



# **The Mbeki Panel Report One Year On Continued Inaction on Justice for Darfur Crimes**

**October 2010**

One year ago, on October 29, 2009, the African Union (AU) endorsed the important report and recommendations of the African Union High-Level Panel on Darfur (AUPD), led by former South African President Thabo Mbeki. The comprehensive 125-page report, entitled “Darfur: the Quest for Peace, Justice and Reconciliation,” recommends a range of steps the Sudanese government should take to advance these objectives, including creation of a hybrid court, composed of Sudanese and non-Sudanese judges and other officials to prosecute serious crimes in violation of international law committed in Darfur, and broad reforms to the criminal justice system.

This briefing paper describes key developments since the AUPD issued its report, identifies shortcomings in the follow-up, and makes recommendations for the AU, United Nations (UN), and other key actors on Sudan to ensure against impunity for victims of serious crimes committed in Darfur.

## **Background**

On July 21, 2008, a week after the prosecutor of the International Criminal Court (ICC) applied for a warrant of arrest for President Omar al-Bashir on charges of war crimes, crimes against humanity, and genocide for atrocities committed in Darfur, the African Union’s Peace and Security Council (PSC) called for the formation of an AU High-Level Panel on Darfur to submit recommendations on “accountability and combating impunity, on the one hand, and reconciliation and healing on the other.”<sup>1</sup> At the same meeting, the AU called on the UN Security Council to defer the ICC’s investigation and prosecution of crimes committed in

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<sup>1</sup> African Union Peace and Security Council, 142<sup>nd</sup> meeting, July 21, 2008, Addis Ababa, Ethiopia, PSC/MIN/Comm(CXLII) Rev.1.

Darfur.<sup>2</sup> Many observers commented that the purpose of the panel’s mandate was to help Sudan circumvent the ICC, although President Mbeki denied this allegation.<sup>3</sup>

In February 2009, the AU endorsed the PSC’s decision to appoint the panel and mandated that it be chaired by President Mbeki. On March 4, 2009, the ICC issued its first warrant for Sudan President al-Bashir on charges of war crimes and crimes against humanity.<sup>4</sup>

Over a six-month period, beginning in April 2009, the “Mbeki Panel” carried out research and conducted a series of hearings in Sudan. The panel issued its report in October, noting that serious crimes in violation of international law had been committed in Darfur and that Sudan had failed to ensure justice for the crimes to date.

The report further indicated that many people in Sudan “are strongly opposed to any suspension of the ICC action, seeing it as an escape route for the Government from the demands of justice,” and that displaced Darfuris “welcomed the prospect of ICC prosecutions as the only appropriate mechanism for dealing with the situation they have suffered in Darfur.”<sup>5</sup>

The panel did not take a position on the AU’s request for a deferral of the ICC’s investigation in Darfur, but noted that even if ICC prosecutions did go forward, they would target only a few individuals, and should be supplemented by national efforts. The panel recommended an “integrated justice and reconciliation response,” including a hybrid criminal court to prosecute serious crimes to be situated within the Sudanese justice system, and comprised of Sudanese judges as well as non-Sudanese judges appointed by the AU.<sup>6</sup>

The panel also recommended national reforms, including removing legal and de facto immunities, revitalizing the Special Criminal Court on the Events in Darfur (SCCED) with AU-

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<sup>2</sup> Under article 16 of the ICC’s Rome Statute, one-year renewable deferrals of investigations and prosecutions may be made by the UN Security Council acting under its Chapter VII authority to maintain international peace and security. Rome Statute of the International Criminal Court (Rome Statute), A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, art. 16.

<sup>3</sup> “Mbeki softens stance on Darfur hybrid court proposal,” *Sudan Tribune*, December 17, 2009, <http://www.sudantribune.com/spip.php?article33484> (accessed October 27, 2010).

<sup>4</sup> African Union, Assembly of the African Union, Twelfth Ordinary Session, February 1-3, 2009, Addis Ababa, Ethiopia, Assembly/AU/Dec.221(XII). A second warrant was issued on charges of genocide in July 2010.

