



The important role of the IMF and external creditors in case of arrest warrants from the ICC– the case of Sudan

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1. Introduction

The focus of this presentation is to stimulate discussion in the ICC and elsewhere on new approaches to creating the environment that is conducive to having the decisions and arrest warrants of the Court executed in collaboration with key international organizations and their key member countries. This case study will deal with the International Financial Institutions (IFIs), external creditor nations and their relationship with the government of Sudan. This area will become increasingly important for the Court given the absence of enforcement powers of the Court and the political constraints that presently exist in the UN Security Council.

2. The Root Causes of Conflict in Sudan and Sudan's External Debt

The conflict that had engulfed the south of Sudan in civil war before the fragile Comprehensive Peace Agreement (CPA) and is threatening the population in Darfur is foundationally about a battle for power, resources and money across this tragic land tied up also with a government in Khartoum that does not seem genuinely interested in

real peace negotiations and a xenophobic ideology towards the African peoples of Sudan. I have argued elsewhere that there is little hope that there can be a sustainable peace without accountability for the mass atrocities committed in conflict zones around the world and certainly in the south of Sudan and presently in Darfur.¹

There has been a failure to focus on what could be the most powerful lever against the Khartoum government, namely to make the burgeoning debt of Sudan a lever against crimes against humanity, war crimes and in the view of many an ongoing genocide.

Sudan's massive and unsustainable external debt could be an important lever to bring Sudan back into the fold of nations that respect the global rule of law, but will require exceptional effort from the international community. The external debt level stands at \$30.4 billion (U.S.) at the end of 2008, of which a substantial majority is in arrears.² This is one of the highest per capita debts in the world and the World Bank has confirmed that the country is in debt distress.³ The debt is owed to commercial and bilateral creditors of the Paris Club and Arab creditors as well as multilateral and regional banks and development agencies. There is also a huge Chinese dimension to the external debt. In 2004, the largest external debt payments at the height of the atrocities in Darfur was to China (\$102 million) to repay loans for servicing oil refinery construction. China and India are also becoming long term creditors to the NCP government with Indian giving \$392 million (U.S.) in non-concessional loans and China giving \$182 million (U.S.). There are also reports that over the last decade the Export-Import Bank of China has given more than 1 billion (U.S.) in concessional loans to Sudan to assist with the building of oil and other infrastructure which is crucial to the sustainability of the oil

¹ To be discussed in a forthcoming book titled "The Court of Last Resort, Peace and Justice in the International Criminal Court" E. Elgar Publishers, U.S. & U.K (2010),

² CIA, The World Factbook, 2008, <https://www.cia.gov/library/publications/the-world-factbook/geos/su.html#Econ>

³ World Bank: Sudan: Joint Bank-Fund debt sustainability analysis, August 2007.

exports to China. China has thus become Sudan's biggest economic partner accounting for 75% of its exports and a large part of its imports much of it in the form of military equipment.⁴

The US Defence department published online in May a report (but subsequently removed it), entitled "Military Power of the People's Republic of China 2009". The report concluded that Sudan is the second leading military client of China and that it received a significant portion of the nearly \$7 billion worth of Chinese Defence exports from 2003 through 2005, the peaks years of the conflict in Darfur. The report also identified that the Chinese arms sales contracts were closely linked to the concession contracts given by the Khartoum government to the Chinese oil companies and the support the Al-Bashir government enjoys in the international arena.

The Khartoum government is well aware that the delays in dealing with the external debt arrears problem are an obstacle to getting critical concessional external financing. Debt forgiveness could, in effect, be vital to the survival of the Al-Bashir regime.

Critical to Sudan dealing with the arrears of its external debt is its eligibility for the Heavily Indebted Poor Countries Initiative (HIPC) of the International Monetary Fund (IMF) and the World Bank. The HIPC involves coordinated action by the multilateral and regional financial institutions and governments to reduce the external debt of the selected countries. Debt reduction relief under the HIPC program has been given to some 27 countries in Africa.

