

ARGUING FOR AN INTEGRATED APPROACH TO RESOLVING THE CRISIS IN DARFUR: THE CHALLENGES OF COMPLEMENTARITY, ENFORCEMENT, AND RELATED ISSUES IN THE INTERNATIONAL CRIMINAL COURT

CHRISTOPHER D. TOTTEN* & NICHOLAS TYLER**

This Article addresses the evolution of the International Criminal Court's case regarding Darfur, Sudan. In particular, the Article examines the U.N. investigation into the human rights abuses in Darfur, the U.N. referral of the Darfur case to the ICC, the ICC's Prosecutor own investigation into the abuses, and the recent issuance of arrest warrants by the ICC for particular Darfur suspects. In addition, the Article analyzes whether the ICC complementarity principle is violated in the Sudan case as a result of local judicial activity against the ICC suspects named in the warrants. Concluding that the principle is not violated, and the ICC may therefore proceed with its case against these suspects, the Article then proposes an integrated approach to resolving the crisis in Darfur. This approach entails ICC prosecutions, Sudanese prosecutions and a truth commission process. Finally, the Article offers suggestions for executing the ICC arrest warrants in the Sudan.

I. INTRODUCTION

The International Criminal Court's (ICC or Court) case regarding the conflict in Darfur, Sudan sheds light on the development and meaning of the complementarity principle under the Rome Statute of the International

* Christopher Totten, J.D., LL.M. Dr. Totten is an Assistant Professor in the Department of Political Science at The College of New Jersey. This Article is dedicated to Carol Arcaro Ryan, my beloved aunt.

** Nicholas Tyler is a current second year law student at Widener University School of Law, and a 2007 graduate of the Department of Criminology at The College of New Jersey. Thank you to Professor Totten for his guidance in this article and support in starting my legal career.

Criminal Court (Rome Statute).¹ The case also illustrates the difficulty of enforcing ICC rulings in the territory of a non-State Party such as Sudan (a non-State Party is any country that is not a member of the ICC). The United Nations has mandated that non-State Parties, including Sudan and surrounding nations, cooperate in the ICC case in Darfur; however, recent events indicate that this case will present new challenges to this mandate.² This Article will address these challenges both in the context of complementarity and in the context of enforcement of the recent ruling by the ICC issuing arrest warrants for two particular Darfur suspects. Though the Article ultimately concludes that the ICC's complementarity principle is not violated in the case of the two named suspects in the warrants, and hence the ICC may proceed with trying these suspects, it will offer numerous suggestions for providing a role to institutions and actors both within and outside of Sudan as part of an integrated approach to managing the current humanitarian crisis in Darfur.

As a way of incorporating the concept of complementarity into a solution for the Darfur crisis, the Article outlines such an approach, providing a particular role to Sudanese actors and institutions, including the Sudanese special courts, as well as a future truth commission. For example, Sudanese special courts may be able to try some of the low-level criminals involved in the Darfur crimes while the ICC focus its efforts on the leaders

¹ Complementarity refers to the shared role between the ICC and the courts of national jurisdictions, such as Sudan, in prosecuting crimes under the Rome Statute. Under the complementarity principle, if national courts like those in Sudan are able and willing to prosecute an individual for crimes covered by the Rome Statute, then the ICC must defer to those national courts and refrain from initiating its own criminal proceedings against that individual. See *infra* note 43 and accompanying text (explaining the Rome Statute's complementarity principle). If the ICC were to continue prosecuting an individual who the national courts were both able and willing to prosecute, it would violate the complementarity principle. The principle would not be violated, however, in the case of national courts that lacked the capacity or willingness to prosecute a particular individual as a result of political unrest or a non-independent judiciary. In this event, the ICC could continue its own prosecution of this individual. See, e.g., Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf. Article 17 contains the Court's complementarity principle. *Id.* It establishes the guidelines under which a case is to be evaluated for admissibility to the Court when the national jurisdiction has undertaken concurrent, related proceedings. *Id.* Under Article 17, a case is inadmissible before the ICC where a national jurisdiction is investigating or prosecuting a concurrent proceeding impartially and independently, and not for the purposes of shielding the individual from criminal liability. *Id.* See *infra* note 43 for the relevant statutory provisions of Article 17.

² See *infra* note 80 and accompanying text (discussing U.N. Security Council Resolution 1593); see also *infra* note 91 and accompanying text (discussing recent statements by Sudanese government officials that reflect an unwillingness to cooperate with the ICC).

of the human rights violations. A Sudanese truth commission could help create a record of the atrocities while providing specific recommendations that directly impact victims' lives in a post-conflict society.

In addition, a particular role for the U.N., the African Union (AU), ICC Member States, and Interpol will be discussed in the context of enforcement of the arrest warrants. If U.N. and AU troops currently in Sudan can not be properly authorized to execute the arrest warrants, then an ICC Member State may be able to execute the warrants with assistance from Interpol.

The effect and outcome of the Darfur case related to these developing issues of complementarity, enforcement, and integration bear serious implications for the Court's future effectiveness and legitimacy.

This Article consists of four Parts examining the on-going Darfur case. Part Two addresses background information related to the Darfur case, including: (1) the history of the ICC; (2) the structure of the Court; (3) the relevant substantive and procedural law; (4) the complementarity principle; and (5) other ICC cases. Part Three analyzes the U.N.'s involvement in Darfur, including the formation of the International Commission of Inquiry in Darfur (Darfur Commission) the Darfur Commission's comprehensive report, and the U.N. Security Council's referral of the case to the ICC. Part Four consists of a review of the progress of the Darfur case in the ICC to date, including the ICC Prosecutor's (Prosecutor) investigation in Darfur, the Prosecutor's Application for Summonses (Application) for two individuals allegedly involved in Darfur crimes, and the recent decision by the ICC's Pre-Trial Chamber to issue arrest warrants for these two individuals. Part Five analyzes emerging issues presented by the evolution of the Darfur case in the ICC, including the issues of complementarity, enforcement, and integration.

II. BACKGROUND

In the past five years an internal conflict in the Darfur region of Sudan has drawn major international attention because of the magnitude of impact on the civilian populations within the implicated territory. Since the most recent crisis began in Darfur, villages have been burned and looted, thousands of people have been killed and raped, and millions have been displaced from their homes.³ The severity of the conflict has placed

³ Int'l Comm'n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur*, § I(VI), delivered to the U.N. Secretary-General, U.N. Doc. S/2005/60 (Jan. 25, 2005) [hereinafter *Darfur Report*], available at http://www.icc-cpi.int/library/cases/Report_to_UN_on_Darfur.pdf. This is the report of the findings by the Commission established by U.N. Security Council Resolution 1564. S.C. Res. 1564, ¶ 12, U.N. Doc. S/RES/1564 (Sept. 18, 2004). For further discussion of the Darfur Report and the