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RATES & AVAILABILITY

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JOURNAL AIMS & SCOPE

Eyes on the ICC is the first peer-reviewed, scholarly journal devoted to the study of the International Criminal Court. The journal seeks to advance the understanding of the ICC and to provide a forum to address the most pressing issues surrounding the establishment and operation of the Court as an international institution. Scholarship on the Court examines the history of its founding; the Court's place within the international legal landscape; the politics of the Court's governance, membership, jurisdiction, investigations, and prosecutions; the Court's current and potential subject matter jurisdiction; the Court's current and potential territorial jurisdiction; the Court's current and potential cases; the Court's jurisprudence; enforcement of the Court's decisions; and implications of the Court's exis-

tence and activities on diverse spheres of human and institutional behavior. Submissions from any field of study are encouraged.

ABOUT THE PUBLISHER

The Council for American Students in International Negotiations (CASIN), founded as the Independent Student Coalition for the International Criminal Court (ISC-ICC), began as the only student-based organization in the United States dedicated to educating the American public about the Rome Statute and the International Criminal Court. The ISC-ICC started as a simple petition, signed by U.S. college and university students across the country, asking then-President Clinton to allow the United States to become a signatory to the Rome Statute. The belief of this initial group of students in the value of a relationship between the U.S. and the ICC has since grown into an effective organization that depends the understanding and commitment of American students to multilateral institutions.

American students from across the country, referred to at the UN as “voices of the future,” participated in the preparatory negotiations for the Court under the auspices of the ISC-ICC. Representing the next generation of American leaders, CASIN has continued to participate in negotiations for the Court at meetings of the Assembly of States Parties, the governing body for the Court. Several times a year CASIN sends delegations of students to high-profile international conventions to participate first-hand in the international policy-making process.

CASIN publications are produced by members of the organization, composed of students and young professionals across the country. With the oversight of an advisory board of top scholars and practitioners of international law and policy, CASIN members work to disseminate the best research on international legal issues and human rights to a global audience. By working closely with leading scholars, the students who produce CASIN publications gain valuable insight into the fields of policy and academia. Scholars who contribute to CASIN publications earn the satisfaction of mentoring highly motivated and forward-thinking young Americans.

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Eyes on the ICC accepts three types of manuscripts for review: (1) articles, 15- to 40-page research papers; (2) notes, student-authored analytical or critical reviews; and (3) book reviews, 600 to 1,000 words on a recent book related to the field. All manuscripts must be typewritten in English and submitted electronically, either via e-mail to icc@americanstudents.us or Berkeley Electronic Press’s Expresso submission service at <http://law.bepress.com/expresso>. All submissions must include an abstract and detailed contact information and credentials (e.g., in the form of curriculum vitae) for the author(s). Each submission under consideration is subjected to double-blind external peer review by two anonymous referees.

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NOTE

The ICC versus Sudan: How Does the Darfur Case Impact the Principle of Complementarity?

Erica J. Saxum*

Only four cases have come before the International Criminal Court since its inception in 2002. The first three cases were self-referrals by Uganda, Democratic Republic of Congo, and Central African Republic. Darfur is the first and only situation thus far to be referred to the Court by the UN Security Council. Examination of these four cases, particularly the Darfur situation, reveals how the ICC interprets the principles of complementarity and admissibility differently based on whether the case is self-referred or referred by the Security Council. Instead of establishing a clear framework for determining admissibility and complementarity, the Court's handling of the four ICC cases show that the Court either: (a) accepts almost any unwillingness or inability factors in order to take jurisdiction of a case, or (b) refuses to accept any ability or willingness factors in order to prevent losing jurisdiction over a case. Understandably, the ICC needs to hear cases in order to establish itself as a legitimate court. The Court should be extremely careful, however, to only take cases that clearly adhere to the jurisdictional elements laid forth in the Rome Statute. By doing so, the ICC can prove its credibility and solidify its place as the new global court.

I. INTRODUCTION

This paper discusses the Darfur situation currently before the International Criminal Court (hereinafter the “ICC” or the “Court”) and the issue of complementarity. Part II provides a background of the Rome Statute (hereinafter the “Statute”). Part III explores complementarity and admissibility, focusing specifically on what constitutes a State’s unwillingness or inability to genuinely investigate or prosecute a case, by reviewing the jurisdictional requirements of the ICC. Part IV reviews the cases that have come, or are currently, before the ICC. Part V examines the ICC’s application of the complementarity principle in the self-referred and Security Council-referred cases. Part VI focuses specifically on the Darfur situation and its admissibility of the case in the ICC, followed by Part VII, the conclusion.