⁴ For details of the critical role China plays in the economic and military spheres in Sudan see "Investing in Tragedy, China's Money, Arms and Politics I Sudan" Human Rights First, <http://www.humanrightsfirst.info/pdf/080311-cah-investing-in-tragedy-report.pdf>

Sudan is listed as a “pre-decision point” country that may be eligible for such critical assistance from the HIPC program. The normalization of relationship with international creditors and debt relief under the HIPC initiative could bring about economic stability and therefore greater political longevity, to the government of President Al-Bashir, if there are large injections of cash from the international community to the multilateral agencies for the benefit of Sudan, once the arrears are dealt with. The past record of the NCP, the governing party of the Al-Bashir regime demonstrates that it has used all its resources, including those from external sources to keep power by permitting the fire sale of state and private assets by its supporters and buying out its opponents in a similar fashion. This will be explained in greater detail below.

The purpose of this paper is to demonstrate that the international financial institutions, their member governments and other external creditors could use the external debt a massive “financial carrot” strategy to exert effective pressure on the Khartoum government to live up to its legal obligations to hand over some or all of the individuals under arrest warrants from the ICC. Far from this happening, there seems to be an almost sympathetic attitude to the masterminds of the most serious international crimes in the Sudanese government.

3. The analysis by the IMF of the macroeconomic record of the Al-Bashir regime

In the 2003 to 2004 period, at the height of the massacres by the Khartoum government and its janjaweed proxies in Darfur, the Staff Monitored Program (SMP) of the IMF, while describing the important steps towards the implementation of the Comprehensive Peace Agreement (CPA) in the south of Sudan, seemed to follow the

press releases of the Khartoum government regarding what was actually occurring in Darfur:⁵

The government and the Sudan People's Liberation Army (SPLA) signed on May 26, 2004 agreements on the outstanding issues regarding the status of the capital and three areas bordering the south and the sharing of political power at the national level. Agreements on security and resource-sharing were signed earlier in September 2003 and January 2004, respectively. In the next few weeks, the parties will consolidate all the agreements into a single peace agreement and finalize the implementation modalities. Hostilities broke out in Darfur in western Sudan in 2003 because of tribal clashes and local insurrection. A ceasefire has recently been negotiated through Chad's intermediation, but the situation remains grave.

In this 2003-2004 period of the SMP review, Sudanese alleged international crimes could hardly be viewed as “tribal clashes and local insurrection.” The characterization seemed to smack of surprising blindness regarding the primary role, in the Darfur carnage, of the Khartoum government, whose economic and structural management, the IMF was extolling. The IMF and Sudan's creditors also seemed to be ignoring that the oil revenues arising out of the macroeconomic success of the Khartoum government was partly being invested in military equipment from Russia and China that would be killing tens of thousands of innocent civilians in Darfur.

Since the start of the new millennium in 2000, Sudan has been quietly engaging with the international financial institutions to normalize relations, without having their international creditors and monitors, including the IMF, demand that it stop its actions

⁵ See the IMF website at <http://www.imf.org/external/pubs/ft/scr/2005/cr05187.pdf>

amounting to serious international crimes in Darfur and continue the pressure on the Khartoum government to live up to its obligations under the CPA.

In 2002, Sudan began to normalize relations with the IMF, the World Bank, the OPEC Fund, the African Development Bank and the Arab Fund for Economic and Social Development. Astonishingly, despite its actions in the South and in Darfur, in recognition of its progress in certain structural reforms, the IMF restored Sudan's voting and related rights. Sudan continues to get high praise for its economic performance from the IMF. In the 2007- 2008 SMP review of Sudan, the IMF report seemed to be more concerned about the cost of the peace agreements, than the past or the ongoing international crimes in Darfur: ⁶

Sudan's economic outlook is favorable, but will hinge on the authorities' ability to correct past slippages, reestablish fiscal credibility, and restore the safety and soundness of the financial system. This will not be an easy task given the heavy commitments imposed by various peace agreements and an uncertain regional environment. The rise in world food prices poses a particular challenge to containing inflation, requiring cautious monetary and fiscal policy implementation.

