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الفدرالية الدولية لحقوق الإنسان

The International Criminal Court and Darfur **Questions and Answers**

On 4 March 2009, the International Criminal Court's (ICC) Pre-Trial Chamber I, decided to issue a warrant of arrest for the President of the Republic of Sudan, Omar al-Bashir for crimes against humanity and war crimes. The decision follows the request made by the ICC Prosecutor, Mr. Luis Moreno-Ocampo, on 14 July 2008.

1. What is the International Criminal Court? Which states support it? What is the relationship between the United Nations and the ICC?

The ICC is a permanent international judicial institution, created by a convention to try individuals responsible for the crime of genocide, crimes against humanity and war crimes. Its statute was adopted at an international conference on 17 July 1998, and entered into force on 1 July 2002.

The ICC started functioning in 2003.

To date, 108 states worldwide have ratified the ICC Statute.

The Court is not a part of the United Nations (UN) system, although the Statute recognises certain prerogatives for the Security Council.

2. How can a matter be referred to the Court? What is the scope of Court's jurisdiction?

- One state party – i.e. a state that has ratified the ICC Statute – can request the Court to investigate a situation. In this case, the Court can investigate crimes committed by a national of a state party or on the territory of a state party.
- The Security Council of the United Nations can also request the Court to investigate a situation, as part of its attributes contained in Chapter VII of the Charter. In this case, the jurisdiction of the Court is not limited to crimes committed by nationals or on the territory of a state party – it is truly universal.
- The Prosecutor can initiate an investigation on his own initiative (with the approval of the judges). In such a case, the Court's jurisdiction is also limited to the crimes committed by nationals or on the territory of a state party.
- Finally, a state that has not ratified the Rome Statute can exceptionally accept the Court's jurisdiction for crimes committed by its nationals or on its territory.

3. How did the ICC start its investigation into the situation in Darfur and what were the main steps?

On 31 March 2005, the UN Security Council adopted Resolution 1593 under Chapter VII of the UN Charter (threat to international peace and security) and under Article 13 of the Statute, referring the situation to the ICC. In its Resolution, the Security Council refers, in particular, to the conclusions of an international commission of inquiry which, upon verifying the gravity of the crimes committed in Darfur, recommended that the situation be referred to the Court.

On 6 June 2005, Mr. Moreno-Ocampo announced the opening of an investigation.

On 27 April 2007, the ICC issued two arrest warrants against Ahmed Harun (former Minister for the Interior and current Minister for Humanitarian Affairs) and Ali Kushayb (Janjaweed militia leader). Both men are charged with crimes against humanity and war crimes committed between August 2003 and March 2004.

4. Sudan has not ratified the Rome Statute. Is it obliged to cooperate with the ICC?

Yes. The Security Council Resolution which referred the situation to the ICC, imposes an obligation to cooperate with the Court on Sudan and all other parties to the conflict.

However, Sudan has barely done so.

In December 2007 and June 2008, the ICC Prosecutor denounced this lack of cooperation before the Security Council. Consequently on 16 June 2008, the Security Council adopted a Presidential Statement reminding Sudan of its obligation to cooperate with the ICC. Other organisations, such as the European Union, have also urged Sudan to cooperate with the Court and to arrest and transfer Harun and Kushayb to the ICC.

Not only has Sudan not arrested these two men, it has also protected them. Mr. Harun has been promoted to the position of co-president of the committee in charge of investigating human rights violations in Sudan and is at the centre of the the deployment of the United Nations – African Union Joint Mission in Darfur (UNAMID). Mr. Kushayb, who was detained in Sudan when the arrest warrant was issued, was released by the Sudanese authorities due to “lack of evidence”. He is now entirely free.

Mr. Moreno-Ocampo declared several times that the protection of these suspects shows that “the entire [Sudanese] state apparatus” is implicated in the commission of crimes in Darfur.

5. Should the ICC leave it up to the Sudanese judicial institutions to address these matters?

The ICC is complimentary to national jurisdictions and can only act once it has asserted a lack of capacity or unwillingness on the part of national tribunals to investigate and/or to prosecute the crimes in question.

On several occasions, the Prosecutor and the judges have found that the Sudanese authorities lack the will and/or the capacity to initiate investigations or prosecutions of the international crimes that fall under the jurisdiction of the Court.