<sup>5</sup> African Union Panel on Darfur (AUPD) report, paras. 242 and 240. African Union communiqué, Peace and Security Council, 207<sup>th</sup> Meeting at the level of the heads of state and government, October 29, 2009, Abuja, Nigeria, PSC/AHG/2(CCVII).

<sup>6</sup> *Ibid.*, para. 320.

appointed experts, and creating a truth, justice, and reconciliation commission to establish the nature, causes, and consequences of the conflict in Darfur from 2002-2009.<sup>7</sup>

While emphasizing the interconnectedness of peace, justice, and reconciliation objectives, the report recommended that the Sudanese government move forward on implementing the justice recommendations without delay. The report stated clearly that “nothing the Panel says in this Report should therefore be regarded as a justification for delaying necessary action with regard to justice and reconciliation.”<sup>8</sup>

On October 29, 2009, the AU endorsed the report and appointed a High-Level Implementation Panel (AUHIP), also headed by Mr. Mbeki, to assist in the implementation of the AUPD report and recommendations. The AU also gave this panel a broad mandate to assist with implementation of the 2005 Comprehensive Peace Agreement, which has since dominated its attention.<sup>9</sup>

In December 2009, the UN Security Council welcomed the report and its recommendations.<sup>10</sup> A group of 18 Sudanese political parties also supported it, noting that accountability for human rights violations committed in Darfur was a necessary precondition for peace and stability.<sup>11</sup> The Sudanese government did not formally respond to the report, but the government delegation expressed reservations at the AU Peace and Security Council session when the report was presented.<sup>12</sup> President al-Bashir and other government officials publicly rejected the hybrid court proposal and any proposal involving foreign experts.<sup>13</sup>

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid., para. 207.

<sup>9</sup> African Union communiqué, Peace and Security Council, 207<sup>th</sup> Meeting at the Level of the Heads of state and government, October 29, 2009, PSC/AHG/Comm.1(CCVII). The panel’s nine-point “programme of action,” as described in a July 2, 2010 report to the Peace and Security Council, deals largely with other challenges, such as the elections, referendum, and Southern Sudan.

<sup>10</sup> “Security Council Press Statement on Sudan,” UN Security Council, SC/9831, December 21, 2009, <http://www.un.org/News/Press/docs//2009/sc9831.doc.htm> (accessed October 27, 2010).

<sup>11</sup> Memorandum to the African Union Peace and Security Council and the African Union Heads of State Summit, <http://blogs.ssrc.org/sudan/2009/10/31/au-panel-on-darfur-documents/> (accessed October 25, 2010).

<sup>12</sup> “Sudan ‘politely’ rejects hybrid court proposal for Darfur, SPLM & rebels critical,” *Sudan Tribune*, October 30, 2009, <http://www.sudantribune.com/spip.php?article32956> (accessed October 25, 2010).

<sup>13</sup> See, for example, “Mbeki soften stance on Darfur hybrid court proposal,” *Sudan Tribune*, December 17, 2009, <http://www.sudantribune.com/spip.php?article33484> (accessed October 25, 2010).

## Lack of Progress on Mbeki Panel Recommendations

The Sudanese government has made no meaningful progress in the implementation of the Mbeki Panel recommendations on justice. The implementation panel noted in July 2010 the appointment by the Sudanese government of a team tasked to discuss the implementation of a justice and reconciliation strategy in Darfur.<sup>14</sup> Their plans were not made public, nor did they lead to concrete actions by the government to implement the panel's justice recommendations.