In September of 2008, the staff of the IMF again reported that "The third Sudan Consortium held in Oslo in May 2008 recognized that important commitments were met over the past year of CPA implementation, but the overall progress has been below expectations." In keeping with the studied understatements of the IMF regarding

⁶ See the IMF website at <http://www.imf.org/external/pubs/ft/scr/2008/cr08174.pdf>

Sudan, the report went on to state that “ The Darfur issue is far from resolved, despite the advent of the UN-African Union Mission in Darfur which took over the peacekeeping mission in early January 2008. After troops from the north and south clashed in the oil rich area of Abyei, relations between the two sides have improved following a June 2008 agreement to allow for international arbitration regarding the Abyei region. However, the charges formulated by the prosecutor to the International Criminal Court generated further tensions in July 2008. Under the CPA, local, legislative, and presidential elections are mandated to take place in 2009, followed by a referendum in Southern Sudan in 2011 to decide on unity or secession.”⁷

The national elections have been delayed until February 2010 and are almost certain to be delayed by Khartoum as some argue will likely be the case with the 2011 referendum.

This most recent analysis of the macroeconomic situation in Sudan seems to place more emphasis on arrears clearance than the past and ongoing international crimes in Darfur in deciding whether to give the ultimate economic gift to the indicted President of Sudan, admission to the HIPC category. Also seemingly ignored are credible reports that a major part of the oil revenues – some assert as high as 70%⁻⁸ which could go to debt clearance ends up supporting and arming the Sudanese military and their janjaweed allies in Darfur and elsewhere.

Nowhere in the analysis of the IMF, is the understanding that the government that they have been praising for its economic and structural reforms, has also brought the

⁷ Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI)—Status of Implementation Prepared by the Staffs of IDA and IMF, Danny Leipziger and Mark Allen, September 12, 2008

⁸ Human Rights First, *supra* note 4 at pg. ii of the Executive Summary.

country to the point of the world's most serious humanitarian crisis and the brink of a break up first in the South through well documented evidence of the undermining of the CPA and then in Darfur and even further afield in Chad and Uganda through the support given to the actions of the Lords Resistance Army lead by Joseph Kony, also under an arrest warrant from the ICC.

Nowhere in any of the IMF's analysis of Sudan is the discussion of how to use its power and influence to pressure the government to stop its actions and those of its proxies on the killings fields of Darfur. Instead, the IMF seems ready to consider the Khartoum government for the most generous debt relief initiative in the world, the HIPC, with the blessing of not only the Arab allies of Sudan, but the most powerful western governments that hold the reins of power in the IMF and other international financial institutions.

4. Using the lever of assistance with the external Sudanese debt as a carrot to enforce the global rule of law in Sudan

It must be emphasized that my position is not to seek the imposition of any new sanctions on Sudan, but to offer encouragement to those who want to bring Sudan into the community of nations that are willing to adhere to the rule of law and universally recognized human rights. The encouragement will be the promise of a new financial, political and social relationship between Sudan and its major external creditors and the international financial institutions that goes beyond anything that China or some of Sudan's regional allies can provide.

The reason why I do not support new forms of sanctions is based on my acceptance of the views of some of the leading Sudan experts that such forms of sanctions encourage

what some commentators have termed the ongoing criminalization of Sudan's economy. What I am proposing is that the IMF and all external creditors put the fact of the indictments against the President and two other individuals on the table in any prospect of assisting with the external debt of Sudan. What I am proposing is to use the absolutely critical financial carrots that Sudan needs as levers in the fight against impunity in Darfur and potentially other parts of the country as well as continuing the pressure for the Khartoum government to live up to its obligations under the CPA. This could also set a major precedent for other countries in similar situations. Let me explain in more detail why the understandable reaction that any form of financial pressure against Sudan will only hurt the poor does not really apply to the political economy of Sudan.

