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Evaluating the International Criminal Court: A Comparative Analysis of Darfur, Sudan, and the Democratic Republic of the Congo

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EVALUATING THE INTERNATIONAL CRIMINAL COURT:
A COMPARATIVE ANALYSIS OF DARFUR, SUDAN, AND THE DEMOCRATIC
REPUBLIC OF THE CONGO

EVALUATING THE INTERNATIONAL CRIMINAL COURT:
A COMPARATIVE ANALYSIS OF DARFUR, SUDAN, AND THE DEMOCRATIC
REPUBLIC OF THE CONGO

A thesis submitted in partial fulfillment
of the requirements for the degree of
Master of Arts in Political Science

By

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Universitas Muhammadiyah Yogyakarta
Sarjana Ilmu Politik, 2006

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ABSTRACT

This thesis examines the effectiveness of the International Criminal Court (ICC) in holding individuals accountable for grave breaches of crimes against peace, war crimes, crimes against humanity, and genocide. I argue that if we measure effectiveness in terms of the ability to set agenda and to publicize, the ICC accomplishes much. My thesis to shows that, as a key part of the international agenda on human rights compliance, the ICC derives its effectiveness from the various naming and shaming campaigns by national governments and non-governmental actors (NGOs).

I draw on the cases of Darfur, Sudan and the Democratic Republic of the Congo to show that the ICC is effectively realizing its purpose: it gives voice to non-state actors like NGOs, regional actors, and international governmental organizations; it regularizes ways for international actors to be part of the process; it provides information to other stakeholders; and it names and shames the perpetrators of human rights violations. Hence, the ICC gives meaning to the cautious optimism that inspires liberal claims.

This thesis is approved for recommendation
to the Graduate Council.

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DEDICATION

I would like to dedicate this achievement to my family: Papa Amir Syarifuddin, Mama Sri Hastuti, siblings Mirza Fitra, Mirna Fitri, Miryanti Sari, Mirvan Syah Putra, and Mirfathul Authar. I would also like to dedicate this achievement to my CH-family: Papa Gian J. Baumann, Mami Regula Baumann, siblings Christin Eigenmann, Nick Baumann, Julie Baumann, Phil Baumann, and Noemi Baumann.

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PART I

INTRODUCTION

The international community increasingly seeks to hold individuals accountable for grave breaches of crimes against peace, war crimes, crimes against humanity and genocide. There are different solutions that range from the codification of international human rights and humanitarian law treaties to engagement in an internationally agreed mechanism to punish the perpetrators. Nevertheless, they share a common search for standards of compliance.

Though national courts can be the most effective mechanisms for prosecuting such violations, international institutions also matter and are effective in their own right. I argue that, if we think of effectiveness as agenda setting and publicity, much is accomplished at the international level. This is especially so if we take a longer view. The international commitment to punish serious human rights violators has moved from ad hoc tribunals to more regularized forums. A recent example is the International Criminal Court (ICC). The establishment of the ICC is an important part of this growing commitment and in its short history its contribution is significant. My purpose in this thesis is to show that, as a key part of the international agenda on human rights compliance, the initial effectiveness of the ICC is a result of various naming and shaming campaigns by national governments and non-governmental actors (NGOs). The effort to publicize major crimes and violations gives the ICC added visibility.

I seek to address the effectiveness of international institutions in protecting human rights in my thesis by examining one of the most recent and controversial of these institutions, the ICC. My thesis is divided into three parts. First, I specify the purpose of the ICC. Second, I show that, under certain conditions, the ICC is effectively realizing its purpose. Third, I argue that even at

this early stage in its development, the ICC gives meaning to the cautious optimism that inspires the liberal claim. To support my argument, I detail two cases to show that if we think of effectiveness as voice and shame, the ICC can be effective.

My purpose, then, is to investigate the effectiveness of the ICC in the cases of Darfur, Sudan and the Democratic Republic of the Congo. Both show non-governmental organizations (NGOs), regional actors, and inter-governmental organizations (IGOs) regularizing voice against those who commit crimes and providing information to other stakeholders as a way of building wider international pressure for shaming perpetrators.

Realism and Liberalism

Like much of political life, bargaining and negotiation are prevalent features of international politics. What makes international politics even more complicated is that actors (states) conduct their affairs under conditions of anarchy. Scholars of international relations define the concept of anarchy as follows: no entity exists above individual states with the power or authority to enforce the treaties, agreements, or contracts that emerge from state bargaining and negotiation. So, states police themselves.

What this means for the possibility of international cooperation is the subject for some debate. There are two main, competing schools of thought in the field of international relations. One is Realism. In realism, conflict is the greater possibility and as a result realists see politically dangerous consequences of anarchy:

- a. As states must enforce their treaties, agreements, or contracts themselves, they create the means to do so.
- b. One fact of international political life is the decentralization of force among states.

- c. When states disagree, the use of force is always a possibility.
- d. Therefore, given the uncertainty of peaceful cooperation, states fear the intentions of others.

Another school of thought is Liberalism. Liberals see the building of international institutions as a way to alleviate the dangerous consequences of anarchy. International institutions provide platform for dialogue as well as opportunities for regular interaction and cooperation, so states have a way out of the Prisoner's Dilemma. When every party can access information about each other, the conduct that made possible by the office of the secretariat or the high level meetings held on routine basis, the exposure to the information could also reduce uncertainty about others' intentions. Then, parties are exposed to settle dispute amicably – through the conduct of diplomacy- rather than to the threat of military force. In short, creating international institutions supposedly helps to better manage the use of force. Thus, the effort to build institutions for liberals is an effort to make peaceful cooperation more a certainty.

Nevertheless, empirical evidence is mixed. Even with the building of many global and regional institutions in international history, and especially since the ending of World War II, the purpose and the effectiveness of them in fostering peaceful and cooperative relations among states remains an open question. What realists continue to see as a false promise, liberals continue to see as a true possibility.

Background of the Problem

The modern history of international relations is often traced back to the Peace of Westphalia of 1648¹. In its aftermath, the world order “effectively affirmed the state as the

¹ It denoted two peace treaties drafted during 1646-1648 and signed in Osnabrück on

unchallenged guarantor of domestic order and legitimizer of external war” (Howard 2001, 16).

As a result, these peace treaties did not bring Europe peace so much as change the terms of war.

The use of force by states grew more intense and costly, with the development of more lethal equipment and technologies to arm the standing forces.

Westphalia helped to institute the legal concept of sovereignty, to encourage the rise of the independent nation-state and to foster the institutionalization of diplomacy and armies. As Mowat (1966, 13) argues, the advent of Europe becoming a nation-state, and each state maintaining a sovereign status, conflicts and war had become more likely to occur. To further aid the likeliness of conflict, there were no sovereign agents or magistrates with authority above or between the states. Due to this, international anarchy existed between the states.

Since states police themselves, international political life does give rise to security competition. A key feature of this competition is balance of power politics, as states seek to offset or attain military advantages of rivals. It is a reliance on relative distributions of military force as a means of bargaining and negotiation. As Howard (2001) argues, balance of power politics produce a kind of negative peace; or simply the absence of war. The search for something more durable and accepted, what Howard calls a kind of positive peace, is what drives the building of institutions.

The institution of war persisted as part of the international order in eighteenth-century Europe, mostly because of the efficacy, morality, and desirability of power. War was a necessary tool in the conduct and preservation of state power. States had the right, again in the name of

May 15, 1648 and in Münster on October 24, 1648, which ended the Thirty Year’s War in the Holy Roman Empire, and the Eight Year’s War between Spain and the Republic of the United Netherlands. Treaty of the Pyrenees of 1659, which ended the European wars of religion (Franco-Spanish War, 1635-1659) was also considered part of the Westphalia Peace Treaty. Source: http://en.wikipedia.org/wiki/Westphalian_peace

sovereignty, to go to war when they thought it necessary –a means to an end. In this practice, state policy was a perfectly adequate *jus ad bellum*. Emer de Vattel, a Swiss philosopher who laid the foundation of modern international law and political philosophy, challenged this just war's doctrine (quoted in Howard 2001, 25). He contended that when two parties believe themselves to be in the right, with neither superior in authority and with no party having authority to adjudicate between them, the right to go to war to preserve justice and right a wrong become irrelevant. What mattered then was *jus in bello*: to conduct war in such a manner it results in the least damage to international society and makes the conclusion of a stable peace possible.

Kant in enunciating the 'perpetual peace' argued that reform of states is taken to be the *sine qua non* of world peace. Kant defined republican states, which would voluntarily agree to be governed by a code of law as the standard of the good state. This type of state, where leaders are accountable to the people, decreases incentives for war and its casualties and lost resources. Further, republican states are more likely to abandon international anarchy and enter a league of nations to obtain collective security (Howard 2001, 30).

Kant's essay, *Perpetual Peace: A Philosophical Sketch*, was written in 1795. Though it outlined the concept of a peaceful community, the movement toward institutionalized peace gained its momentum after World War I, with the establishment of the League of Nations on January 25, 1919. Prior to this, the Concert of Europe had made every attempt to maintain the status quo between the European states and thus avoid war. This same period also saw the development of international law with the first Geneva Conventions being adopted in 1864, which established laws about humanitarian relief during war, and the Hague Conventions of 1899 and 1907, which also governed rules of war, and the peaceful settlement of international disputes. Despite opposition toward international institutions championed by realists and other

skeptics, these periods obviously gave voice to liberals, who viewed such institutions as promising and as ways to foster cooperation under some circumstances as well as help politicize issues.

However, that war is a possible outcome of state bargaining and negotiation once again showed relevance. The Second World War broke out on September 1, 1939 and at the time it ended, on September 2, 1945; some 40 out of 60 million people who had died in the war were civilians. The deadliest conflict in human history had made the League of Nations come to its end since the onset of World War II, and obviously showed that the League had failed its primary purpose. Not only had the war left the political alignment and social structure of the world significantly changed, but it also provided another basis for the second attempt of institutionalized peace. The United Nations Organization officially came into existence on October 24, 1945 upon ratification of the Atlantic Charter by the five permanent members of the Security Council and by the majority of the other 46 countries.

The main victory gained by the Allied forces of World War II was the successful effort to try the perpetrators of peace by setting up the International Ad-Hoc Tribunal at Nuremberg² and Tokyo. Following these, the international community recognized the need to establish a permanent international court to deal with such atrocities. The UN General Assembly delegated the authority to start the preparatory work to the International Law Commission. By the early

² The Nuremberg Trials had a great influence on the development of international criminal law. The conclusions served as models for the following international covenants: The Genocide Convention (1948), The Universal Declaration of Human Rights (1948), The Principles of International Law Recognized in the Charter of Nurnberg Tribunal and in the Judgment of the Tribunal (1950), The Convention on the Abolition of the Statute of Limitations on War Crimes and Crimes against Humanity (1968), The Geneva Conventions on the Laws and Customs of War (1949), Protocol I of the Protection of Victims of International Armed Conflict and Protocol II of the Protection of Victims on Non-International Armed Conflicts. Source: http://en.wikipedia.org/wiki/Nuremberg_Tribunal

1950s, however, their work was pretty much undermined by the Cold War situation. In an attempt to try war crimes in the former Yugoslavia and in Rwanda, the international community established two other ad hoc tribunals in 1994, the International Criminal Tribunal for the former Yugoslavia or ICTY and the International Criminal Tribunal for Rwanda or ICTR.

Ever since, the need to establish a permanent court that would be able to extend its jurisdiction not only during the armed conflict but also during peacetime and in war became a necessity. Marler (1999) enunciated the needs to establish a permanent international criminal court by arguing that the court is a necessary tool to help human nature making societal progress possible. She further argued that the first respectable international attempts to enforce humanitarian laws proved to be extremely inefficient. One reason for this was sessions of negotiations, and a preparation for tribunals that usually lasted two years, resulting in the failure of smaller incidents being left unaddressed, or neglected. With the realization of these issues and their consequences, the necessity of a permanent international court was acknowledged as an essential component in the enforcement of international humanitarian laws (Marler 1999, 829-30).³

In addition, a permanent international criminal court is necessary in order to combat impunity. The Inter-Parliamentary Union argued that even after the world agreed to be guided by the Geneva Conventions, whether in times of peace, international war, or regional conflicts,

³ The phenomenon is called the tribunal fatigue. Roach argued, "The development and application of the ICTY's authority underscores some problems and limitations of ad hoc international criminal courts. First, international criminal tribunals have become costly and arguably inefficient. As of April 2005, the ICTY's total operating budget had reached nearly \$650 million. Second, the regional focus of such jurisdiction means those ad hoc international criminal courts can only target crimes that occur within a designated or defined territory or region. Lastly, it follows that the permanent members of Security Council will use their own veto power to block the prosecution of any of its own military personnel stationed in the area" (2006, 31-2).

states' atrocities against their own people continued to shock the conscience of human kind. The atrocities include war crimes, genocide, crimes against humanity, torture, extrajudicial executions, and involuntary disappearances. Such practices occurred throughout the world in the twentieth century, and the majority of the perpetrators have gone unpunished (IPU and OHCHR 2005, 55).

These circumstances culminated in the establishment of the ICC. The institution derives its mandate, jurisdiction, and authority to try the perpetrators of the crimes of genocide, crimes against humanity, war crimes, and the crimes of aggression⁴ from the Rome Statute that was adopted by 120 states in 1998, and later was signed by 139 states.

Legal Contours of the ICC

To facilitate the understanding of this study and to discuss the jurisdiction of the International Criminal Court in the right contexts, the following terms are defined:

1. Rome Statute 1998, Article 6, genocide “means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups, as such: (a) killing members of the groups; (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

⁴ The International Criminal Court does not currently have jurisdiction over the crime of aggression. An amendment to the Rome Statute of the International Criminal Court, which would grant ICC the jurisdiction over the crimes of aggression, is in the process of ratification by the Assembly of State Parties, the legislative body of the ICC. Under no circumstances, however, the ICC will be able to exercise jurisdiction over the crimes of aggression before January 1, 2017. Source: http://en.wikipedia.org/wiki/International_Criminal_Court. Besides, Rome Statute 1998 Article 5 concludes, “The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”

measures intended to prevent births within the group; and (e) forcibly transferring children of the group to another group.”

2. Rome Statute 1998, Article 7 Paragraph 1, crime against humanity “means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”
3. Rome Statute 1998, Article 8 Paragraph 2, “The Court should have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.” (See Appendix A – War Crimes under the Rome Statute).

Purpose and Method

My purpose is to investigate the effectiveness of the ICC in its early existence. There are

currently seven cases under ICC' investigation and I selected the cases of Darfur, Sudan and the Democratic Republic of the Congo in my thesis. I selected these two cases for the following reasons. The referral of Darfur's case to the ICC was made by the United Nations Security Council through Resolution 1593 adopted on March 31, 2005. The referral marked the first referral of United Nations Security Council to the ICC. It was the only way to deal with human rights atrocities in Darfur since Sudan is not a state party to the Rome Statute. Joseph Kabila, the incumbent president of the Democratic Republic of the Congo, referred the situation in his home country to the ICC on April 2004. It became the first case for the ICC. Unlike Sudan, DRC is a state party to the Rome Statute.

To support my analysis, I use information in the literature and from interviews. The interviews were to gain experts' insights into my indicators of ICC effectiveness. In short, the interviews were necessary to confirm my hypothesis about naming and shaming which is little noted in the literature that assesses the effectiveness of the ICC.

For the interviews, the approval from the Institutional Review Board of the University of Arkansas was granted through Protocol No. 10-12-353 dated December 14, 2010 (See Appendix B and C for IRB Initial and Modifying Protocols). I sent questionnaires' to three people one of whom declined to participate in the interview. Two other interviewees, however, Professors Stephen M. Sheppard and Dustin N. Sharp proved helpful.

Sheppard is a member of the graduate faculty in the University of Arkansas School of Law and adjunct professor in Political Science. Sharp is an Assistant Professor at the Kroc School of Peace Studies at the University of San Diego where he teaches courses on transitional justice and international human rights law and advocacy. He previously served at the U.S. Department of State as an attorney-adviser for the Bureau of International Organization Affairs.

PART II

THE DEBATE OVER INTERNATIONAL INSTITUTIONS AND THE ESTABLISHMENT OF THE ICC

Human rights pervade much political discussion since the end of World War II; the misery of war was a massive affront to human dignity. Along with the devastated post-war situation, the international community realized the need to prevent such tragedies from recurring again in the future. One repercussion was a focus on the institutionalization of peace and the establishment of the United Nations to fulfill the promise of institutions to decrease the incidence of war. Unlike its predecessor, the United Nations is equipped with power to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” as well as the power to pursue military or non-military options in order to “restore international peace and security.”⁵

At the same time, as the attempt to institutionalize peace grew bigger, the UN took the lead in developing an international bill of rights and some legally binding treaties, as summarized in table below. Today, the various international human rights treaties and instruments sponsored by the UN have been ratified by most countries, which have consequently represented the only universally recognized value system.

⁵ Chapter VII of the United Nations Charter – Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 39.

Table 2.1
Summary of Human Rights Instruments and Treaties Sponsored by
The United Nations

No.	Categories	Description	Notes on Ratification
1	International Bill of Human Rights		
	• Universal Declaration of Human Rights (UDHR)	Adopted on December 10, 1948	
	• The International Covenant on Civil and Political Rights (ICCPR)	Adopted on December 16, 1966; Entry into force on March 23, 1976. The Human Rights Committee monitors compliance.	Acquired 72 signatories and 167 parties (as of September 2011)
	• First Optional Protocol to the International Covenant on Civil and Political Rights		Acquired 113 parties and a further 35 signatories (as of May 2011)
	• Second Optional Protocol to the International Covenant on Civil and Political Rights	Adopted on December 15, 1989; Entry into force on July 11, 1991	Acquired 73 parties (as of September 2011)
	• The International Covenant on Economic, Social and Cultural Rights (ICESCR)	Adopted on December 16, 1966; Entry into force on January 3, 1976. UN Committee on Economic, Social and Cultural Rights monitors compliance	Acquired 160 parties (as of July 2011)
	• Optional Protocol to the International Covenant on Economic, Social and Cultural Rights	Adopted on December 10, 2008; Opened for signature on September 24, 2009	Would entry into force when ratified by 10 parties
2	Core Human Rights Treaties		
	• The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	Adopted on December 21, 1965; Entry into force on January 4, 1969. The Committee on the Elimination of Racial Discrimination monitors compliance	Acquired 174 parties and 85 signatories (as of February 2011)
	• The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	Adopted on December 18, 1979; Entry into force on September 3, 1981. The Committee on the Elimination of Discrimination against Women monitors compliance	187 states had ratified or acceded to the treaty (as of July 2011)
	• The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Adopted on December 10, 1984; Entry into force on June 26, 1987. The Committee against Torture monitors compliance.	Acquired 147 parties (as of September 2010)
	• The Convention on the Rights of the Child	Adopted on November 20, 1989; Entry into force on September 2, 1990	As of November 2009, 194 had ratified the convention except Somalia and the USA
	• The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	Adopted on December 18, 1990; Entry into force on July 1, 2003. The Committee on Migrant Workers monitors compliance	

However, the question regarding the effectiveness of the culture of compliance that is monitored by UN bodies, and the ability to constrain states' criteria for waging war remained open to debates. Part of what makes the legal system work is a culture and habit of compliance (Sharp, 2011). Though states may recognize these value systems would they comply? In addition, would compliance enable the UN to provide options for non-military actions? More broadly, how might an international society be structured in order to achieve this coherence?

Realism and liberalism offer different answers for these matters. To realists, institutions are suspect. Mearsheimer argued, "Institutions do not have significant independent effects on state behavior (1995, 1). To liberals, institutions matter. Keohane contended, "Institutions help government to overcome collective action problems by providing information and reducing the cost of transactions" (1984, chapter 6). As regards the impact of human rights' treaty ratification, realists remain skeptical that treaty ratification would have an impact on states compliance with the human rights regime. Liberals disagree.

Theoretical Debate over International Institutions: Realist and Liberal Perspectives

Realists are skeptical about the prospect of meaningful international cooperation. They make five assumptions. First is that the international system is one of anarchy. Second is that states possess military capability; it is the prominent element in supporting political power. *Si vis pacem para bellum* (if you want peace, prepare for war) becomes a justification for the arms race. Third is that states can never be certain about the intentions of others, so no state could guarantee that another state will not use its military might against another. Ironically, if a state prepares to police itself by increasing its military might, other states become less secure. In short, one party's self-policing effort would consequently diminish another state's security. The fourth

assumption is that the leitmotiv of state foreign policy is survival of the fittest. Thus states seek to maintain sovereignty and protect national interests. The fifth assumption is that states are rational actors, therefore they think strategically about how to survive in the anarchic world, and rely on the threat of force in order to manage power. Realists thus expect states to maintain an adequate power potential through balance-of-power and deterrence in order to avoid war (Mearsheimer 1994/1995, 10).

In balancing power, states make rational calculations about their position relative to others in the system. As one state increase its own military capabilities, other states respond in kind in order to maintain their relative military positions. The goal of deterrence is to prevent the outbreak of war by the threat of the use of massive (nuclear) retaliation. Deterrence requires that information about threat must be conveyed to the opponent. Since knowing that an aggressive action will be countered by another party's second-strike capability, and because destruction is assured for both side; this results in the opponent deciding not to resort to force and destroy its own society.

According to realists, international human rights regimes would not make much difference in reality. For one thing, realists claim that such regimes lack an effective monitoring and enforcement mechanism. As realists see it, international organizations are "captured" by powerful states and their effectiveness relies on the states resources. Therefore, there would be little of any meaning that could be accomplished until great powers weigh in –that only happens whenever it serves their political interest. Like their pessimistic view toward the international systems, realists believe there would be no effect from human rights treaty ratification on the countries' human rights performance.

From a regime theory perspective, "international treaties create binding obligations on the

ratifying parties, which countries aspire to honor” in the spirit of *pacta sunt servanda*: agreements are to be kept and honored (Neumayer 2005, 928). Otherwise, states would not engage in a long process of negotiation to disobey codes of conduct rule in effect by such treaties. Treaty norms are usually set to a standard that states cannot immediately comply with because long term goals and desirable results are perceived to be accomplished through attempting to meet higher standards. For this reason, full compliance is neither necessary nor sufficient so long as overall compliance is achieved.

Regime theory also suggests that states observe high standards in compliance, which would usually serve as the safeguard of treaties. It does mean that in low standard countries, the goal is to generate political concern, set normative goals, maintain communication among members, and legitimize the transfer of official development assistance in order to boost low-standard countries’ performance of compliance. In such a relationship, economic sanctions are rarely used against low-standard countries, because, what matter most, is the technical assistance and aid for tackling insufficient compliance capacity. Through this perspective, scholars would cautiously remain optimistic of the effectiveness human rights treaty ratifications have on countries’ human rights performance knowing that the achievement of long-term desirable goals are safeguarded by a mechanism that relies on the political will of high standard countries.

A transnational legal process model works as follows, “The hope at the international level is that over time nations would follow international law out of habit because they have in fact internalized the norms” (Sharp, 2011). Koh contends that transnational legal process model suggested about a three-step process of action through which members of epistemic human rights community internalize norms codified within international treaties: interaction, interpretation, and internalization (Koh quoted in Neumayer 2005, 929). Epistemic human rights community

consists of diplomats, NGO activists, academia, and individuals transnational norm entrepreneurs who engage in a series of interactions, in an attempt to negotiate an international human rights treaty, which involves the member into various stages of drafting and preparatory works. Later, state parties will come to an agreement on the final text to be concluded; in which represents the common norm they share similar comfort. Once the final text is adopted, the signing parties have an obligation to ratify the treaty into their national law.

Since a change in preference is possible, the regular follow-up meetings would provide opportunities to persuade non-complying parties to also join the group. International normative pressures reinforce this possibility:

“Both national interests and national identities are social constructs. [...] They are ideational and ever changing and evolving, both in response to domestic factors and in response to international norms and ideas. States share a variety of goals and values, which they are socialized into by international and nongovernmental organizations. Those norms can change state preferences, which in turn can influence state behavior. [...] In short, the state ‘makes’ the system and the system ‘makes’ the state” (Mingst 2008, 105).⁶

Regular interactions can, therefore, produced share interests and expectations. In addition, socializing powers in the system can lead states to further accept and value the standards in international norms as right or correct, or as an alternative to bearing the cost of non-conformity; such as dissonance and shunning.

Liberal thinkers often use the European Union (EU) as an example of states’ ability and willingness to coexist in a community and as an example of state willingness to weight the rule of law.⁷ In just half a century of existence, the EU has achieved remarkable things; it has

⁶ For more information, see Martha Finnemore’s *National Interest in International Society*, (Ithaca: Cornell University Press, 1996). For an insightful theoretical explanation of constructivism, see chapter one.

⁷ O’Neil argued, “The European Union came on the heels of a devastating wars between these countries that left millions dead. It was in fact the divisions in Europe that served as the

delivered peace between its members, prosperity for its citizens, created a single European currency that is used by 17 out of 27 member states and a frontier-free single market where goods, people, services and capital move around freely. Since its founding, the EU has grown from six to twenty seven countries, and due to its growth, it has become a major trading power, as well as a world leader in fields such as environmental protection and official development assistance (ODA). The success of the EU is the result of its unique nature and the way it functions.

While the countries that make up the EU remain independent sovereign nations, they pool their sovereignty for the purpose of gaining strength and world influence, which none of them could have obtained on their own. In practice, this means that the member states delegate some of their decision-making powers to the European institutions they have created. One purpose is for decisions on matters of joint interest to be made democratically at a European level.