In September, the Sudanese government launched a new “Darfur strategy.”<sup>15</sup> The strategy—which focuses on security and development in Darfur—notably does not address the Mbeki Panel's justice recommendations. It states that the government “remains committed to supporting the work of Sudan's appointed special prosecutor for Darfur and related national tribunals to carry out their mandates.” This is despite a warning by a prominent adviser to the panel that the Sudanese government would be “foolish” to ignore the recommendation for a hybrid court.<sup>16</sup>

In October, Sudan's state minister for justice announced that his ministry would focus on domestic prosecutions for crimes committed in Darfur in the upcoming year.<sup>17</sup> The minister of justice also announced new investigations, and appointed new high-level justice and security representatives to work in Darfur, replacing special prosecutor Nimer Ibrahim with a justice ministry undersecretary, Abdul-Dayem Zamrawi.<sup>18</sup>

However, there is good reason for skepticism about these announcements. Sudan's past attempts at domestic prosecutions for serious crimes have been ineffective.<sup>19</sup> Indeed, it was Sudan's unwillingness to prosecute serious crimes that led to the UN Security Council's

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<sup>14</sup> Report of the Chairperson of the Commission on the Activities of the African Union High-level Implementation Panel (AUHIP) on Sudan, African Union Peace and Security Council, July 2, 2010, para. 13.

<sup>15</sup> “Toward a new strategy to Achieve Comprehensive Peace, Security and Development in Darfur,” Office of the Presidential Advisor, September 2010, on file with Human Rights Watch.

<sup>16</sup> “Interview: Sudan expert warns government against rejecting Darfur hybrid tribunals,” *Sudan Tribune*, September 5, 2010, <http://www.sudantribune.com/spip.php?article36181> (accessed October 25, 2010).

<sup>17</sup> “The Ministry of Justice to support criminal justice work in Darfur” (title translated by Human Rights Watch), *Ajras al Hurriya*, October 13, 2010, [http://www.ajrasalhurriya.net/ar/news\\_view\\_13151.html](http://www.ajrasalhurriya.net/ar/news_view_13151.html) (accessed October 27, 2010).

<sup>18</sup> See Sudan Media Center, “Ministry started investigation into crimes in Darfur,” October 6, 2010, <http://smc.sd/eng/news-details.html?rsnpid=30262> (accessed October 25, 2010); and “Minister of justice appoints new prosecutor for Darfur crimes,” October 20, 2010, <http://smc.sd/eng/news-details.html?rsnpid=30414> (accessed October 25, 2010). Special prosecutor Nimer Ibrahim, appointed in August 2008 to investigate crimes in Darfur, has to date been unsuccessful in bringing prosecutions for serious crimes.

<sup>19</sup> Human Rights Watch, *Lack of Conviction: The Special Criminal Court on Events in Darfur*, no. 1, June 2006, <http://www.hrw.org/node/77885>.

unprecedented decision to refer the situation in Darfur to the ICC in the first place. Moreover, the government has not taken key steps to strengthen its criminal justice system in line with the panel's recommendations and with its obligations under international law and its own constitution.<sup>20</sup>

Meanwhile, the AU, the UN Security Council, the United States, and other international actors involved in Sudan's peace processes have failed to actively press the Sudanese government to move forward on the Mbeki Panel justice recommendations. International attention has understandably shifted to the implementation of Sudan's 2005 Comprehensive Peace Agreement, which ended Sudan's 22-year civil war and called for a referendum on southern self-determination, scheduled for January 2011. At the same time, the Darfur peace process at Doha, Qatar, has foundered, and has not provided an avenue for advancing accountability for Darfur crimes.

## **The Way Forward**

It has been more than five years since the UN Security Council referred the situation in Darfur to the ICC prosecutor, and one year since the High-Level Panel on Darfur presented its report to the AU Peace and Security Council in Abuja. Sudan's utter failure to act on the Mbeki Panel recommendations, and its lack of cooperation with the ICC, coupled with key international actors' limited engagement on issues of accountability—especially around Sudan's national elections and in the lead-up to the referendum on Southern Sudan's secession—underscores the need for far more active efforts to ensure victims of atrocities committed in Darfur are not denied justice.

