

2017

Genocide Left Unchecked: Assessing the ICC's Difficulties Detaining Omar al-Bashir

Saher Valiani

J.D. Washington University School of Law

Recommended Citation

Saher Valiani, *Genocide Left Unchecked: Assessing the ICC's Difficulties Detaining Omar al-Bashir*, 35 BERKELEY J. INT'L LAW. 150 (2017).
Available at: <http://scholarship.law.berkeley.edu/bjil/vol35/iss1/4>

Link to publisher version (DOI)

<http://dx.doi.org/https://dx.doi.org/10.15779/Z38VX0628P>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

Genocide Left Unchecked: Assessing the ICC's Difficulties Detaining Omar al-Bashir

Saher Valiani*

TABLE OF CONTENTS

INTRODUCTION	150
I. BACKGROUND ON THE SITUATION IN DARFUR.....	153
A. <i>History of Conflict</i>	153
B. <i>International Intervention</i>	154
1. <i>The ICC and the UNSC</i>	154
2. <i>The Decision to Issue Arrest Warrants</i>	156
a. <i>War Crimes</i>	157
b. <i>Crimes Against Humanity</i>	158
c. <i>Genocide</i>	159
II. ANALYSIS	162
A. <i>The Significance of Bashir's Prosecution on the Development of Genocide in the ICC</i>	162
B. <i>Obstacles to ICC Enforcement</i>	165
CONCLUSION	168

INTRODUCTION

From the outset of the twenty-first century, over 300,000 civilians have died and 3 million have been displaced in Darfur, Sudan, at the hands of the Sudanese government.¹ Under President Omar Hassan Ahmad al-Bashir's supervision, the Janjaweed militia and the government of Sudan carefully orchestrated a scheme for political dominance against insurgent forces in Darfur, under the guise of racial conflict between the nation's Arab and African populations.² Pre-Trial Chamber I of the International Criminal Court (ICC)

DOI: <https://dx.doi.org/10.15779/Z38VX0628P>

*J.D. Washington University School of Law, B.A. Duke University. The author would like to extend her gratitude to Professor Leila Sadat for lending her support and expertise on international human rights. A special thanks also to the staff of the Berkeley Journal of International Law for their thoughtful and attentive feedback.

1. *Sudan Backgrounder*, UNITED TO END GENOCIDE, <http://endgenocide.org/conflict-areas/sudan-backgrounder/> (last visited Nov. 4, 2016).

2. *Prosecutor v. Bashir*, ICC-02/05-01/09-3, Decision on the Prosecution's Application for a

issued a warrant of arrest for Bashir on March 4, 2009 charging him as an indirect perpetrator or indirect co-perpetrator of two counts of war crimes and five counts of crimes against humanity.³ The ICC issued a second warrant of arrest for Bashir for three counts of genocide on July 12, 2010 after Prosecutor Luis Moreno-Ocampo's successful appeal.⁴ Despite the ICC's recognition of his culpability, Bashir has evaded arrest and remained at large in 2016.⁵

Controversy surrounded Moreno-Ocampo's insistence on adding the label of genocide to the situation in Darfur, which was contrary to the International Commission of Inquiry on Darfur's (ICID) findings.⁶ While clear evidence of widespread, violent acts against civilian populations supported the war crimes and crimes against humanity allegations against Bashir, the majority within Pre-Trial Chamber I initially felt that the Fur, Masalit, and Zaghawa populations did not share any distinctive features for which they were being targeted with genocidal intent.⁷ The majority also questioned why the prosecutor chose not to bring charges of genocide in his earlier cases against Ahmed Harun, Darfur's State Minister for Humanitarian Affairs, and Ali Kushayb, a military commander, for the same situation.⁸ Upon appeal, however, Pre-Trial Chamber I issued the second warrant finding reasonable grounds to try Bashir for genocide by killing, genocide by causing serious bodily or mental harm, and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction.⁹

Despite a second arrest warrant alleging Bashir's liability for three counts of genocide, the ICC has been unable to detain Bashir; its efforts frustrated by a

Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 148 (Mar. 4, 2009), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-3> [hereinafter Decision on Warrant of Arrest].

3. Prosecutor v. Bashir, ICC-02/05-01/09-1, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 7–8 (Mar. 4, 2009), <https://www.icc-cpi.int/iccdocs/doc/doc639078.pdf> [hereinafter Warrant of Arrest]. Judge Anita Ušacka partly dissented and would have issued an arrest warrant only on the basis of indirect perpetration. See Prosecutor v. Bashir, ICC-02/05-01/09-3, Separate and Partly Dissenting Opinion of Judge Anita Ušacka on Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 105 (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01517.PDF [hereinafter Partly Dissenting Opinion].

4. Prosecutor v. Bashir, ICC-02/05-01/09-95, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (July 12, 2010), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-95> [hereinafter Second Warrant of Arrest].

5. Meetings Coverage, Security Council, International Criminal Court's Chief Prosecutor, Briefing Security Council, Criticizes Failure to Address Sudan's 'Persistent Failure' on Darfur, U.N. Meetings Coverage SC/12393 (June 9, 2016), <http://www.un.org/press/en/2016/sc12393.doc.htm> [hereinafter Meetings Coverage].

6. See Int'l Comm'n of Inquiry on Darfur, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, ¶ 640 (Jan. 25, 2005), https://www.un.org/news/dh/sudan/com_inq_darfur.pdf [hereinafter ICID Report].

7. See Decision on Warrant of Arrest, *supra* note 2, ¶ 136 (stating that the majority found "no reasonable grounds to believe that nationality, race and/or religion are a distinctive feature of any of the three different groups" due to their shared racial features and religion).

8. ICC judges were divided over genocide charges against Sudan president, SUDAN TRIB. (Mar. 4, 2009), http://www.sudantribune.com/spip.php?page=imprimable&id_article=30385.

9. Second Warrant of Arrest, *supra* note 4, at 8.

lack of action by the United Nations Security Council (UNSC). Though the UNSC launched an investigation through the creation of the ICID and ultimately referred the situation to the ICC, two notable UNSC permanent member states—China and the United States—abstained from the vote, instead expressing a desire for the matter to be handled under the sovereignty of Sudan’s own government.¹⁰ Furthermore, the UNSC has not stepped in with enforcement actions such as economic sanctions or travel bans, likely pressured by the mounting tension the arrest warrant has caused between the ICC and the African Union (AU), which feels the matter should be handled internally.¹¹ Though U.S. Secretary of State Colin Powell declared the situation in Darfur a genocide in 2004,¹² the ICC continues to experience a widespread lack of support for enforcing the arrest warrants against Bashir, primarily from the UNSC.¹³

A successful arrest depends on the cooperation of ICC member states in apprehending the subject of the warrant.¹⁴ In addition to Sudan’s unwillingness to recognize the authority of the ICC as a non-member state, several member states have refused to cooperate despite their affirmation of the Rome Statute—perhaps out of loyalty to the AU—and have allowed Bashir to travel freely in and out of their borders.¹⁵ Though the AU suggests that an internal resolution to the situation would bring greater peace and stability to the region, the continued reign of Bashir in the Republic of Sudan sends the message that impunity exists for African heads of state.

