

# Towards Ending Impunity in Darfur: The ICC Arrest Warrant of 27 April 2007

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## Introduction

On 27 April 2007 Pre-Trial Chamber I of the International Criminal Court (ICC) issued an arrest warrant against Mr. Ahmad Harun and Mr. Ali Kushayb for their alleged responsibility for the atrocities committed in Darfur, Sudan since 1<sup>st</sup> July 2002.<sup>1</sup> The arrest warrant was delivered pursuant to the United Nations (UN) Security Council (SC) Resolution 1593 of 31 March, 2005<sup>2</sup> which

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<sup>1</sup> See *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad al Abd-al-Rahman*, Case No. ICC-02/05-01/07 (hereinafter *Harun and Kushayb* case).

<sup>2</sup> SC Res. 1593 (2005).

referred the situation in Darfur to the prosecutor of the ICC on the ground that it constitutes a threat to international peace and security. Though not being the only case currently under investigation by the ICC,<sup>3</sup> the importance and significance of this arrest warrant resides in the fact that it is the first warrant issued on the basis of a referral by the UNSC ever since the Court became operational on 1<sup>st</sup> July 2002. In addition, the ICC arrest warrant constitutes the latest and the most energetic in a series of responses<sup>4</sup> from the international community to violations of international humanitarian law and human rights law committed in the course of the Darfur conflict.<sup>5</sup>

This article sets out to determine and critically analyse certain aspects of international law which form the cornerstone on which the arrest warrant of 27 April 2007 rests. These include questions relating to the legality of the warrant, its execution, and its implication for the ICC and all the actors to the Darfur crisis. In order to achieve these goals, Part I will briefly go back to the origins of the ongoing conflict in Darfur before outlining the international community's responses to the humanitarian tragedy associated with that conflict. Thereafter, Part II will examine the legality under international law of the arrest warrant, whereas Part III will discuss issues of cooperation by all the concerned parties in the execution of the warrant. Finally, Part IV will consider the impact which a successful execution of the arrest warrant might have on the Darfur war as well as on the ICC authority.

## I. The Human Tragedy of the Darfur Conflict under International Scrutiny

The origin of the ongoing armed conflict in Darfur is as obscure and intricate as the exact identity of all the different ethnic or tribal groups involved in the actual fighting in the field. However, what is plain to be seen is the scale and brutality of the exactions committed or being committed against the civilian population by the protagonists of the conflict. The plight of the civilian section of the Darfur population was first brought to the world public attention by the media, whose reports have greatly contributed in drawing a wider international public opinion on the concrete situation in Darfur.

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<sup>3</sup> To date three State referrals are being investigated by the Court; they concern the Situation in Democratic Republic of the Congo (ICC-01/04), the Situation in Uganda (ICC-02/04), and the Situation in Central African Republic (ICC-01/05).

<sup>4</sup> See Part I below for earlier international measures dealing with the Darfur crisis.

<sup>5</sup> For an overview of the historical and social background of the Darfur conflict, see e.g. A. de Waal (ed.), *War in Darfur and the Search for Peace* (2007); J. Flint/A. de Waal, *Darfur: A Short History of a Long War* (2005); V. Tanner, *Darfur: Racines Anciennes, Nouvelles Virulences, 4 Politique Étrangère* (2004), 715-728; Report of the International Commission of Inquiry on Darfur to the UN Secretary-General (2005), 14-26, available at <[www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf)>.

## 1. Root Causes of the Conflict

The Darfur conflict is often described as “the new Rwanda”, “the worst humanitarian crisis since Rwanda”, or simply as “another Rwanda”.<sup>6</sup> This analogy to the Rwandan genocide of 1994 is indicative of the magnitude and severity of the violence which the civilian population of Darfur is subjected to as a result of the civil war. Due to the complex tribal interaction and compartmentalisation that characterises the Sudanese society it is quite difficult to identify with an accurate degree of certainty the different protagonists of the Darfur war. However, various reports and writings<sup>7</sup> relating to this conflict concur in distinguishing between two main fighting groups: first, the Janjaweed militias which are composed mainly of landless Arab cattle/camel-herding nomadic groups that fight alongside the official Sudanese armed forces from which they receive military training, funding, and weapons;<sup>8</sup> second, the Sudan Liberation Army and the Justice and Equality Movement (SLA/JEM) which are two rebel groups whose membership is mainly drawn from the sedentary and agriculturalist Muslim African tribes of the Fur, the Zaghawa and the Masalit.<sup>9</sup>

The root causes of the conflict between the Janjaweed/Government and the rebel groups are as complex as the Sudanese society itself. Nevertheless, various historical and sociological studies devoted to this conflict trace its sources to a combination of several factors, including climatic, social and policy factors.<sup>10</sup>

Periodic droughts and desertification that occurred in the 1970s, 1980s and 1990s have forced Arab herders in search for pasture and water for their livestock to encroach upon the more fertile lands of the sedentary farmers. An increased migration of nomadic groups from drought-affected areas into much greener areas of Darfur coupled with the scarcity of fertile land caused the first bloody clashes between farmers and herders.<sup>11</sup> Following subsequent clashes in 1987-1989, various Arab herding tribes united within a pro-Arab ideology coalition supported by Libya and successive central governments in Sudan. The Janjaweed militias were created in the course of this conflict.<sup>12</sup> In the meantime, continuing droughts, environmental degradation, encroachments on farmers' land and growing livestock holdings have increased their desire to acquire fertile land in which to settle per-

<sup>6</sup> See D. Murphy, *Narrating Darfur: Darfur in the U.S. Press*, March-September 2004, in: de Waal (note 5), 317.

<sup>7</sup> E.g. Report of the UN Commission of Inquiry on Darfur and de Waal (note 5).

<sup>8</sup> A. Hagggar, *The Origins and Organization of the Janjaweed in Darfur*, in: de Waal (note 5), 113-139.

<sup>9</sup> J. Flint, *Darfur's Armed Movements*, in: de Waal (note 5), 140-173.

<sup>10</sup> See e.g. Hagggar (note 8); also M. Abdul-Jalil/A. Azzain Mohammed/A. Yousuf, *Native Administration and Local Government in Darfur: Past and Future*; J. Tubiana, *Darfur: A War for Land?*; A. Kamal El-D, *Islam and Islamism in Darfur*, all in: de Waal (note 5), 39-67, 68-91 and 92-112, respectively.

<sup>11</sup> Tubiana (note 10), 70-71; Report of the UN Commission of Inquiry on Darfur, (note 5), 21.

<sup>12</sup> Tubiana (note 10), 70.

manently.<sup>13</sup> Access to such land was achieved by the Arab militias using violent tactics against the sedentary farmers, such as forcing them from their villages then claiming ownership to their land.<sup>14</sup> This approach caused a widespread intertribal violence over land in Darfur. It was in the midst of this brutal environment that the SLA and the JEM, the two main rebel groups in Darfur, made their appearance in 2002-2003. The SLA and the JEM, whose membership was mainly composed of the sedentary tribes of the Fur, the Zaghawa and the Masalit, intended to denounce and fight against the Khartoum Government whose policy was seen as the main cause of the structural, socio-economic, and political marginalisation of the Darfur and its people, including local Arab tribes.<sup>15</sup> However, due to their predominantly non-Arabic composition, the two rebel groups would later attract the sympathy of most non-Arabic tribes present in Darfur. This demarcation of the Darfurian society along ethnic and/or tribal affiliation (the so-called “Arab tribes” on the one hand, and “African tribes” on the other) would soon be exploited by the Sudanese government in its proxy war against rebellion in Darfur. Thus, beginning 2003, the Sudanese Government responded to a series of successful rebel attacks against its infrastructures and armed troops by accusing non-Arab populations of supporting the rebellion, and by recruiting, organising, financing, arming and mobilising Arab militias against the rebels.<sup>16</sup> These Arab militias, which are notoriously known as “Janjaweed” and which are fighting alongside the Sudanese armed forces, are believed to be the principal perpetrators of most of the crimes reported to have been committed in Darfur.

## 2. Reporting on the Conflict: From the Media to the United Nations Security Council

The first significant articles on the atrocities being committed in Darfur appeared in the United States of America’s (U.S.) printing media in the beginning of 2004. In an article entitled “Ethnic Cleansing Again” that was published in the New York Times of March 24, a columnist described violence in Darfur as “a campaign of murder, rape and pillage by Sudan’s Arab rulers” against black African Sudanese, and identified the Sudanese Government together with the Janjaweed as the main culprits.<sup>17</sup> Between March and September 2004, subsequent articles on Darfur would appear in other prominent U.S. printing press such as the Washington Post, the Wall Street Journal, and the Washington Times, which highly contributed in drawing a wider U.S. public opinion on the Darfur crisis. Common among most articles that were published after March 24, was the labelling of the

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<sup>13</sup> Ibid., 75, 77.

<sup>14</sup> Ibid., 71.

<sup>15</sup> Ibid.; also, Report of the UN Commission of Inquiry on Darfur, (note 5), 22-24.

<sup>16</sup> Ibid.

<sup>17</sup> Murphy (note 6), 314.

violence in Darfur as genocide, and the call for humanitarian intervention.<sup>18</sup> However, the totality of the press releases of 2004 concurred in highlighting the most striking feature of the Darfur conflict; namely, the Janjaweed/Government's massive and indiscriminate attacks against civilians, followed by the destruction and burning of their livelihood and entire villages, and the displacement of large portions of the civilian population from their traditional dwelling sites into refugee camps.