II. THE ROME STATUTE AND THE ICC

The Rome Statute was the first multilateral legal document to detail the investigation and prosecution of international crimes.¹ Initially signed by 120 states in 1998 and entered into force on July 1, 2002,² the Statute established the International Criminal Court³ to ensure that the most serious of international crimes do

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¹ Remigius Oraeki Chibueze, *The International Criminal Court: Bottlenecks to Individual Criminal Liability in the Rome Statute*, 12 ANN. SURV. INT’L & COMP. L. 185, 186 (Spring 2006).

² Ada Sheng, *Analyzing the International Criminal Court Complementarity Principle Through a Federal Court Lens*, 13 ILSA J. INT’L & COMP. L. 413 (Summer 2007).

³ *Id.*

IN THE PURSUIT OF JUSTICE:

A Comment on the Arrest Warrant for President Al-Bashir of Sudan

*Samantha Jones**

The arrest warrant issued against President Omar Al-Bashir of Sudan in March 2009 led to uproar and outrage in the international community. While the International Criminal Court's efforts to prosecute those most responsible for serious crimes of concern have been congratulated by some, others have criticized the Court's approach. This paper questions whether the Court's decision was the appropriate method by which to fulfill, or at least pursue, the "interests of justice." This paper analyzes the manner in which the decision was issued and the Majority's assessment of the genocide charges. By making the arrest warrant public at such an early stage of the proceedings, and by using a higher evidentiary threshold to determine the genocide charge, this paper concludes that the ICC's actions may prove counterproductive to achieving justice and securing relief for the victims of the conflict.

On March 4, 2009, amidst the six-year devastating insurgency counter-campaign, the Pre-Trial Chamber ("PTC" or "The Chamber") of the International Criminal Court (the "ICC" or the "Court") issued an arrest warrant (the "Decision") for President Omar Al-Bashir of Sudan for the commission of war crimes and crimes against humanity in Darfur, Sudan.¹ By indicting a sitting Head of State, the Court has boldly taken its first steps in handling such a precarious case. Yet the Court Majority's failure to indict Al-Bashir on charges of genocide led to great disappointment among the victim groups of Darfur. The decision further caused controversy within the international criminal legal field and the Judging panel itself, as firmly exemplified by Judge Anita Ušacka's dissenting opinion on the issue. In issuing the indictment for war crimes and crimes against humanity, however, the Court has demonstrated its power over those most responsible for the most serious crimes of concern in the ultimate pursuit for justice. But for whose benefit? And at what cost? At the time the decision was issued, Al-Bashir expelled humanitarian aid agencies from Darfur and the Prosecutor for the ICC, Luis Moreno-Ocampo (the "Prosecutor") filed an Application for Leave to Appeal ("Prosecutor Appeal") contesting the failure to find that genocide has occurred.² As a result, journalists, blog-savvy academics and lawyers alike wrote extensively on the implications of the arrest warrant and the finer details of the judgment itself. It is my aim, using these opinions and blogs as a foundational basis, to determine whether the Court's decision places the first judicial stepping stone in achieving substantial and effective justice for the victims of Darfur and the wider international commu-

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¹ The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (4 Mar. 2009) [hereinafter Al Bashir Warrant Short].

² The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Prosecution's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" (10 Mar. 2009) [Prosecutor Leave to Appeal]. Note that only the first ground of the Prosecutor's application was granted leave to appeal by PTC 1 on 24 June 2009. See The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Decision on the Prosecution's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" (24 June 2009) [Decision on Prosecution's Leave to Appeal].