Although Sudan has put in place a special court to try those responsible for the events in Darfur, the Prosecutor's investigations and many international reports (especially those of the UN and of international NGOs) have revealed that this court only addressed a few cases without relation to the

serious crimes committed in Darfur over the past five years. This special court has faced many obstacles, including lack of independence, which shows once again the Sudanese authorities' lack of political will to successfully complete investigations and prosecutions for international crimes.

6. Do the ICC actions constitute an intervention in Sudan's domestic affairs or a threat to Sudan's sovereignty?

The principle of State sovereignty is still very important in international law. It does, however, allow for some exceptions, in particular: when a State agrees to give up this principle (for example by ratifying a convention like the Statute of the ICC); when a situation threatens international peace and security, according to the principles of the UN Charter; when a State does not intervene to protect its citizens, victims of international crimes, according to the new principle of responsibility to protect. As such, Sudan has ratified the Constitutive Act of the African Union, which states “the right of the Union to intervene in a Member State [...] in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity.”

As for the ICC, its competence is established by its statute, which allows it to investigate international crimes and to prosecute perpetrators in States that lack the will or the capacity to do so. In the case of Darfur, as explained above, the UN Security Council is the one who gave this mandate to the Court. Sudan, as a member of the UN, must abide by its resolutions. In the current case, the relevant resolution was adopted under Chapter VII of the UN Charter (and is thus compulsory), following the finding that the Darfur conflict constituted a threat to international peace and security.

In any case, sovereignty can never constitute an excuse to carry on the commission of serious crimes, including the crimes against humanity, war crimes and genocide.

7. What are the implications of the decision delivered on 4 March?

The decision follows the request made by the Prosecutor on 14 July 2008, that an arrest warrant be issued for the Sudan's President Omar al-Bashir. Following a careful review of the evidence submitted by the Office of the Prosecutor, the ICC judges decided to confirm part his request and to issue an arrest warrant for the Sudanese President. for crimes against humanity and war crimes. Omar al-Bashir is now a person sought by the ICC.

8. According to the Prosecutor's request for an arrest warrant Bashir has allegedly committed genocide. What is a genocide? What is the difference between genocide, crimes against humanity, and war crimes?

Genocide is the destruction, in whole or in part, of a national, ethnic, racial or religious group, carried out with the specific intent to exterminate. Crimes against humanity are acts (murder, torture, sexual crimes, etc.) committed as part of a generalised and systematic attack against a civilian population (a crime against humanity can be committed during an armed conflict as well as in times of peace). War crimes are serious violations of the laws and customs applicable to armed conflicts (whether international or domestic).

The ICC Prosecutor is accusing Bashir of having planned and ordered genocide (killing of the members of the Fur, Masalit, and Zaghawa ethnic groups; causing serious mental harm to members of these groups; deliberately inflicting on these groups conditions of life calculated to bring about their physical destruction in part), crimes against humanity (including acts of murder, extermination, forced transfer of population, torture and rape), and war crimes (attacks intentionally directed against the civilian population and pillaging).

The judges decided that there are “reasonable grounds to believe” that Al-Bashir is responsible for crimes against humanity and war crimes, including murder, extermination, forcible transfer of population, torture, rape, intentionally directing attacks against the civilian population and pillaging. The Pre-Trial Chamber concluded that the Prosecutor failed to provide reasonable grounds proving the intent to destroy in whole or in part the ethnic groups, constituting the crime of genocide. The Prosecutor may present additional information at a later stage.

9. Can the Court prosecute a head of state, including one that is still in office?

Yes, according to Article 27 of the Statute of the ICC. The Statute applies to everyone equally, regardless of their official capacity. The capacity as head of state, in particular, cannot exempt a person from criminal responsibility.

This principle is based on the idea that there can be no impunity for the most serious crimes. Former presidents have already been prosecuted under this principle: former Yugoslav President Slobodan Milosevic appeared before the International Criminal Tribunal for the former Yugoslavia in order to answer for crimes committed during the war in the Balkans; former President of Liberia Charles Taylor is currently being tried by the Special Court for the Sierra Leone for his role in the Sierra Leonean conflict.

This principle also applies at the domestic level. Thus, former Tchad President Hissène Habré should soon be prosecuted in Senegal for crimes committed while he was in office in Chad.