The severity of the crimes Bashir committed begs the question: why is the UNSC not taking further action to detain Bashir? The Bashir case holds significant implications for defining both the charge of genocide under the ICC and the ICC’s continuing relationship with the AU, as Bashir’s warrant for arrest marks the Court’s first for genocide and the first for a sitting head of state.¹⁶

10. See Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005), <http://www.un.org/press/en/2005/sc8351.doc.htm> [hereinafter Darfur Press Release]. China and the United States constitute two of five permanent, veto-wielding members of the Security Council, both of which suggested that the situation should be handled internally under Sudan’s own sovereignty. Brazil and Algeria also abstained from the UNSC referral. *Id.*

11. See Assembly of the African Union, 13th Sess., July 1-3, 2009, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, Assembly/AU/13(XIII) [hereinafter Meeting of African State Parties].

12. Rebecca Hamilton, *Inside Colin Powell’s Decision to Declare Genocide in Darfur*, ATLANTIC (Aug. 17, 2011), <http://www.theatlantic.com/international/archive/2011/08/inside-colin-powells-decision-to-declare-genocide-in-darfur/243560/>.

13. See Meetings Coverage *supra* note 5.

14. See Meeting of African State Parties, *supra* note 11.

15. See *Prosecutor v. Bashir*, ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, ¶ 20 (Apr. 9, 2014), <https://www.icc-cpi.int/pages/record.aspx?uri=1759849> (stating that Bashir traveled freely to the Democratic Republic of Congo, Chad, Djibouti, Kenya, and Nigeria in conflict with their duties as state parties to the ICC) [hereinafter Decision on Cooperation].

16. See Somini Sengupta, *Omar al-Bashir Case Shows International Criminal Court’s Limitations*, N.Y. TIMES, June 15, 2015, <http://www.nytimes.com/2015/06/16/world/africa/sudan->

This essay will examine the history of the conflict in Darfur, the international community's involvement in bringing criminal charges against Bashir, and the implications of the Darfur conflict on the international charge of genocide, in conjunction with the prevailing difficulties the ICC has faced in capturing Bashir.

I.

BACKGROUND ON THE SITUATION IN DARFUR

A. *History of Conflict*

Though the war in Darfur began in 2003, the region has experienced marginalization since 1916 when British forces first integrated Darfur into Sudan.¹⁷ Sudan gained independence from Britain in 1956, yet civil war waged between the northern and southern regions of Sudan for decades afterward, as the "Arab" north and its political regime in Khartoum attempted to assimilate the "African" south and control its resources.¹⁸ In the west, Darfur faced similar sentiments as the south years later under the regime of Omar al-Bashir, who led a military coup in 1989 and became President of Sudan in 1993.¹⁹ Economic disparity, compounded with mistreatment in Darfur under Bashir's regime, further inflamed regional differences.²⁰ In 2003, the tensions culminated in the Sudan Liberation Movement/Army and the Justice and Equality Movement coordinating an attack on the El Fasher airport as part of a rebel movement against the Sudanese government.²¹ The attack spurred the government to carry out a counter-insurgency campaign through the Sudan People's Armed Forces and the Janjaweed militia, along with other state bodies including the Sudanese Police Forces and the Humanitarian Aid Commission.²² Witnessing the violence unfolding, the President of Chad attempted to mediate the conflict, resulting in the Humanitarian Ceasefire Agreement on April 8, 2004 between the Sudan Liberation Movement/Army, Justice and Equality Movement, and the Sudanese

bashir-international-criminal-court.html; see also *Sudan: ICC Warrant for Al-Bashir on Genocide*, HUMAN RIGHTS WATCH (July 13, 2010), <https://www.hrw.org/news/2010/07/13/sudan-icc-warrant-al-bashir-genocide> (stating that Bashir's arrest warrant marks the ICC's first for genocide).

17. See DALE C. TATUM, *GENOCIDE AT THE DAWN OF THE 21ST CENTURY: RWANDA, BOSNIA, KOSOVO, AND DARFUR* 139–145 (2010) (describing how the British colonial administration enforced cultural divides, perceiving certain indigenous populations as "Arab," synonymous with advanced and civilized, and others as "African," who were despised).

18. See *id.* at 143.

19. *Id.* at 145; see also M.W. DALY, *DARFUR'S SORROW: THE FORGOTTEN HISTORY OF A HUMANITARIAN DISASTER* 247–49, 261–62 (2d ed. 2010) (explaining that the marginalization of Darfur and its tribes continued under Bashir, who in 1994 divided Darfur into three states, making the Fur tribe minorities in each state, then in 1995 supported a reform altering the majority of the West Darfur "emirs," or electoral college members, from Masalits to non-Masalits. This reform provided non-Masalit tribes more opportunities to raid and exert power over Masalit land).

20. See DALY, *supra* note 19, at 280–81.

21. *Id.*

22. See Decision on Warrant of Arrest, *supra* note 2, ¶¶ 209, 214.

government.²³ However, armed conflict continued despite the agreement, resulting in further intervention on an international scale.²⁴

The calculated attacks on civilians carried out by the Janjaweed and the Sudanese government amounted to far more than a counter-insurgency campaign, entering the territory of war crimes, crimes against humanity, and even genocide.²⁵ Under Bashir's direction, the Janjaweed bombed, pillaged, and destroyed villages consisting of Fur, Masalit, and Zaghawa tribe members due to their association with the Sudan Liberation Movement/Army and Justice and Equality Movement.²⁶ The militia not only acted to eliminate the means of survival of the targeted groups, but also to "kill the will, the spirit, and life itself" through the coordination of mass rape, among other abuses.²⁷ Of those who survived, millions of Darfuris have been internally displaced to camps or neighboring countries.²⁸ Bashir supervised and encouraged these human rights violations, propagating the nonexistent differences between historically homogenous ethnic groups in order to control those who opposed the Sudanese government.²⁹

B. *International Intervention*

1. *The ICC and the UNSC*

To create the ICC, 120 member states endorsed the Rome Statute in 1998, granting the ICC the authority to prosecute the most serious crimes of international concern.³⁰ These most serious offenses consist of four core crimes: 1) the crime of genocide; 2) crimes against humanity; 3) war crimes; and 4) the

23. U.S. INST. PEACE, HUMANITARIAN CEASE FIRE AGREEMENT ON THE CONFLICT IN DARFUR (Apr. 8, 2004), http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/sudan_ceasefire_04082004.pdf.

24. See S.C. Res. 1564, ¶ 1 (Sept. 18, 2004) (citing that all parties committed ceasefire violations, evidenced by Janjaweed attacks in August 2004).

