

## **Q&A: ICC Arrest Warrant for Sudanese President Omar al-Bashir**

### **1. Now that the court has issued an arrest warrant, what happens next?**

The ICC does not have its own police force, so it cannot itself arrest President Bashir. What happens to him depends on how much support the international community gives the ICC.

The treaty that created the court-an agreement called the Rome Statute-says that states that have ratified the treaty must fully cooperate with the court, which means that they must enforce its arrest warrants. Also, the UN Security Council resolution that asked the ICC to investigate the situation in Darfur can be interpreted to require all states to cooperate fully with the ICC, whether or not they have not signed or ratified the Rome Statute.

The court said the arrest warrant will initially be transmitted to Sudan, states that are parties to the Rome Statute (the treaty that governs the court) and to the Security Council. The court also stated that it could refer a lack of of cooperation to the Security Council for possible action.

### **2. How will the court's decision affect people in Darfur? Does it put them in additional danger? What about the humanitarian assistance there?**

So far, impunity for perpetrators of violence in Darfur has spurred further conflict. The arrest warrant may stand as a re-affirmation of the rule of law and act as a deterrent for future crimes. At the same time, victims of ongoing conflict need humanitarian assistance, protection and the benefits of a negotiated settlement. The international community, and in particular African countries, should continue to pursue these goals while insisting that the perpetrators of crimes be held accountable. Sudanese authorities should not hold their own people hostage and inflict more suffering by denying them access to humanitarian assistance.

### **3. This surely means the end of any peace negotiations over Darfur, right?**

The issuing of an arrest warrant should not necessarily halt efforts to achieve peace. When the UN Security Council referred the situation in Darfur to the ICC, it determined that the crimes committed there constitute a threat to international peace and security. By doing so, the Security Council clearly re-affirmed not only that justice and peace are compatible, but that justice is an important factor in restoring peace and security.

**4. The ICC charged President Bashir with "two counts of war crimes" and five counts of "crimes against humanity." What is the difference between those charges?**

War crimes are serious violations of the "laws of war," also called international humanitarian law (IHL). IHL is a vast body of rules comprising The Hague Conventions, the Geneva Conventions and its Additional Protocols. These conventions seek to protect persons who are not taking part in armed conflict, such as civilians, the wounded and sick, and prisoners of war-so-called protected persons. War crimes may include willful killings, torture or inhumane treatment of protected persons. Under the ICC statute, a crime must be linked to an international or internal armed conflict and be perpetrated according to a broader policy or plan to be classified as a war crime.

Crimes against humanity are serious crimes (including killing, torture or rape) committed as part of a widespread or systematic attack against civilians, rather than as isolated acts. Crimes against humanity are often connected to a plan or policy organized or sponsored by a government. Unlike war crimes, they can be committed in a time of peace.

**5. The court rejected the prosecutor's request that it charge President Bashir with genocide. Why?**

The crime of genocide, as defined both by the Rome Statute and the Genocide Convention of 1948, requires proof that the perpetrator intended to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such." This destruction can take the form of murders, rapes or torture.

The prosecutor sought to establish that President Bashir specifically intended to destroy, on account of their ethnicity, members of the Fur, Masalit and Zaghawa ethnic groups in Darfur, Sudan. According to the prosecutor, President Bashir, with the support of the Sudanese military and the militias known as Janjaweed, attacked civilians in towns and villages inhabited mainly by members of those three ethnic groups. The attacks, including killing and rapes, led to forced displacement of a substantial part of these groups.

The judges apparently were not persuaded that President Bashir committed these acts with the requisite intent. It would be incorrect to interpret this as a formal decision by the court that there was no genocide in Darfur. The court is only judging individuals, and only on the basis of the limited evidence brought to its attention. The prosecutor said he may appeal the court's decision not to charge President Bashir with genocide.

