the] law. So I wouldn't make too much of the fact while the prosecutor wanted genocide charges, the court has found crimes against humanity, which are, again, torture, murder, rape, on a widespread basis, committed as part of a plan." *Id.* The charge for genocide could be reinstated, however, with more evidence. See *Braced for the Aftershock*, *ECONOMIST*, Mar. 5, 2009, at 66.

¹⁶ See Simons & MacFarquhar, *supra* note 13. Within hours after the ICC issued the arrest warrant, ten international agencies that provide humanitarian care for the people of Darfur received letters from the Sudanese government's Humanitarian Aid Commission (HAC) informing them that their licenses to work in Sudan had been revoked. See Human Rights Watch, *Sudan: Expelling Aid Agencies Harms Victims*, HUM. RTS. WATCH NEWS, Mar. 5, 2009, <http://www.hrw.org/en/news/2009/03/05/sudan-expelling-aid-agencies-harms-victims>. The ten agencies include Oxfam, Medecins sans Frontieres, Save the Children, CARE, and the International Rescue Committee. *Id.* The same evening that these organizations received the letters, HAC officials began seizing property from these agencies' offices in both Darfur and Khartoum, including phones and computers. *Id.* "Despite assurances from Sudanese authorities over recent months, including HAC, that they would continue to facilitate the work of humanitarian agencies, it appears the expulsions were planned well in advance of the warrant being issued." *Id.* One aid official speaking anonymously stated: "It happened right after the announcement. The connection was clear." Simons & MacFarquhar, *supra* note 13. The Sudanese government has often accused aid organizations of supporting the ICC by providing the court with data and testimony that has then been used to build a case against the government. *Id.*

¹⁷ See Kastner, *supra* note 3, at 146, 149; *Sudan's Leader Is Accused*, *supra* note 10, at 55. As Alex de Waal put it, "Now, yes, we all support justice, but can justice be pursued at the expense of withdrawing essential humanitarian support that keep millions of people alive? . . . And so, my question is not should there be accountability, but should accountability, in its timing, in its process, be weighed against other considerations?" *Democracy Now!*, *supra* note 15.

¹⁸ See *Sudan's Leader Is Accused*, *supra* note 10, at 55.

Regardless of the viewpoint taken, the ICC is finding itself in a position to drastically affect the outcome of an ongoing international conflict.¹⁹ Unlike the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), two other international judicial bodies charged with prosecuting war crimes, crimes against humanity, and genocide, the ICC has the potential to exact punishments in the midst of a crisis as opposed to being limited to imposing *ex post facto* justice only.²⁰ Furthermore, even though domestic courts have been created by Sudan, these are criticized as ineffective and unjust, proving that the ICC is greatly needed to deal with the ongoing atrocities.²¹

Due to the magnitude of the conflict and the historic precedent that this case presents, the legitimacy and power of the fledgling ICC is on the line.²² Following the warrant requests by Prosecutor Moreno-Ocampo, the U.N. Security Council faced pressure by some organizations to postpone the indictment of President Bashir.²³ Under Article 16 of the Rome Treaty, the Security Council has the power to postpone an indictment for up to a year, with indefinite renewal, if there is a threat to international security.²⁴ The decision that the United Nations Security Council makes has the potential to solidify the importance of the ICC as a deterrent factor for future leaders or to undermine the importance and power of the court.²⁵

¹⁹ See Kastner, *supra* note 3, at 146.

²⁰ See *id.* at 146, 147, 152, 154 (arguing that “[b]oth tribunals, in particular the ICTY, have produced an important amount of case law, thus advancing international criminal law significantly. . . . [but] were, however, ineffective or else came too late to influence the conflict whilst the atrocities were being committed”).

²¹ See More than 100 to Face Sham Courts in Sudan, *Austl. Amnesty Int’l*, Aug. 19, 2008, <http://www.amnesty.org.au/news/comments/16552/>; Human Rights Watch, *Sudan: End Sham Trials by Anti-Terror Courts*, HUMAN RIGHTS WATCH NEWS, Aug. 6, 2008, <http://www.hrw.org/en/news/2008/08/06/sudan-end-sham-trials-anti-terror-courts>; *infra* notes 102–115 and accompanying text. In July 2008, thirty alleged members of the rebel group JEM were sentenced to death for their supposed role in an attack on the capital Khartoum in May of that same year. See Human Rights Watch, *supra*. Some of the defendants were given only limited access to lawyers, denied the right to see evidence against them, and complained of the use of torture to extract confessions. *Id.*

²² See *Sudan’s Leader Is Accused*, *supra* note 10, at 55.

²³ See *id.*

²⁴ Rome Statute of the International Criminal Court art. 16, July 17, 1998, 2187 U.N.T.S. 90 (“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”); *Sudan’s Leader Is Accused*, *supra* note 10, at 55.

²⁵ See *Sudan’s Leader Is Accused*, *supra* note 10, at 55.

By referring the case of Darfur to the ICC, the U.N. Security Council acknowledged the magnitude of the crisis in Darfur and sent the message that the international community will not allow such injustice to go unpunished. If the prosecution of President Bashir is delayed, the future effectiveness of the ICC, a potentially critical vehicle in the fight for international criminal justice, could be destroyed. While the states that have ratified the Rome Treaty must support the apprehension of President Bashir, as the referring party, the members of the U.N. need to join these states and support the prosecution of President Bashir.

Using Darfur as a case study, this Note argues that, while it is important to consider the potential problems that accompany the indictment and prosecution of a sitting leader, the U.N. Security Council should not delay the trial but rather should support the ICC and seek to facilitate justice. Part I of this Note gives a brief history of the conflict in Darfur, focusing on the role of the Sudanese government in the perpetration of crimes against humanity. Part II chronicles the formation of the ICC and its role in the conflict in Darfur thus far, and explains the reasons the court is both unique and vital to the advancement of international criminal justice. Part III discusses why the ICC is especially needed in Sudan given the failure of the Sudanese government to end the crisis or to create effective domestic courts. Part IV addresses arguments as to why the U.N. Security Council should invoke Article 16 and delay prosecution, and counters with reasons the U.N. should support immediate prosecution. Ultimately this Note surmises that the U.N. Security Council and all U.N. members must help enforce the arrest of President Bashir, in order to give credibility to the ICC, promote justice in Darfur, and deter future leaders from promulgating crimes against humanity.

I. THE CONFLICT IN DARFUR

The country of Sudan has been ravaged by civil war intermittently for several decades.²⁶ The government has been fighting this conflict on two major fronts.²⁷ The first divides the Arab Muslims, who control the North, the policymaking center of the Khartoum government, and

²⁶ TED DAGNE, CONG. RESEARCH SERV., SUDAN: HUMANITARIAN CRISIS, PEACE TALKS, TERRORISM, AND U.S. POLICY 1 (2005), available at <http://www.fas.org/sgp/crs/row/IB98043.pdf>. The Sudanese conflict has been Africa's longest lasting civil war. *Id.*

²⁷ See Rosanna Lipscomb, *Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan*, 106 COLUM. L. REV. 182, 188 (2006).

the African Christians and animists in the south, who have been largely ignored by the government.²⁸ The second conflict has been in the Darfur region in the western part of the country.²⁹

The conflict in Darfur escalated in February 2003 when the JEM and the SLA began attacking government installations and accusing the Sudanese government of discriminating against African ethnic groups in the region.³⁰ Up until this point, the Sudanese government viewed the formation of a peace agreement with the South as its main focus and had largely ignored the problems in Darfur.³¹ Using the turmoil of the government and mounting international pressure to end the North-South conflict to their advantage, the SLA and JEM were able to gain the upper hand in the initial phases of the conflict.³²

Once the Sudanese government realized that the rebel groups were beginning to organize themselves in a far more threatening way than before, it decided to arm an already existing Arab militia—the Janjaweed—to crush the rebel insurrection.³³ Under the direction of government forces, the Janjaweed “unleashed a campaign of terror against civilians [in Darfur].”³⁴ These attacks by the Sudanese government and Janjaweed forces have resulted in horrendous destruction

²⁸ See *id.* Racial differences between the Arabs and the Africans have played a large role in the conflict in Darfur. See PRUNIER, *supra* note 15, at 162–65. The Darfur region has been criticized as being poor and backward because it is “insufficiently Arabized.” *Id.* at 162. The famine of 1984 served to further highlight the dichotomy between a sedentary Arab community and the nomadic African groups, with the Arabs viewed as good and the lifestyle of the African groups seen as bad. See *id.* at 162.