Today, the EU is evidence in support of liberal views on the possibility of change in international political life as a result of constant incremental steps and the involvement of new actors and the forging of new relationships. These new relationships are sometimes driven economic interdependence. More generally, for liberals, countries increasingly observe the need to conduct trade, exchange goods and services, converge with the gaining of mutual understanding, and set democracy as the standard for conducting government affairs, in an attempt to avoid war in the future.

Understanding the prominent aspect of politics and law within international relations,

catalyst for integration. In the aftermath of World War II, a number of European leaders argued that the repeated conflicts in the region were caused by a lack of interconnection between the countries themselves, which in turn fostered insecurity, inequality, and nationalism. These leaders believed that if their countries could be bound together through economic, societal, and political institutions, they would reject war against each other as an irrational act” (2010, 177-78).

liberals remain optimistic of the positive consequences that result from international human rights regimes within political democracies, and where the rule of law prevails. Glen and Murgu (2003) supported this argument quantitatively when they analyzed whether human rights treaty⁸ ratifications had a positive correlation with improvement of global human rights records, and whether observed improvements within a country's human rights record correlated with recent human rights treaty ratifications.

Neumayer (2005) also supported the liberal argument quantitatively. He studied whether international human rights treaties⁹ made a real impact by relating ratification to improved respect for human rights. He suggested that human rights treaties often improved respect for human rights, which are dependent on the extent of democracy and the strength of civil society. The theory of transnational human rights advocacy network argued that improvement in human rights performance is only possible in countries where “a cross-border collective action created to promote compliance with universally accepted norms” are strong (Schmitz ____, 1). Such a network consists of domestic NGOs and Civil Society Organizations (CSOs) with linkages to human rights organizations at the international level (Amnesty International, Human Rights

⁸ The study examined the following human rights treaties: International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Covenant on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of the Child.

⁹ The study examined the following universal and regional human rights treaties: International Covenant on Civil and Political Rights; First Optional Protocol to the International Covenant on Civil and Political Rights; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 21 and 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; European Convention for the Protection of Human Rights and Fundamental Freedoms; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; American Convention on Human Rights; Inter-American Convention to Prevent and Punish Torture; and African Charter on Human and People's Rights.

Watch, International Crisis Group, Global Witness, etc.), and parties and media committed to human rights. Improvement in human rights is a five-step process through which the human rights violating government moved from empty promises (unconstrained repression) to compliance (rule-consistent behavior), having undergone a period of denial, tactical concessions, and prescriptive status (Neumayer 2005, 930; Schmitz ____, 11).

At first, opposing-domestic civil society organization is lacking the influence to constrain human rights violations committed by the state and its repressive apparatus, so the country could manage to escape the spotlight easily and commit more violations. However, the accumulation of gross human rights violations condoned by the regime pull the trigger off, thus forcing the domestic movement to appeal to their international counterpart to put the regime on the spotlight; disseminating information about the violations, shaming the offending regime, generating international public outrage against it and persuading stronger powers to target the country with open criticism and policy measures (Neumayer 2005, 930-31).

The targeted-regime often reacts with denial and oppresses political activists; cracks down their movements, imprisons the political activists, performs summary execution, involuntary disappearances or torture, while at the same time denouncing the universality of human rights and calling the criticism as infringement of sovereignty. This is a very critical stage as domestic political movements lose their supporters and recruitment becomes much more difficult once the regime starts using terrors on its own people to counteract the demand for reform. The only hope left is with the advocacy networks at the international level to maintain the pressure until the regime starts to make some tactical concessions. Often, the regime underestimates the concessions they offer to diffuse criticism. The release of political prisoners, the lifting of some restrictions on civil liberties, as well as the withdrawal of some of the worst

human rights violations would indeed strengthen the domestic political movements to push for more.

Once it makes tactical concessions, the offending regime has little leeway to deny the validity of human rights in principle. The human rights improvements would stop being ad hoc and the ratification of human rights treaties would lead to legal or even constitutional changes, thus acquired its prescriptive status. Later, government's behavior becomes consistent with the human rights norms, where its officials no longer pursue human rights violations. If violations still happen, the perpetrators are more likely to be subject to state prosecution. The following table provide summary for the discussion.

Table 2.2

Summary of Theoretical Debates on Culture of Compliance toward Human Rights Treaties'

Ratification

Impact on Culture of Compliance	
Pessimism	Optimism
Realism (No effect)	[Optimism] Transnational Legal Process (Positive effects) [Cautious Optimism] Regime Theory (Possible positive effects in the long term dependent on political will of high standard countries) [Conditional Optimism] Liberalism (Positive effect dependent on the extent of democracy) Transnational HRs Advocacy Networks (Positive effect dependent on domestic human rights advocacy with international linkages)

Relevance of Naming and Shaming

One of the most effective methods for encouraging state compliance with human rights obligations, in relation to legal commitments accepted by ratifying international treaties, is the practice of focusing moral outrage upon violators, widely known as “naming and shaming”.

Cronin-Furman (2009) argued,

“The power and efficacy of ‘naming and shaming’ suggest that its persistent use must stem from more than just the inadequacy of legal enforcement: it is derived from U[niversal] D[eclaration of] H[uman] R[ights]’s encapsulation of the idea that human rights are accompanied by moral obligations” (177).

Conrad and DeMeritt (2011) shared the same thought. They argue that naming and shaming are international attempts to influence the domestic policy choice of ill-behaved governments. These attempts involve advocacy campaigns organized by other governments, international organizations, advocacy groups and the global news media, to shine negative publicity on the abuses (2-3).

Naming and shaming is “a popular strategy to enforce international human rights norms and laws” (Hafner-Burton 2008, 689) and indeed “an important part of moral advocacy” (Schmitz, 4). Bhagwati (2002) argued,

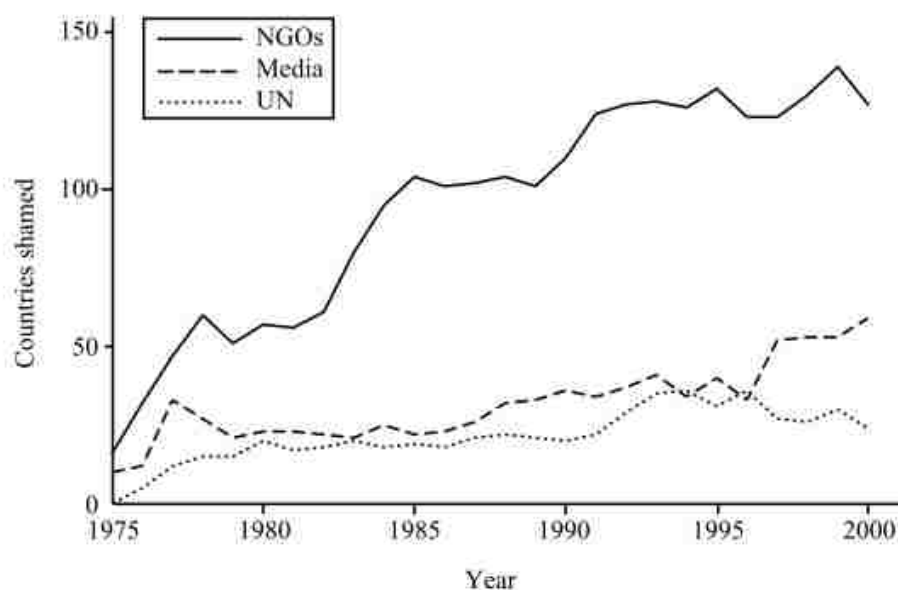
“...[T]he use of non-trade-sanctions approaches is for several reasons likely to be more effective than the use of trade sanctions in advancing social and moral agendas. So the common argument that ILO has no teeth, that is, no trade sanctions, is wrong. I would argue that God gave us not just teeth but also a tongue; and a good tongue-lashing, based on evaluations that are credible, impartial, and unbiased, can push a country into better policies through shame, guilt, and the activities of NGOs that act on such findings” (79).

Lebovic and Voeten asserted “shaming is possible because states share a sense of membership in international community” (quoted in Edwards et.al 2008, 393).

Transnational legal process theorists argue that states would rather engage in social-psychological conformity by joining international human rights regimes rather than bear the cost

of non-conformity, such as dissonance and shunning. Theorists of transnational human rights advocacy networks argue that shaming violators puts governments in the global spotlight for abuses. They see this as an effective way to challenge violators by using their tactical concessions to conform to human rights treaty norms to expose them. Indeed, NGOs, media and the United Nations Commission on Human Rights have used the strategy since 1975, such as shown by the following figure.

Figure 2.1 – Number of Countries Shamed Over Time



Reproduce from Hafner-Burton 2008, 690.

(Note: NGOs: naming and shaming by Amnesty International's press releases and background reports; Media: naming and shaming by Newsweek and The Economist's article on human rights; UN: naming and shaming by United Nations Commission on Human Rights' resolution condemning human rights violations).

Evidence from scholarly research on the effectiveness of naming and shaming for addressing human rights violations is mixed. Hafner-Burton (2008) analyzed the relationship between global naming and shaming and outcomes of government repression in 145 countries from 1975 to 2000. She generated data from Amnesty International press releases or a country's

background report, articles with human rights' content published in *Newsweek* and *The Economist*, and naming and shaming by UNCHR.¹⁰ She argued that whether or not naming and shaming would be followed by better government protections for human rights could be explained in three ways (691-94).

The first is that naming and shaming does not have any impacts toward the governments' human rights practices. She includes Israel – among the most common target of global spotlight, China, Colombia, Cuba, Indonesia, Iran, Nigeria, Palestine and Russia where naming and shaming have no apparent effect; severe human rights violations continue despite years of global spotlights.

The second is that naming and shaming can have unintended consequences, which applies to two different circumstances. On the one hand, the global spotlight may encourage domestic political movement(s) to constrain the abusive government. The offending government might respond by increasing the use of repression to keep them in power. Consequently, more political activists would be subjected to more severe abuses in the process of gaining respect in the long run. Thus, we observe that more human rights abuses follow the spotlight. On the other hand, the global spotlight may create a moral hazard, by providing incentives to the rebel groups, warlords, and militias to escalate their acts of violence while inadequately protecting civilians they used as human shields from retaliation by government's forces. This is especially common in many countries in Africa where agents of terror are gained enough military might to challenge

¹⁰ On March 15, 2006, United Nations Human Rights Council replaced the United Nations Human Rights Council (UNCHR). It is a subsidiary body of the United Nations General Assembly and serves as a UN principal mechanism and an international forum concerned with the promotion and the protection of human rights. Office of the United Nations High Commissioner for Human Rights (OHCHR), on the other hand, coordinates human rights activities throughout the United Nations system and supervises the United Nations Human Rights Council.

authority over resources, such as in the Democratic Republic of the Congo, Northern Uganda, Darfur-Sudan, etc.

The third possibility is persuasion, when naming and shaming resulted in the adoption of better practices and legislation afterward, which is dependent on the countries' degree of democracy. In sum, she concluded that governments shone globally for abuses often extensively continue their use of political terror while reducing some violations of political rights toward their subjects.

Busmann and Schneider (2009) examined whether or not the presence of the International Committee of the Red Cross (ICRC), a distinctively impartial, neutral and independent organization, and the international guardian of the Law of Wars, had a restrained effect on the conflict parties. They contended that the presence of ICRC in conflict zones is associated with more rather than fewer killings, committed both by government and rebel troops against the civilian population. Their finding suggested, "naming and shaming possessed by the ICRC as an instrument of deterrence is not sufficiently strong" (16).

Wright and Escribà-Folch (2009) studied how human rights' naming and shaming affected the risk of irregular and regular exits from power of authoritarian leaders. Their study contended different results for different type of regimes. In autocracies, naming and shaming signaled international disapproval to elites in the targeted country, an influence that could destabilize leaders since it creates an increasingly conducive opportunity to replace the incumbent. In personalist regimes, not only naming and shaming would increase the risk of irregular exit from power, due to the lack of peaceful means of replacing incumbent, but also would decrease the transfer of foreign aid and the conduct of international trade. Consequently, it

lowers incumbent ability to pay off domestic coalitions to enhance political survival.¹¹ In non-personalist regimes, naming and shaming would “increase the risk of regular turnover of power, but has little effect on the risk of irregular exit or international flows of aid and trade” (3).

Wong (2010, 1) contended that NGOs success in naming and shaming is “affected by the qualities of the domestic legal ambiguity surrounding the human rights violations and the imminence of death.” She generated data from Amnesty International Urgent Action letter-writing campaigns from 1974 to 2004, and argued that naming and shaming would be successful on cases of torture, arbitrary arrest and prisoner of conscience (POCs) due to the combination of high legal ambiguity and low imminence of death. In other combinations, human rights naming and shaming would likely fail. These include cases of extra judicial executions, disappearances, and death penalty.

DeMeritt (2010) analyzed the naming and shaming behavior of Amnesty International, *The Economist* and *Newsweek*, and the UNCHR to influence the intentional and extralegal killing of civilians. She operationalized the principal-agent relationship arguing that in order for killing to take place, it requires the existence of a government (the principal) that gives orders to kill, and perpetrators (the agent) for executing the order. She concluded that Amnesty International’s naming and shaming, through its press releases and country’s background reports, decreases the likelihood of killing. Her finding suggested that media attention had no significant impact on

¹¹ Bueno de Masquita and Smith modeled how the size of leader’s coalition and government revenues affected trades between policy concession and aid. The bigger the coalition size is, the more incumbent will rely on public goods to reward supporters, making it difficult to compensate for policy concessions. However, small-coalition leaders rely more on private goods to retain office, making it easier to grant policy concessions for aid. Using data of bilateral aid transferred by OECD from 1960 to 2001, they contended that aid transfers occurred according to the political survival interests of donor and recipient government leaders. This is the harmful of foreign aid to the citizens of the recipient states; they get policy they would rather not have and the flow of foreign aid helps their autocratic incumbent leadership survive and continue to pursue such unpopular policies in the future.

government killing. Nonetheless, UNCHR's naming and shaming decreases civilians death toll.

Hendrix and Wong (2010, 2) incorporated a dataset of more than 12,000 Amnesty International Urgent Action's campaign to find whether or not direct communication with violator states had a positive impact on respect for human rights. They argued that positive outcome could happen for two reasons. First is that "targeting violators bypasses Western policymakers, [...], and in doing so recognizing the legitimacy of target states even as specific practices are condemned." Second is that direct communication, which engaged NGO with states via letter writing by concerned individuals, created common knowledge of committed abuse, and placed violator states' out of its comfort zone for believing its ill behavior act went undercover.

Conrad and DeMeritt (2011, i) studied the relationship between international human rights advocacy and state repression substitutability; what is the likelihood that states would employ one means of repression over others. Their research constituted certain types of human rights violation, especially political imprisonment and one-sided government killing, - violations shamed in UNCHR's resolutions from 1995 to 2005. Their finding suggested that state leaders do indeed engaged in repression substitution: "UNCHR's naming and shaming of one type of physical integrity rights often leads to increases in other types of repression, especially in democracies."

Krain (forthcoming) studied the effectiveness of naming and shaming campaigns by Amnesty International, The Economist, Newsweek, and UNCHR in reducing the severity of genocides or politicides. He incorporated the PITF data of genocides and politicides from 1976 to 2008 and contended that the international naming and shaming had "significant ameliorative effects" to save civilians' life. His finding confirmed the importance role played by transnational advocacy networks on naming and shaming.

In sum, the overall assessment in the literature about the real and potential effectiveness of naming and shaming confirms that it is a popular strategy to enforce compliance with international human rights norms and laws and to challenge perpetrators of human rights violations. Thus, it has sufficient ameliorative effect to save civilian life. Given the inadequacy of a legal enforcement mechanism at the international level, voice and shame can be an effective way to influence domestic policy choice of states and to uphold obligations to respect, protect, and fulfill human rights principles.

Establishment of the ICC

The rationale for establishment of the ICC is that serious perpetrators of crimes against humanity, genocide, and war crimes must be punished. The great development in international law that was the result of the creation of International Military Tribunals at Nuremberg and Tokyo after the World War II represented the beginning of the codification of rules of law designed to protect individuals from the atrocities committed by their own governments (Ratner et.al 2009, xlv). These two ad-hoc tribunals were also the first to hold individuals accountable for violations of human dignity.

The Nuremberg tribunals specifically had three jurisprudential derivations concerning the protection of individuals (Ratner et.al, 7). First, it paved the way for the International Committee of the Red Cross as a controlling authority for international humanitarian law codification. Second, it provided a foundation for the development of international human rights law. The international community came to realize that government could commit human rights crimes in peacetime; therefore, these atrocities have to be regulated by international law. Third, “it laid the groundwork for further elaboration of international law on individual criminal responsibility for

violations of international humanitarian and human rights law” (Ratner et.al, 7).

The study of individual accountability for human rights atrocities must consider four interrelated bodies of law¹², they are:

- a. International human rights law, which refers to the body of international law aimed at protecting the rights of individuals against their own governments or other actors in the international community that might violate their rights.
- b. International humanitarian law or the law governing the conduct of armed conflict. It is rooted on The Law of The Hague and The Law of Geneva, trying to limit the war making methods and providing protections to innocent civilians during wartime.
- c. International criminal law, which refers to the international law assigning criminal

¹² See the following literatures for more discussion on each development of the four bodies of law: Theodor Meron, ‘Some Reflections on the Status of Forces Agreements in the Light of Customary International Law,’ in *The International and Comparative Law Quarterly* Vol. 6.4, 1957; Theodor Meron, ‘Norm Making and Supervision in International Human Rights: Reflections on Institutional Order,’ in *The American Journal of International Law* Vol. 76.4, 1982; Theodor Meron, ‘On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for A New Instrument,’ in *The American Journal of International Law* Vol. 77.3, 1983; Theodor Meron, ‘Reform of the Lawmaking in the United Nations: The Human Rights Instance,’ in *The American Journal of International Law* Vol. 79.3, 1985; Theodor Meron, ‘On A Hierarchy of International Human Rights,’ in *The American Journal of International Law* Vol 80.1, 1986; Theodor Meron, ‘The Geneva Conventions as Customary Law,’ in *The American Journal of International Law* Vol. 81.2, 1987; David Weissbrodt, ‘Humanitarian Law in Armed Conflict: The Role of International Nongovernmental Organizations,’ in *Journal of Peace Research* Vol. 24.3, 1987; Theodor Meron, ‘War Crimes in Yugoslavia and the Development of International Law,’ in *The American Journal of International Law* Vol. 88.1, 1994; Theodor Meron, ‘Extraterritoriality of Human Rights Treaties,’ in *The American Journal of International Law* Vol. 89.1, 1995; Theodor Meron, ‘International Criminalization of Internal Atrocities,’ in *The American Journal of International Law* Vol. 89.3, 1995; Theodor Meron, ‘The Continuing Role of Custom in the Formation of International Humanitarian Law,’ in *The American Journal of International Law* Vol. 90.2, 1996; Theodor Meron, ‘War Crimes Law Comes of Age,’ *The American Journal of International Law* Vol. 92.3, 1998; Theodor Meron, ‘The Marten Clause, Principles of Humanity, and Dictates of Public Conscience,’ in *The American Journal of International Law* Vol. 94.1, 2000; Theodor Meron, ‘The Humanization of Humanitarian Law,’ in *The American Journal of International Law* Vol. 94.2, 2000; and Theodor Meron, ‘Revival of Customary Humanitarian Law,’ in *The American Journal of International Law* Vol. 99.4, 2005.

responsibilities for certain serious violations of international law. Roach noted that the link between state sovereignty and accountability is the most essential feature of international criminal law's evolution (19).

- d. The domestic law of the state, which its codifications provide legal framework for other methods of accountability, for example fact-finding commissions, individual civil liability, truth and reconciliation commission, and repatriation of IDPs. (Ratner et.al, 9-11)

The ICC incorporated those four bodies of law in its legal foundation, the Rome Statute, which entered into force on July 1, 2002, thus marking the establishment of the ICC. The adoption of the Rome Statute on July 17, 1998 during the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome, Italy, revived the half of century's dormancy of international community's effort to the pursuit of collective goods aimed at closing the political, practical, and judicial gaps that have long fostered a culture of impunity.¹³

The ICC differs from the International Court of Justice (ICJ) in important respects. The ICC is a supranational entity that can enforce international law of personal responsibility against

¹³ Roach called the establishment of the ICC in order to challenge the link between sovereignty and impunity (19), while Broomhall (2003) argued that it was the result of the developing works around international criminal law that presented a challenge between the sovereignty of the powerful states and the pursuit of justice, peace and human rights (vii). See Mahnouch H. Arsanjani, 'The Rome Statute of the International Criminal Court,' in *The American Journal of International Law* Vol. 93.1, 1999; Indira Rosenthal, 'Making the International Criminal Court Work, A Handbook for Implementing the Rome Statute,' in the *Human Rights Watch Report* Vol. 13, September 2001; Marc Weller, 'Undoing the Global Constitution: UN Security Council Action on the International Criminal Court,' in *International Affairs* (Royal Institute of International Affairs) Vol. 78.4, 2002; Dapo Akande, 'International Law Immunities and the International Criminal Court,' in *The American Journal of International Law* Vol. 98.3, 2004; and William A. Schabas, *An Introduction to the International Criminal Court*, Third Edition, (Cambridge: Cambridge University Press, 2007) for more insightful and deeper analysis toward the establishment of the ICC.

individuals, but only with respect to crimes committed after the entry into force of the Statute and has no retroactive effect. While International Court of Justice is the judicial organ of the United Nations whose functions are to decide legal disputes submitted to it by states and to provide advisory opinions on legal questions.

Unlike previous war crimes courts with jurisdiction limited to specific conflicts, the ICC is a permanent institution whose jurisdiction extends to the following circumstances:

- a. Where the person accused of committing crimes is a national of a State Party
- b. Where the alleged crimes was committed on the territory of a State Party
- c. Where a situation is referred to it by the UN Security Council (where the Court can not otherwise exercise its jurisdiction)

The latter provides the Court a circumstance in which individuals from countries that are not parties to the Rome Statute may be subject to its jurisdiction. However, the ICC is complementary to national criminal procedures, meaning that the prosecutions for international crimes are expected to take place in domestic courts.¹⁴

The Rome Statute strengthens and consolidates the doctrine of universality in three ways (Weller 2002, 694). First, it refined the list of international crimes that attract genuinely universal jurisdiction. The Statute covers both war crimes, which can be committed only during armed conflict, and gross human rights violations that can be committed in peacetime and in war. The Statute's list of war crimes is extensive; it includes acts prohibited by the 1949 Geneva Conventions on the laws of war, and crimes in internal armed conflict. The Statute also contains

¹⁴ Rome Statute 1998 Article 1 concludes, "An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute."

special rules that extend the Court's war crimes jurisdiction to civil wars, which historically not regulated by international law. For the first time in a legally binding international treaty, the Statute contains a definition of gender, and includes gender-based crimes both as crimes against humanity and war crimes (Spees 2003, 1243)¹⁵. Second, the Statute affirms the classic international law jurisdictional framework, that States have duty to exercise their jurisdiction over such crimes. Third, it establishes a new means of trying to punish, and thereby deter future cases of gross human rights violation through the establishment of the International Criminal Court to organize the exercise of jurisdiction by way of supranational entity.¹⁶

Under the Rome Statute, there are two forms of criminal responsibility. Individual criminal responsibility (Article 25) is when the person commits a crime within the jurisdiction of the Court individually or jointly with or through another person; by ordering, soliciting or

¹⁵ Both the International Military Tribunals at Nuremberg and Tokyo ignored rape and violence against women in their judgments. By contrast, both the ICTY and ICTR statutes include rape as a crime against humanity, and they succeeded in prosecuting various forms of sexual violence as instruments of genocide, crimes against humanity, and crimes of war have developed the international humanitarian law (Meron(g), 567). The inclusion of gender-based crimes in the ICC's jurisdiction had to be attributed to the Women's Caucus for Gender Justice's advocacy to correct deficiencies of sexual crimes and gender violence in existing humanitarian law, as well as to mainstream gender in the ICC. This coalition was formed in 1997 as part of the Coalition for an International Criminal Court and intended to infuse the discussion during the Rome Conference with a gender perspective and advance the recognition of women's right as human rights. Their works were also extraordinary in regard to the adoption of gender definition in the Rome Statute, the first in a legally binding international treaty (Article 7(3)). See Pam Spees, 'Woman's Advocacy in the Creation of the International Criminal Court: Changing the Landscapes of Justice and Power,' in *Signs* Vol. 28.4, 2003 for more insightful explanation.

¹⁶ The Rome Statute bestowed important supranational aspects on the ICC consisting of three elements that could be present alone or all together in three circumstances, as described by Amitai Etzioni in *Political Unification Revisited: On Building Supranational Communities* (2001). Other international organizations that also have supranational aspects are European Court of Human Rights, Inter-American Court of Human Rights, International Court of Justice, International Seabed Authority, International Tribunal for the Law of the Sea, North American Free Trade Agreement, Organization for the Prohibition of Chemical Weapons, United Nation Security Council, United Nations General Assembly, and World Trade Organization. See Appendix E for further referrals to the ICC's supranational elements and its comparison to those of the International Court of Justice.

inducing the commission of a crime; and by aiding, abetting or otherwise assisting to the commission or attempted commission of a crime. Commanders or other superiors' responsibility (Article 28) is when a military commander, person effectively acting as a military commander, or a superior fails to exercise control over the circumstances where he or she should have known that the forces or subordinates under his or her effective command were committing or about to commit crimes within the jurisdiction of the Court; he or she should prevent or repress the commission of such crimes or submit the matter for investigation and prosecution; and the crimes concerned the activities that were within the effective responsibility and control of the superior.