25. Statement from Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Prosecutor's Statement on the Prosecutor's Application for a warrant of Arrest under Article 58 Against Omar Hassan Ahmad Al Bashir, 2 (July 14, 2008), <https://www.icc-cpi.int/NR/rdonlyres/A2BA9996-67C3-4A5F-9AD2-B20A7FD2D176/277757/ICCOTPST20080714ENG.pdf> [hereinafter Statement on Application for Arrest Warrant].

26. *Id.* at 2.

27. *Id.* at 4.

28. *Id.* at 3.

29. *Id.* at 2.

30. See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (entered into force 1 July 2002). After the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the United Nations held a diplomatic conference to better address the prosecution of egregious international crimes through a permanent tribunal; see generally DAVID SCHEFFER, ALL THE MISSING SOULS 168 (2012) (describing the global conditions preceding the formation of the ICC).

crime of aggression.³¹ The ICC has jurisdiction when crimes are committed in a member state or by a national of a member state, provided the member state is not already prosecuting the matter.³² Additionally, non-member states may fall under the jurisdiction of the ICC via UNSC referral.³³ Article 13 of the Rome Statute establishes that conflicts may be referred to the ICC when such referral is made by the state in which the crime is committed, by the UNSC under Chapter VII of the Charter of the United Nations, or by the ICC prosecutor's self-initiated investigation.³⁴ Referrals from the UNSC, made possible by an agreement of cooperation between the UN and the ICC,³⁵ must be voted on by member states in accordance with Chapter VII of the UN Charter after the UNSC assesses the matter's threat to international peace.³⁶

Before making a referral for the conflict in Darfur, the UNSC created the International Commission of Inquiry on Darfur (ICID) to examine allegations of human rights abuses in Sudan.³⁷ Through an extensive independent investigation,³⁸ the ICID determined that the Sudanese government and the Janjaweed violated international humanitarian law in an internal armed conflict using systematic and widespread attacks that most likely amounted to crimes against humanity and war crimes.³⁹ Furthermore, in evaluating the jurisdictional requirements under Article 17 of the Rome Statute, the ICID determined that the Sudanese government had no measures in place to address the conflict, thus creating leeway for ICC jurisdiction.⁴⁰ Following the report, the UNSC adopted Resolution 1593 to refer the situation on Darfur to the ICC prosecutor.⁴¹ The Resolution was approved in 2005 with the support of eleven members of the

31. See Rome Statute, *supra* note 30, at art. 5. Though included in the Rome Statute, the crime of aggression will not fall under the ICC's jurisdiction until member states further define and set conditions on the crime, no sooner than January 1, 2017. See *The Crime of Aggression*, COALITION FOR INT'L CRIM. CT., <http://www.iccnw.org/?mod=aggression> (last visited Nov. 4, 2016).

32. See Rome Statute, *supra* note 30, at arts. 12, 17 (defining jurisdictional limitations of the Court).

33. *Id.*

34. *Id.* at arts. 1–16. Articles 14 through 16 of the Rome Statute further elaborate the requirements under which each type of referral may be made.

35. Relationship Agreement between the United Nations and the International Criminal Court, art. 17, U.N. Doc. A/58/874 (entered into force Oct. 4, 2004) [hereinafter U.N. ICC Agreement].

36. U.N. Charter art. 39.

37. S.C. Res. 1564, ¶ 12 (Sept. 18, 2004) (requesting the Secretary-General create an international commission of inquiry on the human rights violations in Darfur).

38. See ICID Report, *supra* note 6, ¶¶ 21–25 (detailing the commission's several on-site visits, interviews conducted, and reports analyzed, which spanned over 20,000 pages).

39. *Id.* ¶¶ 630–34 (referencing the devastation Darfuris faced as the Sudanese government tortured civilians, conducting mass killings, mass rape, and forced displacement among numerous inhumane acts calculated to disable all groups not sympathetic to the government).

40. *Id.* at 6 (“The measures taken so far by the Government to address the crisis have been both grossly inadequate and ineffective, which has contributed to the climate of almost total impunity for human rights violations in Darfur.”).

41. Darfur Press Release, *supra* note 10.

UNSC.⁴² Four UNSC members abstained from the vote, most notably permanent members China and the United States, objecting to the imposition of ICC jurisdiction over a state not party to the Rome Statute.⁴³

2. *The Decision to Issue Arrest Warrants*

Once the UNSC referral was made, Prosecutor Moreno-Ocampo conducted his own independent investigation in order to decide what charges to bring, if any, and against whom.⁴⁴ Upon review of the ICID report, Moreno-Ocampo first sought to prosecute the Minister for Humanitarian Affairs, Ahmad Harun, and Janjaweed Commander Ali Kushayb for their alleged involvement in several counts of crimes against humanity and war crimes.⁴⁵ For the ICC to issue an arrest warrant at the request of the prosecutor, the arrest must be necessary and there must be reasonable grounds to believe criminal responsibility exists for the commission of a crime under the jurisdiction of the Court.⁴⁶ In the Harun and Kushayb cases, the independent reports of ICID and the Office of the Prosecutor successfully demonstrated reasonable grounds to believe in the existence of crimes against humanity and war crimes.⁴⁷

With regard to President Bashir, Prosecutor Moreno-Ocampo found reasonable grounds to allege Bashir's responsibility for the following crimes:

42. *Id.*

43. *Id.*

44. See Office of the Prosecutor, Int'l Crim. Ct, ICC-02/05, Public Redacted Version of the Prosecutor's Application under Article 58 (July 14, 2008), http://www.genocidewatch.org/images/Sudan_08_07_14_Public_Redacted_Version_of_the_Prosecutor_s_Application_under_Article_58.pdf.

45. See Prosecutor v. Harun, ICC-02/05-01/07, Case Information Sheet (Mar. 25, 2015), <https://www.icc-cpi.int/iccdocs/PIDS/publications/HarunKushaybEng.pdf> (stating that warrants of arrest for both occurred on April 27, 2007).

46. Decision on Warrant of Arrest, *supra* note 2, ¶ 25. Specifically, the Pre-Trial Chamber must be satisfied that:

- (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
- (b) The arrest of the person appears necessary:
 - i. To ensure the person's appearance at trial,
 - ii. To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or
 - iii. Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court which arises out of the same circumstances.

See Rome Statute, *supra* note 30, at art. 58.

47. See ICID Report, *supra* note 6, at 4; see also Prosecutor v. Harun, ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun, 6 (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2007_02902.PDF (indicting Harun for crimes against humanity and war crimes); Prosecutor v. Kushayb, ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb, 6 (Apr. 27, 2007), https://www.icc-cpi.int/CourtRecords/CR2007_02907.PDF (indicting Kushayb for crimes against humanity and war crimes).