²⁹ See Lipscomb, *supra* note 27, at 188. Darfur in the 1990s was “an increasingly marginalized, violent and frustrated place.” PRUNIER, *supra* note 15, at 81. This marginalization of the area has occurred through successive governments since the British conquered the country in 1916. AGNES VAN ARDENNE-VAN DER HOEVEN ET AL., EXPLAINING DARFUR: LECTURES ON THE ONGOING GENOCIDE 10 (Vossiuspers Uva 2007). This marginalization was particularly criticized during the famine of 1984 during which 100,000 people died. See PRUNIER, *supra* note 15, at 56; Kastner, *supra* note 3, at 155–56.

³⁰ See DAGNE, *supra* note 26, at 2.

³¹ See PRUNIER, *supra* note 15, at 81. “[A] certain ‘acceptable’ level of violence in the Western province had been routine, and nobody was very worried by ‘normal’ killings.” *Id.* at 92.

³² See DAGNE, *supra* note 26, at 2. Those providing support to the SLA include businessmen in Darfur and officers and soldiers in the Sudanese army. See *id.* The Sudanese government has also accused the Sudan People’s Liberation Movement/Army of providing support to the SLA. See *id.*

³³ See DAGNE, *supra* note 26, at CRS-3; PRUNIER, *supra* note 15, at 92, 97–98. The Janjaweed “had existed since the late 1980s in an underterminant zone half-way between bandits and government thugs.” PRUNIER, *supra* note 15, at 97.

³⁴ See DAGNE, *supra* note 26, at 3.

and violence.³⁵ As of April 2008, approximately 2.5 million displaced people lived in refugee camps in Darfur and more than 200,000 people had sought refuge in neighboring Chad.³⁶ The U.N. stated that the death toll may now have reached 300,000 in just five years.³⁷

While the battle was once a straightforward conflict between the Sudanese army and the Janjaweed, against the two main rebel groups, JEM and SLA, “the nature of the conflict in Darfur has mutated, making the violence more unpredictable and widespread and the task of getting a lasting peace deal that much harder.”³⁸ This is a result of the Janjaweed militias breaking into smaller factions that have begun fighting amongst themselves and even sometimes against the Sudanese army, particularly in response to the government’s failure to pay them.³⁹ The JEM and SLA rebel groups have also fragmented into about thirty groups of various sizes that have attacked those aid workers helping their own communities.⁴⁰

The violence in the region has severely hampered humanitarian efforts to aid the increasing problems in Darfur.⁴¹ On January 1, 2008, a hybrid force combining the U.N. and African Union, known as the African Union/U.N. Hybrid Operation in Darfur (UNAMID), formally took over peacekeeping authority.⁴² Due to obstructions set in place by

³⁵ See Human Rights Watch, *supra* note 4. Traditional attacks begin with air raids followed by the arrival of militiamen who loot the villages, rape the women, burn the houses, and shoot anyone who can not run away. See PRUNIER, *supra* note 15, at 99–100. These attacks have been viewed as a form of ethnic cleansing, pitting the Arab Janjaweed against the African civilians. See *id.* at 100; Human Rights Watch, *supra* note 4. The targets of the Sudanese military and militia forces were overwhelmingly those “sharing the ethnicity of or geographic proximity to the two main rebel movements.” See HUMAN RIGHTS WATCH, ENTRENCHING IMPUNITY: GOVERNMENT RESPONSIBILITY FOR INTERNATIONAL CRIMES IN DARFUR 6–7 (2005), available at <http://www.hrw.org/sites/default/files/reports/darfur1205webwcover.pdf>. Those ethnic groups were initially the Masalit, Fur, and Zaghawa, but has expanded to include other non-Arab tribes. See *id.* at 7.

³⁶ Human Rights Watch, *supra* note 4. The camps for these refugees are full. SAVE DARFUR, DARFUR UPDATE 2 (2008), available at http://darfur.3cdn.net/46c257b8e3959746d5_ttm6bnau2.pdf. For example, there is an official capacity of 14,000 at the Al-Salam, a camp in South Darfur. *Id.* The numbers of those housed there steadily rose in the year 2007 from 3500 in January, to 13,300 in March, to 33,000 in early July. *Id.* By June 2008, the number had risen to 51,000. *Id.* Additionally, civilians and aid workers are regularly harassed and robbed by gunmen. *Id.*

³⁷ See SAVE DARFUR, *supra* note 36, at 1; Edith M. Lederer, *UN Says Darfur Conflict Worsening, with Perhaps 300,000 Dead*, ASSOCIATED PRESS, Apr. 22, 2008.

³⁸ See *A Glean Among the Ruins*, ECONOMIST, Nov. 20, 2008, at 33–34.

³⁹ See *id.* at 34.

⁴⁰ See *id.*

⁴¹ See SAVE DARFUR, *supra* note 36, at 3–4; Human Rights Watch, *supra* note 4.

⁴² See Human Rights Watch, *supra* note 4.

the Sudanese government, however, by April 2008 the force was “barely one third of its authorized strength.”⁴³ Furthermore, attacks against humanitarian aid workers have been on the rise since 2006.⁴⁴

Despite these atrocities, the Sudanese government has often refused to take responsibility for the crimes of murder, rape, and forced displacement that continue to be ongoing.⁴⁵ In a 2005 report, Human Rights Watch noted that “[i]nstead of acknowledging state responsibility for the scale and gravity of the crimes committed in Darfur, senior Sudanese officials continue to obfuscate, deny, and evade responsibility for the atrocities and scorched earth campaign against civilians in Darfur.”⁴⁶ Recent reports acknowledge that the Sudanese government has continued to participate in large-scale military attacks against civilians, to harass aid workers, and has failed to hold those responsible accountable.⁴⁷ Furthermore, the government of Sudan has refused to cooperate with the ICC and instead has launched a campaign seeking to protect President Bashir from prosecution.⁴⁸ In light of the horrific role the government of Sudan has played in the atrocities in Darfur, and its inability and refusal to handle the situation domestically, the international community must respond with a united front to end these crimes.⁴⁹

⁴³ See *id.* Due to the ineffectiveness and shortage of the UNAMID troops and police, it is losing the respect of Darfurians. See *A Gleam Among the Ruins*, *supra* note 38, at 34. “They had hoped that this force, unlike the previous pathetic outfit provided by the African Union, would finally give them protection from the marauding *janjaweed* and bandits who kill and rape them. They were wrong.” *Id.*

⁴⁴ SAVE DARFUR, *supra* note 36, at 3–4. From June 2006 to June 2007, attacks against humanitarian workers increased 150% and attacks increased again in the beginning of 2008. *Id.* In the first nine months of 2008, 170 humanitarian workers were kidnapped or abducted and eleven were killed. SAVE DARFUR ET AL., RHETORIC V. REALITY: THE SITUATION IN DARFUR 12 (2008), available at http://www.savedarfur.org/newsroom/policypapers/rhetoric_vs_reality_the_situation_in_darfur/. Additionally, between January and October of 2008, 225 humanitarian vehicles were hijacked, while in 2007, the number of vehicles hijacked for the entire year had been only 137. *Id.*

⁴⁵ See generally HUMAN RIGHTS WATCH, *supra* note 35, at 56–72 (highlighting the government of Sudan’s role in organizing and perpetuating the crimes against civilians committed in Darfur and offering recommendations to various organizations to end this cycle). The UNAMID took over after U.N. Resolution 1769 which called for “19,555 military personnel, including 360 military observers and liaison officers, and an appropriate civilian component including up to 3772 police personnel and 19 formed police units comprising up to 140 personnel each.” S.C. Res. 1769, ¶ 2, U.N. Doc. S/RES/1769 (July 31, 2007).

⁴⁶ See HUMAN RIGHTS WATCH, *supra* note 35, at 2.

⁴⁷ SAVE DARFUR ET AL., *supra* note 44, at 4.

⁴⁸ See *id.* at 5; *infra* notes 79–89 and accompanying text.

⁴⁹ See HUMAN RIGHTS WATCH, *supra* note 35, at 85.

II. THE ROLE OF THE ICC

A. *Formation and Purpose of the ICC Generally*

Towards the end of the twentieth century and early twenty-first century, international criminal law rapidly developed.⁵⁰ Not least among these advancements was the creation of the ICC.⁵¹ Understanding the history leading up to the creation of this Court is imperative in order to grasp its revolutionary role in the international legal community.⁵²

Following World War II, the international community demonstrated its commitment to establishing individual criminal responsibility for human rights violations through the creation of the Nuremberg and Tokyo tribunals.⁵³ The decades immediately following these tribu-

⁵⁰ BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW* 63–65 (2004).