Pursuant to the Rome Statute, the Prosecutor can initiate an investigation on the basis of referral from any State Party or from the United Nations Security Council.¹⁷ The Prosecutor can also initiate investigations *proprio motu* on the basis of information received from individuals or organizations. Despite the fact that the International Law Commission did not allow a prosecutor to initiate investigations on his own, but the Preparatory Committee suggested otherwise; "an independent prosecutor was needed as a condition for maintaining and promoting the independence of the ICC *vis-à-vis* the Security Council" (Roach 2006, 33).

Prior to the Rome Conference, in March 1998, Germany and Argentina introduced a proposal to accommodate the dividing State delegations on this issue; the Prosecutor *proprio*

¹⁷ Rome Statute, Article 13 concludes, "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provision of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

motu powers have to be accompanied by a mechanism to check his discretion at an early stage of the investigation. Therefore, the decision would be subject to judicial review by a Pre-Trial Chamber. The Prosecutor could commence the investigation only after being granted authorization by a Pre-Trial Chamber. (Bergsmo and Pejic' quoted in Danner 2003, 515; and Danner 2003, 514-15).

To date, the Prosecutor has opened investigations into seven situations: the Democratic Republic of the Congo, Uganda, the Central African Republic (all of which referred situations occurring on their territories to the Court), Darfur-Sudan (the case was referred by the UN Security Council through Resolution No. 1593 adopted on March 31, 2005), Libya Arab Jamahiriya (it was referred by the UN Security Council through Resolution No. 1970 adopted on February 26, 2011), Republic of Kenya (on March 31, 2010, the Pre-Trial Chamber II granted the Prosecutor authorization to open an investigation *proprio motu*), and Côte d'Ivoire (Pre-Trial Chamber III granted the authorization to open an investigation *proprio motu* on October 3, 2011).

The jurisdiction granted to the ICC allows it to send a very strong message that grave breaches of international crimes would be prosecuted. The work of the ICC is most effective in giving voice to non-state actors, regularizing ways of bringing international voices into the process, providing information to other stakeholders, and naming and shaming as a way to focus international attention. The table below summarizes investigations by the ICC as of October 2011.

Table 2.3

Summary of Investigations and Prosecutions by the International Criminal Court As of October 31, 2011

Situation and Referral	Individuals Indicted ¹	Indicted ²				Transfer to the ICC/Initial Appearance ³	Confirmation of Charges Hearing/ Result	Trial Result	Status
		Date	Genocide	Crimes Against Humanity	War Crimes				
Democratic Republic of the Congo (ICC-01/04) by the government of the DRC Referral: 04/19/2004 Investigation opened: 06/23/2004	Thomas Lubanga Dyilo	02/10/2006	-	-	3	03/17/2006 03/20/2006	9-28 November 2006 Confirmed 01/29/2007	01/26/2009 – 08/26/2011	In ICC custody, Trial Chamber I closed on 26 August 2011, judgment pending
	Bosco Ntaganda	08/22/2006	-	-	3				Fugitive
	Germain Katanga	07/02/2007	-	3	6	10/17/2007 22/10/2007	27 June-18 July 2008	Began 11/24/2009	In ICC custody, trial before Trial Chamber II ongoing
	Mathieu Ngudjolo Chui	07/06/2007	-	3	6	02/06/2008 02/11/2008	Confirmed 09/26/2008		
	Callixte Mbarushimana	09/28/2010	-	5	6	01/25/2011 01/28/2011	16-21 September 2011 Result pending		In ICC custody, pre-trial phase before Pre-Trial Chamber I ongoing
Northern Uganda (ICC-02/04) by the Ugandan government Referral: 01/29/2004 Investigation opened: 07/29/2004	Joseph Kony	8 July 2005	-	12	21				Fugitive
	Vincent Otti		-	11	21				Fugitive, reportedly died in 2007
	Raska Lukwiya		-	1	3				Proceedings finished; died on 08/12/2006
	Okot Odhiambo		-	3	7				Fugitive
	Dominic Ongwen		-	3	4				Fugitive
Central African Republic	Jean –Pierre Bemba Gombo	05/23/2008	-	3	5	07/03/2008	12-15 January 2009	Began 11/22/2010	In ICC custody, trial before

(ICC.02/04) by the government of the CAR Referral: 01/07/2005 Investigation opened: 05/22/2007		06/10/2008				07/04/2008	Confirmed 06/15/2009		Trial Chamber III ongoing
Darfur, Sudan (ICC-02/05) by the UN Security Council Referral: 03/31/2005 Investigation opened: 06/06/2005	Ahmed Haroun	04/27/2007	-	20	22				Fugitive
	Ali Kushayb		-	22	28				Fugitive
	Omar al-Bashir	03/04/2009 07/12/2010	3	5	2				Fugitive
	Bahr Idriss Abu Garda	05/07/2009 (summons to appear)	-	-	3	05/18/2009	19-29 October 2009 Dismissed 02/08/2010		Proceedings finished with charges dismissed
	Abdallah Banda Abakaer Nourain	08/27/2009 (summons to appear)	-	-	3	06/17/2010	12/08/2010 Confirmed 03/07/2011	To begin in 2012	Appearing voluntarily, charges confirmed, trial before Trial Chamber IV to begin in 2012
	Saleh Mohammed Jerbo Jamus		-	-	3				
Republic of Kenya (ICC-01/09) Authorization by a Pre-Trial Chamber Authorization: 03/31/2010 Investigation opened: 03/31/2010	William Samoei Ruto	03/08/2011 (summons to appear)	-	4	-	04/07/2011	1-8 September 2011 Result pending		Appearing voluntarily, pre- trial phase before Pre-Trial Chamber II ongoing
	Henry Kiprono Kosgey		-	4	-				
	Joshua Arap Sang		-	4	-				
	Francis Kirimi Muthaura	03/08/2011 (summons to appear)	-	5	-	04/08/2011	21 September- 5 October 2011 Result pending		Appearing voluntarily, pre- trial phase before Pre-Trial Chamber II ongoing
	Uhuru Muigai Kenyatta		-	5	-				
	Mohammed Hussein Ali		-	5	-				
Libyan Arab Jamahiriya	Muammar Gaddafi	06/27/2011	-	2	-				Proceedings finished; died

(ICC-01/11) by the UN Security Council Referral: 02/26/2011 Investigation opened: 03/03/2011									on 10/20/2011
	Saif al-Islam Gaddafi		-	2	-				Fugitive
	Abdullah Senussi		-	2	-				Fugitive
Republic of Côte d'Ivoire									Investigation authorized by Pre-Trial Chamber III on 10/03/2011

Reproduce from “Detailed Summary of Investigations and Prosecutions by the International Criminal Court” with some changes, obtained from http://en.wikipedia.org/wiki/International_Criminal_Court

¹ Only persons who are publicly indicted are listed here. Nonetheless, the ICC can issue an indictment under seal.

² If not otherwise noted, the indicted is wanted by warrant of arrest issued by Pre-Trial Chambers.

³ If there was a warrant of arrest, the dates of transfer to the ICC (in italics) and have the initial appearance is given in the form of MM/DD/YYYY. Otherwise, only the date of initial appearance is given.

United States Opposition to the ICC¹⁸

The United States was one of only seven nations, joining China, Iraq, Libya, Yemen, Qatar and Israel, to vote against the 1998 Rome Statute of the International Criminal Court. The US is perhaps one of the Court's more hostile opponents and constantly seeks the immunity of its citizens from prosecution. Examples include:

- a. Un-signing; in an unprecedented diplomatic maneuver on May 6, 2002, George W. Bush administration denounced the US signatory of the Rome Statute. Therefore, the US did not intend to be bound by Clinton administration's signature to the Statute on December 31, 2000, or to ratify it.
- b. Bilateral Immunity Agreement; in continuing its policy to undermine the ICC, the US requested its friends and allies to approve bilateral agreements requiring them not to surrender American nationals to the ICC. (See Appendix D for more details on Bilateral Immunity Agreement).
- c. UN Security Council Resolutions 1422 and 1487; following the entry into force of the Rome Statute, the US negotiated a Security Council resolution to provide exemption for U.S. personnel operating in UN peacekeeping operations. Resolution 1422 came into effect July 1, 2002 for a period of one year. Later, it was renewed for a year by

¹⁸ See Bruce Broomhall, 'Toward U.S. Acceptance of the International Criminal Court,' in *Law and Contemporary Problems* Vol. 64.1, 2001; Michael P. Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position' in *Law and Contemporary Problems* Vol. 64.1, 2001; Monroe Leigh, 'The United States and the Statute of Rome,' in *The American Journal of International Law* Vol. 95.1, 2001; 'U.S. Signing of the Statute of the International Criminal Court,' in *The American Journal of International Law* Vol. 95.2, 2001; 'U.S. View of Crime of Aggression,' in *The American Journal of International Law* Vol. 95.2, 2001; 'U.S. Notification of Intent Not to Become a Party to the Rome Statute,' in *The American Journal of International Law* Vol. 96.3, 2002; and John P. Cerone, 'Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Courts and Tribunals,' in *The European Journal of International Law* Vol. 18.2, 2007.

Resolution 1487 which passed on June 12, 2003. The US failed to secure another renewal following the abuse of Iraqi prisoners in Abu Ghraib by American troops.

- a. American Service-Members' Protection Act (ASPA); the U.S Congress passed this law. It was later signed by President Bush on August 2, 2002 to assist the administration's effort to obtain bilateral impunity agreements. The major anti-ICC provisions in ASPA are: (i) a prohibition on U.S. cooperation with the ICC; (ii) the Hague Invasion Act provision: authorizing the President to use all means necessary and appropriate to free any U.S. personnel or allied personnel detained or imprisoned by the ICC; and (iii) punishment for States joining the ICC treaty through the refusal of military aid to State Parties to the treaty (except major U.S. allies).

As a matter of fact, the parties to the Rome Statute thought it was important to have the US on board before the Statute came into effect. The US was portrayed as an important influence that would add to the legitimacy of the regime, since the US had been a strong supporter of international criminal justice, including, most remarkably, the International Military Tribunals at Nuremberg and Tokyo, the ICTY, and the ICTR. However, during the Rome Conference, other state delegations realized that the US was persistent in exempting any US nationals from the application of the Court's jurisdiction. This went against an effort to prohibit special immunities of any kind. Other countries like Australia, Canada, France, and the United Kingdom refrained from expressing concerns about the Court interfering with the peace-keeping functions of their armed services.¹⁹ The international community was obviously ready to move forward without the US on board.

¹⁹ Some of US fixed negotiations included but not limited to the objection of proprio motu power of the Prosecutor and universal jurisdiction of the ICC, was heavily rejected by the Group of Like-Minded States, consisted of over 60 states, including NATO and US' European

allies. In addition, Non-Aligned Movement arguing “any determination of the definition and occurrence of aggression by the Security Council would politicize the Court, since it would allot the P5 to exercise the veto power to block the investigation and prosecution of such crimes” rejected US proposal regarding the definition of crimes of aggression. Both groups also rejected US proposal that the Court ought to require Security Council’s approval prior to the beginning of investigation of cases (Roach, chapter 6; Broomhall, chapter 9).

PART III
A COMPARATIVE ANALYSIS OF DARFUR, SUDAN AND THE DEMOCRATIC
REPUBLIC OF THE CONGO

A. Darfur, Sudan

The Republic of Sudan, a country in northeastern Africa, is the third largest country in Africa, after Algeria and Congo-Kinshasa with a population around 30.9 million. Sudan is divided along lines of religion (Sunni Islam, animist, and Christian), ethnicity (Africa and Arab origin), tribe, and economic activity (nomadic and sedentary). Sudan is both a refugee generating and a refugee hosting country. The majority of the refugees come from Eritrea, Chad, Ethiopia, and the Central African Republic.

Sudan's various ethnicities split into two major groups: Sudanese Arab of the largely Muslim sector that inhabits Northern Sudan and the largely Christian and animist Nilotic who inhabit Southern Sudan. As the result of its political turmoil since independence, Sudan is also divided along two ideological lines: a united, secular, and democratic country, which attracted many northern Sudanese, and the southern Sudanese's demand for self-determination. Following a referendum in January 2011, South Sudan seceded on July 9, 2011 and claimed the area of Bahr al Ghazal, Equatoria, and Greater Upper Nile. On July 14, 2011, South Sudan became a member of the United Nations.

Sudan's Political Instability²⁰

Until 1946, the British and the Egyptian government administered south Sudan and north Sudan as separate regions. The British had further emphasized the divisions by restricting the movement of people from north to south and vice versa. The law was enacted to prevent the spread of malaria to the British troops, to facilitate access of Christian missionaries to the animist population and to stopping the Arab and Islamic influence from advancing to the south.

Just before its independence, the British decided to merge the two into one single administrative region while the political power was granted to northern elites. The tensions over the nature of two regions were heightened when it was obvious that the northern leaders refused to give the southerners' substantial autonomy. Just a year before independence was granted, both regions started fighting. Seventeen years of fighting in the First Sudanese Civil War (1955-1972) resulted in half a million people dying.

In August 1955, the southern army officers mutinied in Torit, Juba, Yei, and Maridi. A trial of a southern member of the national assembly and an allegedly false telegram urging northern administrators in the south to oppress the southerners triggered the mutiny. After the mutinies were suppressed, the survivors began an uncoordinated insurgency in rural areas and transformed into a secessionist movement called Anya-Nya. The new secessionist movement now demanded the right to govern southern Sudan. Between 1963 and 1969 they expanded to the other two southern provinces: Upper Nile and Bahr al Ghazal.

At the same time, the separatist movement was suffering from internal ethnic factionalisms: a situation that the government was unable to take advantage of due to its own

²⁰ The content of this section is summarized from http://en.wikipedia.org/wiki/South_Sudan, <http://en.wikipedia.org/wiki/Sudan>, <http://www.crisisgroup.org/en/key-issues/research-resources/conflict-histories/sudan.aspx>, and various ICG Policy Briefings and Reports mentioned in the bibliography.

political instability. Prime Minister Ismail Al-Azhari led the first independent government of Sudan, but a military coup in 1958 led by Chief of Staff, Lieutenant General Ibrahim Abboud overthrew him. The resentment over military government led to a popular uprising that resulted in the creation of an interim government in October 1964. Colonel Gaafar Nimeiry led the second military coup, which took place on May 25, 1969. Tensions between Marxist and non-Marxist factions in the ruling military class led to another coup in July 1971 and brought the Sudanese Communist Party into power. Nimeiry was able to seize power back, but was overthrown by another popular uprising in 1985. In 1986, Sadiq Al-Mahdi from the Umma Party was elected Prime Minister.

In July 1971, former army lieutenant Joseph Lagu unified the separatist movement of the southern Sudan under one command called Southern Sudan Liberation Movement (SSLM). During the negotiation mediated by World Council of Churches and All Africa Conference of Churches, SSLM was the representative and negotiated on behalf of the entire south. The Addis Ababa Agreement of March 1972 ended the conflict and a single administrative region of the Southern Sudan Autonomous Region was granted to the southerners. However, this agreement failed to completely dispel the tensions that had caused the civil war, leading to a reigniting of conflict resulting in Second Sudanese Civil War (1983-2005)²¹.

Nimeiry increased the tension between the South and the North by circumventing the Addis Ababa Agreement of March 1972, which culminated in the imposition of Islamic laws on all of Sudan, thus disrupting autonomy in the Southern Sudan region. In 1983, Colonel John Garang who founded and led the Sudan People's Liberation Army (SPLA) started launching attacks against the government on the behalf of the southerners. The SPLA was in control of

²¹ See ICG Africa Report No. 48, Dialogue or Destruction? Organising for Peace as the War in Sudan Escalates, 27 June 2002, for more thoughtful analysis of the second civil war.

large areas of Equatoria, Bahr al Ghazal, and Upper Nile provinces and operated in the southern portions of Darfur, Kordofan, and Blue Nile provinces.

The conflict was rooted in the acquisition of natural resources in the south: oil and fertile land suitable for agriculture. This exploitation had been conducted by the government of northern Sudan since independence, which gave its elite much more political advantages. The southerners fought back, demanding an equal share of natural resources and a degree of political autonomy for their region. During the course of the campaign against the rebel movement, the government created a counterinsurgency strategy that exploited ethnic divisions by sponsoring ethnically based militias to attack rebel groups and terrorize and forcibly displace civilians.

In Khartoum, Colonel Omar Al Bashir seized power from the unstable coalition government of Prime Minister Sadiq Al-Mahdi in a bloodless military coup in June 1989. He followed with the suspension of political parties and the introduction of an Islamic legal code on the national level. On October 16, 1993, Al Bashir appointed himself the president of the country. He transformed Sudan into a single-party state and created the National Congress Party (NCP) and filled all of the important position within the government with members of his party.

In August 1991, the SPLA faced its first internal dissension. Riak Machar and Lam Akol led the attempt to overthrow Colonel John Garang, forming the Nuer faction named Sudan People's Democratic Front (SPDF). Indeed, the Nuer is the second largest ethnic group in south Sudan. In September 1992, William Nyuon Bany formed a second rebel faction, and in February 1993, Kerubino Kwanyin Bol formed a third rebel faction. In 1997, the government signed the Nuba Mountains cease-fire with the rebel factions, calling for a degree of autonomy and the right of self-determination for the south. In January 2002, John Garang and Riak Maahar signed an agreement to merge the SPDF and SPLA. To increase its bargaining power prior to the next

round of peace agreements, the SPLA also formed a strategic partnership with the Sudan Alliances Forces (SAF), the largest armed opposition force in the north.

Nonetheless, Khartoum and SPLM made substantial progress toward a conflict resolution. A Comprehensive Peace Agreement (CPA)²² was signed on January 9, 2005 in Nairobi, designed to end the North-South civil war in Darfur. Both parties agreed to the following:

- a. The south would be granted substantial autonomy for six years, followed by a referendum for the right of self-determination, which was held on January 9, 2011.
- b. If the referendum did not result in southern secession, then the SPLA would integrate into the national armed forces, forming Joint Integrated Units.
- c. The revenue from oil would be divided between the two parties during the six-year interim period.
- d. The SPLM would assume some roles in the Government of National Unity (GNU), as

²² This is a collection of agreement, including Machakos Protocol of July 2002 (see ICG Africa Report No. 51, Sudan's Best Chance for Peace: How Not to Lose It, 17 September 2002, and ICG Africa Report No. 65, Sudan Endgame, 7 July 2003, for cross-reference), the Security Arrangements Agreement of September 2003 (see ICG Africa Report No. 73, Sudan: Towards an Incomplete Peace, 11 December 2003 for more detail), the Wealth Sharing Agreement of January 2004, the Power Sharing Agreement (see ICG Africa Report No. 55, Power and Wealth Sharing: Make or Break Time in Sudan's Peace Process, 18 December 2002 for more details), the Protocol on the Resolution of the Conflict in Southern Kordofan and Blue Niles States of May 2004, the Protocol on the Resolution of the Conflict in Abyei Area of May 2004, and Permanent Ceasefire and Security Arrangements Implementation Modalities of December 2004. The two and half years of negotiations were chaired by the Intergovernmental Authority on Development (IGAD) comprising Kenya, Uganda, Ethiopia, Eritrea, Sudan, Djibouti and Somalia. See Crisis Group Africa Report No. 96, The Khartoum-SPLM Agreement: Sudan's Uncertain Peace, 25 July 2005; Crisis Group Africa Report No. 106, Sudan's Comprehensive Peace Agreement: The Long Road Ahead, 31 March 2006; Crisis Group Africa Report No. 130, A Strategy for Comprehensive Peace in Sudan, 26 July 2007; and Crisis Group Africa Briefing No. 50, Sudan's Comprehensive Peace Agreement: Beyond the Crisis, 13 March 2008, for more details on CPA. The digital collection of Comprehensive Peace Agreement could be obtained from <http://www.usip.org/publications/peace-agreements-sudan>

well as in Abyei, Blue Nile State, and Nuba Mountains' administration.

- e. The continued use of sharia law in the south would be a matter of stipulation by the elected assembly.

Amid the new hope that emerged from the signing of CPA, the United Nations Security Council passed three resolutions to deal with “a regime as tough-minded and inscrutable as Sudan, [whereas] patient diplomacy and trust in Khartoum's [good will] has been a [constant] failure” (Crisis Group Africa Briefing No. 43, 1):

- a. Resolution 1590 of March 24, 2005 regarding the establishment of United Mission in Sudan (UNMIS) for an initial six month period to support the implementation of CPA. The Security Council authorized the deployment of 10,000 military personnel, accompanied by an appropriate civilian component and up to 715 civilian police personnel for the enforcement of the Charter's basic principles under Chapter VII.
- b. Resolution 1591 of March 27, 2005 regarding the extension of the earlier arms embargo that was imposed on non-governmental forces in Darfur and that required Khartoum to cease aerial bombardments over Darfur region. The Council also set up a Panel of Experts to monitor the arms embargo.
- c. Resolution 1593 of March 31, 2005 regarding the referral of human rights atrocities in Darfur to the ICC's jurisdiction.

A new chapter in Sudan's civil war opened in Darfur, on February 2003. The war was rooted in three intersecting conflicts. First, it was conflict over political and economic marginalization by Khartoum. Second, it was dissatisfaction over CPA that left out the Darfuri' rebels. Third, it was the local lineage of decades of disputes between “African” sedentary farmers and “Arab” nomadic livestock herders. The conflict culminated in the attack of Al-Fashir

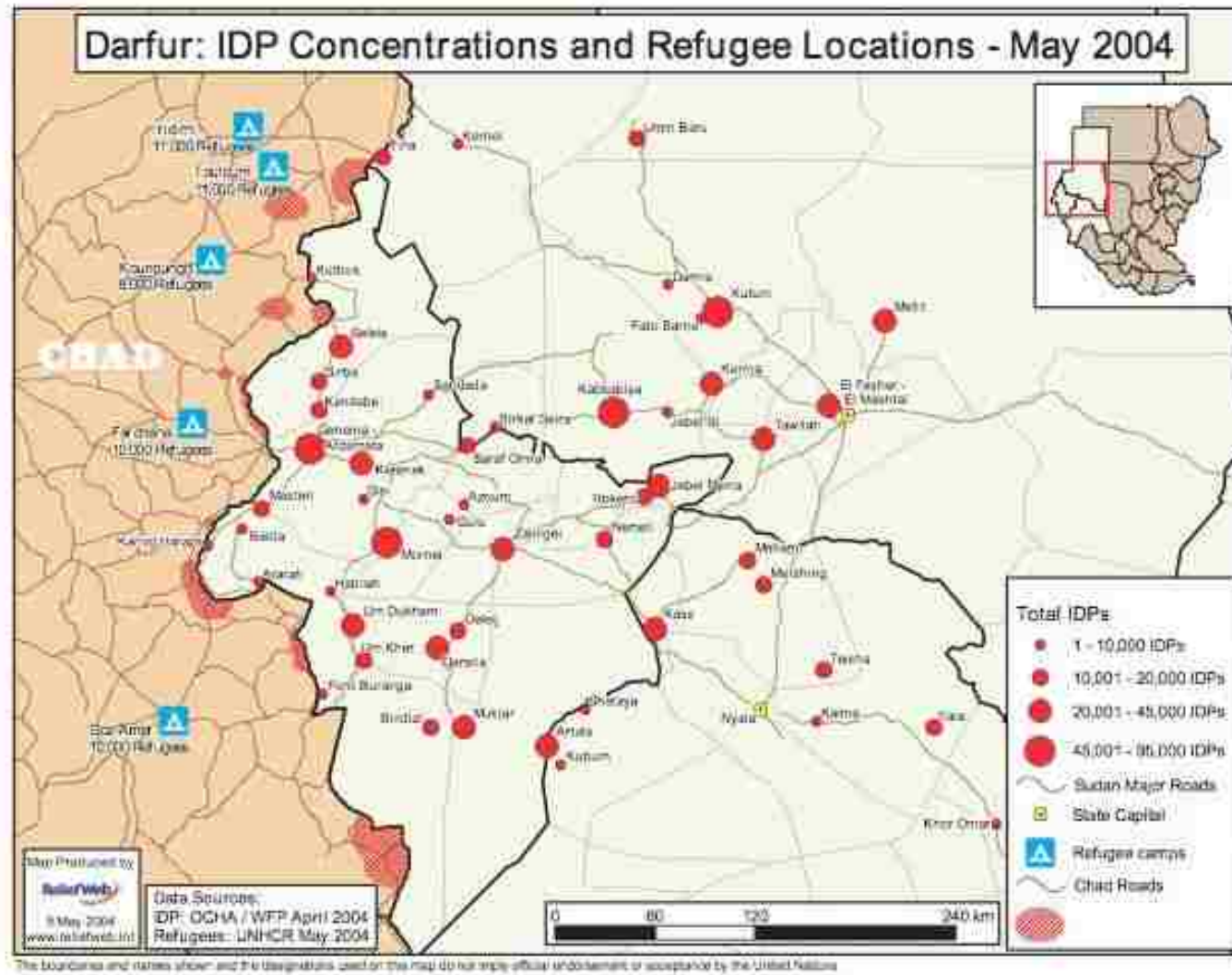
air base, launched jointly by Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) rebels on April 25, 2003.

The rebels were recruited primarily from the Fur, Zaghawa, and Masalit ethnic groups. The attack resulted in four Antonov bombers and helicopter gunships being destroyed on the ground and 75 soldiers, pilots, and technicians killed. Additionally, 32 soldiers, including the air base's commander were captured. The success of the raid was shocking; having been engaged in the civil war in the South for 20 years, none of SPLA's attacks on any government outposts were able to present such humiliating defeat.

Soon after the raid, the Janjaweed militias, recruited mostly from Arab Abbala tribes, joined the side of the official Sudanese military and police.²³ The better-armed Janjaweed quickly gained the upper hand. By the first half of 2004, several thousand people had been killed and as many as a million more had been forcibly displaced, leaving the non-Arab villages completely depopulated and causing a major humanitarian crisis in the region, such as shown in the following figure.