This pattern of attack and destruction is further corroborated by various other public and private sources around the world,<sup>19</sup> which have also documented the pitiless scorched-earth strategy adopted by the Janjaweed/Government against their fellow Darfur civilian population. A brief overview of existing reports on atrocities shows that various criminal acts committed against the civilian population in Darfur include aerial and ground attacks carried out by the military, the Janjaweed, or a combination of the two, on villages and settlements; that such attacks are usually followed by deliberate and indiscriminate violence upon civilians including killings, massacres, summary executions, rape, torture, abduction, looting of property and livestock, destruction and torching of villages. These attacks resulted in the massive displacement of large portions of the civilian population within Darfur and to neighbouring Chad,<sup>20</sup> whereas, according to certain reports, the Arab tribes are beginning to settle in areas previously occupied by the displaced persons.<sup>21</sup> Many sources have also suggested that these criminal acts amount to persecution, ethnic cleansing and extermination.<sup>22</sup>

In response to the growing international concern about the pattern and scale of violence described above, the UNSC adopted a series of resolutions denouncing the ongoing humanitarian crisis and human rights violations as constituting a threat to international peace and security,<sup>23</sup> as prescribed by Article 39 of the United Nations Charter.<sup>24</sup> The most significant of such resolutions is Resolution 1593 which refers the situation in Darfur since 1 July 2002 to the Prosecutor of the ICC. On 27 April 2007 the ICC gave effect to this resolution by issuing an international arrest warrant against Ahmad Harun, a Sudanese Government official

<sup>18</sup> Ibid., 317-324 and 333-335; see also R. Hamilton/C. Hazlett, Not on our Watch: The Emergence of the American Movement for Darfur, in: de Waal (note 5), 341-343.

<sup>19</sup> Sources which have released reports or articles on the Darfur crisis include the UN, the OHCHR, the OCHA, the Sudan UNCT, the UNHCR, UNICEF, the WHO, the African Union, Governments, Intergovernmental Organisations, various Media and Press articles worldwide, and NGOs; for more detailed information on these sources, consult e.g. Annex 3 to the Report of the UN Commission of Inquiry on Darfur, (note 5).

<sup>20</sup> 1.6 million persons have been displaced inside Darfur, whereas more than 200,000 have found refuge in Chad, according to the Report of the UN Commission of Inquiry on Darfur, (note 5), § 226.

<sup>21</sup> Report of the UN Commission of Inquiry on Darfur, (note 5), §§ 186 and 197.

<sup>22</sup> Ibid., §§ 194-195.

<sup>23</sup> See e.g. SC Res. 1556 (2004); SC Res. 1590 (2005); SC Res. 1591 (2005); SC Res. 1593 (2005); SC Res. 1627 (2005); SC Res. 1651 (2005); SC Res. 1709 (2006); SC Res. 1713 (2006); SC Res. 1714 (2006); SC Res. 1755 (2007); SC Res. 1769 (2007); and SC Res. 1779 (2007).

<sup>24</sup> 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 (entry into force: 24 October, 1945).

responsible for coordinating the counter-insurgency in Darfur, and Ali Kushayb, a leading Janjaweed tribal leader and member of the Sudanese Armed Forces, for their responsibility in war crimes and crimes against humanity allegedly committed in Darfur. The following section examines the legality of the ICC arrest warrant.

## II. Legality under International Law of the ICC Arrest Warrant

Two important multilateral treaties provide the legal framework within which to examine the conformity of the ICC arrest warrant with international law; these are the UN Charter<sup>25</sup> and the Statute of the International Criminal Court.<sup>26</sup>

### 1. The Charter Source of the Arrest Warrant

The roots of the ICC arrest warrant can be traced back to Chapter VII of the UN Charter, which prescribes a number of measures that may be taken in response to threats to the peace, breaches of the peace, and acts of aggression. In this regard, Article 39 of the Charter entrusts the Security Council with the power to determine the existence of any threat to the peace, breach of the peace, or act of aggression and to make recommendations, or decide what measures are appropriate to maintain or restore international peace and security. Threat to the peace and breach of the peace may occur in the context of both interstate and internal armed conflicts.<sup>27</sup> A threat to peace in an internal armed conflict exists whenever such conflict has the potential to destabilise the country involved, cause human rights

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<sup>25</sup> Ibid.

<sup>26</sup> Adopted on 17 July, 1998, A/CONF. 183/9 of 17 July 1998 (entry into force: 1 July, 2002).

<sup>27</sup> Common Art. 2 to the four Geneva Conventions of 12 August 1949 (namely Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (6 UST 311, TIAS No. 3362, 75 UNTS 31); Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (6 UST 3217, TIAS No. 3363, 75 UNTS 85); Convention (III) relative to the Treatment of Prisoners of War (6 UST 3316, TIAS No. 3364, 75 UNTS 135); and Convention (IV) relating to the Protection of Civilian Persons in Time of War (6 UST 3516, TIAS No. 3365, 75 UNTS 287)), as well as Art. 1 (3) and (4) of Additional Protocol I of 8 June 1977 (namely Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, (1125 UNTS 3, entry into force: 7 December 1978)) give the meaning of international armed conflicts; whereas Art. 1 of Additional Protocol II of 8 June 1977 (namely Protocol Additional to the Geneva Conventions of 12 August, 1949 and relating to the Protection of Victims of Non-International Armed Conflicts, (1125 UNTS 609, entry into force: 7 December 1978)) defines internal armed conflicts.

violations therein, and bring about dire humanitarian consequences.<sup>28</sup> However, there is a breach of the peace when these consequences actually manifest.<sup>29</sup>

In addition, Article 41 of the Charter authorises the SC to take any measures short of the use of armed force to give effects to its decisions, whereas Article 42 legitimises the use of military force necessary to maintain or restore international peace and security, when non-coercive measures under Article 41 have proved inadequate. Instances of non-military measures under Article 41 include economic sanctions and the severance of diplomatic relations. However, in its practice, the SC has broadened the scope of Article 41 by adopting measures as varied as legal determinations, the establishment of interim administrations of certain territories, and the creation of international criminal tribunals<sup>30</sup> to address the criminal responsibility of private persons for the most serious crimes under international law. The latter constitutes a manifestation of the human rights determination function which the SC has repetitively exercised since the early 1990s. In effect, this institution played a central role in the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)<sup>31</sup> to address human rights tragedies associated with war in the former Yugoslavia and with the Rwandan genocide. Thereafter, it took the lead in addressing serious human rights violations committed in Sierra Leone; an action which culminated in the setting up of the Special Court for Sierra Leone.<sup>32</sup> It is in line with this established practice that on 31 March 2005 the SC adopted Resolution 1593 to address human rights and humanitarian law violations committed in Darfur. Paragraph 5 of the preamble to this Resolution determines the situation in Darfur as continuing to constitute a threat to international peace and security in conformity with UN Charter Article 39, whereas op. paragraph 1 referring the situation in Darfur since 1 July 2002 to the Prosecutor of the ICC, constitutes a non-coercive measure under UN Charter Article 41. It is worth mentioning at this point that prior to Resolution 1593 (2005), the SC had adopted a number of resolutions of a human rights character which specifically aimed at attenuating the humanitarian plight of the civilian victims of the Darfur civil war; among these are Resolution 1556 (2004) which called for the Sudanese Government to disarm the Janjaweed militias and bring their leadership to trial, and which further imposed an

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<sup>28</sup> J.A. Frowein/N. Krisch, in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2<sup>nd</sup> ed., Vol. I (2002), 721.

<sup>29</sup> *Ibid.*

<sup>30</sup> Frowein/Krisch (note 28), 740-746.

<sup>31</sup> SC Res. 827 (1993) establishing the International Criminal Tribunal for the former Yugoslavia to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia; and SC Res. 955 (1994) (S/RES/955) for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law in connection with the Rwandan conflict.

<sup>32</sup> SC Res. 1315 (2000) requesting the Secretary-General of the UN to negotiate an agreement with the Government of Sierra Leone establishing a Special Court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law.

arms embargo against individuals and non-Government entities operating in Darfur; Resolution 1564 (2004) which requested the UN Secretary-General to establish an International Commission of Inquiry on Darfur; and Resolution 1591 (2004) which imposed targeted sanctions on certain individuals designated as constituting an impediment to peace in Darfur. It is the failure of the warring parties to observe the prescriptions contained in previous resolutions that has led Members of the SC to refer the situation in Darfur to the ICC for legal determination.

## 2. ICC Statute

Analysing the legality under the ICC Statute of the arrest warrant of 27 April, 2007 requires a two-pronged determination: first, whether the case for which this warrant was issued has any merit before the ICC; that is whether it is admissible and whether the Court may exercise its jurisdiction over it. Second, whether the warrant proper meets the criteria of lawfulness as set out in Article 58 of the ICC Statute.

### A. Merit of the *Harun and Kushayb* Case before the ICC

For the *Harun and Kushayb* case to have any merit before the ICC, this Court must be able to exercise its jurisdiction with respect to the crimes the accused have committed, and the case itself must be admissible.

#### a) Referral of the Darfur Crimes to the ICC

The ICC Statute defines three distinct modalities for activating the jurisdiction of the ICC<sup>33</sup> in a particular case when a Statute crime is alleged to have been committed.<sup>34</sup> First, when a situation is referred to the Prosecutor by a State Party; second, when a situation is referred to the Prosecutor by the Security Council acting under Chapter VII of the UN Charter; and finally, when the Prosecutor has initiated an investigation *proprio motu* in respect of an ICC crime.<sup>35</sup>

ICC Statute Article 13 (b) provides for the second modality for triggering the ICC jurisdiction, which subjects the SC to a prior determination under Chapter VII of the UN Charter of the existence of a threat to the peace, breach of the peace, or act of aggression. In practice, the SC makes such determination on the basis of a report of an international commission of inquiry appointed by the UN to investigate and objectively assess, factually and legally, situations on the ground, which may amount to serious violations of international humanitarian law and human

<sup>33</sup> Such modalities are usually referred to as the “trigger mechanisms”.

<sup>34</sup> Under Art. 5 of the ICC Statute, the Court has jurisdiction over genocide, crimes against humanity, war crimes and, subject to an agreed definition, over the crime of aggression.

