

**Report of the ICC Prosecutor on Darfur to the U.N. Security Council
Highlights and Analysis**

On Wednesday, June 14, 2006, the Chief Prosecutor of the International Criminal Court (ICC), Luis-Moreno Ocampo, presented his third six month report on the Darfur investigation to the United Nations (UN) Security Council as required by UN Security Council Resolution 1593 (2005). The report articulates the significant progress made by the Office of the Prosecutor (OTP) and the challenges that lie ahead in the next phase of the investigation.

Access to the Darfur Region

Mr. Ocampo made clear that the continuing instability and insecurity in the Darfur region has prevented his office from conducting its investigation there. Nevertheless, the Office has actively conducted over forty missions to more than thirteen countries, including Chad, which neighbors Darfur and is host to the largest number of Darfur's refugees. These missions have resulted in the collection of witness statements and other evidence.

Crime Patterns

The OTP has collected information relating to alleged crimes in a Darfur Crime Database. The database covers the period between October 2002 and May 2006. Included in the database is information indicating a significant number of large scale massacres, thousands of civilian deaths as a consequence of conditions created by the conflict, hundreds of alleged cases of rape, and eye-witness accounts that perpetrators made statements that demonstrated the targeted nature of the attacks, such as "we will kill all the black[s]."

The data also includes information on the widespread displacement of an estimated two million civilians in Darfur, the destruction and looting of nearly 2000 villages throughout Darfur, and reports of direct attacks on humanitarian aid workers and peacekeepers, including the killing of African Union (AU) peacekeepers in 2005 and 2006.

Potential Cases

At this stage of the investigation, the Prosecutor has identified specific cases for investigation and possible prosecution. In deciding which cases to investigate, the Prosecutor considered both the requirement of gravity and the issue of deterrence. With respect to gravity, the Prosecutor outlined key factors that he has considered in selecting cases, such as the scale and nature of the crimes, the systematic character and impact of the crimes, and other aggravating factors. With respect to deterrence, Mr. Ocampo stated the potential for deterrence of future crimes is a priority for his office and a factor in determining which cases to investigate.

Given the complexity of the conflict, in particular given that it has spanned over three years and in different localities throughout the Darfur region, the Prosecutor stated that his office will likely prosecute a series of cases, as opposed to one single case that would represent the Darfur crisis as a whole.

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Cooperation

The Prosecutor highlighted the need for the full cooperation of the government of Sudan, the AU, the UN and other organizations to ensure the OTP's progress in investigating and prosecuting crimes committed in Darfur. With respect to the Sudanese government, the OTP visited Sudan in February 2006 for a series of meetings with Sudanese judges, prosecutors, and other government representatives. In addition to these meetings, the OTP was also able to meet with the governor of South Darfur. The Sudanese government did not impede any of these meetings. In May 2006, the Sudanese government provided the OTP with a written report responding to the OTP's inquiries about the conflict in Darfur. The government's report was supplemented by a June 2006 meeting between the OTP and Sudanese military officers.

The AU has been slow to respond to the OTP's request for full cooperation on the Darfur Conflict. Mr. Ocampo welcomed the AU's written confirmation of its intent to cooperate with the ICC in Darfur, but reiterated the need for the AU's rapid response and assistance in order to ensure justice and accountability.

Admissibility

The Prosecutor spent the greatest amount of time discussing the admissibility of potential cases arising from the Darfur situation. The issue of admissibility has become a central issue given Sudan's establishment of a variety of national mechanisms that it claims are capable of investigating and prosecuting those individuals most responsible for crimes committed in Darfur. Specifically, the Sudanese government has established the Judicial Investigations Committee, the Special Prosecutions Commissions, the National Commission of Inquiry, Ad Hoc Committees, the Committees against Rape, the Unit for Combating Crimes against Women, and most importantly, the Darfur Special Court. Mr. Ocampo acknowledged that the Sudanese government is invoking the principle of complementarity and presenting the Darfur Special Court as an alternative to the ICC. According to the Prosecutor's report, however, neither the Darfur Special Court nor any other national mechanisms have or are investigating those individuals who bear the greatest responsibility for the alleged crimes committed in Darfur. As a result, the principle of complementarity is not invoked and these cases are admissible before the ICC.

Analysis

A foundational tenet of the Rome Statute establishing the ICC, the principle of complementarity states that the ICC can only investigate and prosecute cases coming under its jurisdiction when a national legal system is either unable or unwilling to investigate those cases that the OTP has objectively identified as the most serious with perpetrators bearing the greatest responsibility. "Unable to investigate" means that a country cannot investigate alleged crimes because its legal system is either non-existent or severely hampered by events such as civil strife, war, or rampant corruption. "Unwilling to investigate" means that a country is purposely shielding the accused from justice, often because the government is complicit in the alleged crimes. Thus complementarity requires countries to have competent legal systems that make a good faith effort to investigate those cases that would otherwise fall within the jurisdiction of the Court.

The Prosecutor's report takes the principle of complementarity out of an abstract framework and for the first time, demonstrates how this principle unfolds in an actual case. In the case of Sudan, none of the national mechanisms recently created by the government of Sudan have or are investigating

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those cases that the OTP will likely investigate and prosecute. It is therefore clear from the lack of any meaningful investigations that the establishment of the Darfur Special Court and the other mechanisms intended to address the atrocities committed in Darfur are not good faith efforts by the Sudanese government to ensure justice and end the violence. Rather, they are an attempt by Sudan to usurp the jurisdiction of the ICC by triggering the principle of complementarity.

This principle, however, is not intended as a loophole to be used by countries like Sudan which are, at the very least, complicit in the crimes committed in Darfur. Rather, the principle of complementarity is meant as a safeguard for countries that undertake bona fide investigations of crimes committed by their nationals and thereby override the jurisdiction of the ICC. The OTP's conclusions with respect to Sudan's national mechanisms preserves the integrity of the principle of complementarity by demonstrating that this principle cannot be appropriately applied in the Darfur context.