²³ Janjaweed is indeed Khartoum's counterinsurgency strategy to attack the rebel groups, terrorize and forcibly displace civilians. See the following resources: ICG Africa Briefing, Sudan's Other Wars, 25 June 2003; ICG Africa Report No. 76, Darfur Rising: Sudan's New Crisis, 25 March 2004; ICG Africa Report No. 80, Sudan: Now or Never in Darfur, 23 May 2004; and ICG Africa Report No. 83, "Darfur Deadline: A New International Action Plan", 23 August 2004. See also Mahmood Mamdani, How Can We Name the Darfur Crisis, October 7, 2004, obtained from <http://www.globalpolicy.org/component/content/article/206-sudan/39611.html>, for Khartoum's divide and rule policies in Darfur, including the politicization and militarization of ethnic groups, which explained Khartoum's favoritism of Arab origin over African descendants.

Figure 3.1



The Government of Sudan (GoS) and a SLA faction led by Minni Minawi (SLA/MM) signed the Darfur Peace Agreement on May 5, 2006. However, two other parties to the negotiations, the SLA faction of Abdel Wahid Mohammed Nur (SLA/AW) and the Justice and Equality Movement (JEM) refused to sign. On August 31, 2006, the Security Council adopted Resolution 1706 to expand the mandate of UNMIS to include deployments in Darfur to enforce the DPA, which Khartoum rejected.

Due to a peacekeeping operation that was authorized but failed to deploy, the Security Council adopted Resolution 1769 on July 31, 2007. This authorized the deployment of an African Union-United Nations Hybrid Mission in Darfur (UNAMID).²⁴ Nonetheless, conflict and insecurity persisted in Darfur. Arms and armed groups both continue to proliferate, subjecting more civilians to the already widespread and systematic human rights violations committed by both parties.²⁵ International mediators stated that the difficulty in bringing parties to the peace talks was due to there being “no John Garang in Darfur”, referring to the leading figure among Southern rebels who represented and negotiated on behalf of the entire South.

Khartoum started carrying out aerial bombardments in 2007 and 2008 on civilian areas it claimed to be under rebel control in all three Darfur states. Following the bombing, the

²⁴ The following reports provide insightful explanations regarding the failure of peacekeeping mission to invoke ‘Responsibility to Protect’ the Darfuris: Crisis Group Africa Briefing No. 28, The AU’s Mission in Darfur: Bridging the Gaps, 6 July 2005; Crisis Group Africa Report No. 99, The EU/AU Partnership in Darfur: Not Yet A Winning Combination, 25 October 2005; Crisis Group Africa Report No. 105, To Save Darfur, 17 March 2006; Crisis Group Africa Briefing No. 39, Darfur’s Fragile Peace Agreement, 20 June 2006; Crisis Group Africa Briefing No. 43, Getting the UN into Darfur, 12 October 2006; and Crisis Group Africa Report No. 125, Darfur: Revitalising the Peace Process, 30 April 2007.

²⁵ See Crisis Group Africa Report No. 89, Darfur: Failure to Protect, 8 March 2005 and Crisis Group Africa Briefing No. 32, Unifying Darfur’s Rebel: A Prerequisite for Peace, 6 October 2005 for more discussion on Darfur’s rebel dissent. See Appendix F for Darfur’s Non-Signatory Movements and Appendix G for Major Humanitarian Agreements Binding on Sudanese Parties.

Janjaweed carried out large-scale attacks. These resulted in displacing people, the looting of livestock and properties, unlawful killings, rapes, and the burning of villages. The Janjaweed also attacked civilians in IDPs' camps. Khalil, an IDP in Hasa Hisa camp in West Darfur testified to Amnesty International, "we asked the international community to look our way; to see how we were left with the Janjaweed and the government to attack us as they pleased. We were left on our own" (AFR 54/001/2009, n.p.).²⁶

The violations were conducted to justify the logic that "a dispirited and enfeebled population will be unable to assist the insurgency" (ICG Africa Report No. 54, 2-3). As of April 2008, there were around 2.5 million IDPs in Darfur –this is more than one third of the population of Darfuris- and more than 200,000 people sought refuge in Chad. The war also displaced subsistence farmers, and caused disruption to the trade and nomadic migration routes, which added two million people in need of humanitarian assistance.²⁷

The existence of Janjaweed not only provided Khartoum with the necessary confidence that it could control the militia; it also allowed the government to wage a large war with a minimum of cost. At Khartoum's disposal, the Janjaweed would serve loyally as a counterinsurgency force that could be self-sustained from looting, taking land and possessions from civilians. Both parties attained a remarkable record of violations against civilians, including killings, torture, and hostage taking. Attacks also targeted the peacekeepers, humanitarian aid workers and aid convoys, which severely limited humanitarian access to the Darfuris in need.

²⁶ See Crisis Group Africa Report No. 134, *Darfur's New Security Reality*, 26 November 2007 on rising violence in IDP camps.

²⁷ International Crisis Group attributed these casualties to the result of war, famine and diseases. "Famine in the war-torn communities is Khartoum objectives that has been largely achieved through manipulation, diversion, and denial of international humanitarian relief" (ICG Africa Report No. 54, 2). See the report for more insightful explanation on denial of humanitarian aid as a weapon of war.

Human Rights Watch reported that between January and April 2008, four humanitarian workers were killed, 102 humanitarian vehicles were hijacked, 29 drivers of WFP delivering food aid were missing, fourteen humanitarian premises were attacked and four humanitarian compounds were destroyed and looted. UNAMID, hampered by the lack of required personnel capacity and vital military equipment, was unable to intervene on a number of occasions as civilians were attacked. Rodolphe Adada, Joint Special Representative of UNAMID said, “we are here to keep a peace that doesn’t exist.”

Sudan’s Socio-Economic Situation

Sudan’s ravages of two civil wars did not create enough turmoil for Khartoum to cease hostilities and to comply with the demands of three peace agreements; the CPA, the DPA, and the ESPA. Wealth from oil exploration had secured Khartoum, allowing it to wage war on three different fronts: in the South, in the West (in all three Darfuris’ region) and in the East. However, the economic forecast for Sudan in 2011 and beyond is uncertain, since eighty percent of oilfields are now under the control of South Sudan. The Human Development Index showed that despite Sudan’s ability to sustain its war trajectory, its people’s quality of life regressed for decades, showing no significant achievement in three basic dimensions. In addition, the Corruption Perception Index showed that Khartoum, while waging war and arming the Janjaweed, failed to distribute wealth to its population and to reform governance.

Sudan began exporting crude oil in 1999 and oil production contributed to the boost of Sudan’s economic growth post 2000. The following figures show Sudan’s economic growth in term of GDP per capita. Sudan recorded a 6.1 percent growth in 2003, rocketed to nine percent in 2007, decreased to 4.2 percent in 2009 and slightly increased to 5.2 percent in 2010. Sudan might

receive a significant share of oil income from South Sudan for the use of Sudan's pipelines, refineries, and port facilities.

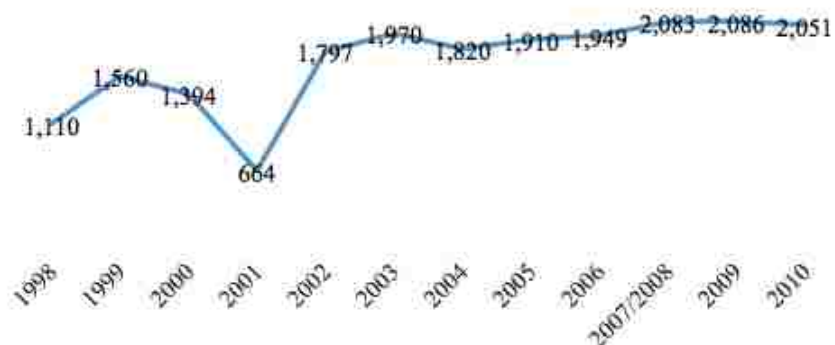
The International Monetary Fund pressed Sudan in the early 1990s to strengthen its macroeconomic reforms. Since 1997, Sudan has been implementing macroeconomic reforms recommended by the International Monetary Fund. China is Sudan's largest economic partner, with forty percent share in oil. In return, China sold small arms used by Khartoum for its military operation in Darfur and Southern Kordofan. Such economic interdependence placed China as one of Sudan's powerful allies in the UN Security Council. Russia, which has benefited from Sudan's \$21 million expenses on military spending, also stands to veto any strong UN Security Council action to punish Sudan.

Given the importance of oil in Sudan's economic growth, Khartoum has been using very repressive approaches to secure its exploration anywhere in the South region. Khartoum launched indiscriminate attacks on civilians, displacing them. Eyewitness accounts confirmed that the tactics included the abduction of women and children, gang rape, aerial bombing supported by helicopter gunships, destruction of humanitarian camps, burning of villages, and attacks that targeted international humanitarian workers and aid convoys.²⁸

²⁸ See ICG Africa Report No. 39, *God, Oil, and Land, Changing the Logic of War in Sudan*, January 2002 and ICG Africa Briefing, *Sudan's Oilfields Burn Again: Brinkmanship Endangers the Peace Process*, 10 February 2003; and ICG Africa Report No. 54, *Ending Starvation as a Weapon of War in Sudan*, 14 November 2002 for further references.

Figure 3.2

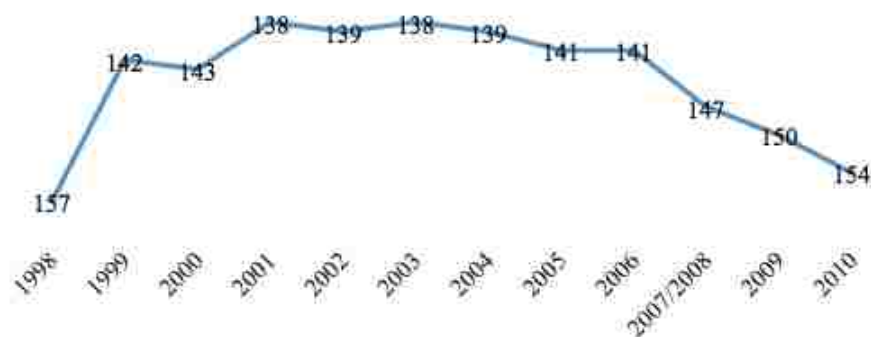
The Republic of Sudan GDP Per Capita (in PPP US\$) 1998 - 2010



Sudan's GDP per capita kept increasing since 2004. However, such positive economic growth is not equivalent with its Human Development Index, which shows signs of deteriorating since 2006. The Human Development Index is a composite measure of the average achievements of a country in three basic dimensions: a long and healthy life (measured by life expectancy at birth); knowledge (measured by adult literacy rate and the combined gross enrollment ratio for primary, secondary, and tertiary schools); and a decent standard of living (measured by GDP per capita in purchasing power parity (PPP) US Dollars). All data on GDP per capita in PPP US\$ and Human Development Index were obtained from UNDP Human Development Report 1998–2010.

Figure 3.3

The Republic of Sudan Human Development Index 1998 – 2010



Sudan's Corruption Perceptions Index (CPI) for seven consecutive years shows that corruption is rampant and prevalent. Transparency International publishes CPI annually, ranking countries on a scale from 10 (very clean) to 0 (highly corrupt). Rankings derive from perceived levels of corruption as determined by expert assessments and opinion surveys on corruption in the public sector.

Table 3.4

Corruption Perceptions Index of The Republic of Sudan

Year	Ranking	Countries Ranked	Rating
2004	122	145	2.2
2005	144	158	2.1
2006	156	163	2.0
2007	172	179	1.8
2008	173	180	1.6
2009	176	180	1.5
2010	172	178	1.6

Naming and Shaming on Darfur and the International Criminal Court's Indictment²⁹

The conflict in Darfur showed the inadequacy of legal enforcement taken by the international community to stop the death toll among civilians. The United Nations Security Council proved incapable of aiming sanctions at Khartoum due to the dividing line of the P5 in regard to the Darfur issue. Various Transnational Advocacy Networks pushed for a more systemic approach to conflict resolution in Darfur. Their method is to name and shame the perpetrators and to bring the case into ICC jurisdiction.

The international spotlight on the Darfur conflict began with a report by one of the transnational advocacy networks, the International Crisis Group (ICG), when it released a report in June 2003, titled "Sudan's Other Wars," which raised early warning alarms of potential deadly

²⁹ See Crisis Group Africa Report No. 152, Sudan: Justice, Peace and the ICC, 17 July 2009 for more insightful on Khartoum's engagement with ICC' indictment.

conflicts in Darfur. ICG launched a Sudan project in 2001 and released the first report, “God, Oil, and Country: Changing the Logic of War” on January 28, 2002. To this date, the ICG has released 42 reports and called the conflict in Sudan “the most extreme and long-running example in the world of using access to humanitarian aids as an instrument of war” (ICG Africa Report No. 54, i).³⁰

Out of 42 reports, sixteen covered the conflict in Darfur and provided dozen of recommendations to multiple parties involved in conflict resolution methods; namely, the United Nations Security Council; the African Union; the United States, European Union and other states willing to support the AU initiatives; the Government of Sudan, the international supporters of the IGAD process, especially the observer countries (US, UK, Norway, and Italy); and the Arab League. ICG also made calls to the belligerent parties to uphold international human right and international humanitarian law and to oblige compliance to the humanitarian agreements signed by the parties to the conflict.

³⁰ Even though Darfur is Sudan’s most pressing regional issue, additional attention is needed in Kordofan, where the African tribes of Misseriya suffered from area’s dissolved in return to a demographic balance more favorable to NCP political power and the African tribes of Nuba that have been subjected to displacement policies, land expropriation and culture homogenization. In the far North, the construction of dams has displaced and angered several communities. In the East, where CPA’s implementation did not address the grievances of the people of one of Sudan’s most politically marginalized, with a worse humanitarian situation than parts in Darfur, would also need attention. Both South Kordofan and Blue Nile are to hold referendum regarding their constitutional future within the Republic of Sudan. While Abyei Area is due to hold referendum in 2011 on whether to join the Republic of South Sudan or remain part of the Republic of Sudan. Khartoum and Eastern Front rebels group signed Eastern Sudan Peace Agreement in October 2006. The peace accord regulated power and wealth sharing in the east region, marked by the appointment of three Eastern Front officials to have share in government positions. Like other two peace agreements, the implementation of Eastern Sudan Peace Agreement to end conflict remained unsatisfied. See the following sources for in-depth discussion on Sudan’s other civil wars: ICG Africa Briefing, Sudan’s Other Wars, 25 June 2003; Crisis Group Africa Report No. 102, Sudan: Saving Peace in the East, 5 January 2006; Crisis Group Africa Report No. 145, Sudan’s Southern Kordofan Problem: The Next Darfur, 21 October 2008; and Crisis Group Africa Program Report No. 154, Jonglei’s Tribal Conflicts: Countering Insecurity in South Sudan, 23 December 2009.

Despite the early warnings made by ICG, widespread media coverage just started when United Nations Resident and Humanitarian Coordinator for Sudan, Mukesh Kapila, in March 2004, called Darfur “the world’s greatest humanitarian crisis”. Many more transnational advocacy networks joined the campaign afterward. Amnesty International publicly shamed Khartoum for atrocities in Darfur in its Human Rights in Republic of Sudan Annual Report for four consecutive years. Amnesty International also cited other reports condemning human rights violations in Darfur in its annual country report; in six reports in 2007, four reports in 2008, one report in 2009, and one in 2010.

Human Rights Watch, a New York based independent organization dedicated to defending and protecting human rights, published 23 reports on Darfur. In the report titled “Entrenching Impunity, Government Responsibility for International Crimes in Darfur,” published on December 2005, Human Rights Watch engaged in publicly naming and shaming the following individuals as perpetrators of crimes against humanity and war crimes committed in Darfur:

1. Khartoum Officials

- Omar Hassan Ahmad Al Bashir, incumbent President of Sudan
- Ali Osman Mohammed Taha, incumbent First Vice President of Sudan
- Major General Abdel Rahim Mohammed Hussein, former Minister of the Interior, Representative of the President for Darfur (2003-2004), incumbent Minister of Defense
- Major General Bakri Hassan Salih, former Minister of Defense, incumbent Minister for Presidential Affairs
- Abbas Arabi, former Chief of Staff of Sudanese Armed Forces

- General Salah Abdallah Gosh, Director of National Security and Intelligence Service
- Ahmad Muhammad Harun, former Minister of State for the Interior of the Government of Sudan, former Minister of State for Humanitarian Affairs of Sudan, and the incumbent Governor of Southern Kordofan

2. Current or Former Regional Officials

- Al Tayeb Abdullah Torshain, former Commissioner of Mukjar, 2003-2005
- Al Haj Attar Al Mannan Idris, Governor of South Darfur, mid 2004 to present
- Ja'afar Abdel el Hakh, former Commissioner of Garsila (prior April 2004), incumbent Governor of West Darfur
- Major General Adam Hamid Musa, Governor of South Darfur, 2003 to mid 2004
- Major General (Ret.) Abdallah Safi el Nour, former Governor of North Darfur (2000-2001), National Minister in Khartoum (2003-2004)

3. Military Commanders

- Brigadier General Ahmed Al Hajir Mohammed, Commander of the 16th Infantry Division forces used in the attacks on the villages of Marla, Ishma, and Labado in December 2004
- Major General Al Hadi Adam Hamid, Chief of Border Intelligence Guard; key liaison to Janjaweed militias
- Lieutenant Colonel Abdul Wahid Said Ali Said, Commander of the 2nd Border Intelligence Guard based in Misteriya, which supports military operations in and around Kebkabiya
- Major Gaddal Fadlallah, commander in Kutum

4. Militia Leaders

- Abdullah Saleh Sabeel (went by *nom de guerre* Abu Ashreen), leader of a militia base in Kebkabiya
- Sheikh Musa Hilal, key militia recruiter and coordinator
- Ali Muhammad Ali Abd-Al-Rahman (went by *nom de guerre* Ali Kushayb)
- Mustapha Abu Nuba, tribal leader of Rizegat sub-clan in South Darfur
- Nazir Al Tijani Abdel Kadir, tribal leader of the Misseriya militia based in Niteiga, South Darfur
- Mohammed Hamdan, Rizegat militia leader allegedly involved in Adwah attack and looting in November 2004

The permanent members of United Nations Security Council were divided on the Darfur issue, though around 37 resolutions passed since 2004. Resolution 1556 passed on July 30, 2004, demanded that the GoS disarm the Janjaweed and cease attacks on civilians. It also imposed an arms embargo. Pursuant to Resolution 1564, adopted on September 18, 2004, the International Commission of Inquiry on Darfur was established to investigate reports of international humanitarian law and human rights violations. The commission reported to the Security Council in January 2005, contending that there was reason to believe that crimes against humanity and war crimes were committed in Darfur, thus recommending the referral of the case to the ICC.

On March 31, 2005, the UN Security Council formally referred the situation in Darfur to the Prosecutor of International Criminal Court through Resolution 1593. In December 2005, the United Nations Panel of Experts, which was established by Resolution 1591, recommended the imposition of sanctions on seventeen individuals, ten government officials, two Janjaweed militia leaders and five Darfur rebel commanders, for their role in committing human rights violations and impeding the peace process. Immediately after the referral, Office of the

Prosecutor conducted two months of preliminary examination, followed by several missions to Khartoum from 2005 to 2007, to assess the complementarity status of Sudan. ICC Prosecutor Luis Moreno-Ocampo later announced that national proceedings in the Sudan on those crimes did not exist.

On May 16, 2006, Resolution 1672 was adopted to impose sanctions on four Sudanese individuals over their involvement in the Darfur conflict. Travel bans and the freezing of assets were aimed at Sheikh Musa Hillal, the Janjaweed leader in Darfur; Major General Mohammed Elhassen, the commander of Sudan's western military region; Gabriel Abdul Kareen Badri, the commander of the National Movement for Reform and Development; and Adam Yacub Shant, the head of SLM/A.

In September 2007, the Panel of Experts submitted a new report describing breaches of international humanitarian law, violations of the arms embargo by all the warring parties, and extending the list of individuals recommended for sanctions. The panel also reported that the government of Sudan painted the military planes white to disguise them as United Nations or African Union aircraft.

Transnational advocacy networks (TANs), International Crisis Group, Amnesty International, and Human Rights Watch, are among those raising voice against the serious human rights violations that took place during war in Darfur. They argued that Khartoum made peace with the SPLA only because the Government of Sudan perceived such a strategy as the most effective way to head off mounting pressure over Darfur. However, the situation on the ground showed negative trends, which made transnational advocacy networks keep their eyes on Darfur.

These organizations contributed in various ways to the development of justice in Darfur. ICG was the first to ring warning bells, informing the international community about the human

rights violations committed by Khartoum in Darfur. Later, ICG, Human Rights Watch and Amnesty International supplied the international community with extensive reports covering the systematic and widespread violations committed by both parties in Darfur. It was hoped the reports would prompt countries that could exert their influence on Khartoum. Three out of six individuals indicted by the ICC were previously named and shamed by Human Rights Watch in their December 2005 report (See Appendix H – List of TANs Reports and UNSC Resolutions for complete list of the reports).

Many more organizations also joined the advocacy campaigns, such as Save Darfur Coalition, American Jewish World Service, the Genocide Intervention Network, and Students Taking Action Now. Calling for more humanitarian aid for the devastating civilian casualties and for increasing the role of international peacekeepers, they held a series of rallies, which the largest one on April 2006 in Washington, D.C.

Understanding the pattern of committing human rights violations with impunity that Khartoum maintained for years, the networks approached the United Nations Security Council to pass a resolution to refer to the situation in Darfur to the ICC, the only mechanism to limit the abuse of GoS' sovereignty, since Sudan itself is not a state party to the Rome Statute.³¹ Later, the Court was able to name the alleged perpetrators and charged them with the following crimes, such as mentioned in the arrest warrants:

1. Ahmad Muhammad Harun, former Minister of State for the Interior of the Government of Sudan (prior to July 2005), Minister of State for Humanitarian Affairs of Sudan (July 2005 – May 2009), and the Governor of Southern Kordofan (May 2009 – present).

The arrest warrant listed 42 counts on the basis of his individual criminal responsibility

³¹ See Part II note 17 for the explanation on the Court's exercise of jurisdiction.

under articles 25(3)(b) and 25(3)(d) of the Rome Statute, including:

- “Twenty counts of crimes against humanity: murder (article 7(1)(a)); persecution (article 7(1)(h)); forcible transfer of population (article 7(1)(d)); rape (article 7(1)(g)); inhumane acts (article 7(1)(k)); imprisonment or severe deprivation of liberty (article 7(1)(e)); and torture (article 7(1)(f));
- Twenty-two counts of war crimes: murder (article 8(2)(c)(i)); attack against the civilian population (article 8(2)(e)(i)); destruction of property (article 8(2)(e)(xii)); rape (article 8(2)(e)(vi)); pillaging (article 8(2)(e)(v)); and outrage upon personal dignity (article 8(2)(c)(ii))” (ICC-PIDS-CIS-SUD-001-002/11_Eng, n.p.)

2. Ali Muhammad Ali Abd-Al-Rahman, alleged leader of the Janjaweed militia.

The arrest warrant listed 50 counts on the basis of his individual criminal responsibility under articles 25(3)(a) and 25(3)(d) of the Rome Statute, including:

- “Twenty-counts of crimes against humanity: murder (article 7(1)(a)); persecution (article 7(1)(h)); deportation or forcible transfer of population (article 7(1)(d)); imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law (article 7(1)(e)); torture (article 7(1)(f)); persecution (article 7(1)(h)); and inhumane acts of inflicting serious bodily injury and suffering (article 7(1)(k));
- Twenty-eight counts of war crimes: violence to life and person (article 8(2)(c)(i)); outrage upon personal dignity in particular humiliating and degrading treatment (article 8(2)(c)(ii)); intentionally directing an attack against a civilian population (article 8(2)(e)(i)); pillaging (article 8(2)(e)(v)); rape (article 8(2)(e)(vi)); and destroying or seizing the property (article 8(2)(e)(xii))” (ICC-PIDS-CIS-SUD-001-

002/11_Eng, n.p.)

3. Omar Hassan Ahmad Al Bashir, incumbent President of the Republic of Sudan, incumbent head of National Congress Party (NCP), and commander in-chief of the Sudan Armed Forces (SAF). The arrest warrant listed ten counts on the basis of his individual criminal responsibility under articles 25(3)(a) of the Rome Statute as an indirect perpetrator/co-perpetrator including:

- “Five counts of crimes against humanity: murder (article 7(1)(a)); extermination (article 7(1)(b)); forcible transfer of population (article 7(1)(d)); torture (article 7(1)(f)); and rape (article 7(1)(g));
- Two counts of war crimes: intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities (article 8(2)(e)(i)); and pillaging (article 8(2)(e)(v));
- Three counts of genocide: genocide by killing (article 6-a); genocide by causing serious bodily or mental harm (article 6-b); and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group’s physical destruction (article 6-c)” (ICC-PIDS-CIS-SUD-02-002/11_Eng, n.p.)

4. Bahar Idriss Abu Garda, Chairman and General Coordinator of Military Operations of the United Resistance Front. Pre-Trial Chamber I considered that he was responsible as a co-perpetrator or an indirect co-perpetrator for three war crimes under article 25(3)(a) of the Rome Statute:

- “Violence to life in the form of murder, whether committed or attempted, within the meaning of article 8(2)(c)(i) of the Statute:
- Intentionally directing attacks against personnel, installation, material, units or

vehicles involved in a peacekeeping mission within the meaning of article 8(2)(e)(iii) of the Statute;

- Pillaging within the meaning of article 8(2)(e)(v) of the Statute” (ICC-PIDS-CIS-SUD-03-002/11_Eng, n. p.)