1. for genocide under Article 6 (a), killing members of the Fur, Masalit and Zaghawa ethnic groups, (b) causing serious mental harm, and (c) deliberately inflicting conditions of life calculated to bring about their physical destruction in part;
2. for crimes against humanity,⁴⁸ including acts of (a) murder, (b) extermination, (d) [*sic*] forcible transfer of the population, (f) torture and (g) rapes; and
3. for war crimes for intentionally directing attacks against the civilian population and pillaging.⁴⁹

Pre-Trial Chamber I, consisting of Presiding Judge Akua Kuenyehia, Judge Anita Ušacka, and Judge Sylvia Steiner, agreed with Moreno-Ocampo on each of the counts for crimes against humanity and war crimes and accordingly issued a warrant of arrest for Bashir.⁵⁰ Before addressing the Court's reluctance in endorsing the genocide charges against Bashir in the first arrest warrant, a brief overview of the other crimes is provided below.

a. War Crimes

Under the allegations of war crimes, the prosecutor asserted that the government of Sudan unlawfully attacked villages inhabited by Fur, Masalit, and Zaghawa populations through its complete control of the Sudan People's Armed Forces, the Janjaweed, the Sudanese Police Force, the National Intelligence and Security Service, and the Humanitarian Aid Commission of Sudan.⁵¹ As the situation involved an armed conflict not of international character, the charge fell under 2(e) of Article 8 of the Rome Statute and was analyzed accordingly.⁵²

To issue a warrant of arrest for war crimes, the Court had to find that the violence: 1) reached a degree of intensity so as to be defined as a war crime; and 2) was performed under the command of an organized armed group that exercised control over territory used to sustain military operations.⁵³ Under this framework, the Court recognized an organized armed conflict between the Sudan Liberation Movement/Army, Justice and Equality Movement, and the government of Sudan through the Janjaweed.⁵⁴ The Court accepted the

48. Defined by Article 7 of the Rome Statute. *See* Rome Statute, *supra* note 30, at art. 7.

49. Statement on Application for Arrest Warrant, *supra* note 25, at 2. The specific components of war crimes alleged under Article 8 of the Rome Statute were 2(e)(i), intentionally directing attacks against a civilian population and 2(e)(v), pillaging a town or place. *See* Decision on Warrant of Arrest, *supra* note 2, ¶ 55.

50. Decision on Warrant of Arrest, *supra* note 2, at 92.

51. *Id.* ¶¶ 55–56.

52. Rome Statute, *supra* note 30, at art. 8(2)(e).

53. Decision on Warrant of Arrest, *supra* note 2, ¶¶ 57–60 (examining the analysis of the ICTY Appeals Chamber for armed conflict “not of an international character” and distinguishing a need for territorial control not stated there in order to carry out “sustained military operations”).

54. *Id.* ¶ 70.

prosecutor's charge of intentional attacks against unarmed civilian populations pursuant to Article 8 (2)(e)(i) of the Rome Statute, finding that between March 2003 and July 2008, Bashir "directed hundreds of attacks" against villages populated with Fur, Zaghawa, and Masalit civilians.⁵⁵ Further, the Court found a reasonable basis supporting the prosecutor's charge of pillaging under Article 8 (2)(e)(v), as part of the Sudanese government's counter-insurgency campaign included seizing attacked land for themselves.⁵⁶

b. Crimes Against Humanity

Applying the definition of crimes against humanity as laid out in Article 7(1) of the Rome Statute, the Court's analysis first focused on whether there were reasonable grounds to believe that the Sudanese government, under the direction of Bashir, knowingly performed widespread, systematic attacks against a civilian population.⁵⁷ Noting that attacks against civilian populations in Darfur occurred consistently over a five-year span and followed a distinctive pattern, in regard to both the targets chosen—Fur, Masalit, and Zaghawa villages—as well as in the coordination of attacks between the Janjaweed and other state military forces, the Court found reasonable grounds to believe that the attacks were systemic.⁵⁸

After finding sufficient evidence to meet the basic framework for all crimes against humanity, the Court examined the specific charges of murder, extermination, forcible transfer of the population, torture, and rape.⁵⁹ With thousands of Darfuris killed and millions displaced, the Court found reasonable grounds to suspect that murder and forcible transfer of the population had occurred.⁶⁰ Ample evidence supported the charges of torture and rape, as Sudanese governmental forces attacked not only targeted villages, but also the camps of those internally displaced, raping women who entered and left the camps to perform daily chores.⁶¹ In determining whether or not extermination

55. *Id.* ¶ 72 (recounting several instances of attacks on civilian populations spanning the five-year range).

56. *Id.* ¶ 77 (stating that the Sudanese government systematically pillaged towns after attacking and seizing them).

57. *See id.* ¶¶ 80–81 (stating that "widespread" and "systematic" are evaluated because these characteristics require acts to be continuous, large-scale and organized rather than isolated). The Court additionally analyzed under Article 7(2)(a) whether the attacks were made in furtherance of a State or organizational policy, to reemphasize the continuity and scale requirements of the crime. *Id.* ¶ 82.

58. Decision on Warrant of Arrest, *supra* note 2, ¶ 85. When attacking a targeted village, attackers circled the target in an orderly fashion prior to the attack and always arrived through the same mechanism (horseback for the Janjaweed, motor vehicles for the Sudanese Armed Forces), evincing organization and knowledge behind the attacks. *Id.*

59. *Id.* ¶¶ 38, 109.

60. *Id.* ¶¶ 94, 98 (stating that the counter-insurgency campaign knowingly murdered civilians associated with opposing parties, additionally displacing up to 2.7 million persons through forcible transfer via coordinated attacks).

61. *See id.* ¶¶ 102–07.

may have occurred, the Chamber looked to the Rome Statute's Article 6 Elements of Crimes and the interpretations used within the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) which require that the killings occur on a mass scale to members of a civilian population.⁶² Given that over 1,000 civilians were killed in one attack alone on March 9, 2004 in the town of Kailek, the Court was persuaded that reasonable grounds existed to believe that the Sudanese government committed acts of extermination.⁶³

c. Genocide

With regard to the allegation of genocide, the majority in Pre-Trial Chamber I disagreed with the arguments the prosecutor set forth, finding that reasonable grounds did not exist to support the belief that Bashir had committed genocide.⁶⁴ Looking to Article 6 of the Rome Statute, the Chamber analyzed whether any of the following acts occurred to constitute genocide:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group⁶⁵

Additionally, the Court adopted the existing conventions under Article 6's Elements of Crime provision stating that in order to constitute genocide: 1) the victims must belong to a targeted group; 2) the killings, harm, or conditions that occur must manifest a pattern against that group, which in itself could lead to the group's destruction; and 3) the perpetrator's actions must occur with the intent to destroy the targeted group, in whole or in part.⁶⁶

One dilemma that the ICID faced when considering the charge of genocide in its initial investigation was the seeming homogeneity between the targeted African groups and the government-supported Arab groups.⁶⁷ Governing forces were primarily responsible for placing the two groups at odds for decades without regard to characteristic differences, thereby decreasing the likelihood that particular groups were being targeted with genocidal intent.⁶⁸ Moreover, the Chamber focused its attention on the elaboration provided by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (1948 Genocide Convention), stating that victims must have been targeted on the basis

62. *See id.* ¶ 96.