<sup>35</sup> ICC Statute Art. 13 (a), (b) and (c), respectively.



rights law.<sup>36</sup> In certain cases<sup>37</sup>, the SC has relied on the findings of commissions of inquiry to establish ad hoc tribunals or courts to prosecute serious human rights violators. In accordance with this practice, the SC adopted Resolution 1564 (2004) requesting the UN Secretary-General to:

[R]apidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.<sup>38</sup>

On 25 January 2005 the International Commission of Inquiry on Darfur<sup>39</sup> submitted a report on its findings to the UN, which confirmed, *inter alia*, that violations of international humanitarian law and human rights law in fact took place in Darfur, and that such violations are likely to amount to war crimes and/or crimes against humanity.<sup>40</sup> In addition, the Commission recommended, amongst others, not the establishment of an additional ad hoc jurisdiction to prosecute the perpetrators of the crimes it has identified, but rather a referral under Article 13 (b) of the ICC Statute of the situation in Darfur to the ICC.<sup>41</sup> The Commission justified its recommendation by explaining that resorting to the ICC to deal with accountability in Darfur would have at least six major merits:

First, the International Court was established with an eye to crimes likely to threaten peace and security. This is the main reason why the Security Council may trigger the Court's jurisdiction under Article 13 (b). The investigation and prosecution of crimes perpetrated in Darfur would have an impact on peace and security. More particularly, it would be conducive, or contribute to, peace and stability in Darfur, by removing serious obstacles to national reconciliation and the restoration of peaceful relations. Second, as the investigation and prosecution in the Sudan of persons enjoying authority and prestige in the country and wielding control over the State apparatus, is difficult or even impossible, resort to the ICC, the only truly international institution of criminal justice, which would ensure that justice be done. The fact that trial proceedings would be conducted in The Hague, the seat of the ICC, far away from the community over which those persons still wield authority and where their followers live, might ensure a neutral atmosphere and prevent the trial from stirring up political, ideological or other passions. Third, only the authority of the ICC, backed up by that of the United Nations Security Council, might impel both leading personalities in the Sudanese Government and the

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<sup>36</sup> See e.g. SC Res. 771 (1992) requesting States and international organisations to collect information relating to violations of international humanitarian law committed in the former Yugoslavia and to make this information available to the Council, and SC Res. 780 (1992) requesting the Secretary-General to establish an impartial Commission of Experts to analyse information collected under SC Res. 771 (1992); also SC Res. 935 (1994) requesting the Secretary-General to establish a Commission of Experts to investigate violations of international humanitarian law committed in Rwanda.

<sup>37</sup> See e.g. Former Yugoslavia, Rwanda, Sierra Leone, and Cambodia.

<sup>38</sup> Paragraph 12.

<sup>39</sup> Established by the UN Secretary-General, UN Doc. SG/A/890 of 7 October 2004.

<sup>40</sup> See (note 5), §§ 630-639.

<sup>41</sup> *Ibid.*, § 647.

heads of rebels to submit to investigation and possibly criminal proceedings. Fourth, the Court, with an entirely international composition and a set of well-defined rules of procedure and evidence, is the best suited organ for ensuring a veritably fair trial of those indicted by the Court Prosecutor. Fifth, the ICC could be activated immediately, without any delay (which would be the case if one were to establish ad hoc tribunals or so-called mixed or internationalized courts). Sixth, the institution of criminal proceedings before the ICC, at the request of the Security Council, would not necessarily involve a significant financial burden for the international community.<sup>42</sup>

The SC finally followed the Commission's recommendation in its Resolution 1593, which referred the Darfur situation to the ICC. On the basis of this referral and of other evidentiary documents submitted by the UN Commission of Inquiry and other reliable sources, the Prosecutor of the ICC issued an international arrest warrant against Ahmad Harun and Ali Kushayb for their alleged role in the crimes committed in Darfur. However, for the warrant to be able to produce the expected legal effects, the *Harun and Kushayb* case must have been admissible.

#### b) Admissibility of the *Harun and Kushayb* Case

After asserting its jurisdiction, the ICC may issue an arrest warrant only if a case is admissible; that is, when it has not been properly addressed by the State which wields jurisdiction over it. This requirement is the object of Article 17 (1)(a) and (b) read together with Paragraph 10 of the Preamble, and Article 1, of the ICC Statute, which in fact embody the fundamental principle of complementarity that governs the relationship between the ICC and national criminal jurisdictions. This principle attributes the primacy of jurisdiction over the ICC Statute crimes to States Parties, while reserving a form of "subsidiary" role to the ICC. In this respect, Article 17 (1)(a) and (b) stipulates that the ICC declares the case inadmissible when it is being investigated or prosecuted by a State which has jurisdiction over it, or when such a State has already investigated the case but has decided not to prosecute the persons concerned. Nevertheless, the ICC may exercise jurisdiction over the case if it considers that the competent State authorities are unwilling or unable genuinely to investigate and/or prosecute. Unwillingness may be determined in instances where proceedings before domestic jurisdictions were intended to shield the accused from criminal responsibility for the ICC Statute crimes,<sup>43</sup> where there has been an unjustified delay in the proceedings which is inconsistent with an intent to bring the accused to justice,<sup>44</sup> and where the prosecuting authorities do not conduct the proceedings independently or impartially.<sup>45</sup> On the other

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<sup>42</sup> Ibid., § 648.

<sup>43</sup> ICC Statute Art. 17 (2)(a).

<sup>44</sup> Ibid., Art. 17 (2)(b).

<sup>45</sup> Ibid., Art. 17 (2)(c).

hand, a total or substantial collapse or unavailability of a national judicial system may be sufficient to determine inability in a particular case.<sup>46</sup>

As far as the Darfur case is concerned, the Report of the UN Commission of Inquiry on the basis of which the arrest warrant against Mr. Harun and Mr. Kushayb is delivered identifies several legal and structural hurdles that fall short of the exigencies of Article 17 of the ICC Statute. This is for instance the case of the 1998 Constitution of Sudan which guarantees the independence of the judiciary, but judges disagreeing with the Government are harassed and even dismissed.<sup>47</sup> In addition, the Chief Justice's decree of 28 March, 2003 establishing specialised criminal courts in Darfur violates basic principles of due process recognised by international law. In effect, under this decree confessions extracted under torture or other forms of duress are admissible as evidence in violation of Article 14 (3)(g) of the International Covenant on Civil and Political Rights (ICCPR), which guarantees the accused's rights not to be compelled to testify against himself or to confess guilt.<sup>48</sup> Before these courts an accused does not have the right to be represented by a counsel of choice; he is allowed to be represented by friends only.<sup>49</sup> The credibility and reliability of the specialised courts are called into question in that they are competent in the Darfur area only, not in the whole territory of Sudan.<sup>50</sup> According to the UN Commission, victims of the atrocities in Darfur often lack confidence in the ability of the judiciary to act independently and impartially.<sup>51</sup> Moreover, Section 33 of the Sudanese National Security Forces Act of 1999 grants extensive immunities to members of the National Security and Intelligent Services and their collaborators, thus making their prosecution for the most serious crimes almost impossible. This provision ensures that none of the beneficiaries be compelled to give information about the actions performed in the course of their duty. Civil or criminal actions against such persons for acts committed in connection with their duty can only be brought with the approval of the Director General; and when the Director General approves a legal action against a member of the security and Intelligent Services and/or his collaborators, the case is heard in secret before an ordinary court.<sup>52</sup> In this regard, the UN Commission observed that trial in secret is contrary to Article 14 (1) of the ICCPR.<sup>53</sup>

These preliminary findings led the UN Commission to conclude that the Sudanese judicial system lacks adequate structures, authority, credibility, and willingness to effectively prosecute and punish the perpetrators of alleged crimes commit-

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<sup>46</sup> Ibid., Art. 17 (3).

<sup>47</sup> Report of the UN Commission of Inquiry on Darfur, (note 5), § 432.

<sup>48</sup> Ibid., § 445.

<sup>49</sup> Ibid., § 446.

<sup>50</sup> Ibid., § 449.

<sup>51</sup> Ibid., § 431.

<sup>52</sup> Ibid., § 454.

<sup>53</sup> Ibid.

ted in Darfur.<sup>54</sup> This conclusion, which may well amount to unwillingness and inability under ICC Statute Article 17, has undoubtedly influenced the decision of the Chamber to declare the *Harun and Kushayb* case admissible.<sup>55</sup>

Moreover, one of the criteria of admissibility which has a bearing on the lawfulness of the ICC arrest warrant is the requirement under ICC Statute Article 17 (1)(a) and (c) that a case be declared inadmissible where the person concerned is being, or has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20 (3).<sup>56</sup> The Sudanese authorities indicated in this respect that Mr. Kushayb was under investigation for a number of incidents which occurred in South and West Darfur, whereas no evidence of investigation or trial was produced against Mr. Harun.<sup>57</sup> Nevertheless, information available to the Pre-Trial Chamber of the ICC indicates that the investigation undertaken by the Sudanese authorities against Mr. Kushayb did not encompass the same conduct which is the subject of the application before the Court,<sup>58</sup> whereas Mr. Harun was appointed to, and is still occupying, the position of Minister of State for Humanitarian Affairs.<sup>59</sup> Consequently, the case against the two accused is not being investigated or prosecuted in Sudan. The lack of investigation and prosecution of Mr. Kushayb and Mr. Harun by the Sudanese authorities is the expression of their unwillingness and inability to investigate or prosecute, which constitute a criterion of admissibility before the ICC under Article 17 (1)(a) and (c) of its Statute.

In sum, the referral to the ICC of the offences committed in Darfur conforms to international law for the following reasons: the situation in Darfur clearly constitutes a threat to the Peace as required by UN Charter Article 39. The SC resolution referring the Darfur situation to the ICC constitutes a measure short of the use of armed forces as prescribed by UN Charter Article 41; and the referral itself is in conformity with ICC Article 13 read together with UN Charter Chapter VII. In addition the *Harun and Kushayb* case is admissible before the ICC as a result of the unwillingness and inability of the Sudanese authorities to carry out proper investigation and or prosecution.

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<sup>54</sup> Report of the UN Commission of Inquiry on Darfur, (note 5), § 445.

<sup>55</sup> Arrest Warrant, (note 1), § 25.

<sup>56</sup> This latter provision prohibits double jeopardy by making it clear that an accused who has been tried by another court for the crimes falling within the jurisdiction of the ICC shall not be tried again by the ICC with respect to the same crimes, unless the proceedings in the other court were intended to shield the accused from criminal responsibility, or were not conducted independently or impartially, or in a manner inconsistent with the intent to bring the accused to justice.

<sup>57</sup> Arrest Warrant, (note 1), §§ 20 and 23.

<sup>58</sup> *Ibid.*, § 21.

<sup>59</sup> See Press Release of 2 May 2007, ICC Doc. ICC-PIDS-PR-20070502-214.