One regional commentator, Abd al-Wahab Abdalla, describes the Sudanese economy in the following terms: "Dominated by a scramble for rents, and particularly those derived from the nexus of sovereign rents, forcible asset transfer, and the mining of natural resources, the Sudanese state has come to resemble a vortex sucking the life out of an eviscerated peasantry to generate hyper-profits and the dictatorship of a security establishment".⁹

Another longstanding regional scholar, Dr. Fatima Babikir Mahmud, describes how the economy was forced out the hands of the formerly dominant mercantile capitalists from

⁹ See the first part of a three part article by Abd al-Wahab Abdalla at the U.S. Social Science Research Council website at <http://www.ssrc.org/blogs/darfur/2009/06/09/sudan-at-the-crossroads-1/>

It should be noted that al-Wahab Abdalla is not a supporter of the ICC or its indictments against the Sudanese officials because he is convinced that other similar characters would replace him and once they have the cover of an important international power, would continue the same actions as the al-Bashir regime. In the view of this author, it makes his analysis even more credible as the thesis of this paper is that the pressures of international organizations like the IFIs and external creditors are needed to ensure what al-Wahab Abdalla calls "democratic sovereignty" is restored in Sudan for the benefit of all its peoples.

the rivers in classes under successive colonial regimes.¹⁰ The wealth of this mostly sectarian class was based on the rapid dispossession and pauperization of the agrarian small holding class followed by massive internal capital and human migration to the metropolis that started the process of hyper-urbanization. This grossly inequitable economic structure laid the ground for the rise of the National Islamic Front (NIF) which transformed into the present day governing National Congress Party (NCP).

What triggered the forced change of control of the economy from the mercantile capitalists was the huge foreign exchange flows by Islamic financial institutions and Diasporas remittances from the Gulf States following the 1970s oil boom. This led to the rise in power of the Muslim Brothers who saw the opportunity to take the reins of the economy and indeed political power from the sectarian mercantilist class.¹¹

Ominously for the people of Darfur, Abd al-Wahab Abdalla goes on to say that one of the main strategies of this new coalition was “Under the pretext of a state of emergency, the militarization of capitalism de-criminalized asset-stripping at the point of a gun”¹²

What much of the IMF analysis fails to comprehend is that this coalition led to the bankruptcy of the state including its systemic default to the international financial institutions and the external creditors

When Sudan was listed as a terror supporting state by the United States while playing host to Osama Bin Laden, the stick of new economic sanctions had the

¹⁰ Fatima Babiker Mahmoud . *The Sudanese Bourgeoisie*. London: Zed Press, 1984.

¹¹ Abd al-Wahab Abdalla, *supra* note 9 at pg. 3.

¹² *Ibid.*

counterproductive effect of bolstering the rent seeking¹³ of the governing coalition through informal Islamic financial networks and markets and increased the power of the security apparatus. Meanwhile the external bankruptcy of the state kept increasing as evidenced by the rising unsustainable external debt of the country.

The influence of the Chinese investment in the oil sector, has in my view, only greatly enhanced this state lead rent seeking. Indeed the seeds of the destruction of this coalition may well be the competition from within their own ranks for what Abd al-Wahab Abdalla calls hyper-accumulation of assets and associated state power. This may explain the attempt to overthrow Al-Bashir by Hassan Al- Turabi who brought Al-Bashir to power. With Al-Bashir successfully fending off the challenge, some of the former members of the coalition are dispersing across Sudan, some, including Al-Turabi, forming opposition to Al-Bashir even within Darfur.