63. *Id.* ¶ 97.

64. *Id.* ¶¶ 204–06.

65. Rome Statute, *supra* note 30, at art. 6.

66. Decision on Warrant of Arrest, *supra* note 2, ¶ 113. The Elements of Crimes provided these further definitions to Article 6, creating three ways to demonstrate the existence of genocide under statute. *Id.*

67. *See* ICID Report, *supra* note 6, at 4.

68. *See id.*

of “positive” characteristics rather than a lack thereof.⁶⁹ Like the ICID, the majority emphasized that the allegedly targeted groups seemed to share a Sudanese nationality and the religion of Islam, but ultimately acknowledged that membership within the three tribal groups, Masalit, Zaghawa, and Fur, did create some affirmative characteristics through customary practices and shared languages.⁷⁰

However, when considering the question of whether it was possible that the government of Sudan committed genocide, the majority held that all other plausible inferences from the evidence must first be eliminated before affirming the possibility of genocide.⁷¹ The Chamber applied a contextual element requirement of a genocidal policy or plan in order to meet the charge, citing the Elements of Crimes and the prosecutor’s application.⁷² Additionally, the Chamber required that the genocidal policy present a “concrete and real” threat to destroy a group in whole or in part, rather than a latent threat alone.⁷³ The majority further examined the International Court of Justice, which instructs that genocide requires an intent to destroy rather than to deport or displace.⁷⁴ Consequently, the majority found that the significant occurrence of forcible transfer in Darfur established that genocide was only one of several reasonable

69. Decision on Warrant of Arrest, *supra* note 2, ¶¶ 134–35 (describing positive characteristics as “national, ethnic, racial or religious”); *see also*, Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 1021 U.N.T.S. 278, <https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf> (defining the crime of genocide) [hereinafter 1948 Genocide Convention].

70. Decision on Warrant of Arrest, *supra* note 2, ¶¶ 136–37.

71. *Id.* ¶ 154. The majority, holding to this heightened evidentiary standard, felt the Sudanese government may have possessed a persecutory rather than a genocidal intent. It distinguished between:

- i. the *dolus specialis*/specific intent required for the crime of genocide (genocidal intent consisting of the intent to destroy in whole or in part a national, ethnic, racial or religious group); and
- ii. the *dolus specialis*/specific intent required for the crime against humanity of persecution (persecutory intent consisting of the intent to discriminate on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, against the members of a group, by reason of the identity of the group).

Id. ¶ 141.

72. *Id.* ¶¶ 122–23 (citing the “pattern of similar conduct” inquiry provided for in the Elements of Crimes).

73. *Id.* ¶ 124. The majority felt that the 1948 Genocide Convention, read without a contextual element, recognized genocide upon the targeted killing of a single individual regardless of a threat to the greater group. The contextual element instead requires a more imminent threat to the existence of the group. *Id.* ¶¶ 119–20, 124.

74. *Id.* ¶ 140; *see also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 190 (Feb. 26) (elaborating on the strict intent requirement for genocide).

inferences that could be drawn from the evidence, and accordingly declined to issue a warrant for the charge of genocide.⁷⁵

Judge Ušacka dissented in part from the majority, finding in favor of the charges of genocide raised by Prosecutor Moreno-Ocampo.⁷⁶ The partial dissent largely focused on the lower evidentiary threshold required for an arrest warrant proceeding compared to the threshold required for a judgment,⁷⁷ arguing that genocidal intent need not be the only reasonable explanation in order to file an arrest warrant for genocide.⁷⁸ Judge Ušacka opined that the evidence showed reasonable grounds to believe that the Sudanese government unitarily targeted the Fur, Masalit, and Zhagawa groups on the basis of their tribal membership,⁷⁹ and, as such, the military groups Bashir controlled possessed the necessary genocidal intent to clear the quantum of proof required to issue an arrest warrant.⁸⁰

Moreno-Ocampo subsequently appealed the majority's decision, echoing Judge Ušacka's dissent in arguing that the majority erroneously applied a higher evidentiary threshold to the genocide charge than the required "reasonable grounds to believe" standard.⁸¹ Moreno-Ocampo emphasized that detailed evidence strongly supported the proposition that Bashir possessed a genocidal intent extending beyond a counter-insurgency movement against the Darfuri tribes, which the prosecutor believed needed addressing.⁸²

One year following the appeal, the Pre-Trial Chamber applied the lower evidentiary threshold for an arrest warrant and granted a second warrant of arrest for Omar al-Bashir, finding that the attacks by the Sudanese government's forces on civilians in Darfur reasonably evinced a policy of genocidal intent.⁸³ The second warrant of arrest did not replace the first; rather it added the original three charges of genocide requested by Moreno-Ocampo, making Bashir the first person wanted for genocide at the ICC.⁸⁴

As of 2016, the government of Sudan continues to refuse to cooperate with the ICC, and Bashir, Ahmad Harun, and Ali Kushayb all remain at large and

75. Decision on Warrant of Arrest, *supra* note 2, ¶¶ 158–59.

76. Partly Dissenting Opinion, *supra* note 3, ¶ 105.

77. *Id.* ¶ 8.

78. *Id.* ¶ 38.

79. *Id.* ¶ 25.

80. *Id.* ¶ 38 (detailing the accounts of witnesses recounting Bashir's statements to "leave no survivors," and reasoning that harmless civilians rather than rebel forces were targeted, going beyond the scope of balancing the power of insurgent forces).

81. See Prosecutor v. Bashir, ICC-02/05-01/09-25, Prosecution Document in Support of Appeal against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir," ¶ 2 (July 6, 2009), <https://www.icc-cpi.int/pages/record.aspx?uri=706618>.

82. *Id.* ¶¶ 17–18.

83. Second Warrant of Arrest, *supra* note 4, at 8–9.

84. *Id.*; Sudan: ICC Warrant for Al-Bashir on Genocide, *supra* note 16.

unprosecuted.⁸⁵ Though the travel whereabouts of Bashir are being strictly monitored by the ICC and reported to the UNSC upon the failure of member states to apprehend him, a network of support through the AU is aiding Bashir's avoidance of justice and maintenance of power in Sudan.⁸⁶

II.

ANALYSIS

A. *The Significance of Bashir's Prosecution on the Development of Genocide in the ICC*

The 1948 Genocide Convention set out to define the crime of genocide in response to the atrocities of the Holocaust in World War II in order to prosecute such crimes and prevent them from occurring again in the future.⁸⁷ Interestingly, the 1948 Genocide Convention sought to prevent even the use of the political crime exemption to extradition, indicating the member states' eagerness to obtain and prosecute those who commit genocide.⁸⁸ Unfortunately, such safeguards have not improved the ability to apprehend persons reasonably suspected of genocide by the ICC, namely Omar al-Bashir.