## B. Requirements for the Issuance of an Arrest Warrant under the ICC Statute

Article 58 of the ICC Statute entrusts the Pre-Trial Chamber, upon application by the Prosecutor, with the power of issuing an arrest warrant when a certain number of conditions have been fulfilled. First, there should be reasonable grounds to believe that the person sought has committed an ICC Statute crime.<sup>60</sup> Second, the arrest of the person sought must be necessary to secure her presence at trial, ensure that she does not obstruct or endanger the investigation or the court proceedings, or else prevent her from continuing to commit the same crime or any other related crime within the jurisdiction of the Court.<sup>61</sup> Alternatively, the Prosecutor may request the Trial Chamber to issue a summons for the person to appear. This must be done subject to the Pre-Trial Chamber's satisfaction that there are reasonable grounds to believe that the person has committed the alleged crimes, and that the summons is sufficient to ensure his appearance before the Court.<sup>62</sup>

In addition, a certain form is prescribed as to the manner in which the content of the Prosecutor's application and of the arrest warrant proper shall be presented. Under ICC Statute Article 58 (2), the Prosecutor's application to the Trial Chamber requesting the issuance of a warrant of arrest must contain the following information: a) the identification of the accused; b) a reference to the ICC Statute crimes allegedly committed by the accused; c) a statement of facts which allegedly amount to those crimes; d) a summary of evidence and information which establish reasonable grounds to believe that the accused committed those crimes; and e) the reason why the arrest of the person is necessary. Moreover, the arrest warrant proper issued by the Trial-Chamber must contain information identical to those required in a), b), and c) above.

Therefore, for the arrest warrant against Mr. Kushayb and Mr. Harun to be lawful, the Pre-Trial Chamber must demonstrate the existence of reasonable grounds to believe that they have committed an ICC Statute crime and that their arrest appears necessary. In addition, it must demonstrate that a summons is not sufficient to ensure the suspects' appearance before the Court.

### a) Criteria of Reasonableness

The expression "reasonable grounds" is understood to embody objective criteria.<sup>63</sup> Since ICC Statute Article 21 (3) requires the interpretation and application of the law to be consistent with internationally recognised human rights, the expression "reasonable grounds to believe" may validly be construed in light of the "reasonable suspicion" standard of sub-paragraph (c) of Article 5 (1) of the European

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<sup>60</sup> ICC Statute Art. 58 (1)(a).

<sup>61</sup> Ibid., Art. 58 (1)(b).

<sup>62</sup> Ibid., Art. 58 (7).

<sup>63</sup> A. Schlunck, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), 757.

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>64</sup> This provision authorises deprivation of liberty only as a result, *inter alia*, of a:

[L]awful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

On occasions, the European Court of Human Rights (ECtHR),<sup>65</sup> has had the opportunity to give sense to Article 5 (1)(c). In *Fox, Campbell and Hartley v. United Kingdom*<sup>66</sup> for example, this Court observed that sub-paragraph (c) of Article 5 (1) speaks of “reasonable suspicion” rather than genuine and *bona fide* suspicion; and further that a “reasonable suspicion” presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence.<sup>67</sup> In addition, in *Murray v. United Kingdom*,<sup>68</sup> the Court argued that Article 5 (1)(c) does not presuppose that the investigating authorities should have obtained sufficient evidence to bring charges, either at the point of arrest or while the arrested person is in custody. Such evidence may have been unobtainable or, in view of the nature of the suspected offences, impossible to produce in court without endangering the lives of others.<sup>69</sup>

#### b) Reasonable Grounds to Believe that an ICC Crime Has Been Committed

The arrest warrant issued by the ICC Pre-Trial Chamber alleges that Mr. Harun and Mr. Kushayb have committed various acts of war crime and crime against humanity. War Crimes were committed against the civilian population, and those crimes took place in the context of an armed conflict not of an international character as prescribed by ICC Statute Article 8 (2)(c)(d)(e) and (f).<sup>70</sup> There was a protracted armed conflict within the meaning of Article 8 (2)(f) of the Statute between the Sudanese armed forces fighting alongside the Janjaweed against organised rebel groups, including SLM/A and the JEM.<sup>71</sup> On the basis of the evidence and information gathered from various sources,<sup>72</sup> the Chamber decided that there are reasonable grounds to believe that the alleged criminal acts were committed in the context of, and were associated with, the armed conflict in Darfur; that such at-

<sup>64</sup> Adopted by the Council of Europe in Rome on 4 November 1950, 213 U.N.T.S. 222, (entry into force: 3 September 1953).

<sup>65</sup> See Section II of the ECHR.

<sup>66</sup> 13 EHRR(1991), 157.

<sup>67</sup> *Ibid.*, §§ 31 and 32.

<sup>68</sup> 19 EHRR(1995), 193.

<sup>69</sup> *Ibid.*, § 55; see also *Brogan and Others v. United Kingdom*, 11 EHRR (1989), 17, at § 53.

<sup>70</sup> Arrest Warrant, (note 1), §§ 42-43.

<sup>71</sup> Arrest Warrant, (note 1), § 46.

<sup>72</sup> See (note 19).

tacks were carried out by the Sudanese Armed Forces (SAF) and the Militia/Janjaweed, acting in concert.<sup>73</sup> On consideration and analysis of the Prosecution Application, in particular the report of the International Commission of Inquiry on Darfur and witness statements, the Chamber developed the view that the information contained therein lead to conclude that there are reasonable grounds to believe that the specific elements of war crimes were met under Article 8 (2)(c)(i) and (ii), 8 (2)(e)(i), (v), (vi) and (xii) of the ICC Statute.<sup>74</sup> These provisions of the Statute expressly prohibit the following conduct: violence to life and person, in particular murder, mutilation, cruel treatment and torture; intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; pillaging and looting; sexual crimes; and wanton destruction and seizure of property.

In addition, and on the basis of available evidentiary materials, including the report of the International Commission of Inquiry on Darfur, the Chamber held that there are reasonable grounds to believe that the elements of crimes against humanity as provided for under Article 7 (1) and 7 (2)(a) of the ICC Statute have been met. These are the implementation by the Sudanese Armed Forces and the Janjaweed militia of a policy of attacking the civilian population by committing acts of rape, murder or forcible transfer of the population in a widespread manner and over an extensive period of time; that the systematic character of the attacks may be inferred from the fact that they were perpetrated in furtherance of a plan or policy consisting in attacking the civilian population.<sup>75</sup> In addition, after examining the Prosecution Application and other supporting evidentiary documents, the Chamber decided that the information gathered therefrom lead to conclude that there are reasonable grounds to believe that the criminal acts committed by the SAF/Janjaweed militia against the Fur, Zaghawa and Masalit populations meet the specific elements of crimes against humanity under Article 7 (1)(a), (d), (e), (f), (g), (h) and (k) of the ICC Statute. Those acts include the murder and forcible transfer of the Fur, Zaghawa and Masalit populations; the severe deprivation of their liberty; their subjection to torture; the rape of their women and girls; the infliction upon them of inhumane acts causing great suffering or serious injury to their body or to their mental or physical health; and the launching of attacks against localities predominantly inhabited by them, which may constitute persecution.<sup>76</sup>

c) Reasonable Grounds to Believe that Mr. Harun and Mr. Kushayb Have Committed an ICC Statute Crime

The arrest warrant accuses Mr. Harun and Mr. Kushayb of having personally contributed to a common plan to pursue a shared and illegal objective of at-

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<sup>73</sup> Arrest Warrant, (note 1), §§ 47, 54, 57.

<sup>74</sup> Ibid., § 59.

<sup>75</sup> Ibid., §§ 60-67.

<sup>76</sup> Ibid., §§ 68-75.

tacking civilian population in Darfur; and consequently holds them together responsible under ICC Statute Article 25 (3)(d)<sup>77</sup> for war crimes and crimes against humanity.<sup>78</sup> In addition, Mr. Kushayb is allegedly criminally responsible under Article 25 (3)(a)<sup>79</sup> of the Statute for having personally committed crimes against humanity and war crimes.<sup>80</sup>

The “reasonableness” of the grounds to believe that Mr. Kushayb has committed the ICC Statute crimes for which he is accused is inferred from available information, documents, UN reports and other sources accompanying the Prosecutor’s application. After a careful examination of evidentiary materials it appeared to the Pre-Trial Chamber that this accused was one of the most senior and best known leaders who joined the SAF together with his tribesmen, and that he was also a commander of thousands of Janjaweed which implemented the Government’s counter-insurgency strategy that resulted in the commission of war crimes and crimes against humanity.<sup>81</sup> In addition, acting alone or together with the SAF, he participated with the Janjaweed under his command in various attacks against civilians and their villages and towns in Darfur between 2003 and 2004. Such attacks resulted in the commission of the following offences: killing of civilians, pillage and destruction of property and towns, burning of huts thus forcing civilians to flee, repetitive rape of women and girls, unlawful detention and torture of civilians, perpetration of inhumane acts and infliction of cruel treatment.<sup>82</sup> Moreover, Mr. Kushayb is alleged to have been fully aware of the occurrence of these illegal acts, and to have committed them together with others.<sup>83</sup> Consequently, he is criminally responsible under article 25 (3)(a) for having committed jointly with others, the war crimes and crimes against humanity for which he is accused.<sup>84</sup> Furthermore, he mobilised, recruited, armed, and provided supplies to the militia/Janjaweed under his command, knowing that his contribution would further the common plan carried out by the SAF and the Janjaweed, which consisted in attacking the civilian population in Darfur. In the Pre-Trial Chamber’s view, the existence of these acts establishes the reasonable grounds to believe that Mr. Kushayb is criminally responsible under Article 25 (3)(d) of the Statute for war crimes and crimes against humanity.<sup>85</sup>

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<sup>77</sup> This provision makes any intentional contribution to the commission or attempted commission of an ICC Statute crime by a group of persons acting with a common purpose, a crime under international law.

<sup>78</sup> Arrest Warrant, (note 1), § 76.

<sup>79</sup> Under this Article, a person is criminally responsible and liable for punishment for an ICC Statute crime if that person commits such a crime as an individual, jointly with another person, or through another person.

<sup>80</sup> Arrest Warrant, (note 1), § 77.

<sup>81</sup> *Ibid.*, §§ 95-97.

<sup>82</sup> *Ibid.*, §§ 100-102.

<sup>83</sup> *Ibid.*, § 103.

<sup>84</sup> *Ibid.*, § 104.

<sup>85</sup> *Ibid.*, §§ 105-107.