⁵¹ *See id.* at 65. The Nobel Peace Prize Laureate Jose Ramos-Horta noted:

In the long history of the world's search for international justice and end to impunity, there is now a permanent court that promises to hold accountable perpetrators of the most serious crimes of concern to the international community For more than 50 years since the Nuremberg and Tokyo trials, the world has failed in bringing to justice those responsible for the millions of victims of such horrendous crimes.

Nuremberg Human Rights Ctr., from Nuremberg to the Hague: The Road to the International Criminal Court 16 (2006), *available at* http://www.iccnw.org/documents/FromNurembergtoHague_07july_eng.pdf.

⁵² *See infra* notes 53–70 and accompanying text.

⁵³ *See BROOMHALL, supra* note 50, at 64; Lipscomb, *supra* note 27, at 182. The Nuremberg Tribunals were established to prosecute the Nazis' crimes against peace, war crimes, and crimes against humanity. WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 5–6 (2007). Resulting from these tribunals are the Nuremberg Principles which have served as the backbone principles of international criminal law. *See BROOMHALL, supra* note 50, at 19. "These Principles mark out a doctrinal field establishing what was . . . a new relationship between the individual, the State, and the international community based on an awareness that national interdependence and industrialized warfare created new exigencies and demanded new and stronger safeguards for the stability of international life." *Id.* The seven Nuremberg Principles are as follows:

1. Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.
2. The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.
3. The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.
4. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him of responsibility under international law, provided a moral choice was in fact possible to him.

nals, however, witnessed a wavering in the initial attempts to create a place of permanent international jurisdiction.⁵⁴ It was not until the establishment of the ICTY in 1993, followed a year later by the ICTR, that momentum was renewed for establishing jurisdiction for international criminal justice.⁵⁵ These two tribunals were critical to the formation of the ICC in providing both legal precedent and a “reassuring model of what an international criminal court might look like.”⁵⁶

While the ICTY and the ICTR provided a strong foundation for the creation of a permanent international court, the ICC differs from these two tribunals in several respects.⁵⁷ First, the ICC is a treaty-based

5. Any person charged with a crime under international law has the right to a fair trial on the facts and law.

6. The crimes hereinafter set out are punishable as crimes under international law:

(a) crimes against peace

(b) war crimes

(c) crimes against humanity.

7. Complicity in the commission of a crime against peace, a war crime, or a crime against humanity, as set forth in principle VI is a crime under international law.

NUREMBERG HUMAN RIGHTS CTR., *supra* note 51, at 3. In fact, efforts to create an international criminal court can be traced back to the nineteenth century, in particular the proposal by Gustav-Moynier, one of the founders of the International Committee of the Red Cross, for a permanent court to hear crimes committed during the Franco-Prussian War. *See* Coal. for the Int'l Criminal Court, History of the ICC, <http://www.iccnw.org/?mod=icchistory> (last visited Nov. 9, 2009).

⁵⁴ *See* BROOMHALL, *supra* note 50, at 64. In particular, the Cold War epitomized an atmosphere of suspicion that left the enforcement of criminal punishment for war crimes to national legal systems which often proved ineffective. *See id.* In 1948, the U.N. General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide, and they called on the International Law Commission (ILC), a body of experts whose job it is to codify and develop international law, to look into the possibility of establishing an international court to handle the trials of those charged with genocide. *See* SCHABAS, *supra* note 53, at 8; Coal. for the Int'l Criminal Court, *supra* note 53. The ILC went so far as to draft such a statute in 1952, but the Cold War resulted in the General Assembly abandoning such efforts. *See* SCHABAS, *supra* note 53, at 8–9; Coal. for the Int'l Criminal Court, *supra* note 53.

⁵⁵ *See* BROOMHALL, *supra* note 50, at 65; Kastner, *supra* note 3, at 147. Both of these courts were created by a Chapter VII Security Council Resolution. *See* Kastner, *supra* note 3, at 147. The ICTY was established to prosecute “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.” SCHABAS, *supra* note 53, at 11. Similarly, the ICTR was established to prosecute those who committed serious violations of international humanitarian law committed in Rwanda and surrounding countries. *See id.* The statutes creating the courts are nearly identical, and they share a prosecutor. *See id.* at 12.

⁵⁶ SCHABAS, *supra* note 53, at 13.

⁵⁷ *See* Kastner, *supra* note 3, at 153.

institution.⁵⁸ On July 17, 1998 the treaty establishing the ICC, the Rome Statute, was created.⁵⁹ This statute required sixty states to ratify or accede before it would enter into force, which was accomplished on July 1, 2002.⁶⁰ The choice to create the ICC by way of a treaty was strategic.⁶¹ In forcing the ICC's creation to be negotiated and concluded among the states, the treaty was meant to enhance the viability and legitimacy of the new court and to make it as free as possible from political influence.⁶² To make this goal a reality, however, the drafters of the Rome Statute had to balance elements that would promote the court's effectiveness with aspects that would appease the member states and encourage ratification.⁶³

Despite attempting to appease the state actors, the court remains independent and its judges are not subject to any external authority.⁶⁴ The Security Council's role in the ICC is two-fold: under Chapter VII of the Charter of the United Nations, it may request the prosecutor to initiate proceedings, but may not influence the results of those proceedings.⁶⁵ Furthermore, it may delay a proceeding or prosecution of the court for a period of twelve months which is subject to renewal.⁶⁶

Due to the interest in keeping the ICC politically neutral, the creation of this latter deferral provision, under Article 16 of the Rome Stat-

⁵⁸ See BROOMHALL, *supra* note 50, at 67; Kastner, *supra* note 3, at 153.

⁵⁹ See COAL. FOR THE INT'L CRIMINAL COURT, *supra* note 6, at 2. The Rome Statute was created during a meeting of 160 countries at the U.N. Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court which took place from June 15–July 17, 1998. *See id.* The basis for the treaty came from a draft statute submitted by the ILC to the U.N. General Assembly in 1994. *See id.*

⁶⁰ See SCHABAS, *supra* note 53, at 19. States were first given a deadline of December 31, 2000, to sign the Statute as an indication that they intended to ratify the Statute. *Id.* Those states that did not meet this initial signature deadline, but subsequently wished to join the court, are considered to have acceded to, rather than ratified, the Statute. *Id.* The delay taken by many states from the time that they signed to the time of ratification was normal given the vast legislative changes that many states needed to make in order to comply with the mandates of the Statute. *Id.* at 20.

⁶¹ See BROOMHALL, *supra* note 50, at 67–68; Kastner, *supra* note 3, at 153.

⁶² See BROOMHALL, *supra* note 50, at 67–68; NUREMBERG HUMAN RIGHTS CTR., *supra* note 51, at 11; Kastner, *supra* note 3, at 153.

⁶³ See BROOMHALL, *supra* note 50, at 68. For example, the statute gives the court inherent jurisdiction (Article 12(1)) while requiring deferral to national proceedings (Article 18). *See id.*

⁶⁴ See NUREMBERG HUMAN RIGHTS CTR., *supra* note 51, at 11. The ICC, while independent, is linked to the U.N. through a Cooperation Agreement and an Agreement on Immunities. *See id.* The Assembly of States Parties has responsibility for governing the court. *See id.*

⁶⁵ *See id.*

⁶⁶ *See id.* at 53.

ute, was highly controversial.⁶⁷ Those that opposed the provision saw it as weakening the impartiality and independence of the court.⁶⁸ It was equally recognized, however, that there are times when the sensitivity of conflicts will require decisions about the wisdom of a criminal prosecution.⁶⁹ This debate is at the forefront of the current controversy over the ICC's role in Sudan.⁷⁰

The ICC is also unique in that it has no official enforcement body.⁷¹ Therefore, the court must rely on the states that ratified the Rome Treaty for support in order to make the court effective.⁷² This further encourages dialogue among the participating states in support of the court's goals.⁷³

Ultimately, the ICC was established to end impunity for the most serious transgressions against human rights and to continue to work to prevent these crimes from occurring.⁷⁴ With the cooperation of the member States, the court will have the potential to do just that.⁷⁵ As stated by Bruce Broomhall:

The International Criminal Court must ultimately be the foundation stone of any claim that international criminal law is moving towards effective enforcement, that is, towards the rule of law. Only the ICC will have the jurisdictional reach as well as the potential resources and legitimacy to secure, with any regularity, a meaningful degree of accountability for the politically sensitive and politically motivated crimes that lie at the heart of the Rome Statute.⁷⁶

⁶⁷ See SCHABAS, *supra* note 53, at 82.