UGANDA AND THE ICC:

Difficulties in Bringing the Lord's Resistance Army Leadership before the ICC

*Adrian Traylor**

On December 16, 2003, the Government of Uganda had the dubious honor of being the first nation to refer a situation to the newly created International Criminal Court (ICC) regarding the situation in the north of the country. The Lord's Resistance Army (LRA) is currently the last of the major resistance groups fighting against the Ugandan Government of Yoweri Museveni. It has perpetrated a brutal campaign against the Ugandan Peoples Defence Force (UPDF) and the people of northern Uganda, southern Sudan, northern areas of the Democratic Republic of the Congo, and the Central African Republic since at least 1987.¹ Uganda has been plagued by a series of rebellious uprisings since gaining independence from Great Britain in 1962.² These uprisings stem from a deep-seated mistrust between the peoples of the north and those of the south. Over the past forty years, all but the LRA have either negotiated absorption into the Ugandan People's Defence Force or have been defeated outright.³

This self-referral has proven to be one of the most problematic cases before the court for several reasons. This paper seeks to illuminate the issues surrounding the ICC's involvement in Uganda. An in-depth understanding of past and current problems in prosecuting offenders is necessary so long as there are those who continue to wage war with no concern for the innocents in their path. The case of Uganda raises issues that range from admissibility of the case under the ICC's Rome Statute, to the Court's role in the peace process. The lessons learned by both the ICC and the international community as a whole will be examined and recommendations for further development will be set forth.

This piece is divided into three parts. Part I examines the history of the Ugandan conflict, including the conditions underlying, at least in part, the continuing mistrust between the different groups within Uganda. The conflict through which the LRA emerged can draw its roots from the 14th to 15th century, and more recently the exchanges of power following Uganda's independence from the United Kingdom. A distinct mistrust seems to have emerged between peoples from the north and those from the south of the country brought about, or at least aggravated, by the violent post-independence regimes.

Part II raises the problems of admissibility brought about by the self-referral of Uganda. This possibility was not considered in the development of the Rome Statute and may, ironically, place the case concerning Uganda outside of the purview of the ICC. Additionally, this section will address the issues of the primacy of goals of the ICC. In the case of Uganda, as with the conflict in the Balkans and the ICTY, the

* LL.M. International Law, University of Edinburgh 2009; MAIPS International Negotiations and Conflict Resolution, Monterey Institute of International Studies. I would like to offer my most heartfelt thanks to Bill Gilmore, Stephen Garrett, Tara Van Ho, and Elizabeth Campbell for their invaluable council. All views expressed in this paper are those of the author and cannot be otherwise attributed.

¹ *Warrant for the Arrest of Joseph Kony*, issued 8 July 2005, as amended 27 Sep. 2005 (Pre Trial Chamber II), ICC-02/04-01/05-53 (27 Sep. 2005) (hereinafter "Warrant for the Arrest of Joseph Kony"). This warrant will be used as the basis for all but certain specific passages as it is very similar to those of the other LRA leadership.

² United States Department of State. Bureau of African Affairs, *Background Note: Uganda: Profile*, available at www.state.gov/r/pa/ei/bgn/2963.htm (May 2009) (last accessed 7 July 2009).

³ Betty Bigombe. *The Peace Process in Northern Uganda: The Roll of the Mediator Speech Given to the United States Institute of Peace* (7 Nov. 2007), available at www.usip.org/events/peace-process-northern-uganda-role-mediator (last accessed 22 Nov. 2009).

COMMENTARY

Is Participation in the ICC in the Strategic Interest of the United States?

Edward S. White*

I. INTRODUCTION

After a controversial start, the International Criminal Court¹ (“ICC” or “the Court”) dropped out of the headlines and ceased to be a hot topic in public debate in the United States. However, with the recent change of U.S. presidential administrations, and the even more recent public comments in support of the ICC by U.S. Secretary of State Hillary Clinton, the ICC is poised to reenter U.S. headlines and again occupy a prominent place in U.S. foreign policy debates. In August 2009, while traveling in Nairobi, Kenya, Secretary Clinton said she had “great regret” the United States was not a signatory to the Rome Statute establishing the ICC.² Likewise, the newly appointed legal advisor to the State Department, Yale Law School Dean and Professor Harold Hongju Koh, has expressed his support for the United States to ratify the Rome Statute (hereinafter the “Statute”).³ In the current U.S. presidential administration, these remarks appear to indicate renewed interest in engaging with the ICC, as well as greater sympathy for joining the Court.

Following World War II, the victors established international tribunals to try crimes against peace, war crimes and, crimes against humanity.⁴ For many years

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¹ U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, 17 Jul. 1998, U.N. Doc. A/CONF 183/9 (1998), available at www.un.org/law/icc/statute/rome.htm (hereinafter “Rome Statute”).