Officials engaged on Sudan from a range of international organizations, including the African Union, have argued that justice risks undermining—and should take a back seat to—the peace process on Darfur and CPA implementation. Yet, as the AUPD itself recognized, the pursuit of multiple goals of peace, justice, and reconciliation should not mean delay on justice, stating:

The Panel considers that it is possible at present to carry out some criminal investigations capable of sustaining prosecutions. In any event, evidence can be identified and preserved for further investigations or use in future

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<sup>20</sup> The Sudanese government has taken a piecemeal approach to amending existing laws, but the principle of legality could block application of new amendments. See AUPD report, paras. 228-29. Sudan has not removed legal and de facto immunities that protect soldiers and officials. It has not brought laws, such as the National Security Act, in line with international standards or its own constitution.

proceedings. Indeed, it is precisely such beginnings in the current environment which would give the people of Darfur confidence in the Government's commitment to bring an end to impunity. Nothing the Panel says in this Report should therefore be regarded as a justification for delaying necessary action with regard to justice and reconciliation....<sup>21</sup>

The panel further noted:

Whilst the ICC action might be a catalyst for acts of accountability in Sudan, Darfurians deserve attention not because of the threat of international action, but principally because they have a right to justice, in their own country, on account of what they have suffered.<sup>22</sup>

The failure to hold perpetrators of the most serious international crimes to account can fuel future abuses.<sup>23</sup> In Sudan, longstanding impunity for the state's use of brutal ethnic militias to attack civilians in the south set a precedent for similar atrocities elsewhere. This likely factored into Khartoum's decision to use the same strategy again with devastating results for civilians in Darfur<sup>24</sup> and continues to fuel abuses on a daily basis. Intensified fighting between government and rebel forces, and between other armed groups in 2010, has killed hundreds of civilians.<sup>25</sup> In early September, government-supported militias attacked Tabra market in North Darfur, killing at least 37 people.<sup>26</sup> A government pledge to investigate the alleged human rights and humanitarian law violations there has yet to yield prosecutions. Government attacks on several villages in eastern Jebel Mara in late September and early October led to additional civilian deaths, mass displacements, and destruction of property.<sup>27</sup>

Human Rights Watch urges all concerned governments and institutions, and especially the African Union and the UN Security Council, to:

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<sup>21</sup> AUPD report, para. 207.

<sup>22</sup> *Ibid.*, para. 245.

<sup>23</sup> See Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, July 2009, <http://www.hrw.org/node/84264/>, pp. 35-92.

<sup>24</sup> *Ibid.*, pp. 68-74.

<sup>25</sup> "UN: Strengthen Civilian Protection in Darfur," Human Rights Watch news release, July 19, 2010, <http://www.hrw.org/node/91744/>.

<sup>26</sup> "Sudan: Protect Rights Ahead of Referendum," Human Rights Watch news release, September 22, 2010, <http://www.hrw.org/node/93203/>.

<sup>27</sup> Little information has emerged from Jebel Mara, as the government and rebel forces have at different times restricted international agencies from visiting. Human Rights Watch has received information confirming the clashes.

## Press Sudan to Implement the Full Range of AUPD Justice Recommendations

The Mbeki Panel has an important role to play in pressing the Sudanese government to act on its recommendations to ensure justice for the people of Darfur and to insist that prosecutions for serious crimes take place in accordance with international standards. As the AUPD panel noted, the ICC has limited capacity and will only prosecute a small number of individuals at the highest levels of responsibility. Prosecutions before a hybrid court and other domestic courts could help to ensure wider accountability than will be possible before the ICC.

These proposals imply a number of conditions, however. First, some political will to prosecute the crimes is needed on the part of the Sudanese government for the proposed hybrid court to function effectively. Otherwise, domestic participation could be marshaled to obstruct the court's work. Hybrid courts generally function well where the main challenge is capacity, not willingness, of the state concerned to prosecute the crimes.<sup>28</sup>

Second, Sudan needs to accept adequate international expert involvement in the proposed hybrid court. The hybrid court proposal is premised on the idea of Sudanese nationals' investigating and trying cases alongside non-Sudanese counterparts drawn from Africa.<sup>29</sup> The non-Sudanese judges and prosecutors also should have the ability to take decisions at odds with the views of their Sudanese counterparts for the courts to be impartial and independent.<sup>30</sup>