⁶⁸ See *id.* Despite these objections, the final provision was an improvement from the original drafted provision initially suggested by the ILC. See *id.* at 82. The original provision would have allowed a single member state to halt prosecution. *Id.* This would have only be overridden by a resolution of the Council which itself is subject to veto power by one of the five permanent members. See *id.*

⁶⁹ See SCHABAS, *supra* note 53, at 82.

⁷⁰ See *infra* notes 116–119 and accompanying text.

⁷¹ See Kastner, *supra* note 3, at 153.

⁷² See BROOMHALL, *supra* note 50, at 151. Once a warrant for arrest has been issued, the state concerned is required to take immediate steps to arrest the person and surrender them to the court. See SCHABAS, *supra* note 53, at 132. One hundred and eight governments have ratified the Rome Treaty. See *A Warrant for Bashir*, ECONOMIST, May 7, 2009, at 20. Conspicuously absent from this list are the United States, Russia, and China. See *id.*

⁷³ See BROOMHALL, *supra* note 50, at 151.

⁷⁴ See Luis Moreno-Ocampo, *The International Criminal Court: Seeking Global Justice*, 40 CASE W. RES. J. INT'L L. 215, 215–16 (2008).

⁷⁵ See *id.* at 224.

⁷⁶ BROOMHALL, *supra* note 50, at 67.

B. ICC Involvement in Darfur

The ICC became involved in the situation in Darfur on March 31, 2005 when the U.N. Security Council referred the situation to the court through Resolution 1593.⁷⁷ The ICC then issued its first two warrants in April 2007.⁷⁸ The first warrant was for government minister Ahmad Harun and the second was for the Janjaweed leader Ali Kushayb.⁷⁹ These two are accused of “individual responsibility for fifty-one counts of crimes against humanity and war crimes, including murder, forcible transfer of population, rape, persecution, torture, and outrages upon personal dignity, among others.”⁸⁰ Neither suspect has been handed over by the Sudanese government.⁸¹ In a second affront to the ICC, the government announced that Harun was promoted to State Minister for Humanitarian Affairs and would co-chair a committee to adjudicate human rights violations in Darfur.⁸² Both of these men have yet to be arrested.⁸³

On July 14, 2008, ICC Prosecutor Luis Moreno-Ocampo issued a warrant request for Sudanese President Omar Bashir.⁸⁴ This is the first time that the ICC has pursued a sitting head of state.⁸⁵ President Bashir has been charged with ten counts of genocide, crimes against humanity,

⁷⁷ See HUMAN RIGHTS WATCH, *supra* note 35, at 84. The U.N. Security Council authorized six resolutions that dealt with Sudan between July 2004 and March 2005. *See id.* at 84 n.249. Resolutions 1574 (November 2004) and 1590 (March 2005) dealt mainly with the north-south peace agreement and mentioned Darfur only in passing. *Id.* The resolutions that specifically dealt with Darfur were Resolutions 1556 (July 2006), which called for the Sudanese government to disarm and punish the Janjaweed militias, 1564 (September 2004), 1591 and 1593 (March 2005). *Id.* The referral by the Security Council came as a shock to the Sudanese government who expected that Security Council allies, including China, Russia, and Algeria, would veto the move. *See id.* at 84–85.

⁷⁸ See SAVE DAFUR ET AL., *supra* note 44, at 1.

⁷⁹ *See id.*

⁸⁰ See SAVE DAFUR, *supra* note 36, at 12.

⁸¹ *See id.*; SAVE DAFUR ET AL., *supra* note 44, at 1.

⁸² See SAVE DAFUR, *supra* note 36, at 12. The Sudanese government also announced that the notorious Janjaweed leader, Musa Hillal, would serve as special advisor on tribal affairs to the President. *See id.* Hillal is already subject to a U.N.-mandated travel ban, and he is considered to be one of the most egregious offenders in North Darfur since 2003. *See id.*

⁸³ See Simons & MacFarquhar, *supra* note 13.

⁸⁴ See SAVE DAFUR ET AL., *supra* note 44, at 5.

⁸⁵ *Sudan's Leader Is Accused*, *supra* note 10, at 55. Slobodan Milosevic of Serbia and Charles Taylor of Liberia were both presidents when they were first charged with war crimes, but they faced other international tribunals. *See id.*

and war crimes.⁸⁶ This indictment also marks the first time that the court has sought an indictment for genocide.⁸⁷ In response to the request for a warrant, the Sudanese government launched a campaign to postpone the indictment, coupled with threats of future violence if the warrant was issued.⁸⁸ In a statement to the United Nations Security Council on December 3, 2008, Prosecutor Moreno-Ocampo noted these threats made by Sudanese government officials:

In response to the Application, Sudanese Presidential Advisor Bona Malwal said on 25 July: “*We are telling the world that with the indictment of our president Al-Bashir we cannot be responsible for the well-being of foreign forces in Darfur*”; Adam Hamid Musa, recent governor of South Darfur, threatened that there will be “*more genocide like it has been not seen before by anyone*”, if President Al Bashir is indicted; and President Al Bashir himself said that “*we are not looking for problems, but if they come to us then we will teach them a lesson they won't forget.*”⁸⁹

In addition, in September 2008, the Sudanese government provided a progress report to the Commission of the African Union claiming that there had been improvements in Darfur and that the government would continue to strive for peace in the country.⁹⁰ As the insecurity in Darfur and the government's unwillingness to punish those responsible for these crimes continues, these claims have proven to be little more than propaganda.⁹¹

Despite these threats, the ICC continued its mission of promoting justice and eliminating impunity by officially issuing an arrest warrant for President Bashir on March 4, 2009, charging him with war crimes and crimes against humanity.⁹² The Sudanese government continued its resistance of the Court by summoning several humanitarian organi-

⁸⁶ Press Release, United Nations, Conference on Developments Relating to International Criminal Court Investigation in Darfur, Role of Security Council (Sept. 19, 2008), available at http://www.un.org/News/briefings/docs/2008/080919_ICC.doc.htm.

⁸⁷ *Sudan's Leader Is Accused*, *supra* note 10, at 55. Until this point, only the United States has referred to the atrocities in Darfur directly as genocide. *See id.*

⁸⁸ *See* SAVE DAFUR ET AL., *supra* note 44, at 5.

⁸⁹ *See* LUIS MORENO-OCAMPO, INTERNATIONAL CRIMINAL COURT, STATEMENT TO THE UNITED NATIONS SECURITY COUNCIL ON THE SITUATION IN DARFUR, THE SUDAN, PURSUANT TO UNSCR 1593 (2005), at 3 (2008).

⁹⁰ *See* SAVE DAFUR ET AL., *supra* note 44, at 5.

⁹¹ *See id.* at 5–6 (highlighting the differences between the claims that the Sudanese government makes regarding improvements in the country as compared with the reality of the situation).

⁹² *See* Simons & MacFarquhar, *supra* note 13.

zations to a meeting almost immediately after the warrant was announced and ordering them to leave the country or curb their work.⁹³ The Sudanese ambassador to the U.N. declared that the government would no longer work with aid groups that it deemed hostile and rejected the ICC's prosecution saying, "We strongly condemn this criminal move. . . . It amounts to an attempt at regime change. We are not going to be bound by it."⁹⁴

The Sudanese government is seeking to convince the U.N. Security Council to invoke its power under Article 16 of the Rome Treaty to suspend any investigation or prosecution.⁹⁵ This is the first time that the Security Council has faced this decision.⁹⁶ Prior to the issuance of the arrest warrant, the five permanent members of the Security Council (Britain, China, France, Russia, and the United States) expressed a desire to wait and see if Sudan would change its course of action before making a decision about whether or not to delay prosecution.⁹⁷ Now that the arrest warrant has been issued, however, there is speculation that France, Britain, or the United States would veto a decision to postpone prosecution.⁹⁸

So far, extreme threats of violence have not played out in the magnitude promised by the Sudanese government officials.⁹⁹ Street demonstrations in support of President Bashir and the exile of needed humanitarian aid groups are the only manifestations of these threats thus far.¹⁰⁰ The government continues to deny the charges brought against their leaders and have rebuffed the court.¹⁰¹

⁹³ See *id.*

⁹⁴ *Id.* President Bashir has also denied all accusations. See *Braced for the Aftershock*, *supra* note 15, at 66. "He told his critics . . . to dissolve their accusations in water and drink them." See *id.* Amidst these public claims of denouncing the court, however, the government has shown some acceptance of the fact that they are likely going to have to engage with the court and have hired the British law firm Eversheds LLP to examine the charges and help with his prosecution. See *A Middle Way for Justice in Sudan*, *ECONOMIST*, Dec. 13, 2008, at 68.