Despite this oil sector revenue strengthening of the Al-Bashir coalition that has not lessened significantly the social costs of dispossession and pauperization of large parts of the Sudanese population, the international community and the associated financial institutions have been willing to bail out the self-induced massive social dislocations and hyper-urbanization. In those urban centers, while some supporters of the present regime like de Waal observe “social peace” in Sudan’s cities, others like Abd al-Wahab Abdalla see dangerous social and economic stratification that is based on a racial hierarchy where the greatest prospects for integration and employment are limited to those linked to the ruling elites and coalition partners.

¹³ I am using the definition of rent-seeking first suggested by economist Gordon Tullock as the situation where governing elites, organizations or even individual use their power and resources to obtain an economic gain from others or an entire country without reciprocating any benefits back to society through wealth creation

The Al-Bashir governing coalition can buy time with the help of the foreign investment and rents in and from the oil sector, but the moment of truth will come for him and it may be only a matter of time before a faction, perhaps even within the present ruling elites, realize the instability of the present economic and power structure can not continue.

In this situation bringing Al-Bashir, Haroun and Kushayb to the ICC, as a global refusal to accept impunity could be regarded by more moderate elements of the ruling Sudanese elites as a potential catalyst for regaining the financial, social and economic stability that the Sudanese people so desperately need. What is needed desperately in Sudan is the emergence of a new governing elite which governs in the interests of all sectors of the Sudanese population given the analysis above of the present Sudanese economy.

5. The important role that the IMF and external creditors could play in the fight against impunity in Sudan

There have been the sounds of silence from the most powerful governments and institutions of the world to the contempt shown by the Khartoum government to the global rule of law as interpreted by the ICC and backed by the UN Security Council in the case of the arrest warrants of Ahmad Haroun, Ali Kushayb and President Al-Bashir. This is now further exacerbated by the decision by the Arab League, and the African Union and the Organization of Islamic States to urge their members, even those who are state parties to the Rome Statute, not to assist in the enforcement of the ICC arrest warrant against President Al-Bashir. Recently the indicted President has been testing

how effective this support is, by traveling to states that are not state parties, like Libya, Egypt, Ethiopia and most recently Zimbabwe.

In this context, it is worth examining the wording of the UN Security Council Resolution 1593 (2005) acting under its Chapter VII powers where it considers there is a threat to international peace and security had decided to refer the situation in Darfur to the Chief Prosecutor of the ICC. In particular it is worth examining the extent of the imposition of legal obligations on both Sudan and member states of the Rome Statute. The main provisions of Resolution 1593 that is relevant in this regard is paragraph 2 of the Resolutions which states that the Security Council *'Decides that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;(emphasis added)*'

Resolution 1953 (2005) of the UN Security Council raises interesting legal questions about whether its wording imposes legal obligations on member states and international organizations to which they belong. It seems clear from the wording of the Resolution, paragraph 2 in particular, that the Security Council imposed no obligations **under the Rome Statute** for non-state parties. It does not exclude obligations on such non-state parties arising out of other international legal obligations, such as obligations imposed under the *ius cogens* rules of international law. Such rules include rules

concerning the prevention and punishment of genocide and torture.¹⁴ This may not have been pointed out to states such as Ethiopia who may have interpreted Resolution 1593 as totally exonerating them from any duties related to the alleged international crimes in Darfur. It should also be noted that countries like Ethiopia are highly dependent on foreign aid and financial debt relief from countries that are state parties to the Rome Statute.

Turning to the obligations of the international financial institutions (IFIs), the IMF, as one of the Bretton Woods institutions created after the Second World War claims it is independent from the UN and can not be regarded as a UN agency. It also claims that by its constituting document, the Articles of Agreement, the IMF it can not get involved in political matters as opposed to its macroeconomic oversight functions. This logic implies that such macroeconomic functions are devoid of any political functions, which from the very reports of the IMF described above, clearly shows that the domestic political and legal situation of countries are critical to the macroeconomic performance of the country.