Prior to the enactment of the Rome Statute, the *ad hoc* criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) incorporated the same definition of genocide into their statutes as the definition established in Article II of the 1948 Genocide Convention.⁸⁹ Though the 1948 definition of genocide was affirmed for contemporary use through its inclusion in the Rome Statute, the charge of genocide has been used infrequently in the international justice system.⁹⁰ International courts have applied heightened thresholds in assessing the charge, beyond those written into the statute.⁹¹ By accepting a lower evidentiary standard for inferring genocide in the second arrest warrant of Bashir, the ICC stepped away from the practice of international courts

85. See generally Office of the Prosecutor, Int'l Crim. Ct., Twenty-Second Report of the Prosecutor of the International Criminal Court to the United Nations Security Council Pursuant to UNSCR 1593, ¶ 2 (Dec. 5, 2015), https://www.icc-cpi.int/iccdocs/otp/OTP-rep-15-12-15_Eng.pdf (stating that Bashir remains at large, though the ICC maintains the upmost interest in detaining Bashir and calling on the support of member states to fulfill their duties to the ICC as well).

86. *Id.*

87. See 1948 Genocide Convention, *supra* note 69. The Genocide Convention took place after the General Assembly of the United Nations declared genocide a crime under international law in UN Resolution 96(I) in 1946. *Id.*

88. See *id.*

89. Decision on Warrant of Arrest, *supra* note 2, ¶ 118. In assessing the charges of genocide in the Darfur situation, the Pre-Trial Chamber assessed Article 4 of the ICTY and Article 2 of the ICTR statutes, finding their definitions the same as that created by the 1948 Genocide Convention.

90. See Alex de Waal, *Reflections on the Difficulties of Defining Darfur's Crisis as Genocide*, 20 HARV. HUM. RTS. J. 25, 29 (2007).

91. *Id.* (explaining that while Raphael Lemkin's definition of genocide in the 1948 Convention was quite broad, "the mainstream tradition of genocide scholarship . . . has sought a narrower definition, emphasizing both eliminationist ideology and totalitarian control").

narrowing the application of genocide to mass atrocities throughout the world⁹² and closer to the broader application and thresholds that the 1948 Genocide Convention likely desired for their deterrent effects.

In evaluating whether genocide reasonably could have been said to have occurred in Darfur, the Pre-Trial Chamber used the definition of genocide from the 1948 Genocide Convention, incorporated into Article 6 of the Rome Statute.⁹³ The Chamber relied on this definition, as had the ICTY and the ICTR before the implementation of the Rome Statute; however, the Chamber initially included an inquiry into whether or not there existed a contextual element to genocide not read into previous statutes.⁹⁴ It ultimately decided to include such an element and required the presence of a genocidal policy or intent, despite the element's propensity to restrict a finding of genocide.⁹⁵

The greater impact of the Chamber's interpretation of genocide in the first arrest warrant, however, lay in the majority's refusal to consider the crimes committed in Darfur as having a genocidal intent when alternative inferences were available, following the steps of the ICTY in its strict interpretation of genocide.⁹⁶ Though rhetoric attempting to limit the use of genocide for situations of complete ethnic cleansing may closely follow the intention of the 1948 Genocide Convention, Judge Ušacka in her partial dissent penned a persuasive opinion arguing against such a limitation. Not only were Fur, Masalit, and Zhagawa tribal members killed, raped, and forcibly displaced on the basis of their tribal affiliations, but their entire means of survival were cut off by the efforts of Bashir, the Janjaweed, and the Sudanese government forces.⁹⁷ Judge Ušacka reasoned that the threshold for intent entered the territory of genocidal when harmless civilians were targeted, first in their homes, then in internal displacement camps, going beyond persecution and instead heading toward eradication.⁹⁸ In rejecting the standard that all other inferences must be eliminated in order to find genocide and employing a broader application of

92. Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 108 AM. J. INT'L L. 334, 344–57 (2013) (describing that fewer than 1% of cases charged in the ICTY and the ICC constituted genocide charges, while the ICTR experienced more genocide charges at 40%).

93. See Rome Statute, *supra* note 30; see also Decision on Warrant of Arrest, *supra* note 2, ¶ 112 (stating the Court's use of the Article 6 definition of genocide).

94. See Decision on Warrant of Arrest, *supra* note 2, ¶¶ 117–21. The 1948 Genocide Convention does not contain such an element, nor did the ICTY or ICTR apply a contextual element. Instead the statutes rely on an analysis of whether there exists an intent to destroy a targeted group, in whole or in part. *Id.*

95. *Id.*

96. See *id.* ¶¶ 142–43 (explaining the ICTY's position that genocide requires a heightened *mens rea* compared to other crimes against humanity, and that discriminatory intent alone does not amount to the "extreme and most inhuman form of persecution" of genocide) (quoting Prosecutor v. Jelicic, Case No. IT-95-10-T, Trial Judgment, ¶¶ 62, 66 (Int'l Crim. Tribunal for the Former Yugoslavia Dec. 14, 1999)).

97. *Id.* at 98–100 (taking into account Darfur's inhabitable terrain and the government's efforts in destroying all sources of food and water for those attacked).

98. See *id.*

genocide where an intent of ethnic cleansing is present, Judge Ušacka laid the foundation later followed by the Chamber in its second arrest warrant.⁹⁹

The ICTR provides a significantly more robust study for prosecuting the crime of genocide at the trial level, with *Prosecutor v. Akayesu* constituting the first genocide case to be tried in any of the international courts.¹⁰⁰ The court examined Jean-Paul Akayesu, the mayor of the city of Taba, as an organizational head, like Bashir, in the commission of atrocity crimes in Rwanda.¹⁰¹ In addition to finding Akayesu liable for genocide after he encouraged the murder of Tutsis in his community, the ICTR ushered in a broader acceptance for satisfying the charge of genocide by including rape as evidence of genocide, recognizing the crime's degrading, torturous nature as well as its use in controlling women and destroying communities.¹⁰² Unlike in Darfur, the situation in Rwanda indisputably constituted genocide, as the Hutu-controlled forces demonstrated clear intent to indiscriminately eliminate Rwanda's Tutsi population.¹⁰³ As such, the ICTR was not required to perform a deeper inquiry into other evidentiary inferences.¹⁰⁴ While fewer deaths and more displacements have occurred in Darfur, the facts of the situation are not as dissimilar as some scholars suggest,¹⁰⁵ as both situations occurred internally and included a diverse range of atrocity crimes calculated to destroy and torture the targeted populations. Mass rape is one of several mechanisms being implemented by the Sudanese government to control and destroy the tribal groups in Darfur, and the recognition of Bashir's crimes as genocide would uphold the broader application hinted at by the ICTR.