As far as Mr. Harun is concerned, his criminal responsibility is based on ICC Statute Article 25 (3)(b)<sup>86</sup> for having induced the commission of war crimes.<sup>87</sup> The “reasonableness” of the grounds to believe that he has committed war crimes is inferred from the higher position he has occupied in the Sudanese Government. In effect, he has served as Minister of State for the Interior of the Government of Sudan between 2003 and 2005.<sup>88</sup> By virtue of his ministerial capacity, the management of the “Darfur Security Desk” was assigned to him, and as such, he oversaw the activities of the Security Committees responsible for coordinating the counter-insurgency in Darfur. In so doing, he coordinated the efforts of Government bodies involved in counter-insurgency, including the police, the Sudanese Armed Forces, the National Security and Intelligent Service and the Militia/Janjaweed, and monitored the work of the Security Committees in Darfur; which in fact reported to him.<sup>89</sup> In addition, due to his position at the “Darfur Security Desk” he was able to participate personally in key activities of the Security Committees, which include recruiting, arming and funding the Militia/Janjaweed in Darfur, meeting with Militia and delivery to them of weapons and fund.<sup>90</sup> Moreover, by reason of his position on the Darfur security desk, his overall coordination of, and personal participation in, key activities of the Security Committees, he intentionally contributed to the commission of war crimes and crimes against humanity knowing that his contribution would further the common plan carried out by the SAF and the Janjaweed, which consisted in attacking the civilian population in Darfur. Consequently, there are reasonable grounds to believe that he is criminally responsible under Article 25 (3)(d) for war crimes and crimes against humanity.<sup>91</sup> Furthermore, his personal incitation of the Janjaweed on several occasions through hate-speech to attack the civilian population and pillage their villages demonstrates his knowledge of the methods used by this criminal group. Accordingly, there are reasonable grounds to believe that he is criminally responsible under Article 25 (3)(b) of the Statute for inducing the commission of war crimes.<sup>92</sup>

#### d) Necessity of Arresting Mr. Harun and Mr. Kushayb

As stated above, ICC Statute Article 58 (1)(b) requires the Chamber to issue a warrant of arrest only upon satisfaction that the arrest of the person concerned appears necessary (i) to ensure her appearance at trial, (ii) to ensure that she does not obstruct or endanger the investigation or the court proceedings or, (iii) where ap-

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<sup>86</sup> This clause makes a person criminally responsible and liable for punishment, if that person orders, solicits or induces the commission of the ICC Statute crimes which in fact occurs or is attempted.

<sup>87</sup> Arrest Warrant, (note 1), § 78.

<sup>88</sup> Ibid., § 80.

<sup>89</sup> Ibid., §§ 81-82.

<sup>90</sup> Ibid., §§ 83-87.

<sup>91</sup> Ibid., §§ 88-89.

<sup>92</sup> Ibid., §§ 90-94.

plicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

In the present case, supporting materials provided by the Prosecutor as evidence indicate that Mr. Harun, who has served as Head of the Darfur Security Desk, and who is currently serving as Minister of Humanitarian Affairs is a member of the “inner circle of power” in Sudan.<sup>93</sup> In addition, he is reported to have concealed evidence relating to the implementation of the Sudanese Government’s counter-insurgency policy in Darfur when he was still Minister of State for the Interior.<sup>94</sup> Moreover, he is reported to have given instructions to the effect that the minutes of the Security Committee meetings relating to the implementation of the counter-insurgency policy shall not be transmitted to the UN International Commission of Inquiry on Darfur.<sup>95</sup> Furthermore, the UN International Commission of Inquiry on Darfur has reported cases in which the Sudanese authorities have put pressure on witnesses interviewed or to be interviewed by the Commission, or have deployed infiltrators to act as internally displaced persons into internally displaced persons camps.<sup>96</sup> On these grounds, the Chamber concluded that Mr. Harun might have concealed evidence in order to protect his government counter-insurgency policy. His arrest therefore appears necessary under Article 58 (1)(b)(ii) of the ICC Statute to ensure that he will not obstruct or endanger the investigation.<sup>97</sup>

As for Mr. Kushayb, the Prosecution’s evidentiary materials show that he is detained in a Sudanese prison.<sup>98</sup> According to the Chamber, his arrest appears necessary at this stage to ensure his appearance at trial in that his detention prevents him from willingly and voluntarily appearing before the Court<sup>99</sup> in conformity with Article 58 (1)(b)(i) of the ICC Statute.

#### e) Summons to Appear

As mentioned earlier on, Article 58 (7) of the ICC Statute authorises the Prosecutor to request the Pre-Trial Chamber to issue a summons for the person to appear as an alternative to seeking a warrant of arrest. In this case, the Chamber must satisfy itself that the summons is sufficient to ensure the presence of the accused before the Court. According to the Pre-Trial Chamber, Article 58 (7) applies only to cases in which the person can and will appear voluntarily before the Court without the necessity of presenting a request for arrest and surrender as provided

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<sup>93</sup> Ibid., §§ 127-128.

<sup>94</sup> Ibid., § 129.

<sup>95</sup> Ibid.

<sup>96</sup> Report of the UN Commission of Inquiry, (note 5), at § 35.

<sup>97</sup> Arrest Warrant, (note 1), § 131

<sup>98</sup> Ibid., § 119.

<sup>99</sup> Ibid., § 133.

for in Articles 89 and 91 of the Statute.<sup>100</sup> Consequently, a summons to appear can only be issued if the Prosecution Application and its supporting materials provide sufficient guarantees that the person will appear before the Court.<sup>101</sup> If satisfied, the Chamber shall issue the summons, with or without conditions restricting liberty – other than detention – if provided for by national law, for the person to appear.

With respect to the case at hand, the central question to address is whether Mr. K u s h a y b and Mr. H a r u n would appear voluntarily before the Court, in which case the issuance of a summons to appear would be justified. In this regard, the Chamber noted that Mr. K u s h a y b is reported to be detained in a Sudanese prison, and that issuing a summons to appear against a person currently detained by national authorities would be contrary to the object and purpose of Article 58 (7) of the ICC Statute.<sup>102</sup> In the Chamber's view, the possibility provided for in Article 58 (7) of the Statute to issue a summons to appear with conditions restricting liberty – other than detention – read together with rule 119 of the Rules of Procedure and Evidence<sup>103</sup> indicates that a summons to appear is intended to apply to persons who are not already being detained.<sup>104</sup> In addition, the Chamber noted that no surrender of Mr. K u s h a y b would be possible under the Statute without the prior issuance of a warrant of arrest.<sup>105</sup> As for Mr. H a r u n, Minister of State for Humanitarian Affairs, the Sudanese Ministry of Foreign Affairs has officially indicated Sudan's unwillingness to cooperate with the Court, and has maintained that the Court has no right to extend its powers over Sudanese territory or its jurisdiction over Sudanese citizens.<sup>106</sup> On these grounds and on the basis of other information provided by the Prosecutor, the Chamber concluded that the requirements of Article 58 (7) for the issuance of the summons to appear, namely that Mr. K u s h a y b and Mr. H a r u n will appear voluntarily before the Court, were not met.<sup>107</sup> Therefore, the issuance of the arrest warrant is justified.

In sum, it appears from the foregoing analysis that the arrest warrant of 27 April 2007 against Mr. H a r u n and Mr. K u s h a y b was issued in conformity with the applicable international law instruments; namely, Chapter VII of the UN Charter and the relevant clauses of the ICC Statute.

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<sup>100</sup> Ibid., § 117.

<sup>101</sup> Ibid., § 118.

<sup>102</sup> Ibid., §§ 119-120.

<sup>103</sup> ICC-ASP/1/3 of 2002.

<sup>104</sup> Arrest Warrant, (note 1), § 120.

<sup>105</sup> Ibid., § 121.

<sup>106</sup> Ibid., § 123.

<sup>107</sup> Ibid., § 124.

### III. Execution of the Arrest Warrant

In general, once a warrant of arrest has been issued, it has to be executed in order to give effect to its substance.<sup>108</sup> Part IX of the ICC Statute spells out the modalities of international cooperation and judicial assistance between the ICC, on the one hand, and States, appropriate international, intergovernmental or regional organisations, on the other hand,<sup>109</sup> in the execution of the Court's orders. It further grants authority to the Court to request any State on the territory of which the person sought may be found, to arrest and surrender that person to the Court.<sup>110</sup> The term "any State" in this respect would be interpreted to mean all States; that is, States Parties as well as States non-Parties to the ICC Statute.<sup>111</sup>

An attempt is made in the following paragraphs to identify and examine a number of legal, practical and policy factors that might affect a proper execution under Part IX of the ICC Statute of the arrest warrant against Mr. Harun and Mr. Kushayb.

#### 1. Cooperation by States Parties to the ICC Statute

ICC Statute Article 86 contains a general obligation of States Parties to fully cooperate with the Court, in accordance with the provisions of its Statute, in the investigation and prosecution of the crimes within its jurisdiction. This clause limits the duty to cooperate with States Parties only, thus excluding from its ambit individuals, or any other entity.<sup>112</sup> However, the reading of this provision must not be done in isolation from other clauses contained elsewhere in the Statute which create specific obligations to cooperate for third parties under certain conditions.<sup>113</sup> The consequence of such a reading would be that the obligation to arrest and surrender Mr. Harun and Mr. Kushayb is primarily, but not exclusively, directed to States Parties to the ICC Statute. Sudan is not a Party to the Statute and is therefore not bound by its provisions in terms of Article 86.<sup>114</sup>

<sup>108</sup> See ICC Statute Arts. 91 and 92 respectively, for the content and form of a valid ICC Arrest Warrant.

<sup>109</sup> ICC Statute, Art. 87.

<sup>110</sup> Paragraph 1 of Art. 89 of the ICC Statute.

<sup>111</sup> C. Kreß/K. Prost, in: Triffterer (note 63), 1073.

<sup>112</sup> C. Kreß, in: Triffterer (note 63), 1052.

<sup>113</sup> See e.g. sub-paragraphs 5 and 6 of ICC Statute Art. 87, which create a possibility for the Court to establish a cooperation framework agreement with States non-Parties and with intergovernmental organisations respectively; see also Art. 93 (10)(c) which permits the Court to request assistance from States non-Parties to its Statute.