² *Clinton Says She Regrets U.S. Is Not a Member of ICC*, REUTERS, 6 Aug. 2009. Secretary Clinton reportedly used the word “signatory.” The United States signed the Rome Statute establishing the ICC on December 31, 2000 (see note 14, *infra*), but the Clinton Administration never submitted it to the U.S. Senate for ratification. Subsequently, the Bush Administration “unsigned” the treaty on May 6, 2002. See note 17, *infra*.

³ *Restoring the Rule of Law, Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 14-32 (2008) (statement of Harold Kongju Koh, Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law, Yale Law School) (urging the Obama Administration to “withdraw” the Bush Administration letter to the United Nations Secretary General “unsigned” the Rome Statute, and proposing diplomatic engagement with the States Party to the Statute in order to “pave the way for eventual ratification.”), available at http://ftp.fas.org/irp/congress/2008_hr/091608koh.pdf. The U.S. Senate confirmed Dean Koh as U.S. State Department Legal Advisor on June 25, 2009. Roll-call Vote No. 213Ex, 155 Cong. Rec. 97 (25 June 2009) at S.7050.

⁴ Generally speaking, crimes against peace involved violation of treaty obligations (the Kellogg-Briand Pact, in particular) renouncing the use of war as an instrument of national policy. War crimes involved violations of both customary norms of international law and treaty obligations (such as the Hague Convention of 1907) governing conduct between warring parties. Crimes against humanity involved gross violations of the human rights of civilian

FILM REVIEW

Pamela Yates (director), *The Reckoning: The Battle for the International Criminal Court* (Skylight Pictures, 2009)

*Lauren Fielder Redman**

The Reckoning is a film that no observer of the International Criminal Court (hereinafter “ICC” or the “Court”) should miss. This award-winning documentary presents a broad overview of the Court, from its conception at the Rome Convention through its initial investigations, indictments and hearings. In addition to this historical overview, it provides a well-balanced investigation of the problems faced by the Court, as well as major criticisms of the Court’s practices and procedures.

One of the strongest features of the film is its use of interviews. The film opens with a group of Hemal tribespeople of Ituri Congo walking through elephant grass fields full of skeletons. Tribal spokesman Professor Pilo Kamaragi laments about how “the killers go unpunished.” This is an apt opening, showing in graphic clarity how much some victims may believe the world needs the ICC. After this poignant beginning in the Congolese killing fields, the film toggles between narratives from Ben Ferencz, who was 27 years old when he became a prosecutor at Nuremburg, representatives from the drafting process of the Rome Statute, ICC prosecutors and investigators, government officials, human rights defenders and, most compelling of all, victims of the horrific atrocities that gave rise to ICC indictments.

The film also delves into the objective and creation of the ICC, examining conflicts in which the Court has been involved from its inception in 2002 to the present. Throughout the film, viewers are provided insight as to the inner workings of the Court, specifically why the ICC chose to exercise jurisdiction, or how it was granted jurisdiction, over a particular matter. (Despite the existence of war crimes that took place prior 2002, the ICC is permitted only to address crimes committed since its inception in 2002.)

I. UGANDA

The film begins with the Court’s first case regarding Uganda and the gross human rights violations committed by the Lord’s Resistance Army (hereinafter “LRA”) over the past two decades. Chief ICC Prosecutor¹ Luis Moreno-Ocampo explains why the Court chose Uganda as its first case, pointing out that, as a general practice, the Court prosecutes only Commanders who order the attacks, not the foot soldiers who carry them out. While it is sometimes difficult to link the victims to those who made the orders, the Uganda case was replete with evidence by witnesses, thus proving such a linkage was not overly difficult. In presenting this case, as elsewhere in the film, there is footage, both moving and graphic, of the atrocities and victims. Viewers get a strong sense of the many hurdles with which the Court must contend, from indictment to prosecution. These issues are especially noticeable during footage surrounding arrests of the indicted. It becomes apparent that the alleged perpetrators in the Uganda conflict, including Lord’s Resistance Leader, Joseph Kony, have not been arrested, and the filmmaker focuses on the disparity between legal systems vis a vie the arrest process. Another increasingly difficult issue with which the Court struggles is the Ugandans’ growing dis-

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¹ Although the ICC has only one chief prosecutor, Moreno-Ocampo, there are also members who hold the title “Deputy Prosecutors.” Unless otherwise noted, “Prosecutor” denotes only Moreno-Ocampo.