⁹⁵ See *SAVE DARFUR ET AL.*, *supra* note 44, at 5; *Sudan's Leader Is Accused*, *supra* note 10, at 55. The report claimed that the government had "cooperated without reservation with the AU, U.N. and International community in their collective efforts to achieve peace and stability in Darfur." *SAVE DARFUR ET AL.*, *supra* note 44, at 5.

⁹⁶ See *Sudan's Leader Is Accused*, *supra* note 10, at 55.

⁹⁷ See *id.*

⁹⁸ See *Simons & MacFacquhar*, *supra* note 13.

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

III. NEED FOR THE ICC IN DARFUR

The ICC is desperately needed in Darfur given the failure of the Sudanese government to prosecute those responsible for these crimes.¹⁰² One of the foundations of the Rome Statute is the idea of “complementarity.”¹⁰³ This concept provides an opportunity for states to take on the responsibility of investigating and prosecuting crimes committed in their own borders, through the use of their domestic courts.¹⁰⁴ According to this principle, the ICC will only assert jurisdiction over a case when it concludes that the national courts are “unwilling or unable to prosecute” on their own.¹⁰⁵ While the application of complementarity in the case of a U.N. Security Council referral is somewhat vague, the idea behind the principle is that international criminal justice will be most successful when international prosecutions are avoided because of effectively functioning domestic courts.¹⁰⁶

Although it would be ideal to have the Sudanese government create fair and efficient domestic courts in order to avoid often cited pitfalls of purely international justice systems, the Sudanese government has shown that this has not, and likely will never, happen.¹⁰⁷ The report from the government of Sudan to the African Union and U.N. on Sep-

¹⁰² See MORENO-OCAMPO, *supra* note 89, at 5; *More Than 100 to Face Sham Courts in Sudan*, *supra* note 21; Human Rights Watch, *supra* note 21.

¹⁰³ See BROOMHALL, *supra* note 50, at 86; MORENO-OCAMPO, *supra* note 89, at 5.

¹⁰⁴ See MORENO-OCAMPO, *supra* note 89, at 5.

¹⁰⁵ See Lipscomb, *supra* note 27, at 199. The idea of complementarity was overwhelmingly supported at the creation of the Rome Statute. See BROOMHALL, *supra* note 50, at 86. This not only works to ensure that the ICC will not supersede national courts, but also “[b]ecause the Court has the power to make the final decisions on the admissibility of cases before it, States that wish to avoid the adverse attention, the diplomatic entanglements, the duty to cooperate and other consequences of ICC activity have a real incentive to take action against crimes under the Statute.” *Id.* at 86. While the ICC could agree to hand over the prosecution of President Bashir and others, it will only do this if the judges of the ICC are convinced that a special or hybrid court would be as strict and as fair in its application of justice, a very high hurdle for Sudan to overcome. See *A Middle Way for Justice in Sudan*, *supra* note 94, at 69.

¹⁰⁶ See Lipscomb, *supra* note 27, at 200, 202–03. Sudan’s most prominent opposition politician, Sadiq al-Mahdi, has suggested creating independent hybrid courts that would have both Sudanese and international judges. See *A Middle Way for Justice in Sudan*, *supra* note 94, at 68. Such courts have been set up by the U.N. and also by those countries concerned with Sierra Leone and Cambodia. See *id.*

¹⁰⁷ MORENO-OCAMPO, *supra* note 89, at 5; Lipscomb, *supra* note 27, at 193, 202. Some of the problems that have been cited with purely international processes include failure to adequately promote local building capacity, difficulties in overcoming problems of perceived legitimacy, failure to promote reconciliation in the country where the crimes were committed, and inability to apprehend the major perpetrators. Lipscomb, *supra* note 27, at 193–94.

tember 17, 2008 stated that over the last five years, the Sudanese domestic court system has only tried and completed seven cases and these had no connection to crimes by Ahmad Harun, Ali Kushayb, or President Bashir.¹⁰⁸ Furthermore, the courts that do exist have been criticized as being hastily created and inherently unfair.¹⁰⁹ Georgette Gagnon, the Africa director at Human Rights Watch stated that, "The special courts set up by Sudan to try alleged rebels who attacked [Sudan's capital] Khartoum are a charade. The special courts don't meet even minimal fair trial standards, and yet they have the power to sentence people to death."¹¹⁰

The failure of Sudan's justice system has caused Darfur to "become a byword for impunity, a wilderness of atrocity and crime, and probably the world's worst humanitarian disaster."¹¹¹ For any chance to truly restore peace to the region, the perpetrators of these crimes must be brought to justice.¹¹² "[T]he ICC appears to be the most credible institution to hear the Darfur story, given its 'entirely international composition and a set of well-defined rules of procedure and evidence.'¹¹³ Other options for dealing with the atrocities that do not involve the ICC, such as hybrid tribunals or a Special Court like the one created during Sierra Leone's civil war, are not well suited to the current conflict in Darfur.¹¹⁴ As noted by Human Rights Watch:

As a permanent international court with a mandate to prosecute genocide, war crimes, and crimes against humanity when national courts are unable or unwilling to do so, the ICC was created to address exactly the type of situation in Darfur. Although prosecuting widespread atrocities would present challenges for any international or internationalized criminal tri-

¹⁰⁸ MORENO-OCAMPO, *supra* note 89, at 5. The most severe of the crimes that were prosecuted was the case of a student killed during a demonstration. *See id.*

¹⁰⁹ *See* Human Rights Watch, *supra* note 21.

¹¹⁰ *See id.*

¹¹¹ *See* Udombana, *supra* note 5, at 5.

¹¹² *See id.* at 19–20.

¹¹³ *Id.* at 20 (quoting International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, Pursuant to Security Council Resolution 1564 of 18 September 2004*, ¶ 648 (Jan. 25, 2005)).

¹¹⁴ *See id.* at 10–11. Charles Taylor, Liberia's former president who has been charged as responsible for grave crimes against humanity during Sierra Leone's civil war is facing prosecution by a hybrid tribunal. *See id.* His case has been before the Special Court since 2003, but the court has yet to complete a single case or hand down a conviction. *See id.* at 11. The court is now facing financial problems due to the fact that it was not created under Chapter VII of the U.N. Charter making it a donor-driven institution as opposed to funded by the contributions of the member states. *See id.* at 10–11.

bunal, the ICC is preferable to other alternatives. National prosecutions are not viable. . . . [and a] new ad hoc international or national-international tribunal would take too long to establish.¹¹⁵

IV. PEACE VERSUS JUSTICE: DECIDING WHETHER TO INVOKE ARTICLE 16

The debate over whether or not the U.N. Security Council should invoke its power under Article 16 of the Rome Statute has brought up the well-known debate in the international community between peace versus justice.¹¹⁶ Those advocating peace argue that arresting the sitting head of state will only cause more bloodshed and ruin any chance for peace negotiations.¹¹⁷ Conversely, others fear that giving in to the President's blackmail will undermine the ICC's credibility and crush any hope of deterring other tyrants.¹¹⁸ While there are certainly sensitive political issues to consider, by referring this case to the ICC, the U.N. showed its trust in the ability of the court to take appropriate steps, and they must now support the court in fulfilling that obligation.¹¹⁹

A. Importance of the Referral to the ICC

The initial referral of the investigation of the humanitarian crisis in Darfur to the ICC was the first step in legitimizing the fledgling court and showed the world that the international community will no longer accept such atrocious crimes.¹²⁰ The U.N. additionally acknowledged

¹¹⁵ Human Rights Watch, *US: ICC Best Chance for Justice in Darfur*, HUM. RTS. WATCH NEWS, Jan. 21, 2005, <http://www.hrw.org/en/news/2005/01/21/us-icc-best-chance-justice-darfur>.

¹¹⁶ See *Sudan's Leader Is Accused*, *supra* note 10, at 55.

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See *A Warrant for Bashir*, *supra* note 72, at 20.