It is also highly questionable as to whether specialized multilateral institutions like the IMF, the World Bank and the World Trade Organization can legitimately claim that they have a self-contained field of international law contained in their constitutive documents and do not have to adhere to the rules set down by the general international public order laid down since the end of the Second World War that includes the UN Charter and the mandatory rules contained therein, such as adherence to binding resolutions of the UN Security Council that expressly do apply to them.

¹⁴ For a detailed discussion of the scope the *ius cogens* rules of international law and cites to other leading authorities see P. Malanczuk & M.B. Akehurst, *Akehurst's Modern Introduction to International Law* 7th Edition, 1997 (Routledge) pgs. 57-60.

IFIs are created under international law rules and so are part of the international legal order, including any obligations under *ius cogens* rules. This has been confirmed by the International Court of Justice (ICJ) in the advisory opinions in the *Reparations* case¹⁵ and the *WHO/ Egypt* case.¹⁶ In the latter decision, the ICJ made the following ruling:

*“ International organizations are subjects of international law and, as such are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties ”*¹⁷

Thomas Buergenthal, the eminent jurist who was both President of the Inter-American Court of Human Rights and presently a judge of the ICJ has confirmed in his writings that the World Bank is bound by its obligations under the UN Charter and other human rights treaties.¹⁸ An accepted principle, even by the most international organizations is that a violation of an international law principle which the body is bound to follow can result in international responsibility and give rise to the obligation to provide reparations.¹⁹ However, there could well be situations in which an IFI may claim that it has violated no principle of international law as it has been following only its self-contained body of international law under the Articles of Agreement. In this context,

¹⁵ *Reparation for Injuries Suffered in the Service of the United Nations* case, ICJ, 1949. Confirmed by the “*Certain Expenses*” case, ICJ, 1962

¹⁶ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion of 20 December 1980, 73, ICJ Rep., 1980, p. 88

¹⁷ *Ibid* at 89-90.

¹⁸ Thomas Buergenthal, *The World Bank and Human Rights* in E. Brown Weiss, A. Rigo Sureda & L. Boisson de Chazournes (eds), *The World Bank, International Financial Institutions and the Development of International Law* (1999)

¹⁹ ILC Report, A/58/10, 2003, paras.41-54; ILC Special Rapporteur, *First Report on responsibility of international organizations*, 26 March 2003, A/CN.4/532, Article 3; ILC Drafting Committee, *Titles and texts of the draft articles 1, 2 and 3 adopted by the Drafting Committee*, A/CN.4/L.632.

the International Law Association has asserted that the determination of whether there has been an international wrongful act by the organization should be done by applying the general rules of international law. How an international organization determines the legality of its own actions under its internal legal order can not be determinative of the outcome.²⁰

The response of the IFIs to this legal position has traditionally been that they can only operate under the mandate of their constitutive document which both in the case of the IMF and the World Bank, their Articles of Agreement have expressly excluded political considerations including in the view of many officials the arena of human rights. What is ignored by this position is that in the evolution of the work of the IFIs, especially the World Bank, the mandate has been interpreted to include considerations of at least economic rights such as poverty alleviation, health, education and good governance. What seems to have been interpreted as being excluded from the IFIs Articles of Agreement are civil and political rights. The confirmation by substantially the entire world's nations at the 1993 Vienna World Conference on Human Rights that civil and political rights and other rights are indivisible makes the exclusion unjustifiable.²¹

However, no IFI constitutive document, including that of the IMF has expressly excluded rights that underlie the fight against impunity for the most serious international crimes, such as the basic right to life and security of the person.

²⁰ Report of the Seventy-First Conference, Berlin, Aug. 16–21, 2004 Final Report of the International Law Association Committee on Accountability of International Organizations, 27.