<sup>114</sup> This conforms with Art. 26 of the Vienna Convention on the Law of Treaties (VCLT, 23 May 1969, UN Doc. A/CONF.39/11/Add.2; UNTS, Vol. 1155, 331, (entry into force 27 January 1980) which requires every treaty to be binding only upon the Parties to it; in addition op. para. 2 of SC Res. 1593 referring the *Darfur* case to the ICC explicitly recognizes that "States not party to the Rome Statute have no obligation under the Statute ...".

In addition, under ICC Statute Article 89 (1) States Parties shall comply with the request for arrest and surrender in accordance with the Statute and the procedures under their national law, whereas Article 88 makes it clear that States Parties ensure that such procedures are available in their domestic law. Moreover, Article 99 (1) requires that requests for assistance be executed in accordance with the relevant procedures under the law of the requested State. Although the absence of procedures under national law is not in itself a ground to reject a request from the ICC,<sup>115</sup> the execution of the warrant of arrest against Mr. Harun and Mr. Kushayb may still prove problematic in cases where the requested State Party has not yet adopted an enabling domestic legislation setting the parameters of cooperation with the ICC. This contingency or possibility is worrying in that many States that are Parties to the ICC Statute are still to translate its provisions into their respective national legislation.<sup>116</sup> In addition, nothing in the Statute obliges States Parties to take an accused into custody for an ICC Statute crime in the absence of sound national legal procedures to that effect. Moreover, ICC Statute Article 93 (3) gives the possibility to States to oppose a request by the Court where the execution of a particular measure of assistance contained in the request is prohibited in the requested State on the basis of an existing fundamental legal principle of general application. Such a fundamental legal principle may be, for example, that of non-retroactivity of the law (and procedures) under the requested State's domestic legal system. Therefore, if Mr. Harun and Mr. Kushayb were to be present in the territory of a State Party which has not yet enacted a national implementing legislation, the execution of the arrest warrant against them may be legally challenged on the basis of this fundamental principle of criminal law. In this context, the domestic court of the requested State might adopt a line of argument similar to that of the Law Lords in the *Pinochet* case,<sup>117</sup> which qualified an internationally reprehensible conduct as crime under United Kingdom law only after a national legislation has been adopted to that effect. In this instance, the British House of Lords refused to take into consideration for the purpose of extradition, acts of torture committed prior to the coming into force of a Parliament Act incorporating the Torture Convention into the British national criminal justice system;<sup>118</sup> this notwithstanding the *ius cogens* character which has been attributed to the offence of torture under international law, and the fact that the UK had ratified this Convention four years earlier.

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<sup>115</sup> K. Prost, in: Triffterer (note 63), 1070.

<sup>116</sup> As of 7 May 2008 39 out of 105 States Parties to the ICC Statute have enacted national implementing laws, see details at <[www.nottingham.ac.uk/law/hrlc/international-criminal-justice-unit/implementation-database.php](http://www.nottingham.ac.uk/law/hrlc/international-criminal-justice-unit/implementation-database.php)>.

<sup>117</sup> UK House of Lords: *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* (24 March 1999), 38 ILM 581 (1999).

<sup>118</sup> See for instance the individual opinions of Lord Goff of Chieveley and Lord Hope of Craighead, in: 38 ILM (1999), 597 and. 618-621 respectively.

## 2. Cooperation by States Non-Parties to the ICC Statute

Pursuant to Article 87 (5)(a) of the ICC Statute, a State not Party may be invited by the Court to provide assistance on the basis of an ad hoc arrangement, an agreement or any other appropriate basis. If a State not Party which has entered into an ad hoc arrangement or an agreement with the Court fails to cooperate with a Court's request, the Court may inform the Assembly of States or the Security Council if the latter has referred the matter to the Court.<sup>119</sup> However, paragraph 5 of Article 87 envisages cooperation between the Court and non-State Parties only on a voluntary basis.<sup>120</sup> It is worth mentioning at this point that no ad hoc arrangement or agreement in this regard exists between the ICC and Sudan. Consequently, Sudan is not obliged under the ICC Statute to cooperate in the execution of the ICC arrest warrant against Mr. Harun and Mr. Kushayb. But, the ICC Statute is not the only source of a legal obligation to cooperate with the ICC; such obligation may be imposed on Sudan by other international law sources, such as the United Nations Charter<sup>121</sup> and Customary international law.

### A. UN Charter

The examination of Sudan's obligations under the Charter to cooperate with the ICC will be done by addressing three fundamental issues; namely: the Charter bases of cooperation in the execution of the ICC arrest warrant, the quality of the addressees of the obligation to cooperate, and the nature of a binding decision by the SC.

#### a) Charter Sources of Cooperation

Articles 24 and 25 of the UN Charter lay out the foundation of the general powers of the Security Council to adopt decisions which are binding on all Members of the United Nations.

Article 24 provides in this respect as follows:

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

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<sup>119</sup> ICC Statute Art. 87 (5)(b).

<sup>120</sup> Kreß/Prost (note 111), 1061; this reiterates the prescription of Art. 34 of the VCLT, which holds that "a treaty does not create either obligations or rights for a third State without its consent".

<sup>121</sup> See note 24.

Whereas Article 25 reads:

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Other provisions of the UN Charter which have a bearing on the Security Council's authority to adopt binding decisions include Article 48 (1) which stipulates that:

The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

To this, one may add Article 49 which provides that UN Members shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Areas in which the Security Council's decision-making power is particularly decisive in achieving the purposes of the United Nations as set out in Article 1 of its Charter, include the pacific settlement of disputes<sup>122</sup> in which the Council has investigative and recommendatory powers; action in respect to threats to the peace, breaches of the peace and acts of aggression<sup>123</sup> which may involve the use of non-coercive or coercive measures to maintain or restore international peace and security; regional arrangements,<sup>124</sup> and the international trusteeship system.<sup>125</sup>

In Resolution 1593 (2005), the SC has determined that the situation in Sudan constitutes a threat to international peace and security; it has also expressly invoked Chapter VII as the legal basis of its action.<sup>126</sup> The Council's practice in this respect have, in the past, given rise to a controversy as to whether an express mention of Chapter VII in a SC resolution was needed and/or was sufficient to create binding obligations. However, recent UN practice indicates that a resolution specifically invoking Chapter VII is not necessarily binding,<sup>127</sup> whereas a binding resolution does not necessarily need to invoke Chapter VII explicitly.<sup>128</sup> Further disagreements emerged as to whether the Security Council may also take binding decisions outside the framework of Chapter VII.<sup>129</sup> This question was dealt with by the International Court of Justice (ICJ) in its advisory opinion on the *Namibia Case*.<sup>130</sup> In this instance, the Security Council requested<sup>131</sup> the ICJ to determine the

<sup>122</sup> Chapter VI of the UN Charter.

<sup>123</sup> Chapter VII of the UN Charter.

<sup>124</sup> Chapter VIII of the UN Charter.

<sup>125</sup> Chapter XII of the UN Charter.

<sup>126</sup> The first SC Resolution explicitly invoking Charter VII is SC Res. 253 (1968) on the situation in Southern Rhodesia.

<sup>127</sup> For example SC Res. 1782 (2007) on Côte d'Ivoire passed under UN Charter Chapter VII "urges" the Parties to the conflict to collaborate with the Group of Experts ..., with the term "urges" clearly not implying a mandatory obligation.

<sup>128</sup> SC Report Security Council Action under Chapter VII: Myths and Realities, Special Research Report No. 1, 23 June 2008, 6, available at <[www.securitycouncilreport.org](http://www.securitycouncilreport.org)>.

<sup>129</sup> See e.g. the debate leading to the adoption of SC Res. 1695 (2006) on North Korea.

<sup>130</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia, Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971), 16 et seq.

legal consequences flowing from a number of resolutions<sup>132</sup> adopted by the General Assembly and the SC in relation to the presence of South Africa in Namibia. One of the main questions addressed to the Court was to find out whether such resolutions constituted ‘decisions’ within the meaning of Article 25 of the UN Charter; in other words, whether Article 25 of the Charter applies only to decisions taken by the SC under Chapter VII. The Court concluded that the Security Council does not need to rely on Chapter VII to impose binding obligations, and further suggested a contextual approach to this issue in the following manner:

It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to the decisions of the Security Council adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council [...] The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers of Article 25, the question is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussion leading to it, the Charter provision invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.<sup>133</sup>

This statement would mean that under Article 25, the binding character of a SC resolution does not depend on its reliance on Chapter VII of the UN Charter, but rather on its wording, its *travaux préparatoires* and its context. In other words, under Article 25 a Security Council resolution may either be a recommendation, or a binding decision irrespective of its reliance on Chapter VII. Recent practice of the Security Council have shown that when a Council resolution is intended to create binding obligations, it includes the following three elements: first, a determination of the existence of a threat to international peace, a breach of the peace or an act of aggression in accordance with Article 39; second, the insertion of the chapeau “acting under Chapter VII”; and third, the verb “decide” in the operative paragraph of the resolution.<sup>134</sup> In line with this logic, paragraph 5 of Security Council Resolution 1593 (2005) determines the situation in Sudan “to constitute a threat to international peace and security”; paragraph 6 of the Preamble states that the Security Council is “acting under Chapter VII of the Charter of the United Nations”; whereas in op. paragraphs 1 and 2 the Security Council “decides” to refer the situation to the Prosecutor of the ICC, while enjoining Sudan and other parties to the conflict in Darfur to cooperate fully with the ICC. The wording of SC Resolution 1593 (2005) therefore, makes it a binding decision which imposes on Sudan the obligation to cooperate in the execution of the ICC arrest warrant

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<sup>131</sup> Through SC Res. 284 (1970).

<sup>132</sup> These included SC Res. 276 (1970); SC Res. 264; and SC Res. 269 (1969).

<sup>133</sup> ICJ Reports (1971), 52-53.

<sup>134</sup> SC Report, (note 128), 5.



against Mr. Harun and Mr. Kushayb. The next paragraphs will attempt to determine who else may be legally bound by this Resolution.