¹²⁰ See Udombana, *supra* note 5, at 21–22. The referral came under Resolution 1593; eleven countries voted for the Resolution, none voted against it, and four countries—Algeria, Brazil, China, and the United States—abstained. See Coal. for the Int'l Criminal Court, Res. 1593, <http://www.iccnw.org/?mod=res1593> (last visited Nov. 9, 2009). It has been argued that with the Security Council's referral, "the ICC made an important move from academic exercise to legal reality." Corrina Heyder, *The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status*, 24 BERKELEY J. INT'L L. 650, 650 (2006). Much has also been noted about the United States' decision to abstain from voting. See *id.*; Udombana, *supra* note 5, at 9–11. The United States had argued that they did not believe that a referral to the ICC was the best step to take with the situation in Darfur. See Udombana, *supra* note 5, at 9. Despite this, the U.S. Representative to the U.N. noted that "it was important that the international community spoke with one voice in

the role that the ICC would play in promoting international justice and indicated that it was intended to complement the role of the Security Council.¹²¹ By allowing the referral to go through, the international community set forth that consistency and fairness will dominate the international community's approach to such atrocities.¹²² Finally, in making the referral the U.N. Security Council placed its confidence and trust in the ICC, and recognized that in order to achieve peace, there must be justice.¹²³ In fact, a failure to have referred the crisis to the ICC would have begged the question as to whether the Court would ever be able to exercise its jurisdiction over cases other than ones where states themselves had consented.¹²⁴

Especially in light of the importance of its decision to make a referral to the ICC, the U.N. Security Council must continue the support it has granted to the Court or else potentially hurt the credence it has given it up to this point.¹²⁵

B. *Fears of Promoting the Prosecution of President Bashir*

Discussions concerning the continued prosecution of President Bashir highlight two reoccurring fears regarding a decision not to defer the case.¹²⁶ The first is the fear that there will be more bloodshed in the country, putting human rights workers even more at risk.¹²⁷ The second fear is that once Bashir is arrested, the international community

order to help promote effective accountability." *See id.* at 10. While some have seen the referral to the court as a breakthrough, based on the United States' position, others note that the abstention of the United States weakens the credibility and power of the ICC. *See Heyder, supra*, at 650. While the referral procedure had been seen as one of the most important facets of the Rome Treaty during the negotiations surrounding its drafting, it seemed to present a huge obstacle during discussion of the crisis in Darfur. *See id.* at 652.

¹²¹ *See Udombana, supra* note 5, at 18. It is also important that the crimes committed in Darfur clearly fell within the mandate of the court. *See Heyder, supra* note 120, at 653. "The global community faced horrific crimes against humanity and war crimes, that qualified as genocide according to the United States, while the state in whose territory the crimes were committed made no attempt to prosecute the perpetrators." *Id.*

¹²² *See Udombana, supra* note 5, at 18.

¹²³ *See id.* at 19–20.

¹²⁴ *See Heyder, supra* note 120, at 652.

¹²⁵ *See Sudan's Leader Is Accused, supra* note 10, at 55.

¹²⁶ *See Court Seeks Arrest of Sudan's President*, CHINA DAILY, July 15, 2008, http://www.chinadaily.com.cn/world/2008-07/15/content_6846745.htm; Press Release, Derek Kilmer, Voice of Am., Sudanese Officials Meet with African Union on International Criminal Court Charges (July 21, 2008) (on file with author); Press Release, Voice of America, AU Official Criticizes Charges for Sudan Leader (July 17, 2008) (on file with author).

¹²⁷ *See Court Seeks Arrest of Sudan's President, supra* note 126; Press Release, Derek Kilmer, *supra* note 126; Press Release, Voice of America, *supra* note 126.

will lose all bargaining power for further peace negotiations with Sudan.¹²⁸ These fears, however, suggest that justice is somehow mutually exclusive from peace.¹²⁹

The fear of more bloodshed is not unfounded.¹³⁰ The reaction of many in Sudan to the possibility of an arrest warrant for President Bashir certainly gave cause for concern.¹³¹ The ruling National Congress Party in Sudan called the case against the President “irresponsible cheap political blackmail” and further warned that there would be “more violence and blood” if the arrest warrant were actually issued.¹³² Outside of a meeting between President Bashir and his cabinet members soon after the possibility of an arrest warrant became public, hundreds of Sudanese congregated to protest any arrest of their President.¹³³ In response to threats of future violence, Shereen Zorba, deputy UNAMID spokesperson, commented that this might require the temporary relocation of foreign staff working on humanitarian relief operations.¹³⁴ She further lamented that “[t]he people of Darfur have already suffered unimaginable suffering and should not be subjected to more tragedy,” which could be the result of disruption in humanitarian operations.¹³⁵

Some of these fears came to fruition when the court announced that it would indeed indict the President and issued a warrant for his arrest.¹³⁶ Agencies estimated to be providing fifty to seventy percent of the total humanitarian assistance to Darfur—such as food, water, and medical care—have had their licenses to operate revoked and have been told to leave.¹³⁷ This departure will have a catastrophic effect on

¹²⁸ See *Court Seeks Arrest of Sudan's President*, *supra* note 126; Press Release, Derek Kilmer, *supra* note 126; Press Release, Voice of America, *supra* note 126.

¹²⁹ See *Court Seeks Arrest of Sudan's President*, *supra* note 126; Press Release, Derek Kilmer, *supra* note 126; Press Release, Voice of America, *supra* note 126.

¹³⁰ See *Court Seeks Arrest of Sudan's President*, *supra* note 126; Press Release, Derek Kilmer, *supra* note 126; Press Release, Voice of America, *supra* note 126.

¹³¹ See *Sudan Indictment May Bring More Bloodshed*, CBS News, July 14, 2008, http://www.cbsnews.com/sotries/2008/07/14/world/main4256898.shtml?source=related_story.

¹³² See *id.* Members of Sudan's ruling party have also decried the charges against the President as unfair and politically motivated. See *Court Seeks Arrest of Sudan's President*, *supra* note 126. The head of Sudan's Bar Association, Fathi Khalil commented that “The prosecutor of the International Criminal Court with his announcement demanding the arrest of President al-Bashir has proved that he is playing a political role, not a legal one.” *Id.*

¹³³ See *Sudan Indictment May Bring More Bloodshed*, *supra* note 131.

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ See Simons & MacFarquhar, *supra* note 13.

¹³⁷ See Human Rights Watch, *supra* note 16.

more than a million people in the region.¹³⁸ This deprivation of necessary aid by the government may in itself be a violation of international humanitarian law in the unlawful reprisal or collective punishment.¹³⁹

Despite these problems which must now be addressed, however, the violence in Darfur continues and remains a serious matter that needs not only attention and humanitarian aid, but action.¹⁴⁰ Adding legitimacy to the decision to issue a warrant for the sitting President Bashir, the ICC Head Prosecutor has not taken this decision lightly.¹⁴¹ Prosecutor Moreno-Ocampo was public about the fact that he was investigating the activities of President Bashir in an effort to force him to cooperate.¹⁴² Additionally, the Prosecutor was equally as public about his request for an arrest warrant, when he could have applied for a sealed warrant.¹⁴³ According to an editorial in *The Economist*, had President Bashir “reined in the attacks, cooperated better with peacekeepers and the court and tried peacemaking, he might have wriggled off the ICC hook. He didn’t bother.”¹⁴⁴ With the credibility of the ICC on the line, and the failure of other efforts to thwart the humanitarian crisis going on in the country, no better option exists than the continued prosecution of President Bashir.¹⁴⁵

Concerns about the loss of peace negotiations are yet another component of the debate about the proper role of the ICC in Sudan.¹⁴⁶ Some are concerned that an indictment will derail the peace negotiations of 2005 that addressed the long civil war between northern and

¹³⁸ *Id.*

¹³⁹ *See id.* According to international law, the government of Sudan is responsible for providing protection and assistance to those affected in Darfur. *See id.* If the government is unwilling or unable to provide such assistance, then it is legally obligated to provide unimpeded access to independent and impartial aid agencies. *See id.*

¹⁴⁰ *See Sudan’s Leader Is Accused*, *supra* note 10, at 55; Press Release, United Nations *supra* note 86.

¹⁴¹ *See Sudan’s Leader Is Accused*, *supra* note 10, at 55. In an interview of Alex De Waal and Richard Dicker conducted by Democracy Now!, De Waal commented that Prosecutor Moreno-Ocampo was “rushing through this indictment . . . process.” *See Democracy Now!*, *supra* note 15. In response Dicker said that he took “strong exception to . . . [De Waal’s] use of the term ‘rush’.” *Id.* Dicker continued, “I think [De Waal]’s term ‘rush’ is ill-advised from the perspective of those who remain victims and have been victims.” *Id.*

¹⁴² *See Sudan’s Leader Is Accused*, *supra* note 10, at 55.

¹⁴³ *See id.*

¹⁴⁴ *A Warrant for Bashir*, *supra* note 72, at 20.