**6. If President Bashir is not immediately taken into custody, what will that say about the authority and importance of the ICC?**

President Bashir is the first head of state indicted by the ICC, which sends a signal that no one is above the law. The ICC will only be as powerful as states want it to be, yet it is a permanent institution and its arrest warrants will not go away. The International Criminal Tribunal for the Former Yugoslavia waited 12 years from the time it issued a warrant for the president of the self-proclaimed Republika Srpska, Radovan Karadžić, until his arrest.

**7. The ICC has so far issued arrest warrants for 12 people, all of them Africans. Why does the court seem focused on Africa instead of the entire world?**

African states have been at the forefront of establishing the ICC, and three out of the four situations currently under examination by the ICC were referred by the concerned African states themselves: Uganda, the Democratic Republic of Congo and the Central African Republic. The court itself has highlighted that it was acting to protect victims of mass atrocity. The court is also analyzing crimes allegedly committed in other part of the world, including Colombia, Afghanistan and Georgia.

The ICC should not be judged on the basis of where its cases come from, but whether they meet the threshold for admissibility and merit to be before the court. The ICC is an independent justice institution, and its decisions to convict a person are based on whether there is enough evidence to establish beyond a reasonable doubt that a crime has been committed. The court also depends on the political will and support of the international community to conduct investigations and gather evidence.

The court's mandate is limited to crimes committed after July 1, 2002, which excludes many situations. Except in the case of a UN Security Council referral, the court can only investigate in countries that have ratified the Rome Statute or accepted the jurisdiction of the court on an "ad hoc" basis. Global ratification of the ICC Statue will ensure that the ICC can become active in all parts of the world.

**8. What gives the court authority to take action against President Bashir?**

The ICC was established by the international community in recognition of the importance of fighting impunity for serious crimes. The ratification of the Rome Statute by more than 100 states bears witness to a global trend to put an end to impunity for the perpetrators of these crimes. This provides the ICC with strong legal and moral authority.

In 2005 the UN Security Council referred the situation in Darfur to the ICC with a resolution that is binding on all states, including Sudan. The referral gave the ICC jurisdiction over the situation in Darfur and a mandate to investigate and try those responsible for crimes committed there. In the case of President Bashir, the ICC judges issued an arrest warrant after finding reasonable grounds to believe that he committed crimes against humanity and war crimes.

**9. Does President Al-Bashir have immunity as a head of state?**

Sudanese law may provide the head of state with immunity in Sudan, but the Rome Statute says that immunities do not bar the court from exercising its jurisdiction. The International Court of Justice confirmed in 2002 that such immunities do not bar the ICC.

**10. Is it possible the Security Council will stop this case from going forward?**

The Rome Statute gives the UN Security Council authority to defer an investigation or prosecution for 12 months. We believe that this power should be used only in cases where the demands of peace make it absolutely necessary to temporarily suspend efforts

toward justice. The Security Council should not defer cases in response to threats, including threats to commit violence or cut off a peace process. The Security Council deemed Darfur a threat to international peace and security in 2005 and referred the case to the ICC. Deferring the case now would seem inconsistent with that finding. It also would appear to give in to those seeking to prevent justice rather than heeding the voices of victims who consistently demand justice.

### **11. What standard would be used during an ICC trial to determine President Bashir's guilt or innocence?**

Different standards of proof have to be met at different stages of the proceedings. For the arrest warrant to be issued, the prosecutor had to convince a panel of three judges there were "reasonable grounds" to believe that President Bashir committed a crime within the jurisdiction of the court.

Before a trial can start, the judges will call a hearing to confirm the charges listed in the warrant, which requires a higher standard of proof. For the judges to confirm the charges, the prosecutor has to show there are "substantial grounds to believe" that the accused has committed the alleged crimes.

At the trial stage, the standard is still higher, for the prosecutor must establish "beyond reasonable doubts" that the accused committed the alleged crimes. The defense has a right to present its own case and try to cast doubt. Ultimately, the judges must be convinced without the slightest hesitation that the accused is guilty. If there is doubt, the accused must be acquitted.

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