#### b) Addressees of the Obligation to Cooperate

In general, the decisions of the SC are addressed to UN Member States which are required to implement them in good faith. In this respect, Articles 25, 48 and 49 of the UN Charter indicate that, depending on the specific content of those decisions, Member States have the obligation to carry them out and join in offering mutual assistance.<sup>135</sup> In this respect, Sudan is bound to execute the ICC arrest warrant against Mr. Harun and Mr. Kushayb which is the product of a SC's binding resolution. However, the situation remains uncertain as to whether non-State actors and individuals are under a binding obligation to comply with SC decisions.<sup>136</sup> Recent practice of the SC has seen an increased number of demands addressed directly to non-State actors and individuals.<sup>137</sup> Since the UN Charter is silent about non-State actors, and since States are getting more and more suspicious about the practical expansion of the SC powers, the question of binding non-State actors will remain unresolved until a consensus has emerged. The decisions of the SC have sometimes been addressed to regional organisations, and again, the uncertainty remains as to whether such organisations, as entities with international personality, can be directly bound by the Council's decisions. Nevertheless, the Council seems to have found a practical solution to this uncertainty, which consists of emphasising a cooperative approach with regional organisations while refraining from imposing explicit demands or requirements on them.<sup>138</sup> This cautious attitude clearly appears in Resolution 1593 (2005) op. para. 2 of which only "urges" States not Parties to the ICC Statute and concerned regional and other international organisations to cooperate with the Court in the arrest and surrender of the accused Sudanese officials.

#### c) Binding Character of the Obligation to Cooperate

As already stated above, not all decisions of the Security Council have a binding character, especially those which are worded in terms of recommendations. However, it is admitted that decisions taken under Chapter VII as well as those taken under Chapter VIII are binding in terms of Article 25.<sup>139</sup> The binding effect of Ar-

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<sup>135</sup> Ibid., 17.

<sup>136</sup> Ibid., 18.

<sup>137</sup> See for examples the various resolutions addressed to the Angolan rebel group UNITA (especially SC Res. 811 (1993) and SC Res. 864 (1993)) imposing natural resource and arms embargoes on the movement, and freezing asset and imposing travel bans on its leaders; also SC Res. 1556 (2004) and 1591 (2005) imposing arms embargo on Sudanese non-governmental entities and individuals, and imposing targeted sanction against certain individuals.

<sup>138</sup> SC Report, (note 128), 20.

<sup>139</sup> J. Delbrück, in: Simma (note 28), 457.

ticle 25 stems from the agreement by all Members of the United Nations, when joining the Organisation, “to accept and carry out the decisions of the Security Council” in matters that are fundamental for the maintenance of international peace and security. In practice, the binding character of the Security Council’s decisions under Article 25 with regard to actions undertaken under Chapter VII remains undisputed among UN Members. This can be illustrated by an almost worldwide cooperation among UN Members in the implementation of the Security Council’s decisions relating to the Iraqi invasion of Kuwait in 1990,<sup>140</sup> and those adopted in response of the terrorist attack of September 11, 2001 against the USA territory.<sup>141</sup> The arrest warrant against Mr. Harun and Mr. Kushayb was issued on the basis of Security Council Resolution 1593 referring the situation in Darfur to the Prosecutor of the ICC as foreseen by ICC Statute Article 13 (b). This Resolution, which was adopted on the basis of Chapter VII of the UN Charter, determines the situation in Sudan as constituting a threat to international peace and security, and urges all States and concerned regional and other international organisations to cooperate fully.<sup>142</sup> Such an obligation to cooperate in the arrest and surrender of the accused would therefore be binding on Sudan not on the basis of the ICC Statute to which it is not a Party, but rather through the operation of Article 25 of the UN Charter. What would be interesting to stress at this point is that cooperation with the ICC will be done in accordance with the relevant provisions of the ICC Statute as set out in Part IX. It remains to inquire whether Sudan can rely on the Vienna Convention on the Law of Treaties (VCLT) to claim that its non-membership to the ICC Statute frees it from all obligations to cooperate with the ICC in the arrest and surrender of Mr. Harun and Mr. Kushayb. This issue is fundamental in that the VCLT restates the principle of *pacta sunt servanda* which makes it clear that a treaty is binding only on the parties to it. In addition, no treaty may create obligations or rights for a third party without its express consent or acceptance.<sup>143</sup> As already stated earlier, Sudan’s binding obligations to cooperate with the ICC stem from the Charter and not from the ICC Statute. Moreover, UN Charter Article 103 deals with conflicts of obligations under international law and stipulates that in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement their obligations under the Charter shall prevail. According to Professor Bernhardt, Article 103 represents a partial suspension of the basic in-

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<sup>140</sup> Especially SC Res. 662 (1990) deciding that an act of aggression has been committed by Iraq against Kuwait; SC Res. 678 (1990) requiring the adoption of measures necessary to end the Iraqi aggression and restore peace and security, and SC Res. 687 (1991) setting the conditions of the truce to be concluded after the military defeat of Iraqi forces.

<sup>141</sup> Particularly SC Res. 1368 (2001) qualifying the terrorist attacks as constituting a threat to international peace and security and requesting the adoption of all necessary steps to respond to such attacks, and SC Res. 1373 (2001) deciding on measures that must be taken by all UN Members to prevent and suppress terrorism.

<sup>142</sup> Op. para. 2 of SC Res. 1593 (2005).

<sup>143</sup> Arts. 26, 34 and 25 of the VCLT.

ternational law *maxim pacta sunt servanda*.<sup>144</sup> This remark would imply that the UN Charter through the operation of its Articles 25 and 103, read in conjunction with Articles 26, 34 and 35 of the VCLT, may, in certain specific circumstances, impose on States obligations resulting from an agreement to which they are not Parties. This seems to be the situation in the case at hand because if Sudan were to cooperate with the ICC in the execution of the arrest warrant, such cooperation would take place on the general basis of Resolution 1593 (2005) whose op. para. 2 imposes on Sudan an obligation to cooperate fully; whereas the modalities of cooperation would take place within the legal framework of cooperation as set up by Part IX of the ICC Statute, which in principle is addressed to States Parties and third States with which the ICC has entered into an ad hoc arrangement, or any other appropriate agreement. Therefore, being a full Member of the UN, Sudan is bound to cooperate with the ICC in the arrest and surrender of the accused by virtue of the explicit responsibility it has conferred on the SC, under UN Charter Article 24, to maintain international peace and security, and by virtue of Article 25 by which it agrees to accept and carry out the decisions of the SC. In addition, the wording in which Resolution 1593 (2005) referring the case to the ICC is couched suggests a binding obligation and not a mere recommendation. Moreover, this resolution imposes on Sudan and other parties to the Darfur conflict a specific obligation to cooperate, while, at the same time, creating a general obligation to cooperate for other States and international organisations.

## B. Customary Law

Customary international law<sup>145</sup> may also be a source of binding obligations under international law. In this regard, Article 38 of the VCLT provides that “[n]othing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law recognised as such”. Certain acts falling within the definition of war crimes and crimes against humanity are absolutely prohibited; these include, acts committed in violation of the basic norms of the law of war,<sup>146</sup> torture, genocide, slavery and slave trade, systematic racial discrimination, extermination, enforced disappearance. The existence of such categories of war crimes and crimes against humanity appears to have generated a number of basic humanitarian customary obligations having a universal character.<sup>147</sup> For instance, Article 1 common to the four Geneva Conventions of 12

<sup>144</sup> In B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2002), Vol. II, 1296.

<sup>145</sup> For the definition of custom see D.J. Harris, *Cases and Materials on International Law*, 6<sup>th</sup> ed. (2004), 20-42; also M.N. Shaw, *International Law*, 5<sup>th</sup> ed. (2003), 68-88.

<sup>146</sup> As provided for in common Art. 3 to the Geneva Conventions of 1949.

<sup>147</sup> L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (1988), 428; also J.-M. Henckaerts/L. Doswald-Beck, *Customary International Humanitarian Law: Rules* (2007), Vol. I.

August 1949 as well as Articles 1 and 89 of Additional Protocol I of 8 June 1977,<sup>148</sup> impose on States Parties an obligation to respect and to ensure respect of international humanitarian law in all circumstances. By the same token, Article 2 (2) of the Torture Convention<sup>149</sup> provides that no exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture. Moreover, the Genocide Convention<sup>150</sup> contains a strong language which imposes an absolute obligation on States to prosecute and punish genocide offenders.<sup>151</sup> The rules contained in the foregoing instruments are thus believed to belong to the category of *ius cogens*<sup>152</sup> norms in that they existed in the form of international customary law prior to their introduction in the texts of the relevant conventions.<sup>153</sup> The consequence of such rules is that they create legal obligations binding on all States irrespective of their membership to a particular convention. In light of this analysis, cooperation by non-States Parties under ICC Statute Article 87 (5) would no longer be voluntary in character in respect of violations of *ius cogens* norms; rather it would assume the character of a peremptory customary law obligation. Similarly, cooperation between the Court and intergovernmental organisations as envisioned by paragraph 6 of Article 87 of the ICC Statute would not merely be permissive; it would become compulsory in character under customary international law. Consequently, if one were to rely on this analysis, Sudan, other parties to the Darfur crisis, as well as all States and concerned international organisations would be bound to implement the ICC arrest warrant with regard to those aspects of war crimes and crimes against humanity which are customary law crimes par excellence.

It appears therefore from the foregoing paragraphs that, although not being Party to the ICC Statute, Sudan would be legally bound to cooperate in the execution of the ICC arrest warrant against Mr. Harun and Mr. Kushayb through the operation of Articles 25 and 103 of the UN Charter to which it is a full Member. In addition, Sudan would be under the legal obligation, pursuant to international customary law as contained in the Geneva Conventions and in Additional Protocol I, to cooperate with the ICC in the arrest and surrender of the accused for war crimes and crimes against humanity which are believed to be offences of customary law nature. Pursuant to this line of argument, the UN Charter and SC Resolution 1593 (2005) would stand as *lex generalis* for Sudan's basis of cooperation with the Court in that they only provide the general legal basis for coopera-

<sup>148</sup> See (note 27).

<sup>149</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (GA Res. 39/46, UN Doc. A/39/51).

<sup>150</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 1948 (GA Res. 260 A (II), 78 UNTS 227, (entry into force: 12 January 1951).

<sup>151</sup> Arts. 4 and 5.

<sup>152</sup> For a thorough analysis of these rules, see Hannikainen (note 147).