While the Pre-Trial Chamber's second arrest warrant for Omar al-Bashir could lead to a new opportunity to determine the standards for the crime of genocide on the international level, Bashir has yet to be apprehended and prosecuted. In order to shape the scope of genocide convictions in the ICC, the UNSC must further align with the ICC's goals and make greater efforts to enforce the mandates of the ICC.

99. *Id.*; see also Second Warrant of Arrest, *supra* note 4 (using less stringent scrutiny in determining genocide for an arrest warrant).

100. *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment (Sept. 2, 1998), <http://www.un.org/en/preventgenocide/rwanda/pdf/AKAYESU%20-%20JUDGEMENT.pdf>; *Historic judgment [sic] finds Akayesu guilty of genocide*, U.N. MECHANISM FOR INT'L CRIM. TRIBUNALS (Sept. 2, 1998), <http://unictr.unmict.org/en/news/historic-judgement-finds-akayesu-guilty-genocide>. As the first indictment of genocide since the 1948 Genocide Convention, *Akayesu* sent a clear signal that the 1948 Genocide Convention would be upheld after a long period of dormancy; see TATUM, *supra* note 17, at 47.

101. *When Rape Becomes Genocide*, N.Y. TIMES, Sept. 5, 1998, <http://www.nytimes.com/1998/09/05/opinion/when-rape-becomes-genocide.html>.

102. *Akayesu*, *supra* note 100, ¶¶ 597–98.

103. *See id.* ¶¶ 125–26.

104. *Id.*

105. *See de Waal*, *supra* note 90, at 29.

B. Obstacles to ICC Enforcement

The African Union (AU) presents a challenge to the ICC's goal of obtaining Omar al-Bashir, as many of its member states have taken the position that the situation in Darfur should be handled internally.¹⁰⁶ While tensions between the AU and ICC have arisen in part because African leaders feel targeted by the many cases brought forth involving the continent,¹⁰⁷ the root of the conflict began when the African Peace and Security Architecture and UNSC requested that Bashir's referral to the ICC be deferred for twelve months pursuant to Article 16 of the Rome Statute, in hopes of resolving the matter internally.¹⁰⁸ The UNSC denied the request, triggering the AU's lack of cooperation with both arrest warrants, despite the membership status of many African states.¹⁰⁹

As to the allegations that the ICC is targeting Africa, the Office of the Prosecutor has decried such a notion, asserting that the Court's "choice of cases is based on the relative gravity of abuses, and that crimes committed in Africa are among the world's most serious."¹¹⁰ Former UN Secretary-General Kofi Annan has reiterated that the ICC is a court of last resort, and that it is a culture of impunity within Africa that is being targeted rather than the continent itself.¹¹¹ Further, many of the allegations of animus come from the African leaders who have found themselves under the Court's scrutiny;¹¹² African victims, however, stand to gain from the Court's interest in enforcing justice and protecting them from further harm.¹¹³ Far from holding water, the accusations of ICC bias merely serve as a political tactic employed by certain African leaders in an attempt to diminish the power of the ICC and distract from their own crimes.

106. See Meeting of African State Parties, *supra* note 11, ¶¶ 2–4.

107. See GERHARD WERLE ET AL., AFRICA AND THE INTERNATIONAL CRIMINAL COURT 182–84 (2014) (discussing sentiment that the cases chosen are not based on “universal demands on justice” but rather on the concerns of financial supporters of the ICC, to the disadvantage of the African continent).

108. See Meeting of African State Parties, *supra* note 11, ¶¶ 2–4.

109. WERLE ET AL., *supra* note 107, at 182–184 (stating that the African Union came to question the authority of the Rome Statute in overriding the immunity of state officials of non-member states, creating diverging opinion on the ICC in the AU).

110. CONG. RESEARCH SERV., INTERNATIONAL CRIMINAL COURT CASES IN AFRICA: STATUS AND POLICY ISSUES 26 (2011) (quoting a CRS interview with an Office of the Prosecutor official on Sept. 3, 2008).

111. *Id.* at 28.

112. See Abdul Tejan-Cole, *Is Africa on Trial?*, B.B.C. (Mar. 27, 2012), <http://www.bbc.com/news/world-africa-17513065> (stating that Rwandan President Paul Kagame has “dismissed the Court saying it was made for Africans and poor countries” while African Union Chair Jean Ping accused the ICC of unfairly targeting African leaders).

113. See *id.* Tejan-Cole, the former prosecutor at the Special Court for Sierra Leone, notes that the victims of mass atrocities in the Democratic Republic of Congo celebrated the verdict against Lubanga, and dismisses allegations of bias, explaining that the Court only intervenes where a nation is unwilling or unable to prosecute.

Bashir has taken advantage of the tensions that seemingly exist between the ICC and the AU by exerting his power as the sitting head of Sudan and traveling to member states without repercussion.¹¹⁴ Though several African states have acted contrary to their duties as parties to the Rome Statute, the ICC lacks a mechanism for enforcement and can implement few tangible repercussions against non-compliant member states.¹¹⁵ The ICC alerts the UNSC when a member state has acted in breach by playing host to Bashir, yet the UNSC has done little with its ability to impose sanctions.¹¹⁶ Despite the persistent efforts of the ICC, the UNSC has not acted to bring justice to African victims.¹¹⁷

This raises the question of whether the UNSC has a bias against Africa. The UNSC has acted in the past in situations that threatened international peace on the level of terrorism.¹¹⁸ In response to the 1988 Lockerbie bombing of Pan Am Flight 103, the UNSC imposed an air and arms embargo on Libya in 1992 in order to pressure the surrender of two Libyan suspects of the bombing.¹¹⁹ Similarly, the UNSC threatened sanctions and demanded Sudan extradite suspects in connection with an assassination attempt on Egyptian President Hosni Mubarak in 1995.¹²⁰ However, outside of instances of terrorism, the UNSC has been reluctant to act.¹²¹ In the Bashir proceedings, the UNSC has remained largely influenced by the politics of its permanent members, including the major abstentions of the United States and China in investigating the issue.¹²² China in particular has strong economic interests in Sudan through the sale of arms and purchase of oil during the Darfur conflict.¹²³ While the U.S.

114. See Decision on Cooperation, *supra* note 15, ¶ 20.

115. See U.N. ICC Agreement, *supra* note 35 (requiring that the ICC refer breaches to the UNSC on matters referred by the UNSC).

116. See Meetings Coverage, *supra* note 5.

117. *Id.*

118. See generally Andrew Hudson, *Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights*, 25 BERKELEY J. INT'L L. 203 (2007) (describing the UNSC's role in counter-terrorism on behalf of the UN).

119. *Timeline: Libya Sanctions*, B.B.C. (Oct. 15, 2004), <http://news.bbc.co.uk/2/hi/africa/3336423.stm> (stating that sanctions remained in place until 2003 and were successful in pressuring Libya to ultimately surrender the suspects).