¹⁴⁵ *See Sudan’s Leader Is Accused*, *supra* note 10, at 55.

¹⁴⁶ *See A Warrant for Bashir*, *supra* note 72, at 55; *UN Fears over Warrant for Bashir*, BBC, Nov. 6, 2008, <http://news.bbc.co.uk/2/hi/africa/7712616.stm>; Press Release, United Nations *supra* note 86.

southern Sudan.¹⁴⁷ Additionally, some worry that indicting President Bashir could end any hope of a peaceful negotiation in Darfur.¹⁴⁸ In suggesting both potential problems, the Sudanese Ambassador Abdalmahmood Abdalhaleem stated, “We condemn this indictment against our head of state. This is an affront to the president and the whole nation. It will have bad, destabilizing and negative consequences for the peace process for Darfur and Sudan at large.”¹⁴⁹

The north-south peace process, while a step in the right direction for the country, has been fraught with the same stagnation and helplessness seen in Darfur.¹⁵⁰ In the agreement, the two sides agreed to “share the wealth, integrate the two sides’ armies and settle the boundary between them.”¹⁵¹ While designed to create a unified, harmonious New Sudan, neither side has invested in promoting the attractiveness of this unification as the Comprehensive Peace Agreement demands.¹⁵² In fact, the agreement gives southerners the right to secede from Sudan in 2011 following a referendum, and many southerners are considering such an action.¹⁵³ Given the condition of the agreement now, deferring the indictment of President Bashir will likely only continue the stalemate.¹⁵⁴ Furthermore, in the case of two other heads of state taken to court—Liberia’s Charles Taylor and Yugoslavia’s Slobodan Milosevic—fears that prosecuting these leaders would dismantle peace efforts proved unfounded.¹⁵⁵

¹⁴⁷ See *UN Fears over Warrant for Bashir*, *supra* note 146; Press Release, United Nations, *supra* note 86.

¹⁴⁸ See Betsy Pisik, *UN Braces for Retaliation After Indictment*, WASH. TIMES, July 15, 2008, at A19; Press Release, United Nations *supra* note 86. There has also been a discussion of the potential for a deal between the ICC and the government of Sudan where the Security Council would defer the prosecution in exchange for the two Sudanese officials with outstanding arrest warrants. See Press Release, United Nations, *supra* note 86. In response to this suggestion, however, Osman Hummaidi, a Sudanese human rights researcher and campaigner, noted that this “deal would be difficult, if not impossible, since it would have serious implications for other members of the Sudanese government who might themselves have been involved in war crimes.” See *id.*

¹⁴⁹ See Pisik, *supra* note 148.

¹⁵⁰ See *A Gleam Among the Ruins*, *supra* note 38, at 33.

¹⁵¹ *Id.*

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ See *Arrest the President*, *supra* note 13 (noting that many rounds of talks between Darfuri rebels and the Sudanese government have come to nothing before); see also *A Gleam Among the Ruins*, *supra* note 38, at 33–34 (noting that the government of Sudan has thus far not been working to create permanent unification of the north and south).

¹⁵⁵ See *Braced for the Aftershock*, *supra* note 15, at 66. Charles Taylor is on trial before a Sierra Leone court, and Slobodan Milosevic died before he could be convicted. See *id.*

While amnesty has been used as a tool in peace negotiations, President Bashir has shown an unwillingness to cooperate with the ICC in any capacity.¹⁵⁶ Given the response of President Bashir thus far, allowing him impunity for his actions at this point would be a “get out of jail free card.”¹⁵⁷ One Senior Security Council diplomat explained that President Bashir might have had the necessary votes to get the indictment against him deferred if he “had put as much effort into peace in Darfur as he is alleged to have put into directing atrocities.”¹⁵⁸ At one point, there was hope that “the stick of indictment and carrot of suspension” would entice President Bashir to mend his ways, but that did not happen.¹⁵⁹ At this point, there is a real fear that deferring the prosecution any longer will create a return to a “climate of impunity.”¹⁶⁰ Richard Dicker, the Director of the International Justice Program at Human Rights Watch aptly notes that:

[i]f the UN were to decide that it would allow a Government to bully it into silence in confining its own human rights reporting and what it did with that information, I think that would be a huge step back for the UN, its commitment to human rights, and its credibility.¹⁶¹

C. *Reasons for Supporting the Indictment and Continued Prosecution*

While there are certainly serious issues to consider in moving forward with the prosecution of President Bashir, ultimately, justice must be served.¹⁶² If this process does not move forward, the impunity of key perpetrators in Darfur will signal to the world that government sanctioned crimes against humanity in the context of genocide are tolerated by the international community.¹⁶³ Far from rushing through a decision of indictment, the Prosecutor and the ICC have taken the time

¹⁵⁶ See M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409 (2000) (discussing the role of allowing impunity in cases of international criminal justice); Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT'L L. REV. 293 (2005) (discussing the role of amnesties in the Rome Statute and the problems that can arise from allowing them); *Sudan's Leader Is Accused*, *supra* note 10, at 55.

¹⁵⁷ See Press Release, United Nations *supra* note 86.

¹⁵⁸ *Braced for the Aftershock*, *supra* note 15, at 66.

¹⁵⁹ See *A Warrant for Bashir*, *supra* note 72, at 20.

¹⁶⁰ See *Braced for the Aftershock*, *supra* note 15, at 66.

¹⁶¹ Press Release, United Nations, *supra* note 86.

¹⁶² See *id.*

¹⁶³ See Human Rights Watch, *supra* note 115.

to thoroughly investigate the conflict in Darfur before making a decision.¹⁶⁴ The stakes for the fledgling ICC, and international justice as a whole, are very high.¹⁶⁵ The prosecution of President Bashir is a crucial step in legitimizing the role of the ICC, providing deterrence for future world leaders, and honoring the victims of these atrocities.¹⁶⁶

The ICC has the capability not only to render justice in this specific case in Darfur, but also to heighten deterrence through the imposition of international criminal justice.¹⁶⁷ Prosecutor Moreno-Ocampo noted that “one case in the court reverberates in the world. . . . This court is not just a system to punish, it establishes the law. So, one case in the court makes the reality in the world.”¹⁶⁸ Unlike other temporary ad hoc tribunals, the permanent nature of the court makes it a lasting threat to those who perpetrate human rights abuses.¹⁶⁹ “Because the ICC functions as a court of last resort and exercises a direct influence on national systems to act, it is realistic to believe that its mere presence will augment the number of national prosecutions in the future, and thus increase the long-term potential for global deterrence.”¹⁷⁰

However, while this potential deterrence is great, the court’s power to influence other leaders could be drastically undermined by a decision to defer prosecution of President Bashir in light of his threats and acts of retaliation.¹⁷¹ The legitimacy of an international criminal court

¹⁶⁴ See Simons & MacFarquhar, *supra* note 13 (noting that judges issued the arrest warrant only “after months of deliberation”); *Democracy Now!*, *supra* note 15 (commenting that the killings in Darfur have continued for six years and that the ICC took between eight and nine months to render a decision after the Prosecutor asked for arrest warrants in July 2008).

¹⁶⁵ See *Braced for the Aftershock*, *supra* note 15, at 66.

¹⁶⁶ See *infra* notes 167–191 and accompanying text.

¹⁶⁷ See Kastner, *supra* note 3, at 154 (noting that “specific deterrence will probably be at least as important as deterring perpetrators of future armed conflicts, which has been an important goal of international criminal justice so far”).

¹⁶⁸ See *International Criminal Court “Working to Protect African Victims,”* AMNESTY INT’L, Mar. 5, 2009, <http://www.amnesty.org/en/news-and-updates/feature-stories/international-criminal-court-working-protect-african-victims-20090305>.

¹⁶⁹ See Kastner, *supra* note 3, at 154. In his article on the importance of the Rome Statute, Prosecutor Moreno-Ocampo recognized that “[t]he treaty creates a judicial actor on the international scene, and the mere existence of this independent judicial actor will provide incentives to the states’ parties to apply the law. If they do not apply the law, the court will. It is a new concept in the international arena: the law must be respected.” Moreno-Ocampo, *supra* note 74, at 220.

¹⁷⁰ Kastner, *supra* note 3, at 154.