²¹ See the Report of the Conference and the Vienna Declaration on Human Rights on the website of the UN High Commissioner for Human Rights at the following url:

[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.24+\(PART+I\).En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.24+(PART+I).En?OpenDocument)

Indeed, if there were to be such a prohibition in the IFIs Articles of Agreement, it could well be regarded as in violation of international human rights law and in particular the body of rules comprising *ius cogens*. There could well be issues of state responsibility for member states of the IFIs if there were to be such an express exclusion of considerations of fundamental human rights that underpin the fight against impunity for the most serious of international crimes.

Indeed the European Bank for Reconstruction and Development in its preamble stated the commitment to fundamental principles of multiparty democracy, the rule of law, respect for human rights and market economics. This could be taken as demonstrable proof that human rights are not incompatible with the main financial objectives of the IFIs and indeed may be central to achieving the same goals. The World Bank or at least its Legal Counsel, Roberto Danino had come around to this view when in a legal opinion, he stated that "... there are instances in which the Bank *may* take human rights into account and others in which it *should*. Indeed, there are some activities in which the Bank cannot *properly* undertake without considering human rights"²²

As regards the state responsibility of states who are the influential decision makers at the highest levels of the IFIs, there is an interesting legal argument to be made regarding the impact of decisions on human rights in any given situation. It could be cogently argued that such state responsibility is triggered when there is an absence of or virtual blindness to the necessity of mechanisms to protect fundamental human rights in the operations of the IFIs. Directors from the Group of Seven (G7) control more than 60 percent of votes at the Bank and Fund, while the U.S. Director acting in concert with the U.S. administration has veto power over any extraordinary vote that requires a

²² Roberto Dañino, *Legal Opinion on Human Rights and the Work of the World Bank*, January 27, 2006. at para. 18

supermajority vote of 60 percent or more. The power of the G7 countries come from their respective quotas in the IMF based on the ability to provide financial resources to the Fund and its potential vulnerability to balance-of-payments challenges. The quota thereby not only governs how much the member can draw on the IMF resources, but also the member's voting power in the Fund's two governing bodies the Board of Governors and the all powerful Executive Board.

The U.S. has nearly 17% of the voting power of the executive directors, enough to veto any change in the size of the Board and other important decisions including changes to the quotas and amendments of the Articles of Agreement. Other than the G7, countries only Saudi Arabia, China and Russia have individual membership with the rest of the 177 member countries are grouped into 16 multi-country constituencies each of which have an executive director who casts the votes of all countries in the constituency. It is unlikely that the U.S. would ever agree to change its veto power on the Executive Board given the fact that a supermajority of 85% is needed to change quotas or amend the Articles of Agreement. Therefore the main countries that profess to champion universally accepted human rights and the fight against impunity has overwhelming control over one of the most important levers in the promotion of global justice and accountability.

In this regard, it is instructive to note how a former U.S. Administration defended its decision before the U.S. Congress to back a \$40 billion IMF loan and its own \$3 billion emergency back up loan to the Indonesia under the repressive regime of President Suharto during the Asian financial crisis. Two Treasury Department officials (which included the present Treasury Secretary under the Obama Administration, Timothy Geithner) made, inter alia, the following arguments. First, that among the pantheon of

human rights violators, the government of President Suharto did not rank among the worst of the worst. Second, it had blocked the IMF from considering loans to Iran and Sudan and held up loans for Croatia while it was harboring war criminals.²³

In present situation in Sudan, the UN itself has asserted that Darfur represents the worst of the worst global humanitarian crisis caused by the Al-Bashir regime and that regime is harboring three alleged war criminals that include the President himself!

The European Court of Human Rights has ruled that in situations regarding the responsibility of states for the acts of international organizations, under the doctrine of “equivalence” the Court will examine whether there are adequate substantive guarantees for human rights protections offered and mechanism controlling their observance that that are equivalent to those which the European Convention of Human Rights provides, although there is a presumption of legality.²⁴

It could be argued in a similar fashion that the states that control the decision making of the IMF have a similar state responsibility to ensure that it has adequate and effective mechanism for the protection of human rights in dealing with regimes such as those of the Al-Bashir government. The fact that the majority of the key decision makers at the IMF are state parties to the Rome Statute of the ICC, perhaps the standards in that treaty should be the guide as to what those mechanisms should be.