120. S.C. Res. 1044, ¶ 4 (Jan. 31, 1996); Press Release, Security Council, Security Council Demands Sudan Act to Extradite Suspects in Assassination Attempt of Egyptian President by 10 May, or Face Limited Sanctions, U.N. Press Release SC/6214 (Apr. 26, 1996).

121. See John Prendergast & David Sullivan, *IRRESOLUTION: The U.N. Security Council on Darfur*, ENOUGH PROJECT, (July 24, 2008), <http://www.enoughproject.org/publications/irresolution-un-security-council-darfur> (describing that subsidiary bodies within the UNSC, including sanctions committees, are made up of Council members, consequently requiring the political will of members to accomplish committee goals. Counter-terrorism, therefore, is acted upon, while "crimes against humanity often simply die in committee").

122. Darfur Press Release, *supra* note 10; see Prendergast & Sullivan, *supra* note 121 (discussing the interconnectivity between international politics and UNSC activity on the Darfur conflict).

123. See David H. Shinn, *China and the Conflict in Darfur*, 16 BROWN J. WORLD AFF. 85, 88–94 (2009) (outlining the historical relationship between China and Sudan and the former's economic involvement in the Darfur conflict).

does not share an underlying economic interest, the country abstained from the vote due to a fundamental objection to the ICC's jurisdiction over states not party to the Rome Statute.¹²⁴ These two abstentions likely aided the Sudanese government in remaining unchallenged while ignoring the ICC's wishes.¹²⁵ Though the UNSC ultimately investigated Darfur and may not be biased wholly against the issues facing Sudan and Africa, the UNSC is overly susceptible to the politics of its member states, undermining its global enforcement duties including the implementation of sanctions.¹²⁶ To gain further support from the UNSC, the ICC may need to appeal directly to China and the United States to support its efforts to achieve international peace, or risk Bashir remaining at large for years to come.

Though the prospect of capturing Bashir seems bleak without greater support from the UNSC, the ICC does still hold some power. More countries are requesting that Bashir not come to events to which he was invited under the threat of arrest.¹²⁷ The weakening of his authority resembles that of other world leaders who unsuccessfully attempted to evade international arrest warrants. For example, in the ICTY's case against former Serbian President Slobodan Milošević, his termination as a head of state in 2000 contributed to his eventual capture;¹²⁸ soon after an arrest warrant was issued in 1999, internal pressures mounted with citizens calling for his removal and he was ultimately arrested by Serbian law enforcement in 2001 despite promises of protection by his successor.¹²⁹ Bosnian Serb leader Radovan Karadžić also evaded the custody of the ICTY for twelve years, but as the European Union applied pressure in order to shift Serbia's political climate, he too was left vulnerable and ultimately arrested.¹³⁰ Similarly, former Liberian President Charles Taylor evaded the custody of the Special Court of Sierra Leone for three years by exiling himself to Nigeria after internal pressures forced him to step down. As Taylor's authority diminished from afar, Nigeria and Liberia faced increasing external pressure from the UN and the United States, leading to his ultimate arrest and

124. *Id.*

125. *Id.*

126. See Prendergast & Sullivan, *supra* note 121, at 6–7.

127. Julius Barigaba, *We'll Get Bashir, Kony Soon, Says ICC*, E. AFRICAN (June 14, 2010), <http://www.theeastafrican.co.ke/news/-/2558/937546/-/pdvbwoz/-/index.html>.

128. Tracey Gurd, *Arresting the "Big Fish": Lessons on State Cooperation for the International Criminal Court*, in *THE ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW* 27, 28–29 (Aegis Trust ed., 2009) http://reliefweb.int/sites/reliefweb.int/files/resources/603D8E48589F6DD1C12577E70039FB54-Aegis_Jan2009.pdf.

129. *Id.* at 29. When Milosevic refused to step down as head of state, citizens held mass protests until he conceded defeat. Six months later, Milosevic was arrested in Belgrade after a 36-hour standoff where Serbian law enforcement surrounded his villa.

130. *Id.* at 29–30 (suggesting that the conditions for Karadzic's arrest were influenced in part by the EU conditioning Serbia's membership to the Union on his surrender and full cooperation with the ITCY).

surrender for trial at the Hague.¹³¹ These cases illustrate the concerted internal and external pressures required to enforce contentious international arrest warrants.

Bashir's arrest warrants and resulting inability to travel may function to diminish his authority and pressure Sudan into appointing a new head of state, creating the environment necessary for his surrender. However, the external pressure needed to remove Bashir remains elusive. Bashir's freedom still implicates a greater conflict between the sovereignty of the AU and the ICC, affording him extra support throughout the continent along with the support of Sudan's international allies, including China and Russia.¹³² To apply external pressures, the UNSC must act in conjunction with the ICC to ensure the compliance of ICC member states throughout Africa and the world, whether through negotiations or sanctions. The ICC only stands to gain by pushing for the enforcement of Bashir's arrest warrants, as Bashir's eventual capture and trial may build enough momentum to garner greater respect for the ICC and aid in its struggle to ensure justice for African victims.

CONCLUSION

The second arrest warrant of Omar al-Bashir presents an indispensable breakthrough in the international enforcement of genocide, with the potential to carry over to future genocide charges and indictments. On its own, the arrest warrant sends the message that the 1948 Genocide Convention must be upheld as written and the charge of genocide prosecuted in its every manifestation, including mass rape, ethnic cleansing, and displacement. The potential prosecution of Omar al-Bashir therefore has significant implications for defining the crime of genocide and its international enforcement.

Bashir's case also holds in balance the global perception of the ICC's power to enforce international law and counter irremovable African heads of state. Despite the ICC's best efforts to protest impunity for heads of state committing mass atrocities, Bashir remains President of Sudan with the support of the AU, among other key allies. Though the UNSC remains susceptible to the influence of global powers and politics due to its reliance on member states, the UNSC must act further to support the ICC in order to uphold its mandate to ensure international peace and security. By failing to apprehend Bashir through every available means, the UNSC undermines its duties to the ICC, instead following the agendas of its most powerful member states. Greater enforcement action by the UNSC is the best hope the ICC has in apprehending Bashir, bringing justice to Sudanese victims, and validating its status as a global force.

131. *Id.* at 30–31 (describing that similar conditionality standards as those employed against Serbia were placed on Nigeria to surrender Taylor, including pressure by the United States).

132. See DANIEL LARGE, LUKE PATEY & S. AFRICA INST. OF INT'L AFFAIRS, RIDING THE SUDANESE STORM: CHINA, INDIA, RUSSIA, BRAZIL, AND THE TWO SUDANS 5–18 (2014) (discussing Russia, India, Brazil, and China's relationship with Sudan after 2005, including the continued purchase of Sudanese oil and support of Sudan's sovereignty against the ICC).