10. Why would Bashir be responsible for crimes committed during the conflict in Darfur?

Over the last five years, Bashir has been the President of the Republic of Sudan, Commander in Chief of the Armed Forces, and head of the National Congress party. He has also headed the recruitment and arming of Janjaweed militias from this position. Thus, Bashir has been in complete control of state institutions in Sudan.

For five years, he has denied the existence of crimes in Darfur. As the ICC Prosecutor has pointed out, the denial of crimes and cover up, as well as shifting responsibility to others, are characteristics of planning and perpetrating this type of crimes.

As President and Commander in Chief of the Sudanese armed forces, Bashir is accused of having ordered, planned and encouraged the perpetration of the most heinous crimes. The Pre-trial Chamber decided that there are “reasonable grounds to believe” that Al-Bashir is responsible for crimes against humanity and war crimes, including murder, extermination, forcible transfer of population, torture, rape, intentionally directing attacks against the civilian population and pillaging. The Pre-Trial Chamber concluded that the Prosecutor failed to provide reasonable grounds proving the intent to destroy in whole or in part the ethnic groups, constituting the crime of genocide. The Prosecutor may present additional information at a later stage.

11. Do the Court and the Prosecutor use a double standard for states in Africa and the Middle East? Why are they interested in Darfur and Bashir and not in the Israel-Palestine conflict and Olmert's responsibility, or in acts committed by the United States during the war in Iraq and the war on terror (Guantanamo)?

The Court has currently no jurisdiction to investigate the Israel-Palestine conflict or the war in Iraq, since Israel and the United States have not ratified the ICC Statute. It is true that Sudan is not a State Party either, but the Court has jurisdiction there through Security Council Resolution 1593,

adopted under Chapter VII of the UN Charter, on the basis that this conflict constitutes a threat to international peace and security.

NGOs, especially those which are part of the international Coalition for the ICC, have criticised this situation and have conducted campaigns for the ICC Statute to be ratified by as many states as possible. Other states and international institutions should also push to make sure that the ICC becomes truly universal.

The ICC Prosecutor's decision to initiate legal proceedings against Sudanese President al-Bashir did however increase the sense of bias of this institution. It has been said that the ICC would be "going after Africa", "against the poorest countries in the South", and would therefore be partial. However, all these arguments fall short of an objective assessment of the matter.

Firstly, it is important to underline that African States currently constitute one-third of the States Parties to the Statute. They have recognised and accepted the ICC jurisdiction over their territory and their nationals.

Secondly, it is because they had ratified the ICC Statute and, therefore, accepted its jurisdiction, that three out of four States currently under investigation, have themselves referred the situation to the ICC. They have themselves requested that the Prosecutor open an investigation into the crimes perpetrated on their territory, thus recognising their lack of capacity to carry out investigations and prosecutions for those crimes.

As far as the situation in Darfur is concerned, the Security Council's involvement was justified by the gravity of the situation in the Western region of the Sudan since 2003. A conflict which has brought about the displacement of over two million people and has made thousands of millions of victims of international crimes, constitutes a threat to international peace and security in the region.

Finally, the seriousness of the crimes is a crucial criteria for open investigations at the ICC level. According to many international reports, it is possible to assert that crimes which are among the most serious have been perpetrated in a systematic manner in the currently under investigation by the Court.

12. The ICC arrest warrants do not target rebel groups, only the Janjaweed militias and the government. Is the Prosecutor's approach unbalanced?

The ICC is a judicial institution and is thus not guided by political considerations. Its investigations and prosecutions are based on evidence collected by investigators from the Office of the Prosecutor, and can target the different parties to the conflict.

To date, arrest warrants have only been issued against one party to the conflict. However, in November 2008, the Prosecutor requested that warrants of arrest be issued for rebel commanders allegedly responsible for crimes committed within the framework of an attack against the African Union peace-keeping force, carried out in Haskanita in September 2007. The ICC judges should issue a decision on such request in due time.

13. Will an arrest warrant against Bashir damage the peace process in Darfur? What will be the effect of this action of the Court on the conflict in the Darfur?

The peace process in Darfur is primarily a responsibility of the Sudanese government. It should be supported by the international community, which referred the matter to the ICC in order to help reestablish peace through the prosecution of crimes.