²³ See David E. Sanger IMF Loans to Rights Violators Are Attacked in Congress, New York Times, April 22, 1998 also located at the Times website at <http://www.nytimes.com/1998/04/22/world/imf-loans-to-rights-violators-are-attacked-in-congress.html>

²⁴ Bosphorus Airways v. Ireland, 45036/98 [2005] ECHR 440 (30 June 2005), para. 155-6.

It could also be argued that the IFIs cannot *properly* undertake its role in dealing with the macroeconomic situation of Sudan without considering the gross violations of human rights and the ICC arrest warrants.

Both state and non state parties AND international financial institutions who are external creditors of the present Sudanese government are fully able to use these provisions of Resolution 1593 to urge the Al-Bashir regime to cooperate with the ICC as a precondition of assistance with the external debt of Sudan.

6. Conclusion

For the legal reasons outlined above, I therefore suggest that there is no doubt that the states which are members and contributors to the IMF and the World Bank are bound by Security Council resolutions and relevant international treaties that member countries have signed and ratified.

This is especially relevant to the external creditor nations and the influential members of the IMF that have signed and ratified the Rome Statute of the ICC. I suggest that both the financial institutions and the state parties who are key members of the IMF have a positive duty to promote the objectives of the Rome Statute which includes bringing pressure to bear on the Sudanese government to cooperate with the ICC. A source of the positive duty of Member States of the ICC to bring pressure to bear to ensure serious crimes do not go unpunished is the ICC Statute itself and several provisions that urge the full cooperation of Member States, such as Article 86 which mandates a general duty to cooperate.²⁵

²⁵ Article 86 states:

In this regard, it is also instructive to note that while the U.S. has the greatest decision making power in the IMF, it could be argued that the power of the EU, along with Australia, Canada and Japan together is as great, if not even greater, given that three of the most powerful Executive Directors on the governing Executive Board are appointed by individual EU countries along with Japan, all of whom are also State Parties to the ICC. In addition, four of the multi-country constituencies on the Executive Board are led by the EU countries, namely the Netherlands, Italy, Belgium and Finland who are also State Parties to the ICC along with Australia and Canada who are also two of the strongest supporters of the ICC.

The IMF, the World Bank and the key countries that are States Parties that are dominant in those institutions can legitimately insist the Sudanese officials subject to the ICC's arrest warrants must be handed over to the Court if there is to be any possibility of assisting with the external debt of Sudan and definitely if there is any remote chance of Sudan acceding to the immensely treasured HIPC status that could potentially wipe out the entire external debt. This could well be the most powerful lever that is available to deliver these officials to the Court.

The very existence of the government of President Al-Bashir depends on his having the financial ability to keep all his actual and potential enemies satisfied and not engaged in unseating his fragile governing coalition. The IMF, the World Bank and their controlling member governments therefore have a powerful lever it can choose to advance at least one part of the fight against impunity that has wrecked havoc on the people of Sudan.

States Parties shall, in accordance with the provisions of the Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Other provisions of the Statute that also mandate full cooperation on all aspects of the ICC's mandate and operations include Article 93

The International Financial Institutions and the external creditors should be helping the people and victims of the Al-Bashir regime, not those who have perpetrated the worst crimes known to humanity upon them. This is area where the political will of the U.S., the members of the European Union and Japan can, using their acknowledged financial power, effect the desired change. The world will watch as to whether they choose to continue the macroeconomic dance of blindness with Khartoum or show some element of moral courage and help bring the indicted Sudanese officials to justice in The Hague. The hundreds of thousands of innocents who have lost their lives in Darfur and the 2.7 million who still live in fear and desperation in the refugee camps in Darfur and Chad demand no less.