<sup>153</sup> A. Schluack *Amnesty versus Accountability: Third Party Intervention dealing with Gross Human Rights Violations in Internal and International Conflicts* (2000), 31.

tion without giving any further details; whereas the ICC Statute would constitute the *lex specialis* for cooperation with the Court in that the crimes for which cooperation is sought as well as the parameters for cooperation are clearly defined and explained in its provisions.

Moreover, it is worth adding at this point that if the parties concerned fail to cooperate in the arrest and surrender of Mr. Harun and Mr. Kushayb, the ICC shall make a finding to that effect and inform the Security Council.<sup>154</sup> The SC will then have to decide on the appropriate measures to take on the basis of Article 41 of the UN Charter as elaborated earlier on in this text. Nevertheless, the success or failure of the arrest and surrender of the accused might have important consequences on the outcome of the Darfur civil war, and will undoubtedly have a serious impact on the ability of the ICC to execute its mandate in the future effectively.

#### IV. Implications of the Warrant of Arrest for the Darfur Crisis and for the ICC

The issuance by the ICC of the arrest warrant of 27 April, 2007 constitutes the first and most energetic move of the international community in holding persons responsible for the crimes committed in the context of the Darfur civil war. Depending on its outcome, this arrest warrant is expected to have deep impact on the Darfur conflict itself, and on the ICC authority.

##### 1. Impact on the Darfur Civil War

Although an order or a judgement from the ICC cannot by itself put an end to the conflict raging in Darfur, the arrest warrant of 27 April 2007 nevertheless constitutes a strong signal to those who are fuelling, encouraging, inciting, and financing that conflict. It signifies that no one involved in the atrocities committed in connection with the Darfur war, be it in their official capacity as Head of State or Government,<sup>155</sup> member of Government or parliament, elected representative or a government official, shall be exempt from personal criminal responsibility; and

<sup>154</sup> ICC Statute, Art. 87 (7).

<sup>155</sup> On 14 July, 2008 the Prosecutor of the ICC presented a case against Hasan Ahmed Al Bashir, the serving Sudanese President, for genocide, crimes against humanity and war crimes, details available at <[www.icc-cpi.int/press/pressreleases/406.html](http://www.icc-cpi.int/press/pressreleases/406.html)>; precedents relating to the prosecution of serving or former Heads of States include *United States v. Noriega*, 746F. Supp.1506 (S.D. Fla.1990), aff'd, 117 F.3d 1206 (11<sup>th</sup> Cir. 1997); *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, 38 ILM 581 (1999); *Prosecutor v. Slobodan Milosevic*, ICTY Case No. IT-01-50-I (IT-02-54) of 8 October 2001; and *Prosecutor against Charles Ghankay Taylor*, Case No. SCSL-03-01-PT of 29 May 2007.

that no form of immunity shall attach to their official capacity.<sup>156</sup> In this sense, the arrest warrant has a deterrent effect on the freedom of the accused, present or future, to engage in the commission of additional crimes. The prospect of facing the ICC jurisdiction in the future might contribute in curbing the scale of violence in Darfur, and might even open up the way for a peaceful solution to the ongoing conflict. However, for such an outcome to occur, the action of the ICC combined with that of the Security Council must be conducted in conjunction with national initiatives within Sudan, aiming at reconciling the different ethnic groups divided by the conflict. Such initiatives may take place within the framework of a global peace initiative that might include a truth commission endowed with the power to grant conditional amnesty to lesser offenders and to propose compensations and other rehabilitation schemes to the victims of violations.

For the victims to the Darfur conflict, the arrest warrant constitutes the first concrete move towards satisfying their hope for justice.

## 2. Impact on the ICC Authority

Being a very young institution whose establishment has been surrounded by deep controversies and divisions, the ICC needs to consolidate its authority by proving that it is the most credible institution in the field of international criminal justice. For this to happen, it must be capable to establish its autonomy and independence *vis-à-vis* other international institutions such as the ICJ by developing its own line of procedures, reasoning and jurisprudence. There is no doubt that the ICJ, in certain instances, shares jurisdiction with the ICC in matters of international humanitarian law.<sup>157</sup> However, the judgment passed by the ICJ in this respect may, at some points, be in contradiction with certain basic tenets of the ICC Statute. The most blatant instance in which the ICJ has passed a judgment which contradicts the provisions of the ICC Statute is its decision in the *Arrest Warrant* case<sup>158</sup> in which it was ruled that the issue and circulation by the Belgian authorities of an arrest warrant against the incumbent Minister for Foreign Affairs of the Congo infringed the immunity from criminal jurisdiction and the inviolability enjoyed by that minister under international law.<sup>159</sup> This decision is at variance with article 27 (2) of the ICC Statute which expressly provides that:

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<sup>156</sup> ICC Statute Art. 27.

<sup>157</sup> In its rulings or advisory opinions in the *Corfu Channel* case (1949), the *Reservations to the Genocide Convention* case (1951), the *Nicaragua-USA* case (1984), the *Application of the Genocide Convention (Bosnia & Herzegovina v. Serbia & Montenegro)* (1996 and 2003), the *Case Concerning the Arrest Warrant of 11 April 2000* (2002), etc., the ICJ has addressed in detail various aspects of international humanitarian law, and of genocide, which are also within the jurisdiction of the ICC.

<sup>158</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002.

<sup>159</sup> *Ibid.*, §§ 70, 71 and 75).

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.<sup>160</sup>

Although the ICJ has clearly stated in its judgement that immunities enjoyed under international law do not represent a bar to criminal prosecution in certain circumstances,<sup>161</sup> nothing is said as to under which circumstances immunity is not a bar to prosecution. Therefore, a successful execution of the ICC arrest warrant against Mr. Harun and Mr. Kushayb may provide the Court with an opportunity to elaborate further on the extent and limits of sovereign immunity with respect to the ICC crimes. This will eventually lead the Court, if the issue of immunity is raised, to take a progressive stance on it, similar to the one adopted by the International Criminal Tribunal for the former Yugoslavia in the *Furundzija* case to the effect that individuals are personally responsible, whatever their official position, even if they are heads of State or Government ministers.<sup>162</sup> The consequence and advantage for the ICC would then be to demarcate itself from the UN Court, and to establish a solid foundation as far as the rejection of sovereign immunity for the core crimes under international law is concerned.

In addition, the credibility of the ICC's subsequent orders may depend on the success or failure of the arrest warrant of 27 April, 2007. If the ICC fails to get this warrant executed, its authority will be easily discredited by States such as the USA, which has constantly opposed the Court as being ineffective. As a result, subsequent orders by this Court may not yield the expected effect on suspected criminals. However, the fact that States non-Parties to the ICC Statute such as the USA, Russia and China, did not make use of their veto power within the Security Council to block the referral of the Darfur situation to the ICC is an indication that in their eyes, the Court remains the most suitable and competent forum to prosecute Sudan's most wanted war criminals.

Finally, the success of the ICC arrest warrant will signify an end to the system of ad hoc international criminal tribunals and courts that have hitherto been periodically established to deal with specific situations.

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<sup>160</sup> Similar wording is used in many other international criminal law instruments: e.g. Arts. 7 and 8 of the 1945 Charter of the International Military Tribunal of Nuremberg, Art. 6 of the 1946 Charter of the International Military Tribunal of the Far East, Principle III of the 1950 Nuremberg Principles, Art. 4 of the 1948 Genocide Convention, Art. 3 of the 1973 Apartheid Convention, Art. 7 (2) of the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia, and Art. 6 (2) of the 1994 Statute of the International Criminal Tribunal for Rwanda.

<sup>161</sup> *Arrest Warrant* case (note 158), § 61.

<sup>162</sup> Case no. IT-95-17/1. TC II, Judgment of 10 December 1998, § 140.

## Conclusion

As stated at the outset, this article aimed at determining and analysing the legality of the ICC arrest warrant of 27 April 2007, the various issues relating to its execution, and its implications for the Darfur conflict and for the ICC.

As for the legality of the ICC arrest warrant, it emerges from the arguments developed above that this warrant finds its sources in Chapter VII of the Charter of the United Nations on the basis of which SC Resolution 1593 (2005) referring the matter to the ICC was adopted, and in the ICC Statute Article 13 (b) of which permits such a referral. In addition, the examination of the relevant clauses of the ICC Statute has shown that all the requirements for the issuance of a legally valid arrest warrant have been met. First, the fundamental principle of complementarity that governs the relationship between the ICC and national criminal jurisdictions has been respected in that the Sudanese authorities have manifested their unwillingness and inability to genuinely investigate and/or prosecute the persons whose arrest and surrender is sought. This lack of interest in accountability legally justifies the assertion of the ICC jurisdiction. Second, evidentiary materials provide reasonable grounds to believe that war crimes and crimes against humanity have been committed in Darfur, and that the persons sought, namely Mr. Harun and Mr. Kushayb, are responsible for the commission of such crimes. Third, since the persons sought are not in a position to appear willingly and voluntarily before the Court, their arrest appears therefore necessary to secure their presence at trial (in the case of Mr. Kushayb) and to ensure that they do not obstruct or endanger the investigations (in the case of Mr. Harun). Finally, the issuance of a summons to appear could not ensure a voluntary appearance of the accused before the Court; the reason being that Mr. Kushayb is reported to be detained in a prison whereas the Government of Sudan has repetitively made it clear that it would not cooperate with the ICC, thus excluding any possibility of surrendering Mr. Harun, its Minister of Humanitarian Affairs. In both situations, none of the accused can be said to be in a position to voluntarily give effect to a summons to appear; the issuance of an arrest warrant is therefore legally grounded.

With regard to the execution of the arrest warrant, it has been demonstrated that all the parties to the Darfur conflict as well as States Parties and States non-Parties to the ICC Statute would be under a binding obligation to cooperate in the execution of the ICC arrest warrant. The binding character of this obligation flows from the UN Charter Chapter VII determination of SC Resolution 1593 (2005) and from the customary law (or *ius cogens*) nature of war crimes and crimes against humanity for which the persons sought are accused.

Finally, it has been argued that depending on its outcome, the ICC Arrest Warrant of 27 April 2007 might contribute in halting violence in Darfur, and may contribute in strengthening the authority of the ICC as the most viable international criminal jurisdiction.