5. Abdallah Banda Abakaer Nourain, Commander-in-Chief of Justice and Equality Movement Collective-Leadership, one of the components of the United Resistance Front.
6. Saleh Mohammed Jerbo Jamus, former Chief of Staff of SLA-Unity and currently integrated into Justice and Equality Movement.

Pre-Trial Chamber I considered that both Abdallah Banda and Saleh Jerbo were responsible as co-perpetrators for three war crimes under article 25(3)(a) of the Rome Statute:

- “Violence to life within the meaning of article 8(2)(c)(i) of the Statute;
- Intentionally directing attacks against personnel, installations, material, units and vehicles involved in a peacekeeping mission within the meaning of article 8(2)(e)(iii) of the Statute;
- Pillaging within the meaning of article 8(2)(e)(v) of the Statute” (ICC-PIDS-CIS-SUD-04-001/11_Eng, n. p.)

On May 2, 2007, arrest warrants were issued for Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman. Bahr Idris Abu Garda appeared voluntarily on May 17, 2009. Two arrests warrants were issued on separate occasions for the incumbent President of the Republic of Sudan, the first sitting head of state indicted by the ICC. The development of Omar Al Bashir’s case indeed was a very interesting one. On July 14, 2008, the ICC Prosecutor submitted an application for the issuance of an arrest warrant for Omar Al Bashir for five counts

of crimes against humanity, two counts of war crimes, and three counts of genocide.

On March 4, 2009, Pre-Trial Chamber I issued the first arrest warrant, confirming the charges of war crimes and crimes against humanity, and left behind the charges of genocide arguing that there was no reasonable ground to support Omar Al Bashir *dolus specialis* motives. On February 3, 2010, in response, the Prosecutor appealed for the inclusion of genocide charges in the arrest warrant. The Appeals Chamber found that the Pre-Trial Chamber I “had applied an erroneous standard of proof when evaluating the evidence submitted by the Prosecutor.” Following the standard of proof as identified by the Appeals Chamber, the second arrest warrant was issued on July 12, 2010 for three counts of genocide committed against the Fur, Masalit, and Zaghawa ethnic groups.

The charge of genocide against the incumbent President of Sudan was not something that was without controversy. In February 2004, the International Association of Genocide Scholars was the first to declare that the conflict in Darfur was genocide. In September 2004, the US Secretary of State termed the conflict in Darfur genocide and claimed it was the worst humanitarian crisis of the 21st century. Moreover, the Darfur Peace and Accountability Act, which was signed into law by President George W. Bush on October 13, 2006, imposed sanctions against the perpetrators of genocide, war crimes and crimes against humanity in order to support peace efforts in Darfur.

Amnesty International was among others who refused to use the term ‘genocide’ and went by ‘the grave human rights abuses’ terminology. The United Nations, possibly in trying to mediate conflicts of interest among the permanent members of the Security Council regarding Darfur, stated that “mass murder of civilians have been committed by the Janjaweed, but not

genocide.”³²

On February 8, 2010, Pre-Trial Chamber I ruled that there was insufficient evidence to precede Abu Garda to trial. On April 23, 2010, Pre-Trial Chamber I also declined the prosecutor’s application to appeal the decision. However, both decision do not preclude the Prosecutor from requesting confirmation of the charges against Abu Garda if it is supported by additional evidence. Both Abdallah Banda and Saleh Jerbo also appeared voluntarily on June 16, 2010. On March 7, 2011, Pre-Trial Chamber I confirmed the charges against the two and committed them to trial.

³² Section 3, Darfur Peace and Accountability Act of 2006, “Congress makes the following findings:

- (1) On July 23, 2004, Congress declared, ‘the atrocities unfolding in Darfur, Sudan, are genocide’.
- (2) On September 9, 2004, Secretary of State Colin L. Powell stated before the Committee on Foreign Relations of the Senate, ‘genocide has occurred and my still be occurring in Darfur’, and ‘the Government of Sudan and the Janjaweed bear responsibility’.
- (3) On September 21, 2004, in an address before the United Nations General Assembly, President George W. Bush affirmed the Secretary of States’ finding and stated, ‘[a]t this hour, the world is witnessing terrible suffering and horrible crimes in the Darfur region of Sudan, crimes my government has concluded are genocide’.
- (4) On July 30, 2004, the United Nations Security Council passed Security Council Resolution 1556 (2004), calling upon the Government of Sudan to disarm the Janjaweed militias and to apprehend and bring to justice Janjaweed leaders and their associates who have incited and carried out violations of human rights and international humanitarian law, and establishing a ban on the sale or supply of arms and related materiel of all types, including the provision of related technical training or assistance, to all nongovernmental entities and individuals, including the Janjaweed.
- (5) On September 18, 2004, the United Nations Security Council passed Security Council Resolution 1564 (2004), determining that the Government of Sudan had failed to meet its obligations under Security Council Resolution 1556 (2004), calling for a military flight ban in and over the Darfur region, demanding the names of Janjaweed militiamen disarmed and arrested for verification, establishing an International Commission of Inquiry on Darfur to investigate violations of international humanitarian and human rights law, and threatening sanctions should the Government of Sudan fail to fully comply with Security Council Resolutions 1556 (2004) and 1564 (2004), including such actions as to affect Sudan’s petroleum sector or individual members of the Government of Sudan. ...”

Amnesty International recalled, “The grave human rights abuses...cannot be ignored any longer, nor justified or excused by a context of armed conflict” (ENGAFR540082004, February 3, 2004).

On July 2008, Khartoum started to seek alliance for Bashir's case deferral by approaching the Arab League, the African Union, and the Organization of Islamic Conference. During 2008 UN General Assembly, it gained support from the Group of 77 non-aligned countries. The permanent members of UN Security Council were divided into three divisions; UK and France, the strongest Security Council allies of the ICC, who refused to support the Article 16 deferral of investigation for the sake of Sudan's politics; Russia and China, who had always been ready to veto any strong Security Council action to punish Sudan; and the US which was reluctant to take a leadership role on deferral since it itself is not a party to the Rome Statute.

On February 2009, it was clear that Khartoum could not secure Bashir's deferral from the Security Council. Consequently, Khartoum retaliated by expelling thirteen INGOs, and dissolved three local NGOs. These humanitarian agencies were covering the needs of people in Darfur, Kassala and Red Sea, Abyei, Southern Kordofan and Blue Nile. This consisted of food provisions and safe drinking water for 1.1 million people and healthcare for 1.5 million people (Crisis Group Africa Report No. 152, 18).³³

Sudan has been engaging in civil war since before independence. The conduct of war, which has been attributed to the marginalization of non-Arab origins, caused many casualties and sufferance of civilians. These people were displaced from their community and their land. Khartoum gave the land to Arab origin tribes later. By doing this, Khartoum could secure its political position and win the majority vote it needed to stay in power. Understanding that the state officials practiced ill behaviors with impunity for decades, Sudan does need to obtain major

³³ They were *Action Contre la Faim* (ACF), Care International, CHF International, International Rescue Committee (IRC), Mercy Corps, MSF Holland and France, Norwegian Refugee Council, Oxfam GB, *Solidarite*, PATCO, Save the Children Fund UK and US, the Khartoum Centre for Human Rights and Environmental Development, the Sudan Social Development Organization (SUDO), and the Amal Centre for the Rehabilitation of Victims of Torture in Khartoum.

policy changes. Therefore, the fight against impunity should be at the core of its peace process.

Khartoum had reluctantly lobbied against the initiatives to include justice for the crimes committed in Darfur in the CPA, Darfur Peace Agreement, and in Eastern Sudan Peace Agreement of October 2006. For major policy changes to happen, any easy trade-offs between peace and justice should be refused, and any political and economic accommodations at the expense of a national judicial process should be repudiated. ICG notes the culture of impunity in Sudan, saying:

“A more systemic approach should be developed within a conflict resolution [...] so as to advance improvements on impunity and reformed governance. This is essential to foster the kind of sustainable peace that cannot be built by temporary ceasefires, cooption of spoilers into state institutions and quick-fix power-sharing agreement. Justice requires [...] criminal prosecution of individuals, [...] the establishment of a credible system and culture of accountability through transitional justice mechanism that make the fight against impunity a key component of a reformed governance system” (Crisis Group Africa Report No. 152, 28).

B. The Democratic Republic of the Congo

The Democratic Republic of the Congo (DRC), or Congo-Kinshasa to differentiate it from the neighboring Republic of the Congo, gained independence from Belgium on June 30, 1960. It borders the Central African Republic and South Sudan to the north; Uganda, Rwanda and Burundi and is separated from Tanzania by Lake Tanganyika in the east; and Zambia and Angola to the south. DRC was in war with five of them during the Second Congo War.

Its official name was formerly, in chronological order, the Congo Free State (1877-1908), Belgian Congo (1908-1960), Congo-Léopoldville, Congo-Kinshasa and Zaire. It is the second largest country in Africa and the fourth most populous nation in the continent, with a population of nearly 71 million. DRC is widely considered to be one of the richest country in the world in natural resources, yet its citizens are among the poorest in the world, tiered the last in IMF,

World Bank, and CIA World Factbook's rankings of PPP per capita. It has the second lowest nominal GDP per capita, ahead of Burundi (IMF 2010), the third lowest ahead of Somalia and Burundi (World Bank 2010), and the second lowest ahead of Somalia (CIA World Factbook 2010).

Congo's Political Instability³⁴

The Rwandan genocide that took place between April and June 1994 caused over a million Hutu to seek refuge in the DRC. Among them were up to 100,000-armed men from former *Forces Armées Rwandaises* (FAR) and *Interahamwe*, Rwandan Hutu militia forces, which were responsible for killing the Tutsis. The UN High Commissioner for Refugees treated the massive refugee exodus simply as a humanitarian crisis and provided them with basic needs. The ex-FAR/Interahamwe joined forces with local Hutu militias and Mobutu's army (*Forces Armées Zaïroises* or FAZ) to launch a campaign against Congolese ethnic Tutsis in Kivu province, accusing them of supporting the Rwandan Patriotic Front (RPF), and to launch incursions against the Tutsi-led regime in Rwanda.

After two years of continuing arguments with the United Nations regarding their treatment by the militiamen, the new Rwandan government took the matter into its own hands. The year 1996 marked when the neighboring Rwandan genocide and civil war's tensions came to DRC. Rwandan armies, which were joined by a coalition of Burundi, Eritrea, Angola and Uganda, went under the cover of a small group of Tutsi militia to dismantle the Hutu refugees' camp in North Kivu. By the time the Rwandans finished their march across DRC, they had killed

³⁴ The content of this section is summarized from http://en.wikipedia.org/wiki/Democratic_Republic_of_the_Congo, <http://www.crisisgroup.org/en/key-issues/research-resources/conflict-histories/dr-congo.aspx>, and various ICG Policy Briefings and Reports mentioned in the bibliography.

200,000 to 300,000 Hutu refugees; the vast majority of the victims were women, old people and children.

Meanwhile, the same coalition also aimed to overthrow the government of Colonel Joseph-Désiré Mobutu who had been in power since November 1965. Some Mobutu longtime opposition forces joined them and the newly expanded coalition became known as the *Alliance des Forces Démocratique pour la Libération du Congo-Zaïre* (AFDL) led by Laurent-Désiré Kabila. Leaving the North Kivu, they marched toward Kinshasa and forced Mobutu to flee the country in May 1997. Kabila named himself president of the Democratic Republic of the Congo. By the end of the First Congo War, the AFDL committed serious massacres against Rwandan Hutus in refugee camps and Congolese Hutus, whom they accused of supporting the Rwandan genocide.

On July 27, 1998, President Kabila asked all of the foreign military forces that had helped him overthrow Mobutu to return to their countries. This broke apart alliances that once had brought Kabila to power. New alliances then emerged that revolved around the question of whether Kabila should be kept in power.³⁵ Rwandan troops in DRC retreated to Goma and launched a new rebellion named *Rassemblement Congolais pour la Démocratie* (RCD) to fight Kabila. The Ugandan and some Burundian government troops created another rebel movement called the *Mouvement de Libération du Congo* (MLC) led by the Congolese warlord Jean-Pierre Bemba. On August 2, 1998, the two declared their rebellion against President Kabila.

Angola, Zimbabwe, Namibia and Chad supported the DRC militarily, while Libya and

³⁵ Paul Kagame, the leader of the Rwandan Patriotic Front and later rose to power as Rwandan president effectively ended the Rwandan genocide in July 1994, was the leader of the coalition of five nations who took part in the First Congo War. Laurent-Désiré Kabila was his chosen man and during the time Kabila was the president of the DRC, it was the Rwandans who occupied all civilian and military key positions. Kagame's intention to control its big neighbor later was responded by Kabila's calling for foreign troops fully withdrawal from the DRC.

Sudan made financial contributions.. The United Nations Security Council, meanwhile, adopted Resolution No. 1279 on November 30, 1999. It was to establish a peacekeeping force, the United Nations Mission in the Democratic Republic of the Congo (MONUC), in response to the outbreak of the second civil war.

The continental war in Congo was inseparably intertwined with internal problems facing other countries. As a result, five foreign civil wars and one interstate war were waged on DRC territory. These were in addition to the DRC's own internal conflict. First, it was war between Rwanda and the ex-FAR and *Interahamwe*. After the 1994 genocide in Rwanda, they sought refuge at North Kivu, DRC, and launched incursions into Rwanda against the Kigali Tutsi-led regime.

Second, it was war between Uganda and the Allied Democratic Forces (ADF). Composed of former soldiers of Idi Amin Dada, they carried out several bloody attacks against Kampala from Congolese territory. At the same time, Yoweri Museveni faced two other guerrilla movements at home, West Nile Bank Front, which was active in northwest Uganda, and Lord Resistance Army (LRA). Indeed, Uganda's presence in DRC collided with Kampala's involvement in Sudan's civil war. Uganda supported Southern Sudan Liberation Army (SPLA) that was fighting Khartoum. To retaliate against the threat posed by Kampala, Sudan supported all three Ugandan anti-Museveni guerrilla movements. Sudan accused Uganda of supporting the SPLA, who were recruited from among 350,000 refugees from South Sudan living in the north of Uganda (ICG Congo Report No. 2, 19).

Third, it was war between Burundi and the Forces for the Defense and Democracy (FDD) whom carried out their movement from South Kivu. Fourth, it was war between Congo-Brazzaville and militia backing the deposed former President Lisouba. Fifth, it was war between

Angola and *União Nacional para a Independência Total de Angola* (UNITA). Sixth was Angola's interstate war with Congo-Brazzaville. Luanda always took to the offensive against any neighboring governments that supported UNITA, sometimes contributing forces to support a coup d'état. José Eduardo dos Santos of Angola contributed to the military force that brought General Sassou Nguesso back to power in 1997. The former elected Congo-Brazzaville president, Pascal Lisouba who led the country from 1992-1997, provided 'safe passage' for UNITA diamond production.

Internally, Kabila had to deal with movements challenging his leadership. The Banyamulenge forged an alliance with Rwanda under the umbrella of *Rassemblement Congolais pour la Démocratie* (RCD). Kabila supported Pascal Lisouba during the civil war in Congo-Brazzaville that brought Sassou Nguesso back to power. In return, Nguesso supported *Union des Républicains Nationalistes pour la Libération* (UNFL), Mobutu's former Special Presidential Division forces, which moved to Congo-Brazzaville after Mobutu was ousted from power and later joined the coalition against Kabila.

On the one hand, an alliance formed to oust Kabila from power. It included the RCD, MLC, Rwanda, Uganda and Burundi. The rationale was that his support for guerilla groups opposed to governments of former allies had increased regional instability. On the other hand, there was Kabila resisting the rebel movement with the support from Angola, Zimbabwe, Namibia and Chad, accusing the first party of being foreign adventurists in Congolese territory for natural resources.³⁶

³⁶ During the First Congo War, Angola assisted the AFDL headed by Kabila and reaped the benefits of Mobutu discontinued support for UNITA, and this alliance was maintained during the Second Congo War. The Angolan Armed Forces (Forças Armadas Angolanas or FAA) with a force of 110,000 men had been fighting in its civil war since 1975. Thus had a longer experience of combat than any of the other belligerent countries. One equation of the Second Congo War

The prolonged war took place until 2003. It was known as the “African World War.” It involved seven African nations and about 25-armed groups. By 2008, the war had killed 5.4 million people and displaced millions seeking asylum in neighboring countries.³⁷ On July 10, 1999, heads of state of DRC, Namibia, Rwanda, Uganda, Zimbabwe, and the Minister of Defense of Angola signed the Lusaka Ceasefire Agreement. Jean-Pierre Bemba signed the agreement on August 1, 1999, while 50 representatives of RCD signed the agreement on August 31, 1999.

The agreement was designed to seal sustainable peace in the Central African region and within the DRC. It formed the basis for³⁸:

- 1) Immediate cessation of hostilities and the establishment of a Joint Military Commission tasked with: (i) investigating ceasefire violations, (ii) working-out mechanism to disarm the identified militias, and (iii) monitoring the withdrawal of foreign troops.
- 2) Disarmament, Demobilization, Repatriation, Reintegration and Resettlement (DDRRR)

was the economic benefits reaped from the war. The northeastern provinces of Congo are extremely rich with gold, diamonds, copper, zinc, tin, uranium, zinc, silver and coltan. DRC’s 40-kilometers which stretch to the Atlantic coastline, are marked by oil installations and oil reserves, which is under control of Luanda.

³⁷ See ICG Kivu Report No. 1, North Kivu into the Quagmire? An Overview of the Current Crisis in North Kivu, 13 August 1998; ICG Congo Report No. 2, Congo at War, Briefing on the Internal and External Players in the Central African Conflict, 17 November 1998; ICG Democratic Republic of Congo Report No. 4, Africa’s Seven-Nation War, 21 May 1999; ICG Congo Report No. 3, How Kabila Lost His Way: The Performance of Laurent Désiré Kabila’s Government, 21 May 1999; and ICG Africa Report No. 26, Scramble for the Congo, Anatomy of an Ugly War, 20 December 2000 for further references.

³⁸ See the following reports for more insightful explanation: ICG Democratic Republic of the Congo Report No. 5, The Agreement on A Cease-fire in the Democratic Republic of Congo: An Analysis of the Agreement and Prospects for Peace, 20 August 1999; ICG Africa Report No. 27, From Kabila to Kabila: Prospects for Peace in the Congo, 16 March 2001; ICG Africa Briefing Paper, Disarmament in the Congo: Investing in Conflict Prevention, 12 June 2001; ICG Africa Report No. 37, The Inter-Congolese Dialogue: Political Negotiation or Game Bluff, 16 November 2001; ICG Africa Report No. 38, Disarmament in the Congo: Jump-Starting DDRRR to Prevent Further War, 14 December 2001; and ICG Africa Report No. 44, Storm Clouds Over Sun City: The Urgent Need to Recast The Congolese Peace Process, 14 May 2002.

of armed groups took part in the war.

- 3) The deployment of UN Charter VII force tasked with disarming the belligerents, collecting weapons from civilians, and providing humanitarian assistance and protection to the IDPs
- 4) The establishment of Inter-Congolese Dialogue to forge political dispensation in the DRC.

Upon the assassination of Laurent-Désiré Kabila on January 26, 2001, his son Joseph Kabila took office. He committed to continuing the peace efforts instigated by his father. In April 2001, United Nations Mission in the Democratic Republic of Congo (MONUC) deployed 16,000 peacekeepers to support the implementation of peace talks. However, the conflict was re-launched in January 2002 by ethnic clashes in the northeast. Both Uganda and Rwanda halted their withdrawal and sent in more troops. In December 2002, all Congolese belligerents and political groups signed The Global and Inclusive Agreement in Sun City, South Africa, ushering in a transitional government that would be in power from 2003 to 2006.

In fact, the transitional government that was sworn in on June 30, 2003, was a political compromise between the main armed groups³⁹:

- Joseph Kabila's *Forces Armées Congolaises* (FAC)
- Jean-Pierre Bemba's *Mouvement de Libération du Congo* (MLC)
- Azarias Ruberwa's *Rassemblement Congolais pour la Démocratie-Goma*

³⁹ It is important to note that the appointed vice presidents did not reflect the same share: Vice President Yerodia Abdoulaye Ndombasi of Kabila's coalition, Vice President Azarias Ruberwa of RCD-Goma, Vice President Jean-Pierre Bemba of MNC, and Vice President Arthur Zahidi Ngoma representing political opposition. However, the 36 ministries' post, 25 vice ministers, 500 deputies, 120 senators, nine military regional commanders, and ten provincial governor were distributed among the main armed groups, political opposition and civil society. See Appendix B The Members of the Transitional Government, Crisis Group Africa Briefing No. 34, 14-15.

(RCD-G)

- Mbusa Nyamwisi's *Rassemblement Congolais pour la Démocratie-Mouvement de Libération* (RCD-ML)

- Roger Lumbala's *Rassemblement Congolais pour la Démocratie-National* (RCD-N)

- Mai-Mai militias from the east of DRC

The transitional government was labeled “The 1+4.” This reflected the power sharing agreement. According to the 2003 transitional constitution, the executive branch was vested in a 61-member cabinet, headed by a President and his quartet of vice presidents.⁴⁰

After some delays, first-round presidential elections were held on July 30, 2006. They were marked by the eruption of violent clashes in Kinshasa between Kabila and Bemba supporters after neither gained a majority in first-round vote (44.81% of the vote was for Kabila, and 20.03% of the vote for Bemba). Kabila was inaugurated as the elected president on December 3, 2006 after securing 58.05% vote in the run-off.

Kabila's weak government allowed conflict and human rights abuses to endure.⁴¹ In Kivu, the *Forces Démocratiques de Libération du Rwanda* (FDLR), a new alliances of ex-FAR, Interahamwe, and post-genocide rebels recruited from the Banyamulenge and refugee camps in

⁴⁰ See Crisis Group Africa Briefing, *Back to the Brink in the Congo*, 17 December 2004; Crisis Group Africa Briefing No. 34, *A Congo Action Plan*, 9 October 2005; Crisis Group Africa Report No. 104, *Security Sector Reform in the Congo*, 13 February 2006; and Crisis Group Africa Report No. 108, *Congo's Elections: Making or Breaking the Peace*, 27 April 2006 for in-depth discussion of the situation in DRC during the transitional government period.

⁴¹ See the following reports for further references of post-election's DRC: Crisis Group Africa Briefing No. 42, *Securing Congo's Elections: Lessons from the Kinshasa Showdown*, 2 October 2006; Crisis Group Africa Briefing No. 44, *Congo: Staying Engaged after the Elections*, 9 January 2007; Crisis Group Africa Report No. 128, *Congo: Consolidating the Peace*, 5 July 2007; and Crisis Group Africa Report No. 151, *Congo: A Comprehensive Strategy to Disarm the FDLR*, 9 July 2009.

Tanzania, posted another security threat to Rwanda.⁴² To counter attack, Laurent Nkunda created a rebel movement named National Congress for the Defense of the People (CNDP).

Despite DRC referral of Ituri crisis to the ICC, violence still erupted and caused a refugee crisis at the end of October 2008.⁴³ Joseph Kony's Lord Resistance Army (LRA) expanded their movement to cover DRC by setting up camps in the Garamba National Park in northeast DRC. In northern Katanga, the Mai-Mai posed a serious threat to the local population.⁴⁴ The MONUC, now numbering to 22,000 troops, was criticized for failing to protect civilians from human rights violations committed by both FDLR and FDRC. The war is one of the world's deadliest conflicts since World War II.

Congo's Socio-Economic Situation⁴⁵

The DRC has suffered from systemic corruption since Mobutu came to power, and the legacy of poor governance prevailed in Laurent-Désiré Kabila and Joseph Kabila's presidency. The Congo's two wars between 1996-1997 and 1998-2003 had enhanced the erosion and collapse of state institutions. On July 26, 2005, the United Nations Expert Panel on the Arms Embargo in the Democratic Republic of the Congo reported that between sixty to eighty percent

⁴² See ICG Africa Report No. 56, *The Kivus: The Forgotten Crucible of the Congo Conflict*, 24 January 2003; ICG Africa Briefing, *Pulling Back from the Brink in the Congo*, 7 July 2004; Crisis Group Africa Report No. 91, *The Congo's Transition is Failing: Crisis in the Kivus*, 30 March 2005; and Crisis Group Africa Report No. 133, *Congo: Bringing Peace to North Kivu*, 31 October 2007 for deeper insight into Kivu's conflict.

⁴³ See ICG Africa Report No. 64, *Congo Crisis: Military Intervention in Ituri*, 13 June 2003; ICG Africa Report No. 84, *Maintaining Momentum in the Congo: The Ituri Problem*, 26 August 2004; and Crisis Group Africa Report No. 140, *Congo: Four Priorities for Sustainable Peace in Ituri*, 13 May 2008 for further references.

⁴⁴ See Crisis Group Africa Report No. 103, *Katanga: The Congo's Forgotten Crisis*, 9 January 2006 for an in-depth discussion of Katanga's mineral conflict.

⁴⁵ See Crisis Group Africa Report No. 114, *Escaping the Conflict Trap: Promoting Good Governance in the Congo*, 20 July 2006, and Crisis Group Africa Report No. 150, *Congo: Five Priorities for a Peacebuilding Strategy*, 11 May 2009 for further references.

of customs revenues were embezzled, one fourth of the national budget was not properly accounted for, and millions of dollars were misappropriated in the army and state-run companies.

These problems had a deliberate impact on the humanitarian situation. The unpaid soldiers harassed and intimidated civilians, committed looting, and abducted the villagers. The civil servants also committed the practice of extorting money from the population. Over ninety percent of taxes had been arbitrarily created and were illegal along the trade routes in Equateur and Bandundu provinces. The higher rank of military and government officials fought over control of mineral extractions. IDPs had almost no health service to rely on, and the death of civilians remained high in the aftermath of the civil war. There were more than 1,000 casualties daily.