Third, Sudan needs to implement the full range of broad reforms of its criminal justice system. A number of well-documented flaws in the domestic criminal justice system—such as lack of adequate fair trial protections, broad immunities for certain categories of individuals, use of the death penalty, and lack of witness protection programs—are likely to prevent a hybrid court situated in the domestic system, or other domestic prosecutions, from meeting benchmarks for fair, effective prosecutions consistent with international law and practice.<sup>31</sup>

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<sup>28</sup> See, for example, Human Rights Watch, *Bringing Justice: The Special Court for Sierra Leone Accomplishments, Shortcomings, and Needed Support*, vol. 16, no. 8(A), September 2004, <http://www.hrw.org/node/11984>.

<sup>29</sup> African Union Peace and Security Council, "Report of the African Union High-Level Panel on Darfur (Darfur: The Quest for Peace, Justice and Reconciliation)," Addis Ababa, October 2009, para. 320(b).

<sup>30</sup> The AU High-Level Panel proposal does not provide details with regard to a breakdown between Sudanese and non-Sudanese officials and staff at the hybrid court.

<sup>31</sup> Human Rights Watch, *Lack of Conviction*, pp. 15-26, 30. See also African Union Peace and Security Council, "Report of the African Union High-Level Panel on Darfur (Darfur: The Quest for Peace, Justice and Reconciliation)," October 2009, paras. 228-238. For a detailed discussion of key benchmarks for fair, effective proceedings consistent with international standards and

## Insist on Sudanese Cooperation with the ICC

All major interlocutors with the Sudanese government—including the African Union, the UN Security Council, the United States, and the European Union and its members—should more actively press the Sudanese government to cooperate with the ICC.

The ICC remains the sole forum through which meaningful pursuit of investigation and prosecution for crimes committed in Darfur is currently taking place.<sup>32</sup> Sudan’s continued inaction in implementing the Mbeki Panel’s recommendations only reinforces the importance of the ICC’s investigations and prosecutions.

There is no indication that the ICC investigations are detrimental to the maintenance of international peace and security or that suspending the court’s activities would contribute to peace in Sudan. Peace negotiations in Darfur have continued to founder for many reasons unrelated to efforts to secure justice, including that the two main rebel groups continue to reject the process and that the government has precluded effective civil society participation. Unrealistic timelines for achieving results, competition and lack of coordination between the main Darfur actors—the AU-UN Hybrid Operation in Darfur (UNAMID), the AU-UN Joint Chief Mediator for Darfur, and the AUHIP—have also arguably hindered the process.

States understandably manage a range of interests in relation to Sudan, particularly in relation to CPA implementation and the upcoming referendum on southern self-determination. Insistence on cooperation with the ICC should nevertheless remain a priority if impunity is to be avoided by key actors committed to accountability. Notably, the ICC judges issued a formal finding of non-cooperation by the government of Sudan in the ICC’s cases for Ahmed Haroun and Ali Kosheib in May 2010. Human Rights Watch urges the UN Security Council to respond to this finding to press for cooperation, such as through a resolution, sanctions, or a presidential statement.<sup>33</sup>

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practice, see Human Rights Watch, “Benchmarks for Justice for Serious Crimes in Northern Uganda: Human Rights Watch Memoranda on Justice Standards and the Juba Peace Talks,” September 2, 2008, <http://www.hrw.org/node/73886>.

<sup>32</sup> To date, the ICC has issued arrest warrants for three suspects on charges of crimes in Darfur: President al-Bashir; Ahmed Haroun, current governor of Southern Kordofan state; and Ali Kosheib, a “Janjaweed” militia leader. The ICC has also issued summons to appear for three rebel leaders in connection with attacks on international peacekeepers in Darfur: Bahar Idriss Abu Garda, Abdallah Banda Abakaer Nourain, and Saleh Mohammed Jerbo Jamus.

<sup>33</sup> *Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, ICC, case no. ICC-02/05-01/07, Pre-Trial Chamber I informs the United Nations Security Council about the lack of cooperation by the Republic of the Sudan in the case against Harun and Kushayb, May 25, 2010.