The peace process in Darfur has been significantly slow for reasons unrelated to the ICC. Rather, this is due to the lack of political will of the parties. For five years, Bashir has denied the extreme gravity of the crimes in Darfur. He has also rendered humanitarian organisations' access to victims very difficult, and has blocked the deployment of peacekeeping troops. Further, President Bashir himself has never taken part in the peace talks in Darfur.

Therefore, it is difficult to state that an arrest warrant against Bashir is likely to have a negative impact on the peace process. On the contrary, such a warrant could potentially help reestablish peace in Darfur, by revealing the criminal responsibility of and punishing those who have committed the crimes. This would avoid their repetition. Additionally, an arrest warrant could help separate Bashir from the peace process, which would, in turn, facilitate the long-term enactment of peace agreements, as was the case after the issuance of an international arrest warrant against former Liberian President Charles Taylor.

Actually, history has shown that advocating for the legal accountability of high political figures can contribute effectively to the reestablish and maintain peace and stability. For instance, the Charles Taylor and Slobodan Milosevic trials clearly contributed to truth-telling regarding the massive crimes committed in these countries and to uncovering their key roles in planning and executing the crimes. This helped consolidating the process of building a sustainable peace.

14. Can the Security Council “suspend” the investigations and prosecutions of the ICC?

Yes. Article 16 of the Rome Statute authorises the Security Council to request the Court to suspend an investigation or prosecution for a period of 12 months (renewable), if it considers that the Court's actions threaten international peace and security.

It is worth mentioning here that this does not mean calling off the procedures, but stalling them for a limited period of time. No state or institution has the power to request the Court to bring to an end its investigations or prosecutions.

From the moment the Prosecutor submitted its request in July, the League of Arab States and the African Union took steps to call upon the United Nations Security Council to suspend investigations and prosecutions in accordance with Article 16. The issue has nonetheless not been formally debated within the Council because its members have divergent positions on such a suspension. For some States, allowing the ICC proceedings to move forward is essential in order to pursue peace in Sudan. These States are also respectful of the independence of the ICC. In this sense, the new American administration has recently stated that it saw no reason to support a deferral of investigations and prosecutions at this time.

15. What is the responsibility of states and international organisations concerning the Court's actions?

States and international organisations are required to respect the Court's independence.

The States Parties to the Rome Statute must cooperate with the Court (Chapter IX of the Statute).

This cooperation implies not only concrete actions such as arresting and transferring suspects to the Court, supporting access to information, protecting witnesses, freezing and seizing assets, etc. It also requires political support to the Court in bilateral state relations, as well as in their actions within international and regional organisations.

16. What responsibility do states and international organisations have concerning the other aspects of the conflict in Darfur?

The international community must work towards putting an end to the conflict in Darfur and protecting the civilian population as well as the troops of the United Nations – African Union Joint Mission (UNAMID) currently deployed on the field.

They should also take measures to support the political process of building a sustainable peace in Darfur.

17. How can the ICC execute an arrest warrant if it does not have a police force? Who bears an obligation to execute warrants of arrest issued by the ICC? Is it not illusory to believe that Sudan is going to execute the arrest warrant for its president? Will Bashir be then able to escape justice?

It is up to State Parties to the ICC Statute to execute the arrest warrants issued by the Court. As explained above, the Sudan also has an obligation to cooperate with the Court, including through execution of warrants of arrests related to the ICC investigation in Darfur.

In the case of the Darfur situation, all United Nations' Member States must cooperate with the ICC so that it can carry out its investigations and prosecutions (including through the arrest and surrender of persons sought by the Court), because the Security Council decided to refer the situation to the ICC by a resolution under Chapter VII of the United Nations Charter.

Should a State (other than Sudan) whose cooperation has been requested by the Court consider that surrendering Bashir to the ICC would require it to act inconsistently with its obligations under international law (Article 98.1 of the ICC Statute), the State concerned should communicate that to the ICC and challenge its cooperation request.

It is likely that -at least initially- the Sudan will not execute the arrest warrant for its president. Nevertheless, should Bashir leave the Sudanese territory to visit another State (a State Party to the Rome Statute) for him to be arrested on that State's territory and be transferred to the ICC.