One clear cost of civil war is a reduction in economic growth. One year of conflict reduces a country's growth rate by 2.2%. On average, each civil conflict lasts for seven years, so the conflict would reduce the economic growth by 15% by the end of the war. It would take roughly ten years to regain the pre-war growth rates (Collier and Hoeffler 2006, 40). The country also increased military spending by about 1.8%.

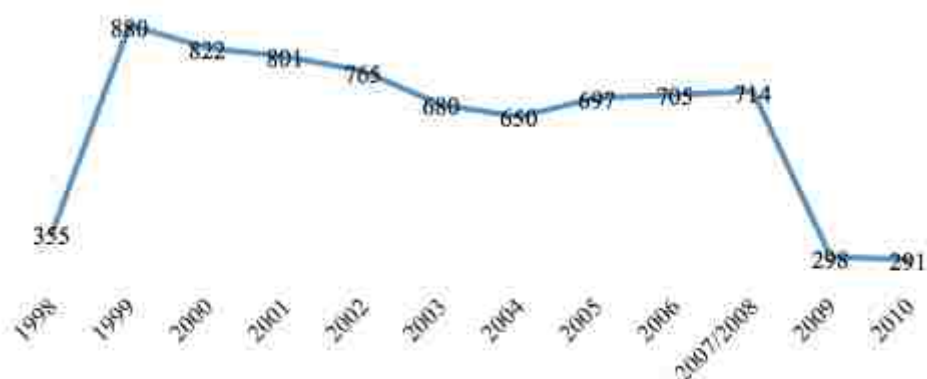
Conflict also has a severe effect on human health. One way to quantify this effect is using the Disability Adjusted Life-Years (DALYs), “a measure of the total number of people affected and the period for which their disability lasts” (Collier and Hoeffler, 42). The estimated figure is five million DALYs net present value of health costs when the hostilities start. If each DALY is valued at the same amount of per capita income in many at-risk countries, which is around \$1,000 then the economic cost of harm to human health is around \$5 billion. (Collier and Hoeffler, 42).

The DRC became an aid-dependent country. Its net official development assistance

(ODA) was greater than ten percent of GNP during 1990-1997 when Joseph-Désiré Mobutu was in power. As of year 2003, the net ODA received amounted to 94.9% of GDP, which was equal to \$ 5.381 billion. However, this pouring of foreign aid to Congo-Kinshasa did not improve the GDP per capita of its population nor its inhabitant's quality of life, such as shown in the following graphs.

Figure 3.5

The Democratic Republic of the Congo GDP Per Capita (in PPP US\$) 1998 - 2010



Internationally, there is a consensus that human development should be the primary objectives of aid. The consensus was reiterated in March 2002, during the International Conference on Financing for Development in Monterrey, Mexico. The participants agreed to make aid one of the building blocks of a new global partnership for poverty reduction. This linked aid effectiveness and the Human Development Index. Data on GDP per capita and HDI were obtained from UNDP Human Development Report 1998 – 2010.

Figure 3.6

The Democratic Republic of the Congo Human Development Index 1998 - 2010



The Global and Inclusive Agreement, which was able to bring belligerent parties into governing the DRC along with civil society and political opposition, ushered in donors' reengagement with sponsoring reforms in a post-civil war Kinshasa. However, the performance of the transitional government was marked by intense political infighting, a lack of accountability, corruption, and a failure to gain stability. Casella and Eichengreen (1996) studied the effect of foreign aid on economic stabilization. They argued that foreign aid transferred sufficiently early in the game leads to earlier stabilization, while delay was destabilizing and encouraged further postponement of reforms. This result does not hold for DRC. In order for foreign aid to have an impact on economic stabilization, political stability must be secured first (see Collier 2007).

Donors have been treating corruption in DRC as a technical problem. Therefore, they emphasized improving data management systems, the creation of legislations and program's training. They avoided the political aspects of strengthening parliaments and courts, anti-corruption and auditing bodies. Such approaches had shown failures to promote good governance in three consecutive years. In 2003, two third of the national budget was spent

outside normal procedure. Even though the figure had decreased to 27 percent in the following year, the presidency overspent by \$18 million. Vice President Jean-Pierre Bemba alone exceeded his budget by some \$11 million. Also in 2004, an audit of state payroll revealed that the pay slips did not match the civil servant database. In 2005, government revenue amounted to only ten percent of GDP. Spending concentrated in the capital only, with less than two percent disbursed outside Kinshasa. In addition, DRC's Corruption Perceptions Index (CPI) for seven consecutive years shows that Kabila failed to fight corruption and promote good governance.

Table 3.7

Corruption Perceptions Index of the Democratic Republic of the Congo

Year	Ranking	Countries Ranked	Rating
2004	133	145	2.0
2005	144	158	2.1
2006	156	163	2.0
2007	168	179	1.9
2008	171	180	1.7
2009	162	180	1.9
2010	164	178	2.0

Collier and Hoeffler provided the most comprehensive estimate of the cost of civil war, \$64 billion annually.⁴⁶ They favored the targeted use of aid or international military intervention to prevent recurring conflicts. However, there are some challenges to these options. Poorly targeted aid, for example, can actually do great harm to the prospects for peace when it merely

⁴⁶ The figure is calculated from various national and regional cost of civil war, which amount to 250% of initial GDP times \$19.7 billion of average GDP of conflict-affected low-income countries, which is equal to \$49.25 billion. If we recall the cost of conflict harm to human health, which is equal to \$5 billion then the total cost would be \$54.25 billion (rounded to \$54 billion). This is already a significant figure, but there is a conflict trap, the likelihood of countries that have just experienced a civil war to have further conflict. Therefore, over the fifteen years period needed for the risk to reach the pre-war level again, the additional discounted cost would be \$10.2 billion. Hence, the final calculation would be \$54 billion + \$10.2 billion = \$64.2 billion, rounded to \$64 billion.

bolsters dictatorships and allows inequality to grow. We might want to recall the period of 1971-1997 when Joseph-Désiré Mobutu was in power and Zaire became a kleptocracy. He got the support of the US and Western powers amid his severe human rights violations, political repression, and corruption. By 1984, Mobutu was said to have \$4 billion in his personal Swiss bank account, an amount close to the country's national debt. International aid in the form of loans gave personal gains to Mobutu while he failed to provide public goods.

Valuable natural resources, meanwhile, provide ways for rebel movements' self-financing. DRC is the most dangerous place in the world to be a woman or girl, as warring parties have used rape as a weapon of war, in order to fight for control over minerals. The most brutal rapes were committed by the FDLR. *Medecins Sans Frontières* (MSF) reported that 75 percent of all rape cases it dealt with worldwide were in eastern Congo. UNICEF and related medical centers reported treatment of 18,505 persons for sexual violence in the first month of 2008, thirty percent of which were children. North Kivu Provincial Sub-commission on Sexual Violence reported that an estimated ninety percent of minors in prison in eastern Congo have been convicted of rape.⁴⁷

DRC is the world's largest producer of ore. It is a mineral that produces Tin (Sn), Tungsten (W), Tantalum (Ta), and Gold (Au) that end up being used in electronic devices such as cell phone. Raise Hope for Congo, for example, is working to get the Conflict Mineral Trade Act to become law in the United States. If so, it would be the strongest effort to date to address the scourge of conflict minerals.

Recall the moment when the world was alerted to the problem of blood diamonds as a

⁴⁷ François Grignon, *Rape as a Weapon of War in Congo*, published in *Spiegel International*, 11 June 2009, retrieved from <http://www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/rape-as-a-weapon-of-war-in-congo.aspx>

funding source for rebel movements. In response, the Kimberley Process Certification Scheme was put in place to ensure that the diamonds purchased by buyers were not fueling violence in Africa. Certification introduces a two-tier market where uncertified goods are sold at a discounted price. This appears to have been at least partly responsible for the collapse of the Revolutionary United Front (RUF) in Sierra Leone and UNITA in Angola.

UN peacekeeping missions are also limited. MONUC has been present in DRC since April 2001 and now amounts to 22,000 troops. It was heavily criticized for causing civilian suffering, the failure to neutralize FDLR and delaying long-awaited security sector reform (SSR).

DRC is one of the countries with the highest rate of child soldiers worldwide. Amnesty International reported that despite some 5,000-child soldiers waiting for reintegration assistance at the end of 2007, the number of children serving with armed groups remained high. The FARDC formally ended the recruitment of child soldiers in 2004. Nonetheless, in 2009, an estimated 3,000 to 4,000 children remained in the ranks of Congolese army units and foreign army groups.

From 2007 to 2011, DRC always ranked among the top ten in the Failed State Index. Kindornay, et al (2009) weighed in the stabilizing and destabilizing factors of DRC's armed conflict, governance and political instability, militarization, population heterogeneity, demographic stress, economic performance, human development, environmental stress, and international linkages, and came out with three scenarios predicting the future of the DRC.

The 'best-case scenario' would reflect in conflict reduction that would decrease the military spending. Thus, more funds would be allocated to provide basic services for the inhabitants. FARDC and the Rwandan government's joint efforts would be able to reduce the

operational capacity of FDLR. CNDP would have to be disarmed and integrated into FARDC. Altogether, this would increase Tutsi minorities' involvement in the political process. As the result of conflict reduction, sexual violence and child soldiers' practices would be significantly decreased.

The 'most-likely scenario' would reflect in the persistence of low-intensity conflict. Rebel groups refuse to recognize the authority of the central government. Thus conflict could be reignite at any time. That is why defense spending remains a priority for government. The FDLR would continue to operate, creating a stumbling block for the DRC and Rwandan government's joint efforts. Any attempts to integrate former rebel soldiers into FARDC would further destabilized the unity of the government's armed forces. Mitigation of human rights abuses would be difficult for alleviation of the problem faces major difficulties.

The 'worst-case scenario' would reflect in the increasing tensions between Jean-Pierre Bemba, the leader of the major opposition party, and Joseph Kabila' supporters. Ethnic tensions in the eastern province would continue rising with the unsuccessful repatriation of Hutu militias and refugees back into Rwanda. DRC-Rwanda government's joint effort would fail to disarm FDLR. Later, DRC-Rwanda government relationship would face a breakdown. Re-emergence of conflict would increase human rights violations. Conflict minerals would continue because of the DRC government's failure to gain greater control over its sovereign territory. A community devastated by conflict would become a perfect supplier of frustrated youth open to being recruited as combatants. Altogether, it would increase future conflict.

Naming and Shaming on the Democratic Republic of the Congo and the International Criminal Court

DRC has been devastated by the continental war and needed more than the promise of reform to move forward. Joseph Kabila, the incumbent President of the DRC, made the referral of his country to the ICC during his presidency in the transitional period. The referral would externalize the political costs of prosecution to the ICC, and provide a powerful mechanism to discredit enemies and reshape the domestic political landscape. In addition, DRC also shows cooperation with the Court by transferring individuals indicted to the ICC. Only by doing this, could reconciliation of DRC's divided communities be achieved

The effort to broker a peace agreement in the DRC began soon after the Second Congo War broke out, on August 8, 1998. The neighboring states, regional organizations such as African Union and SADC, and the Francophone had led constant diplomatic efforts aimed at ending the continental war waged in the DRC. A total of 23 peace initiatives preceded the signing of Lusaka Ceasefire Agreement on July 10, 1999.

The war in DRC added fuel to the fire in the region: Sudan, Uganda, Rwanda, Burundi, Angola, Congo-Brazzaville, Central African Republic. It also purportedly destabilized the countries of Eastern and Southern Africa: Zimbabwe, Namibia, Zambia, Tanzania, Kenya, Ethiopia, and Eritrea (ICG DRC Report No. 4, 34). Consequently, the engagement of the Security Council since early on was unavoidable.

The Security Council adopted Resolution 1234 on April 9, 1999, demanded an immediate cessation of hostilities, a withdrawal of foreign-armed groups and reestablishment of the government's authority. Resolution 1279 adopted on November 30, 1999, was to establish the United Nations Mission in the Democratic Republic of Congo (MONUC). On February 24,

2000, the Security Council expanded MONUC's mandate to monitor the peace process of the Second Congo War by adopting Resolution 1291.

The request to establish a panel of experts on June 2, 2000, submitted by the President of the Security Council to the Secretary General, emerged subsequent to various reports on activities of illegal exploitation of resources in the DRC. On July 31, 2000 the Secretary General notified the President of the Security Council on the establishment of the Expert Panel on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo.

On January 16, 2011, the panel published its first report. Ms. Safiatou Ba-N'Daw from Côte d'Ivoire who chaired the panel and worked together with Mr. François Ekoko (Senegal), Mr. Mel Holt (USA), Mr. Henri Maire (Switzerland), and Mr. Moustapha Tall (Senegal) confirmed the allegation that the Congo's resources had contributed to sustaining and prolonging the war in Congo (Grignon 2004, 45). Therefore, the finding uncovered the self-financing advantages of Kigali and Kampala's presence in the DRC, though both countries emphasized the necessity to obtain a security buffer zone.

Kigali covered a large part of its occupation-defense budget from the resources exploited from the DRC territory under RCD control. The war provided the senior military ranks with extraordinary economic benefits. President Museveni, the incumbent commander-in-chief, perceived the benefits, as sufficient reward to keep the army leadership loyal to his presidency. Equally important, the panel documented and illustrated how the looting of Congo's riches by Zimbabwe and its Congolese government associates were under the cover of the war effort.

The 2003 All Inclusive Peace Agreement allowed the establishment of a parliamentary commission with mandate to review all mineral extraction contracts signed during the two wars.

The commission, headed by Christophe Lutundula, submitted the “Report of the Parliamentary Commission on the Examination of the Validity of Contracts Signed During the 1996/1997 and 1998 Wars” in June 2005. The report revealed that the management of natural resources had worsened during the transition period and identified serious flaws in the ongoing operation of mineral extractions. Consequently, the commission urged the government to review many contracts that were signed during the two wars, to cancel all contracts signed during the transitional period, and to hold new concessions until a new government was elected.

The findings of the UN Panel of Experts and Lutundula Commission helped keep the issue of exploitation of resources in the DRC on the international agenda and to simultaneously keep the peace process moving forward. Soon after being named in the first report, Rwanda and Uganda accelerated their withdrawal from the DRC, to avoid the threat of sanctions.

ICG field analysts had been monitoring the development of conflict in North and South Kivu since April 1998. On August 13, 1998, it published the first report titled “North Kivu, Into the Quagmire? An Overview of the Current Crisis in North Kivu.” To this date, ICG has published 34 reports regarding the conflict in DRC. Human Rights Watch has published 40 reports while Amnesty International, in addition to its Human Rights in the DRC report published since 2008, had also published many reports (see Appendix H – List of TANs Reports and UNSC Resolutions).

In 2006, the United Nations Committee on the Elimination of All Forms of Discrimination against Women showed concern regarding the transitional government’s inability to prioritize women’s rights and gender equality. UN Special Rapporteur on Violence, Yakin Ertürk, reported about ‘unimaginable brutality’ toward women in North and South Kivu. The armed group kidnapped women and girls, and used rape as a weapon of war, in order to fight for

control over minerals, or make them work as sexual slaves.

In 2008-2009, the Office of the High Commissioner for Human Rights reported that gross human rights violations such as arbitrary execution, rape, torture and cruel, inhuman and degrading treatment are pervasive in the DRC, committed mostly by the army and police and intelligence services. In an effort to bring the war crimes suspect to justice, the government of the DRC, a state party to the Rome Statute, referred the situation in DRC to the ICC Prosecutor on April 19, 2004. President Joseph Kabila, who signed the request letter, asked the prosecutor to investigate crimes within the jurisdiction of the Court that were allegedly committed in the DRC since the entry into force of the Rome Statute.

This decision was surprising considering that Kabila's inner circles might be convicted for its participation in conflict minerals and other wrongdoing punishable under the crimes against humanity provision of the Rome Statute. Professor Burke-White argued that Kabila's decision might rest primarily on cost benefit analysis of domestic politics and international pressure. He also notes:

“[T]he very weakness of the national government and the politically charged nature of any judicial proceedings may well have led Kabila to refer the case to externalize the political costs of prosecution onto the ICC... Given that many key political actors are implicated in international crimes, criminal justice offers a powerful mechanism to discredit enemies and reshape the domestic political landscape” (Quoted in Lipscomb 2011, 211).

On June 23, 2004 the Office of the Prosecutor decided to open an investigation, initially with a focus on crimes committed in the Ituri. On July 4, 2004, the case was allocated to Pre-Trial Chamber I. Further, the Court was able to name the alleged perpetrators and charged them with the following crimes, such as mentioned in their arrest warrants:

1. Thomas Lubanga Dyilo, alleged founder of *Union des Patriotes Congolais* (UPC) and the

Forces Patriotiques pour la Libération du Congo (FPLC); alleged former Commander-in-Chief of the FPLC since September 2002 and at least until the end of 2003; and alleged president of the UPC. He is allegedly responsible, as co-perpetrator, of war crimes consisting of:

- “Enlisting and conscripting of children under the age of 15 years into the *Forces Patriotiques pour la Libération du Congo* (FPLC) and using them to participate actively in hostilities in the context of an international armed conflict from early September 2002 to June 2, 2003, punishable under article 8(2)(b)(xxvi) of the Rome Statute;
 - Enlisting and conscripting children under age of 15 years into the FPLC and using them to participate actively in hostilities in the context of an armed conflict not of an international character from June 2, 2003 to August 13, 2003, punishable under article 8(2)(e)vii) of the Rome Statute” (ICC-PIDS-CIS-DRC-01-004/11_Eng, n.p.)
2. Bosco Ntaganda, former alleged Deputy Chief of the General Staff of the *Forces Patriotiques pour la Libération du Congo* (FPLC); alleged Chief of Staff of the *Congrès National pour la Défense du Peuple* (CNDP) armed group, active in North Kivu in the DRC.
 3. Germain Katanga, alleged commander of the *Forces de Résistance Patriotiques en Ituri* (FRPI).
 4. Mathieu Ngudjolo Chui, alleged former leader of the *Front des Nationalistes et Intégrationnistes* (FNI).

Both Germain Katanga and Mathieu Ngudjolo Chui allegedly jointly committed, through other persons, within the meaning of article 25(3)(a) of the Rome Statute:

- “Three crimes against humanity: murder under article 7(1)(a) of the Statute; sexual slavery and rape under article 7(1)(g) of the Statute;
- Seven war crimes: using children under the age of 15 to take active part in hostilities under article 8(2)(b)(xxvi) of the Statute; deliberately directing an attack on a civilian population as such or against individual civilians or against individual civilians not taking direct part in hostilities under article 8(2)(b)(i); willful killing under article 8(2)(a)(i) of the Statute; destruction of property under article 8(2)(b)(xiii) of the Statute; pillaging under article 8(2)(b)(xvi) of the Statute; sexual slavery and rape under article 8(2)(b)(xxii) of the Statute” (ICC-PIDS-CIS-DRC2-03-004/11_Eng, n.p.)

5. Callixte Mbarushimana, alleged Executive Secretary of the *Forces Démocratiques pour la Libération du Rwanda – Forces Combattantes Abacunguzi* (FDLR-FCA).

Pre-Trial Chamber I considers that there are reasonable grounds to believe that he is criminally responsible under article 25(3)(d) of the Rome Statute for:

- “Five counts of crimes against humanity: murder, torture, rape, inhumane acts and persecution;
- Six counts of war crimes: attacks against the civilian population, destruction of property, murder, torture, rape and inhumane treatment” (ICC-PIDS-CIS-DRC-04-002/11_Eng, n.p.)

In February 2008, the Prosecutor announced that the arrest of Mathieu Ngudjolo Chui had closed the ICC investigation in Ituri. Prior to that, Thomas Lubanga Dyilo, was transferred to the ICC on March 17, 2006, and Germain Katanga transferred to the ICC on October 17, 2007. Both were charged with perpetrating conflict in Ituri. Thomas Lubanga’s trial commenced on

January 26, 2009 and the closing oral statements took place on August 25-26, 2011. The Trial Chamber I would render the decision on whether or not the accused is guilty within a reasonable time after the presentation. Both Katanga and Ngudjolo Chui are undergoing Trial Chamber II. Pre-Trial Chamber I had issued a warrant of arrest for Bosco Ntaganda on August 22, 2006, while Callixte Mbarushimana's confirmation of charges hearing is scheduled to start on September 16, 2011.

Global Policy Forum, an independent policy watchdog headquartered in NY, is publicly naming and shaming the DRC for its engagement in diamond and mineral conflicts. Hundreds of reports are posted and freely accessible from the organizations' website. It attracts more than five million visitors annually and exposes how natural resources lie at the heart of civil wars, including in the DRC. Raise Hope for Congo advocated and conducted direct lobbying for the Conflict Mineral Trade Act to be passed by the US Congress.

DRC has one of the highest rates of child soldiers worldwide, placing the country in an Amnesty International global campaign. DRC is also the most dangerous place in the world to be a woman or girl because the warring parties have excessively used rape as a weapon of war. Consequently, DRC is on the list of naming and shaming by the Office of the High Commissioner for Human Rights. This multifaceted conflict in DRC moved diverse and various TANs to put the DRC into the international spotlight.

PART IV

ON THE EFFECTIVENESS OF NAMING AND SHAMING TO THE POWER OF ICC AND THE WAY FORWARD

I argue that naming and shaming techniques work and show this in the two cases. I argued that publicity is an important power of the ICC. Publicity provides transparency; lays the groundwork for a more vigorous and powerful diplomatic, economic and military response to perpetrators. It also develops a sense of legitimacy for State Parties to the Rome Statute. The International Military Tribunal at Nuremberg once reminded us, “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁴⁸

The international community holds the perpetrators of human rights violations accountable for their action, and as Ratner et.al 2009 argued,

“International crimes violate the most central norms of humanity, and all states should have a moral and political interest in seeing an effective remedy. Accountability, whether through prosecutions or otherwise, also serves a preventive purpose. It can signal to future violations of human rights that their actions will not simply be forgotten in some political compromise. The exact form of accountability is less important than the existence of some process for stigmatizing the offender, aiding the victim, informing the society, and ensuring that political settlements and transitions take account of human rights abuses – *all were made possible through naming and shaming*” (370).⁴⁹

The International Criminal Court is to be the deterrent for some of the worst crimes. Many scholars of international law and transitional justice argue that “holding perpetrators accountable, demonstrates the viability of the rule of law and human rights protections, thereby

⁴⁸ “Judgment of the International Military Tribunal.” Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, Part 22. London, 1950. 447. Print.

⁴⁹ Emphasis added by the author.

should deter others from thinking that they are above the law” (Hillebrecht 2011, 10).⁵⁰ Roach (2006) argues that a global deterrent effect is a critical starting point for understanding the politics of international criminal law. The ICC Statute, he added, “eliminates all existing national amnesty laws that have provided immunity to perpetrators of gross human rights violations” (2).

Hillebrecht further argues that there are three main causal mechanisms by which action at the ICC could deter future abuses. The first is normative in nature. The second is the effect international law has on inspiring international action to restrain the atrocities. The third is a re-calculation of perpetrators’ likelihood of accountability. The first two mechanisms put emphasis on the fact-finding and investigatory works of the ICC. As the ICC moves forward with its discovery of atrocities, the importance of exposing the abuses to the international community becomes necessary, since it provides transparency. Further, it would lay the groundwork for an extensive naming and shaming campaign, which would give leeway to more vigorous and powerful diplomatic, economic, and military sanctions.

The transnational advocacy networks (TANs) such as International Crisis Group, Human Rights Watch, and Amnesty International were involved in a massive naming and shaming campaign aimed at the conflicts in Darfur and Congo-Kinshasa. International Crisis Group, an

⁵⁰ Stephen M. Sheppard analogized the deterrent effect of the ICC to the speeding ticket that could be given at anytime. He argued,

“I think about it this way, do you drive; do you have a car? Many people speed, when they speed and they are finally given the tickets, they can’t argue that there was no law because they have been able to speed all the other times. You don’t have to have one patrolman to proof there is a speed limit; you don’t need a patrolman every mile. Even without a patrolman, from time to time if anyone can get a ticket, it reminds us all that there is such a capacity. The fact there is speeder that does not mean there is no speed limit. So one of the things that people argued about implicitly in this is, ‘do we have to look to all these things to show it’s effective, to show it’s real?’ The answer is NO. All we need to know there is a speed limit, and from time to time the ticket can be given, even if it isn’t given, it can be given. That is enough for it to be effective. Because when the ticket is given, you don’t get much of an excuse. You can say, ‘But they all sped!’ But nobody took you seriously” (Sheppard, 2011).

international NGO founded in 1995 and headquartered in Brussels, published Crisis Group briefings and reports as resources of advice to the governments of DRC and Sudan, the governments of mediating states, and intergovernmental bodies (such as the EU, AU, and UN). These briefings and reports contained recommendations on how to achieve resolution of the conflicts.

Human Rights Watch, a NGO headquartered in New York City, has long adopted publicly naming and shaming of abusive governments through media coverage and direct exchanges with policymakers in their campaign. It constantly monitors human rights conditions in the DRC and Sudan, and other 78 countries around the world and publishes reports and news releases. Indeed, Human Rights Watch compiled a list of all the perpetrators of conflict in Darfur.

Amnesty International, a London based worldwide movement, works to improve human rights through campaigning and international solidarity. Amnesty International does direct lobbying, conducts letter writing campaigns and targeted appeals, among other things, to put pressure on governments, armed groups, companies and intergovernmental bodies to uphold international human rights and humanitarian law. It also publishes country human rights reports annually and provides news releases.