¹⁷¹ See *Braced for the Aftershock*, *supra* note 15 (noting that “[i]t would certainly be hugely damaging for the ICC, and for global peace and justice, if the council were seen simply to crumple at threats from the latest thug-in-a-high-place”); *Saving the President*, ECONOMIST, Sept. 25, 2008, at 63 (noting the argument that “a possibly permanent deferral of justice

is imperative in seeking to solve these humanitarian conflicts and the international community must uphold the law to preserve this.¹⁷²

While the court should consider the effect that retaliation by the government of Sudan could have on the victims of Darfur, failing to seek the prosecution of those responsible for the crimes will serve only to further demoralize these victims.¹⁷³ Prosecutor Moreno-Ocampo has made it clear that his priority is to protect African victims.¹⁷⁴ If the ICC and U.N. Security Council allow the government of Sudan “to use threats of additional violence and further crimes to defer or even dispel the possibility of justice, the victims of Darfur are ultimately betrayed.”¹⁷⁵ The decision of the Sudanese government to expel aid workers is itself a violation of international law.¹⁷⁶ This is certainly a devastating problem that the U.N. must work to reverse, but these cruel and inhumane tactics should not be a reason to delay prosecuting the man responsible for such atrocities.¹⁷⁷ These victims certainly should not be made to suffer any more than they already have, but delaying prosecution is not the solution to that problem.¹⁷⁸

While the ICC has made it clear that they are ready to proceed with the prosecution of President Bashir, it will take the support of the entire international community, and in particular the U.N., in order to

would create a bad precedent, irreparably damaging the world’s first permanent war-crimes court, with no guarantee that Mr. Bashir would behave any better”).

¹⁷² See Moreno-Ocampo, *supra* note 74, at 220. Moreno-Ocampo recognized that “[i]n the camps, people are dying slowly. 2.5 million people dying slowly; 5,000 people dying each month and the world is ignoring that. These people need to be recognized, the crimes have to be recognized, because right now, when you read the news, they talk about what happened in 2004, not what happens today. And the court is stopping the denial and saying, this happened today and the leader of the country is involved in the crimes.” *International Criminal Court “Working to Protect African Victims,” supra* note 168.

¹⁷³ See *International Criminal Court “Working to Protect African Victims,” supra* note 168.

¹⁷⁴ See *id.*

¹⁷⁵ Suliman Baldo & Sara Darehshori, *Sudan, Justice and Peace*, HUM. RTS. WATCH NEWS, July 16, 2008, <http://www.hrw.org/en/news/2008/07/15/sudan-justice-and-peace>. This point was reiterated by Georgette Gagnon, Africa director at Human Rights Watch, when she said, “To suspend the ICC investigation in response to Khartoum’s outrageous threats and empty promises would be to betray the victims in Darfur.” Human Rights Watch, *Turkey: Support Justice in Darfur*, HUM. RTS. WATCH NEWS, Aug. 15, 2008, <http://www.hrw.org/en/news/2008/08/14/turkey-support-justice-darfur>.

¹⁷⁶ See *Sudan: Expelling Aid Agencies Harms Victims, supra* note 16; *supra* note 139 and accompanying text.

¹⁷⁷ See Suliman & Darehshori, *supra* note 175; *Millions Face Starvation and Disease as Aid Agencies Are Expelled from Darfur*, AMNESTY INT’L Mar. 5, 2009, <http://www.amnesty.org/en/news-and-updates/news/millions-face-starvation-disease-aid-agencies-expelled-from-darfur-20090305>.

¹⁷⁸ See Suliman & Darehshori, *supra* note 175.

achieve this goal.¹⁷⁹ The 108 governments that have ratified the Rome Treaty are obligated to try and bring President Bashir to justice.¹⁸⁰ There are however, members of the Security Council that have not ratified the Rome Statute, including the United States, China, and Russia.¹⁸¹ While these countries have the power under Article 16 to postpone the prosecution, they have no legal obligation to seek his arrest.¹⁸² In order for the prosecution of President Bashir to be successful, there must be widespread support for the Court.¹⁸³ This must include the powerful countries that are members of the U.N. but have not ratified the Rome Treaty.¹⁸⁴ The U.N. first referred the matter to the ICC, and now must back the arrest warrant and continued prosecution of President Bashir.¹⁸⁵

Pursuing justice in Darfur through the immediate prosecution of those responsible, particularly President Bashir, is essential for ultimate peace in Sudan, and for the kind of permanent international justice the ICC represents.¹⁸⁶ While the government's expulsion of vital humanitarian aid workers is a potentially catastrophic backlash, President Bashir has had more than enough time to mend his ways and avoid a potential indictment.¹⁸⁷ Allowing him to go free now would be a message to the world that the ICC can be bullied by tyrannical threats.¹⁸⁸ The U.N. and the international community as a whole must work together to appre-

¹⁷⁹ See *A Warrant for Bashir*, *supra* note 72, at 20; Suliman & Darehshori, *supra* note 175.

¹⁸⁰ See *A Warrant for Bashir*, *supra* note 72.

¹⁸¹ See *id.* The tension between the United States and the ICC has been particularly dramatic. See *id.* Throughout the negotiations, the United States argued that its soldiers could potentially be the target of politically motivated or frivolous prosecution. See *Africa, Q&A: International Criminal Court*, BBC NEWS, Mar. 4, 2009, <http://news.bbc.co.uk/2/hi/africa/3834237.stm>. Once certain safeguards were put in place, however, Bill Clinton signed the treaty as one of his last acts as president. See *id.* The Bush administration, however, was extremely opposed to the treaty. See *A Warrant for Bashir*, *supra* note 72, at 20; *Africa Q&A: International Criminal Court*, *supra*. George W. Bush made a point of this by "unsigned" the Rome treaty and aggressively sought to exempt Americans from its proceedings. See *A Warrant for Bashir*, *supra* note 72, at 20. Despite this, the United States did recognize the need for justice in Darfur and therefore withheld a veto that could have prevented the court from investigating the situation there. See *id.* With President Obama now in office, however, there is a chance the United States will take a more favorable stance with the ICC in general. See *A Gleam Among the Ruins*, *supra* note 38, at 33; *A Warrant for Bashir*, *supra* note 72, at 20.

¹⁸² See *A Warrant for Bashir*, *supra* note 72, at 20.

¹⁸³ See *id.*

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*; Human Rights Watch, *supra* note 115.

¹⁸⁷ See *A Warrant for Bashir*, *supra* note 72, at 20; Human Rights Watch, *supra* note 115.

¹⁸⁸ See *A Warrant for Bashir*, *supra* note 72, at 20; Human Rights Watch, *supra* note 115.

hend President Bashir, and force him to face the ICC for the atrocities he orchestrated.¹⁸⁹ While concerns about peace versus justice dominate the debate over what to do in Sudan, the reality is that there can be no enduring peace in the region until justice is done.¹⁹⁰ The only way to ensure justice is for the international community to support the ICC in its pursuit of holding President Bashir accountable.¹⁹¹

CONCLUSION

The crisis in Darfur is one of the most pressing concerns of the international community. The government of Sudan has supported and orchestrated years of mass murder, rape, and the displacement of hundreds of thousands of Darfurians. In particular, the sitting President Bashir has had direct involvement in these crimes.

Despite the ICC's clear acknowledgment of the role President Bashir has played, the international community is now caught in a debate about whether or not to go forward with the prosecution. Some argue that the U.N. Security Council should invoke their power under Article 16 of the Rome Statute and delay an indictment in an effort to prevent a potentially violent retaliation on the part of the Sudanese government. While there is reason for concern over the threats of Sudan's government and its decision to expel needed humanitarian aid organizations from the country, President Bashir must be held immediately accountable to ensure lasting peace in the country.

Furthermore, the creation of ICC is one of the most significant accomplishments in international criminal justice and its legitimacy and future power of deterrence rest on the prosecution of those responsible in Sudan. Delaying the prosecution sends the message to future tyrannical leaders that the court can be bullied into delaying an indictment through violence and threats. Sudan's retaliation tactics should not be reason to grant President Bashir leeway, but rather should bolster the argument for seeking immediate justice.

In order to accomplish the justice that the victims of Darfur deserve, the U.N. Security Council must not delay the prosecution of President Bashir any longer, but must instead support the ICC in apprehending the sitting president. The entire international community and the future of international criminal justice depend on this decision.

¹⁸⁹ See *A Warrant for Bashir*, *supra* note 72, at 20; Human Rights Watch, *supra* note 115.

¹⁹⁰ See *A Warrant for Bashir*, *supra* note 72, at 20; Human Rights Watch, *supra* note 115.

¹⁹¹ See Kastner, *supra* note 3, at 146, 149; *A Warrant for Bashir*, *supra* note 72, at 20; Human Rights Watch, *supra* note 115.