The US Department of State is also one of the key players in transnational advocacy networks. In compliance with Sections 116(d) and 502 (b) of the Foreign Assistance Act of 1961, as amended, and Section 504 of the Trade Act of 1974, as amended, the department is required to submit Country Reports on Human Rights Practices to the US Congress every year. The Department emphasizes, “the existences of human rights helps secure the peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracy, and prevent humanitarian crisis.”

The way in which the transnational advocacy networks worked to name and shame the perpetrators in both Sudan and the DRC confirmed what Kick and Sikkink (1998) described as a boomerang pattern.⁵¹ This suggests that domestic NGOs need transnational advocacy network to shine a powerful light on human rights abuses. It also suggests the role that non-state actors could play in evoking human rights compliance.

Background reports and press releases also have impact. Press releases are more likely to be short interventions by sending messages of breaking events to general publics in order to shape their perceptions. Individuals at the grass roots could mobilize support and put pressure on elected leaders to play more active roles in demanding that violating states comply with human rights. Background reports are for longer interventions. They are usually based on in-depth country research, and target human rights professionals, academics, UN officials, donor countries, Western democratic states, decision makers at the regional and international level, and journalists.

Naming and shaming by transnational advocacy networks allow more support and more pressure to be placed on violating states, or on the parties in the inner circle of conflict negotiations. Such patterns are especially effective when a particular state lacks a sufficient human rights movement that could contend domestic violations, such as the case in Darfur and DRC.

Nonetheless, even as the number of ICC indictments in Africa increases, it will continue to be difficult for the Court to reach perpetrators in big or powerful countries. It is important for the ICC's effectiveness to go beyond naming and shaming if it is going to build legitimacy and respect (Sharp 2011).

⁵¹ See Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders*, (Ithaca: Cornell University Press, 1998) for more insightful explanation.

One-way to move forward with such issue is by re-designing the decision making process at the ICC. This requires a more efficient working relationship between the Assembly of State Parties and the ICC judiciary. The proposition is that “the creation of a decision-making body within the Assembly of State Parties whose task would be to address a humanitarian crisis in a manner that overcomes the time restrictions imposed by the principle of complementarity” (Roach, 172). The following table would provide details on the proposition.

Table 4.1

Types of Prevention in the ICC and Security Council

Organs	Non-Intervention	Intervention
ICC	Cell 1 Reputation	Cell 3 Admissibility
Security Council	Cell 2 • Preventive Diplomacy • Economic Sanctions	Cell 4 • Use of Military Force • Stabilization • Rapid Deployment

Reproduced from Roach 2006, 172.

The ICC is clearly a key part of the debate on the effectiveness of international institutions. This is especially so when we think of the agenda setting and publicity that it already accomplished at the international level. The cases of Darfur, Sudan and the Democratic Republic of the Congo show that the ICC is effectively realizing its purpose: it gives voice to non-state actors like NGOs, regional actors, and international governmental organizations; it regularizes ways for international actors to be part of the process; it provides information to other stakeholders; and it names and shames the perpetrators of human rights violations. Hence, the ICC gives meaning to the cautious optimism that inspires liberal claims. As Roach (2006, 72-73) emphasized,

“The desire for accountability, [...], is not some cognitive picture per se, but an intrinsic and objective element of our moral experience. As moral beings, we assert this

objectivity through the institutional mechanism that embodies our fundamental conceptions of justice or the common good. It is in this respect that, as rationally human beings, we universally condemn the crime of genocide and crimes against humanity. It is also in this manner that the principles and rules of the ICC cannot be conceived as simply formalistic or hollow statements of moral accountability.”

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APPENDIX A
WAR CRIMES UNDER THE ROME STATUTE

2. For the purpose of this Statute, “war crimes” means:

- (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful enforcement;
 - (viii) Taking of hostages.
- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
 - (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

- (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gasses, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) Employing weapons projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

- (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
 - (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
- (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:
- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (iii) Taking of hostages;
 - (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
- (i) Intentionally directing attacks against the civilian populations as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (v) Pillaging a town or place, even when taken by assault;

- (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
 - (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (ix) Killing or wounding treacherously a combatant adversary;
 - (x) Declaring that no quarter will be given;
 - (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.



120 Ozark Hall • Fayetteville, Arkansas 72701 • (479) 575-2208 • (479) 575-3846 (FAX)
Email: irb@uark.edu

Research Support and Sponsored Programs Institutional Review Board

December 14, 2010

MEMORANDUM

TO: Mirisa Hasfaria
Patrick Conge

FROM: Ro Windwalker
IRB Coordinator

RE: New Protocol Approval

IRB Protocol #: 10-12-353

Protocol Title: *Evaluating the International Criminal Court: Calling the Case of Darfur, Sudan and the Democratic Republic of the Congo*

Review Type: ☒ EXEMPT ☐ EXPEDITED ☐ FULL IRB

Approved Project Period: Start Date: 12/14/2010 Expiration Date: 12/13/2011

Your protocol has been approved by the IRB. Protocols are approved for a maximum period of one year. If you wish to continue the project past the approved project period (see above), you must submit a request, using the form *Continuing Review for IRB Approved Projects*, prior to the expiration date. This form is available from the IRB Coordinator or on the Compliance website (<http://www.uark.edu/admin/rsspinfo/compliance/index.html>). As a courtesy, you will be sent a reminder two months in advance of that date. However, failure to receive a reminder does not negate your obligation to make the request in sufficient time for review and approval. Federal regulations prohibit retroactive approval of continuation. Failure to receive approval to continue the project prior to the expiration date will result in Termination of the protocol approval. The IRB Coordinator can give you guidance on submission times.

If you wish to make *any* modifications in the approved protocol, you must seek approval *prior to* implementing those changes. All modifications should be requested in writing (email is acceptable) and must provide sufficient detail to assess the impact of the change.

If you have questions or need any assistance from the IRB, please contact me at 120 Ozark Hall, 5-2208, or irb@uark.edu.



210 Administration • Fayetteville, Arkansas 72701 • (479) 575-2208 • (479) 575-3846 (FAX)
Email: irb@uark.edu

Research Compliance
Institutional Review Board
October 11, 2011

MEMORANDUM

TO: Mirisa Hasfaria
Patrick Conge

FROM: Ro Windwalker
IRB Coordinator

RE: PROJECT MODIFICATION

IRB Protocol #: 10-12-353

Protocol Title: *Evaluating the International Criminal Court: A Comparative Analysis of Darfur, Sudan and the Democratic Republic of the Congo*

Review Type: ☒ EXEMPT ☐ EXPEDITED ☐ FULL IRB

Approved Project Period: Start Date: 10/11/2011 Expiration Date: 12/13/2011

Your request to modify the referenced protocol has been approved by the IRB. **This protocol is currently approved for 2 total participants.** If you wish to make any further modifications in the approved protocol, including enrolling more than this number, you must seek approval *prior to* implementing those changes. All modifications should be requested in writing (email is acceptable) and must provide sufficient detail to assess the impact of the change.

Please note that this approval does not extend the Approved Project Period. Should you wish to extend your project beyond the current expiration date, you must submit a request for continuation using the UAF IRB form "Continuing Review for IRB Approved Projects." The request should be sent to the IRB Coordinator, 210 Administration.

For protocols requiring FULL IRB review, please submit your request at least one month prior to the current expiration date. (High-risk protocols may require even more time for approval.) For protocols requiring an EXPEDITED or EXEMPT review, submit your request at least two weeks prior to the current expiration date. Failure to obtain approval for a continuation *on or prior to* the currently approved expiration date will result in termination of the protocol and you will be required to submit a new protocol to the IRB before continuing the project. Data collected past the protocol expiration date may need to be eliminated from the dataset should you wish to publish. Only data collected under a currently approved protocol can be certified by the IRB for any purpose. If you have questions or need any assistance from the IRB, please contact me at 210 Administration Building, 5-2208, or irb@uark.edu.

APPENDIX D
US BILATERAL IMMUNITY OR “ARTICLE 98” AGREEMENTS

Coalition for the International Criminal Court
April 18, 2003

In capitals around the world, U.S. government representatives are seeking bilateral immunity or so-called “Article 98” agreements in an effort to shield U.S. citizens from prosecution by the newly created International Criminal Court (ICC or Court). Dubbed “impunity agreements” by leading legal experts, these bilateral agreements, if signed, would provide that neither party to the accord would bring the other’s current or former government officials, military or other personnel (regardless of whether or not they are nationals of the state concerned) before the jurisdiction of the Court.

Many legal, government and NGO representatives argue that the U.S. is misusing Article 98 of the Rome Statute of the International Criminal Court; the provision of the ICC’s governing treaty that the U.S. is using to justify seeking such accords. Legal experts furthermore contend that if countries that have ratified the Rome Statute enter into such agreements, they would breach their obligations under international law.

Q: Why is the U.S. seeking bilateral immunity agreements?

A: The pursuit of bilateral immunity agreements is part of a long history of U.S. efforts to gain immunity for its citizens from the ICC. From 1995 through 2000, the U.S. government supported the establishment of an ICC, yet one that could be controlled through the Security Council or provided exemption from prosecution of U.S. officials and nationals. In 2001, the Bush Administration discontinued participation in ICC meetings and, on 6 May 2002, officially nullified the Clinton administration’s signature of the Rome Statute. Purportedly, the Bush Administration believes that the Court could be used as a stage for political prosecutions, despite ample safeguards included in the Rome Statute to protect against such an event.

Contrary to assurances from high-level U.S. officials, the U.S. is not respecting the rights of States that have ratified or acceded to the Rome Statute. As it did in seeking an exemption for peacekeepers from the jurisdiction of the ICC through the Security Council, the U.S. government is using coercive tactics to obtain immunity from the jurisdiction of the ICC for its nationals. U.S. officials have publicly threatened economic sanctions, such as the termination of military assistance, if countries do not sign the agreement. In several instances, there have been media reports of the U.S. providing large financial packages to countries at the time of their signature of bilateral immunity agreements.

Q: What is Article 98 of the Rome Statute?

A: The nations that negotiated the drafting of the Statute did so with extensive reference to international law and with care to address potential conflicts between the Rome Statute and existing international obligations. The drafters recognized that some nations had previously existing agreements, such as Status of Forces Agreements (SOFAs), which obliged them to

return home the nationals of another country (the “sending state”) when a crime had allegedly been committed. Thus Article 98 (2) was designed to address any potential discrepancies that may arise as a result of these existing agreements and to permit cooperation with the ICC. The article also gives the “sending state” priority to pursue an investigation of crimes allegedly committed by its nationals. This provision is consistent with the Statute’s complementarity’s principle, which allows the country of the nationality of the accused the first opportunity to investigate and, if necessary, try an alleged case of genocide, war crimes, or crimes against humanity.

Q: What are the bilateral immunity agreements being sought by the U.S.?

A: To date, several versions of these bilateral agreements have been proposed: those that are reciprocal, providing that neither of the two parties to the accord would surrender the other’s “persons” without first gaining consent from the other; those that are non-reciprocal, providing only for the non-surrender to the ICC of U.S. “persons”; and those that are intended for states that have neither signed nor ratified the Rome Statute, providing that those states not cooperate with efforts of third-party states to surrender U.S. “persons” to the ICC.

Q: Why do experts believe bilateral immunity agreements are in contravention of international law?

A: Many governmental, legal and non-governmental experts have concluded that the bilateral agreements being sought by the U.S. government are contrary to international law and the Rome Statute for the following reasons:

- The U.S. bilateral immunity agreements are contrary to the intention of the Rome Statute’s drafters. Delegates involved in the negotiation of Article 98 of the Statute indicate that this article was not intended to allow the conclusion of new agreements based on Article 98, but rather to prevent legal conflicts, which might arise because of existing agreements, or new agreements based on existing precedent, such as new SOFAs. Article 98 was not intended to allow agreements that would preclude the possibility of a trial by the ICC where the sending state did not exercise jurisdiction over its own nationals. Indeed, Article 27 of the Rome Statute provides that no one is immune from the crimes under its jurisdiction.
- The U.S. bilateral immunity agreements are contrary to the language of Article 98 itself. The proposed agreements seek to amend the terms of the treaty by effectively deleting the concept of the sending state from Article 98(2); this term indicates that the language of Article 98(2) is intended to cover only SOFAs, Status of Mission Agreements (SOMAs) and other similar agreements. SOFAs and SOMAs reflect a division of responsibility for a limited class of persons deliberately sent from one country to another and carefully addresses how any crimes they may commit should be addressed.

By contrast, the US-proposed bilateral immunity agreements seek immunity for a wide-ranging class of persons, without any reference to the traditional sending state-receiving state relationship of SOFA and SOMA agreements. This wide class of persons would include anyone found on the territory of the state concluding the agreement with the U.S. who works

or has worked for the U.S. government. Government legal experts have stated that this could easily include non-Americans and could include citizens of the state in which they are found, effectively preventing that state from taking responsibility for its own citizens.

- The U.S. interpretation of Article 98 is contrary to the overall purpose of the ICC. The U.S. government's so-called "Article 98" agreements have been constituted solely for the purpose of providing individuals or groups of individuals with immunity from the ICC. Furthermore, the agreements do not ensure that the U.S. will investigate and, if necessary, prosecute alleged crimes. Therefore, the intent of these U.S. bilateral immunity agreements is contrary to the overall purpose of the ICC, which is to ensure that genocide, crimes against humanity and /or war crimes be addressed either at the national level or by an international judicial body.

Q: What are the possible ramifications of the signature of these bilateral immunity agreements?

A: States that sign these agreements would breach their obligations under the Rome Statute, the Vienna Convention on the Law of Treaties and possibly their own extradition laws. In particular, States Parties to the Rome Statute that sign these agreements will breach Articles 27, 86, 87, 89 and 90 of the Statute, which require states to cooperate with and provide assistance to the Court. These states will also violate Article 18 of the Vienna Convention on the Law of Treaties, which obliges them to refrain from acts that would defeat the object and purpose of the Statute. Finally, many states will likely violate their own extradition laws in signing such agreements, as states generally have much wider power to approve extraditions and surrenders of persons than the US-proposed bilateral immunity agreements would allow.

Q: Who has been approached with bilateral immunity agreements and with what result?

A: Reports indicate that many countries from around the world, including close allies of the U.S. government, those seeking membership in NATO, and those in the Middle East and South Asia, have been targeted for approach and face extreme pressure to sign. John Bolton, US Undersecretary for Arms Control and International Security, recently stated, "Using Article 98 of the Rome Statute as a basis, we are negotiating bilateral, legally-binding agreements with individual States Parties to protect our citizens from being handed over to the Court. Our negotiators have been engaged in bilateral discussions with several EU countries.... (And) several countries in the Middle East and South Asia. Our ultimate goal is to conclude Article 98 agreements with every country in the world, regardless of whether they have signed or ratified the ICC, regardless of whether they intend to in the future."

As of April 16, 2003, twenty-seven countries were reported to have signed U.S. bilateral immunity agreements: Romania, Israel, East Timor, the Marshall Islands, Tajikistan, the Dominican Republic, Palau, Mauritania, Uzbekistan, Honduras, Afghanistan, Micronesia, Gambia, El Salvador, Sri Lanka, India, Nepal, Djibouti, Bahrain, Tuvalu, Georgia, Azerbaijan, Nauru, the Democratic Republic of Congo, Tonga, Sierra Leone and Rwanda. National law in many of these countries requires that the agreement be ratified by parliament before becoming binding. Several countries, including members of the European Union, have conducted legal

analyses of these agreements and concluded that the proposed agreements are contrary to international law.

Q: How does this effort tie in with the larger U.S. offensive against the Court?

A: A number of relevant foreign policy directives from Washington have paved the way for the U.S. effort to gain exemption for its citizens from the ICC. On May 6, 2002, Marc Grossman, U.S. Under Secretary of State for Political Affairs, announced that the current administration no longer considered it bound by the U.S. signature of the Rome Statute and did not intend to ratify the treaty. In May 2002, the U.S. first threatened to destabilize UN peacekeeping operations by promising to veto the UN mission in East Timor unless its military personnel were granted immunity from the ICC; the operation was renewed without such a provision. On July 12, 2002, the U.S. obtained a one-year renewable exemption for UN peacekeepers in the context of the Security Council debate on the UN mission in Bosnia-Herzegovina. (The agreement was made retroactively effective to July 1, 2002.) On August 2, 2002, the last day before U.S. Congressional summer recess, President Bush signed the American Service Members' Protection Act, which authorizes the withdrawal of U.S. military assistance from certain non-NATO allies supporting the Court. The Act does, however, also include broad Presidential waivers.

U.S. pressure on countries to support its bilateral immunity agreements intensified in mid-August 2002 when U.S. officials, including Pierre-Richard Prosper, U.S. Ambassador at Large for War Crimes Issues, indicated that the US relationship with NATO would change should his government fail to achieve its goal to secure broad non-surrender agreements. It has furthermore been reported that States seeking entry into NATO may be refused entry on the basis of a failure to sign a bilateral immunity agreement, although U.S. officials have publicly denied this claim.

Q: Does a State that signs or ratifies a so-called “Article 98” agreement still have obligations to the ICC?

A: Yes. Different stakeholders may disagree as to whether or not the so-called Article 98 Agreements violate the terms of the Rome Statute and the scope of the Article as intended by its drafters. There is, however, little debate that Agreement signatories that are State Parties to the Rome Statute continue to have all prior obligations related to the ICC, except with regard to the specific terms of the Agreement. This includes the obligation to cooperate with the ICC in all investigations and prosecutions not involving the United States, and the opportunity to exercise national jurisdiction over the ICC crimes. Agreements signatories that are not yet States Parties to the Rome Statute may, and should be encouraged to, accede to the Rome Statute. It will be up to the ICC to decide whether or not the so-called Article 98 Agreements proposed by the United States are valid. Until such a determination is made, it is incumbent on States Parties to fulfill their obligations to the Court, and for Statute signatories to proceed with the accession process.

Source : <http://www.globalpolicy.org/component/content/article/164/28427.html>

APPENDIX E
INTERNATIONAL CRIMINAL COURT AND INTERNATIONAL COURT OF JUSTICE
SUPRANATIONAL ELEMENTS

Amitai Etzioni in Political Unification Revisited: On Building Supranational Communities defined the three elements of supranational as follows:

1. Making of significant decisions by a body that is not made of national representatives and does not receive instructions from national governments.
2. The decisions of the body are legally binding to the subject or participants.
3. Individuals or other private parties may interact directly with the body and/or have legal obligations as stated above.

International Criminal Court	
Aspect	Supranational Element
The Prosecutor may independently open investigations into cases of widespread violation of the Statute, such as war crimes, genocide, and crimes against humanity, given the consent of the Pre-Trial Chamber. The Prosecutor may conduct investigations on the territory of a State Party (Article 53 and 54 of the Rome Statute)	1
Judges and members of the Office of the Prosecutor serve in a personal capacity and, though accountable to the Assembly of State Parties, act entirely independently and without instruction from national governments or any entity outside the Court (Article 36, 40 and 42 of the Rome Statute).	1
The Court has jurisdiction over persons, who are individually responsible and punishable for crimes under the Statute, such as war crimes, genocide, and crimes against humanity (Article 25 of the Rome Statute).	2, 3
The Pre-Trial Chamber may, after an investigation by the Prosecutor and on the application of the Prosecutor, issue a warrant of arrest for an individual if it has reasonable grounds to believe the individual has committed a crime under the Statute involved in the case under investigation by the Prosecutor (Article 58 of the Rome Statute).	2, 3
Arrest warrants are binding on State Parties, which are obligated to take steps to arrest the person in question immediately (Article 59 of the Rome Statute).	2
The Prosecutor of the Court, with the consent of the Pre-Trial Chamber, consisting of three judges, is authorized to directly summon a person if there are reasonable grounds to believe the person committed an alleged crime under the Statute and a summons is sufficient to ensure the person's appearance (Article 58 of the Rome Statute).	3
Individuals concerned have the right to challenge an arrest	3

warrant at the international level and apply at the international level for release pending trial (Article 60 of the Rome Statute)	
International Court of Justice	
Aspect	Supranational Element
The judges, who compose the Court, serve in a personal capacity, and though they are elected by the General Assembly on the advice of the Security Council, they are forbidden from receiving instructions from national governments or any entity outside the Court (Article 4 of the Statute of ICJ).	1
ICJ rulings in contentious cases are binding on the State Parties to the dispute. Thus, its decisions have the status of a treaty obligation for the State Party in question (UN Charter Article 94 Paragraph 1).	2
In case of non-compliance with decisions, the ICJ may refer a state party to the Security Council for enforcement, although this provision has never been used (UN Charter Article 94 Paragraph 2).	2
The ICJ Statute is a self-executing treaty, meaning (dependent on the constitutional provisions of the State Party in question) the provisions of the treaty are enforceable in the respective legal structures of State Parties, indistinguishable from national laws of the State Party. Taken with fact that its decisions are distinguishable in obligation from the Statute of the ICJ itself, the decisions of the ICJ have the status of national law in national courts.	2
The Court has the power in a contentious case to indicate any provisional measures for the preservation of the rights of either party (Article 41 of the ICJ Statute).	2
State parties to the ICJ Statute may declare acceptance of the jurisdiction of the Court in all cases. This means that any other state party having declared compulsory jurisdiction as well may bring the state party before Court for an alleged violation of international law. Should the ICJ decide to take up the dispute, the party is required to defend itself in a case before the ICJ and accept the decision of the Court. Certain treaties also confer on the ICJ compulsory jurisdiction over the treaty (Article 36 Paragraph 2 of the ICJ Statute).	2

Reproduce from: Supranational Aspects of International Organizations, retrieved from http://en.wikipedia.org/wiki/Supranational_aspects_of_international_organizations

APPENDIX F
DARFUR'S NON - SIGNATORY MOVEMENTS

JEM (Justice and Equality Movement)	Leader: Khalil Ibrahim The group refused to attend peace talks in Sirte, Libya on October 2007 and attributed their objection to “the presence of rebel groups that had no constituencies therefore deserved no place at the negotiating table.”
JEM – Collective Leadership	Leader: Bahr Idriss Abu Garda
JEM - Azraq	Leader: Idriss Ibrahim Azraq
National Movement for Reform and Development	Leader: Khalil Abdullah Another splinter group of Justice and Equality Movement
SLA/AW (Sudan Liberation Army)	Leader: Abdel Wahid Nur The group refused to attend peace talks in Sirte, Libya and demanded a deployment of peacekeeping force to stem the violence in Darfur
SLA/AS	Leader: Ahmed Abdelshaafie Breakaway faction from SLA/AW. SLA/AW commanders appointed Abdelshaafie as interim chairman to replace Abdel Wahid in July 2006. The group enjoyed strong support from the fur tribe
SLA/G19	Leaders: Khamees Abdallah, Adam Bakhit, Jer el Neby Khamees had been the original leader of this group, but the group has since split into several factions. In Chad, Adam Bakhit continues to control a faction (in coordination with Khamees). Jar el Neby, with Suleiman Marajan and Osman Bushra, controls another faction in Darfur.
SLA Unity	Leader: Abdallah Yehya and other prominent figures (Sherif Harir, Abu Bakr Kadu, Ahmed Kubur) It is the group with the largest number of fighters. They opposed the peace talk for the same reason as JEM.
SLA/MM defectors	Groups that have defected from Minni Minawi, including those led by Salah “Bob” and Majzoub Hussein.
RDFF/PFA (Revolutionary Democratic Front Forces/Popular Forces Army)	Leaders: Salah Mohamed Abdulrahman Musa (also known as “Abu Surrah”), Yassin Yousuf “Arab” rebel movement.
SFDA (Sudan Federal Democratic Alliance)	Leaders: Ahmed Diraige, Sharif Harir Sharif Harir has reportedly left the SFDA to

	become a full member of the SLA
NRF (National Redemption Front)	Leaders: Khalil Ibrahim, Sharif Harir, Ahmed Diraige, Khamees Abaker An alliance formed in Eritrea in June 2006. While initially effective as a military alliance, it has yet to find any political cohesion.
United Revolutionary Force Front	Leader: Alhadi Agabeldour
SLA/NSF (Non-Signatory Faction)	Made up of SLA/AW, SLA/AS, and SLA/G19, created as a way to have representation in the Ceasefire Commission.

Reproduce from: Appendix B – Darfur Non-Signatory Movement, *Crisis Group Africa Report No. 125*, Darfur: Revitalising the Peace Process, 30 April 2007 and War in Darfur, retrieved from http://en.wikipedia.org/wiki/War_in_Darfur

APPENDIX G
MAJOR HUMANITARIAN AGREEMENTS BINDING ON SUDANESE PARTIES

- The Republic of Sudan should comply fully with its obligations under the following international human rights treaties to which it becomes a party: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the Slavery Convention of 1926 and the related Supplementary Convention, the International Convention on the Suppression and Punishment of the Crime of Apartheid, the International Convention against Apartheid in Sports, the Convention Relating to the Status of Refugees and the Related Protocol, and the African Charter on Human and People's Rights.
- The Fourth Geneva Convention of 12 August 1949 on the Protection of Civilian Persons in Time of War, ratified by Sudan on 23 September 1957. Article 3.1 provides, "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria." Sudan signed but has not ratified the 1977 supplementary protocol on the Protection of Victims of Non-International Armed Conflicts (Protocol II)
- Operation Lifeline Sudan (OLS) I Plan of Action, 14 March 1989. The first tri-partite agreement between the government, SPLA and UN states that "free access should be guaranteed to UN, NGO, and donor personnel participating in relief activities, enabling them to reach all civilian non-combatant populations in need of emergency relief through the Sudan."
- Operation Lifeline Sudan (OLS) II Plan of Action, 28 March 1990, states, "Relief and rehabilitation should be provided to civilians in need wherever they are deemed to be neutral."
- The OLS tri-partite agreement negotiated through IGAD in March and May 1994 states as a fundamental principle "the delivery of relief assistance to all needy populations regardless of their locations and further, that all parties to the conflict, agree to permit UN/OLS the free movement of food and non-food relief by air, land, river and rails as agreed by the UN/OLS and concerned parties."
- The "Security Protocol," 18 November 1998, signed through the Technical Committee on Humanitarian Assistance (TCHA), made up of the government, the SPLA and the UN, recognises the need to ensure the security and safety of humanitarian aid personnel and property.
- The "Minimal Operational Standards for Rail Corridors and Cross-line Road Corridors," also signed 18 November 1998 through the TCHA, provides specific modalities for the delivery of humanitarian supplies from territory controlled by one party to territory controlled by another.
- The "Beneficiary Protocol" on the Implementation of Principles Governing the Protection and Provision of Humanitarian Assistance to War Affected Civilian Populations, signed

through the TCHA on 15 December 1999, provides that “all humanitarian agencies accredited by the UN for humanitarian work in the Sudan shall have free and unimpeded access to all war-affected populations in need of assistance...”

- Four agreements negotiated in December 2001 by the U.S. Special Envoy, former Senator Danforth, and designed to test the commitment of the parties for peace included “zones of tranquillity” to allow for emergency humanitarian intervention and access for disease eradication programs several days per month in areas of active fighting, as well as the establishment of an international commission to investigate and combat the practice of slavery in Sudan. The commission, known as “International Eminent Persons Group,” released its report on 22 May 2002.
- The Nuba Mountains Cease-Fire Agreement of 19 January 2002, brokered by the US and Swiss governments and signed at Burgenstock, Switzerland, provides for humanitarian assistance through humanitarian corridors and an international monitoring team to be drawn from donor countries. Originally valid for six months, it was renewed in July 2002 for a further six-month period.
- Agreement on a civilian monitoring protection force, 10 March 2002, negotiated by Senator Danforth and including pledges by the parties not to attack civilians or civilian facilities.
- “Memorandum of Understanding between the Government of Sudan and the Sudan People’s Liberation Movement/Army on Resumption of Negotiations on Peace in Sudan,” 15 October 2002, includes cessation of hostilities, resumption of peace negotiations at Machakos under the IGAD framework, and (Clause 5) unimpeded humanitarian access.
- “Meeting held on the Implementation of Clause 5 of the Machakos MoU on Unimpeded Humanitarian Access,” 26 October 2002, stipulates the modalities for unimpeded humanitarian access through 31 December 2002.

Reproduce from: Appendix B – Major Humanitarian Agreements Binding on Sudanese Parties, *ICG Africa Report No. 54, Ending Starvation as a Weapon of War in Sudan*, 14 November 2002.

APPENDIX H
LIST OF TRANSNATIONAL ADVOCACY NETWORKS REPORTS AND UNITED
NATIONS SECURITY COUNCIL RESOLUTION ON DARFUR AND THE DEMOCRATIC
REPUBLIC OF THE CONGO ISSUES

List of International Crisis Group Reports on Darfur, Sudan:

- 1) ICG Africa Briefing, Sudan's Other Wars, 25 June 2003
- 2) ICG Africa Report No. 76, Darfur Rising: Sudan's New Crisis, 25 March 2004
- 3) ICG Africa Report No. 80, Sudan: Now or Never in Darfur, 23 May 2004
- 4) ICG Africa Report No. 83, Darfur Deadline: A New International Action Plan, 23 August 2004
- 5) Crisis Group Africa Report No. 89, Darfur: Failure to Protect, 8 March 2005
- 6) Crisis Group Africa Briefing No. 26, Do Americans Care about Darfur?, 1 June 2005
- 7) Crisis Group Africa Briefing No. 28, The AU's Mission in Darfur: Bridging the Gaps, 6 July 2005
- 8) Crisis Group Africa Briefing No. 32, Unifying Darfur's Rebels: A Prerequisite for Peace, 6 October 2005
- 9) Crisis Group Africa Report No. 99, The EU/AU Partnership in Darfur: Not Yet a Winning Combination, 25 October 2005
- 10) Crisis Group Africa Report No. 105, To Save Darfur, 17 March 2006
- 11) Crisis Group Africa Briefing No. 39, Darfur's Fragile Peace Agreement, 20 June 2006
- 12) Crisis Group Africa Briefing No. 43, Getting the UN into Darfur, 12 October 2006
- 13) Crisis Group Africa Report No. 125, Darfur: Revitalising the Peace Process, 30 April 2007
- 14) Crisis Group Africa Report No. 134, Darfur's New Security Reality, 26 November 2007
- 15) Crisis Group Africa Report No. 152, Sudan: Justice, Peace and the ICC, 17 July 2009
- 16) Crisis Group Africa Briefing No. 68, Sudan: Preventing Implosion, 17 December 2009
- 17) Crisis Group Africa Briefing No. 72, Rigged Elections in Darfur and the Consequences of a Probable NCP Victory in Sudan, 30 March 2010

List of Human Rights Watch Reports on Darfur, Sudan:

- 1) Darfur in Flames, Atrocities in Western Sudan, April 2, 2004
- 2) Darfur Destroyed, Ethnic Cleansing by Government and Militia Forces in Western Sudan, May 6, 2004
- 3) Addressing Crimes against Humanity and "Ethnic Cleansing" in Darfur, Sudan, A Briefing Paper to the UN Security Council, May 24, 2004

- 4) Darfur Documents Confirm Government Policy of Militia Support, A Human Rights Watch Briefing Paper, July 19, 2004
- 5) Empty Promises? Continuing Abuses in Darfur, Sudan, August 11, 2004
- 6) Sudan: Janjaweed Camps Still Active, Sanctions Urged for August 30 Deadline, August 27, 2004
- 7) “If We Return, We Will be Killed,” Consolidation of Ethnic Cleansing in Darfur, Sudan, November 14, 2004
- 8) Targeting the Fur: Mass Killings in Darfur, January 21, 2005
- 9) Sexual Violence and Its Consequences among Displaced Persons in Darfur and Chad, April 12, 2005
- 10) Submission to the 38th Ordinary Session of the African Commission on Human and People’s Right, November 19, 2005
- 11) Entrenching Impunity, Government Responsibility for International Crimes in Darfur, December 8, 2005
- 12) Sudan: Imperatives for Immediate Change, The AU Mission in Sudan, January 19, 2006
- 13) Darfur Bleeds: Recent Cross-Border Violence in Chad, February 21, 2006
- 14) Ensuring Protection in Darfur: The UN Mandate, April 21, 2006
- 15) Darfur: Humanitarian Aid under Siege, May 8, 2006
- 16) Lack of Conviction, The Special Criminal Court on the Events in Darfur, June 8, 2006
- 17) Darfur 2007: Chaos by Design, Peacekeeping Challenges for AMIS and UNAMID, September 19, 2007
- 18) Ten Steps for Darfur, Indicators for Evaluating Progress in the Human Rights Group of Experts Process, September 24, 2007
- 19) Five Years On, No Justice for Sexual Violence in Darfur, April 6, 2008
- 20) “They Shot at Us as We Fled,” Government Attacks on Civilians in West Darfur in February 2008, May 18, 2008
- 21) The Way Forward, Ending Human Rights Abuses and Repression Across Sudan, October 26, 2009
- 22) Darfur in the Shadows, The Sudanese Government’s On-going Attacks on Civilians and Human Rights, June 5, 2011
- 23) Unfinished Business, Closing Gaps in the Selection of ICC Cases, September 15, 2011

List of United Nations Security Council Resolutions on Darfur, Sudan:

- 1) Resolution 1556, adopted on July 30, 2004, demanding Sudan to disarm Janjaweed militia and bring to justice the perpetrators of human rights and international humanitarian law violations committed in Darfur.

- 2) Resolution 1564, adopted on September 18, 2004, threatened the imposition of sanctions against Sudan if it failed to comply with its obligations on Darfur. The Convention on the Prevention and Punishment of the Crime of Genocide was invoked to establish an international inquiry to investigate human rights violations in the region.
- 3) Resolution 1591, adopted on March 27, 2005, regarding the placing of travel ban and asset freeze on those impeding the peace process in Darfur.
- 4) Resolution 1593, adopted on March 31, 2005, referring human rights atrocities in Darfur to the International Criminal Court.
- 5) Resolution 1651, adopted on December 21, 2005, extending the mandate of an expert panel monitoring sanctions against and violations of human rights in Darfur.
- 6) Resolution 1665, adopted on March 29, 2006, extending the mandate of panel of expert to monitor sanctions against and violations of human rights in Darfur.
- 7) Resolution 1672, adopted on April 25, 2006, imposing travel and financial sanctions on four Sudanese individual over their involvement in the Darfur conflict: Sheikh Musa Hillal (Janjaweed leader), Major General Mohammed Elhassen (commander of Sudan's western military region), Gabriel Abdul Kareen Badri (commander of National Movement for Reform and Development), and Adam Yacub Shant (head of Sudan Liberation Movement/Army).
- 8) Resolution 1679, adopted on May 16, 2006, endorsing a decision by the African Union Peace and Security Council to transform peacekeeping operation in Darfur.
- 9) Resolution 1706, adopted on August 31, 2006, expanding the United Nations Mission in Sudan (UNMIS) to include deployments in Darfur
- 10) Resolution 1713, adopted on September 29, 2006, extending the mandate of panel of expert to monitor sanctions against and violations of human rights in Darfur.
- 11) Resolution 1769, adopted on July 31, 2007, authorizing the deployment of African Union-United Nations Hybrid Operation in Darfur (UNAMID)
- 12) Resolution 1779, adopted on September 28, 2007, extending the mandate of panel of expert to monitor sanctions against and violations of human rights in Darfur.
- 13) Resolution 1812, adopted on April 30, 2008, regarding reports of the Secretary-General on the Sudan.
- 14) Resolution 1828, adopted on July 31, 2008, regarding reports of the Secretary-General on the Sudan.
- 15) Resolution 1841, adopted on October 15, 2008, regarding reports of the Secretary-General on the Sudan.
- 16) Resolution 1881, adopted on July 30, 2009, extending the UNAMID mission until July 31, 2010.
- 17) Resolution 1891, adopted on October 31, 2009, extending the mandate of the panel of experts to monitor the arms embargo and sanctions until October 15, 2009
- 18) Resolution 1935, adopted on July 30, 2010, extending the mandate of UNAMID mission.

- 19) Resolution 1945, adopted on October 14, 2010, extending the mandate of expert panel monitoring sanctions against groups in Darfur.
- 20) Resolution 1982, adopted on May 17, 2011, extending the mandate of expert panel monitoring arms embargo and other sanctions against Sudan.
- 21) Resolution 2003, adopted on July 29, 2011, extending the mandate of UNAMID mission.

List of International Crisis Group Reports on the DRC:

- 1) ICG Kivu Report No. 1, North Kivu, Into the Quagmire? An Overview of the Current Crisis in North Kivu, 13 August 1998
- 2) ICG Congo Report No. 2, Congo at War, A Briefing on the Internal and External Players in the Central African Conflict, 17 November 1998
- 3) ICG Democratic Republic of Congo Report No. 3, How Kabila Lost His Way: The Performance of Laurent Désiré Kabila's Government, 21 May 1999
- 4) ICG Democratic Republic of Congo Report No. 4, Africa's Seven-Nation War, 21 May 1999
- 5) ICG Democratic Republic of Congo Report No. 5, The Agreement on A Cease-fire in the Democratic Republic of Congo: An Analysis of the Agreement and Prospects for Peace, 20 August 1999
- 6) ICG Africa Report No. 26, Scramble for the Congo: Anatomy of An Ugly War, 20 December 2000
- 7) ICG Africa Report No. 27, From Kabila to Kabila: Prospects for Peace in the Congo, 16 March 2001
- 8) ICG Africa Briefing Paper, Disarmament in the Congo: Investing in Conflict Prevention, 12 June 2001
- 9) ICG Africa Report No. 27, The Inter-Congolese Dialogue: Political Negotiation or Game of Bluff?, 16 November 2001
- 10) ICG Africa Report No. 38, Disarmament in the Congo: Jump-Starting DDRRR to Prevent Further War, 14 December 2001
- 11) ICG Africa Report No. 44, Storm Clouds Over Sun City: The Urgent Need to Recast the Congolese Peace Process, 14 May 2002
- 12) ICG Africa Report No. 56, The Kivus: The Forgotten Crucible of the Congo Conflict, 24 January 2003
- 13) ICG Africa Report No. 64, Congo Crisis: Military Intervention in Ituri, 13 June 2003
- 14) ICG Africa Briefing, Pulling Back from the Brink in the Congo, 7 July 2004
- 15) ICG Africa Report No. 84, Maintaining Momentum in the Congo: The Ituri Problem, 26 August 2004
- 16) Crisis Group Africa Briefing, Back to the Brink in Congo, 17 December 2004

- 17) Crisis Group Africa Report No. 91, The Congo's Transition is Failing: Crisis in the Kivus, 30 March 2005
- 18) Crisis Group Africa Briefing No. 25, The Congo: Solving the FDLR Problem Once and for All, 12 May 2005
- 19) Crisis Group Africa Briefing No. 34, A Congo Action Plan, 19 October 2005
- 20) Crisis Group Africa Report No. 103, Katanga: The Congo's Forgotten Crisis, 9 January 2006
- 21) Crisis Group Africa Report No. 104, Security Sector Reform in the Congo, 13 February 2006
- 22) Crisis Group Africa Report No. 108, Congo's Election: Making or Breaking the Peace, 27 April 2006
- 23) Crisis Group Africa Report No. 114, Escaping the Conflict Trap: Promoting Good Governance in the Congo, 20 July 2006
- 24) Crisis Group Africa Briefing No. 42, Securing Congo's Elections: Lessons from the Kinshasa Showdown, 2 October 2006
- 25) Crisis Group Africa Briefing No. 44, Congo: Staying Engaged after the Elections, 9 January 2007
- 26) Crisis Group Africa Report No. 128, Congo: Consolidating the Peace, 5 July 2007
- 27) Crisis Group Africa Report No. 133, Congo: Bringing Peace to North Kivu, 31 October 2007
- 28) Crisis Group Africa Report No. 140, Congo: Four Priorities for Sustainable Peace in Ituri, 13 May 2008
- 29) Crisis Group Africa Report No. 150, Congo: Five Priorities for a Peacebuilding Strategy, 11 May 2009
- 30) Crisis Group Africa Report No. 151, Congo: A Comprehensive Strategy to Disarm the FDLR, 9 July 2009
- 31) Crisis Group Africa Briefing No. 73, Congo: A Stalled Democratic Agenda, 8 April 2010
- 32) Crisis Group Africa Report No. 165, Congo: No Stability in Kivu Despite a Rapprochement with Rwanda, 16 November 2010
- 33) Crisis Group Africa Report No. 175, Congo: The Electoral Dilemma, 5 May 2011
- 34) Crisis Group Africa Briefing No. 80, Congo: The Electoral Process Seen from the East, 5 September 2011

List of Human Rights Watch Reports on the DRC:

- 1) "Attacked by All Sides," Civilians and the War in Eastern Zaire, March 1, 1997
- 2) Transition, War and Human Rights, April 1, 1997
- 3) What Kabila is Hiding, Civilian Killings and Impunity in Congo, October 1, 1997

- 4) Transition and Human Rights Violations in Congo, December 1, 1997
- 5) Casualties of War, Civilians, Rule of Law and Democratic Freedoms, February 1, 1999
- 6) Eastern Congo Ravaged: Killing Civilians and Silencing Protest, May 1, 2000
- 7) Background to the Hema-Lendu Conflict in Uganda-Controlled Congo, January 31, 2001
- 8) Uganda in Eastern DRC, Fuelling Political and Ethnic Strife, March 1, 2001
- 9) Reluctant Recruits, Children and Adults Forcibly Recruited for Military Service in North Kivu, May 1, 2001
- 10) Attacks on Civilians in Ugandan Occupied Areas in Northeastern Congo, February 13, 2002
- 11) A Briefing Paper for the “Arria Formula” Meeting on the Situation in the DRC, April 25, 2002
- 12) The War Within the War, Sexual Violence against Women and Girls in Eastern Congo, June 20, 2002
- 13) War Crimes in Kisangani, The Response of Rwanda-backed Rebels to the May 2002 Mutiny, August 20, 2002
- 14) Chaos in Eastern Congo: UN Action Need Now, Human Rights Watch Briefing Paper October 31, 2002
- 15) Covered in Blood, Ethnically Targeted Violence in Northern DRC, July 7, 2003
- 16) Policy Paralysis, A Call for Action on HIV/AIDS-Related Human Rights Abuses against Women and Girls in Africa, December 1, 2003
- 17) DR Congo: Briefing to the 60th Session of the UN Commission on the Human Rights, January 29, 2004
- 18) Child Soldier Use 2003, A Briefing for the 4th UN Security Council Open Debate on Children and Armed Conflict, January 29, 2004
- 19) Democratic Republic of the Congo: Confronting Impunity, February 2, 2004
- 20) DR Congo: War Crimes in Bukavu, Human Rights Watch Briefing Paper June 2004, June 12, 2004
- 21) Making Justice Work: Restoration of the Legal System in Ituri, DRC, September 1, 2004
- 22) Burundi: The Gatumba Massacre, War Crimes and Political Agendas, September 7, 2004
- 23) Democratic Republic of Congo: Civilians at Risk During Disarmament Operations, December 29, 2004
- 24) Seeking Justice, The Prosecution of Sexual Violence in the Congo War, March 7, 2005
- 25) The Curse of Gold, June 1, 2005
- 26) Submission to the 38th Ordinary Session of the Africa Commission on Human and People’s Rights, Banjul, Gambia, November 19, 2005
- 27) Elections in Sight, “Don’t Rock the Boat,” December 15, 2005

- 28) What Future? Street Children in the Democratic Republic of Congo, April 4, 2006
- 29) UPC Crimes in Ituri (2002-2003), November 8, 2006
- 30) Statement to the DRC Parliamentary Commission Investigating Events in Bas Congo, April 12, 2007
- 31) Down to Business, The Human Rights Council's Backlog of Work, September 10, 2007
- 32) Renewed Crisis in North Kivu, October 23, 2007
- 33) "We Will Crush You," The Restriction of Political Space in the Democratic Republic of Congo, November 25, 2008
- 34) The Killing in Kiwanja, The UN's Inability to Protect Civilians, December 12, 2008
- 35) The Christmas Massacres, LRA Attacks on Civilians in Northern Congo, February 16, 2009
- 36) Soldiers Who Rape, Commanders Who Condone, Sexual Violence and Military Reform in the Democratic Republic of Congo, July 16, 2009
- 37) "You Will Be Punished," Attacks on Civilians in Eastern Congo, December 13, 2009
- 38) Trail of Death, LRA Atrocities in Northeastern Congo, March 28, 2010
- 39) Always on the Run, The Vicious Cycle of Displacement in Eastern Congo, September 14, 2010
- 40) Unfinished Business, Closing Gaps in the Selection of ICC Cases, September 15, 2011

List of UN Panel of Experts Reports:

- 1) Interim Report of the United Nations Expert Panel on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, S/2001/49, 16 January 2001
- 2) Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, S/2001/357, 12 April 2001
- 3) Addendum to the report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, S/2001/1072, 13 November 2001
- 4) Interim report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, S/2002/565, 22 May 2002
- 5) Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, S/2002/1146, 16 October 2002
- 6) Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, S/2003/1027, 23 October 2003

- 7) Addendum to the Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, S/2003/1027/Add.1, 23 October 2003

List of United Nations Security Council Resolutions on the DRC:

- 1) Resolution 1234, adopted on April 9, 1999, regarding war in the Democratic Republic of the Congo. The Security Council demanded an immediate cessation of hostilities in the region, a withdrawal of foreign troops, and the re-establishment of the government's authority.
- 2) Resolution 1258, adopted on August 6, 1999, regarding the deployment of military liaison personnel in the DRC to observe and report on the compliance on factions with the peace accords.
- 3) Resolution 1273, adopted on November 5, 1999, regarding the extension of military liaison personnel's mandate in the DRC.
- 4) Resolution 1279, adopted on November 30, 1999, regarding the establishment of United Missions in the Democratic Republic of Congo (MONUC).
- 5) Resolution 1291, adopted on February 24, 2000, regarding the extension and the expansion of MONUC's mandate.
- 6) Resolution 1304, adopted on June 16, 2000, demanding the cessation of hostilities in the Second Congo War among Congolese, Rwandan and Ugandan forces.
- 7) Resolution 1323, adopted on October 2000, extending MONUC's mandate.
- 8) Resolution 1332, adopted on December 14, 2000, extending MONUC's mandate.
- 9) Resolution 1341, adopted on February 21, 2001, demanding the disengagement and withdrawal plans of foreign troops in the DRC.
- 10) Resolution 1355, adopted on June 15, 2001, extending MONUC's mandate.
- 11) Resolution 1361, adopted on August 23, 2000, extending MONUC's mandate.
- 12) Resolution 1376, adopted on November 9, 2001, launching the third phase of MONUC's deployment.
- 13) Resolution 1417, adopted on June 17, 2002, extending MONUC's mandate.
- 14) Resolution 1445, adopted on December 4, 2002, expanding MONUC's mandate.
- 15) Resolution 1457, adopted on January 24, 2003, condemning illegal exploitation of natural resources in the DRC and requesting a six-month mandate for a panel of experts to investigate the issue.
- 16) Resolution 1468, adopted on March 20, 2003, welcoming the agreement for establishing a transitional government in the DRC.
- 17) Resolution 1484, adopted on May 30, 2003, authorizing Operation Artemis in Bunia, DRC.
- 18) Resolution 1489, adopted on June 26, 2003, extending MONUC's mandate.

- 19) Resolution 1493, adopted on July 28, 2003, extending MONUC's mandate.
- 20) Resolution 1499, adopted on August 13, 2003, extending the mandate of panel of experts to monitor exploitation of natural resources in the DRC.
- 21) Resolution 1501, adopted on August 26, 2003, authorizing multinational force in eastern DRC to assist MONUC.
- 22) Resolution 1522, adopted on January 15, 2004, regarding the integration and restructuring of armed forces in the DRC.
- 23) Resolution 1533, adopted on March 12, 2004, strengthening arms embargo against the armed groups in eastern DRC.
- 24) Resolution 1552, adopted on July 27, 2004, extending arms embargo.
- 25) Resolution 1555, adopted on July 29, 2004, extending MONUC's mandate.
- 26) Resolution 1565, adopted on October 1, 2004, extending and strengthening MONUC's mandate.
- 27) Resolution 1592, adopted on March 30, 2005, extending MONUC's mandate.
- 28) Resolution 1596, adopted on April 18, 2005, widening arms embargo.
- 29) Resolution 1616, adopted on July 29, 2005, renewal of arms embargo.
- 30) Resolution 1621, adopted on September 6, 2005, increasing MONUC's strength.
- 31) Resolution 1628, adopted on September 30, 2005, extending MONUC's mandate.
- 32) Resolution 1635, adopted on October 28, 2005, extending MONUC's mandate.
- 33) Resolution 1649, adopted on December 21, 2005, renewal of arms embargo, financial and travel sanctions against the DRC.
- 34) Resolution 1654, adopted on January 31, 2006, re-establishment of panel monitoring arms embargo.
- 35) Resolution 1669, adopted on April 10, 2006, redeployment of personnel from UN Operations in Burundi to support MONUC.
- 36) Resolution 1671, adopted on April 25, 2006, authorizing the deployment of EUFOR RD Congo.
- 37) Resolution 1693, adopted June 30, 2006, increasing the size of MONUC.
- 38) Resolution 1698, adopted July 31, 2006, extending mandate of panel of experts to monitor the arms embargo.
- 39) Resolution 1711, adopted September 29, 2006, extending MONUC's mandate.
- 40) Resolution 1736, adopted on December 22, 2006, increasing the strength of MONUC.
- 41) Resolution 1742, adopted on February 15, 2007, extending MONUC's mandate.
- 42) Resolution 1751, adopted on April 13, 2007, extending MONUC's mandate.
- 43) Resolution 1756, adopted on May 15, 2007, extending MONUC's mandate.
- 44) Resolution 1768, adopted on July 31, 2007, extending arms embargo.

- 45) Resolution 1771, adopted on August 10, 2007, renewal of arms embargo.
- 46) Resolution 1794, adopted on December 21, 2007, extending MONUC's mandate.
- 47) Resolution 1797, adopted on January 30, 2008, authorizing MONUC to organize and conduct local election.
- 48) Resolution 1799, adopted on February 15, 2008, renewal sanctions against DRC.
- 49) Resolution 1804, adopted on March 13, 2008, concerning the situation in Great Lakes Region.
- 50) Resolution 1807, adopted on March 31, 2008, concerning the situation in DRC.
- 51) Resolution 1843, adopted on November 20, 2008, concerning the conflict in Kivu.
- 52) Resolution 1856 and Resolution 1857, adopted on December 2008, concerning the situation in DRC.
- 53) Resolution 1896, adopted on November 30, 2009, extending the mandate of the committee established pursuant to Resolution 1553 (2004) and extension of measures on arms, transport, financial and travel against the DRC imposed by Resolution 1807 (2008).
- 54) Resolution 1906, adopted on December 23, 2009, extending MONUC's mandate.
- 55) Resolution 1925, adopted on May 28, 2010, extending MONUC's mandate until June 30, 2010, authorizing the withdrawal of 2,000 troops and the transformation of MONUC to the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) on July 1, 2010.
- 56) Resolution 1952, adopted on November 29, 2010, extending arms embargo and other sanctions against the DRC.
- 57) Resolution 1991, adopted on June 28, 2011, extending the mandate of the MONUSCO.