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**The Role of the Prosecutor of the  
International Criminal Court  
-A Case Study of Situation in Darfur**

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# Summary

Since the Rome Statute entered force in 2002, the International Criminal Court (ICC) has already been operating for almost ten years. Some situations have been referred to the Court by possible means provided for in the Rome Statute. As a young criminal court, the Office of the Prosecutor, as an integrity part of the Court, may be the most visible organ which attracts worldwide attention. The Chief Prosecutor (“the Prosecutor”) is the crucial figure among the international legal professionals in the Court. He is the first one in the Court to respond to those crimes that have been committed and fall into the jurisdiction of the Court. Given the treaty-based nature of the Court, mandate of the Prosecutor and his powers provided for in the Rome Statute, he is a most powerful and independent prosecutor; but due to lack of enforcement power and independence from United Nations, he is a weakest prosecutor as well. The role of the Prosecutor is crucially important for the ICC and international criminal justice. His selection of situations to investigate, identification of suspects and his performance in prosecution have a long-term global impact and will necessarily shapes the way the work of the Court will be perceived.

In this thesis, the role of the ICC Prosecutor will be discussed in the context of *situation in Darfur, Sudan*, which is the first situation referred to the ICC Prosecutor by the United Nations Security Council. In this situation, the Prosecutor seems to be confronted with criticism and suspicion in each step he took.

The discussion is divided into two parts: activities and proceedings outside the courtroom and in the courtroom, respectively. For the former, the activities carried out by the Prosecutor and his Office are followed and the Prosecutor’s approach from conservative to confrontational is identified and analysis of this approach is made considering the availability of cooperation and external support; for the latter, the hearings in the confirmation of charges will be covered for discussing his failure in charge confirmation.

The Prosecutor appeared to perform not very well both outside and inside the courtroom, but there is no denying the fact that he is in the difficult position as the first chief prosecutor and in this tough situation. This study is to make an objective evaluation of the role of the ICC Prosecutor bearing in mind that he is confronted with unprecedented structural and political constraints.

# Preface

At the first place, the author would like to thank everyone who has encouraged and helped me in the process of writing this thesis. Special thanks go to my supervisor, Dr Karol Norwak, for his suggestions on the topic, selection of materials and comments on structure.

I will also thank Professor Lyal S. Sunga for his comments on my thesis topic. Gratitude also will be expressed to Ms. Iryna Marchuk for her warmly support in seeking proceeding documents of International Criminal Court for me.

Finally, I would like to give my warmest thankfulness to all long-distance encouragement and support from my parents, my friends and my colleagues in China.

# Abbreviation

ICC	International Criminal Court
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
SCSL	Special Court for Sierra Leone
ECCC	Extraordinary Chambers in the Court of Cambodia
Nuremberg Tribunal	International Military Tribunal at Nuremberg
Tokyo Tribunal	International Military Tribunal at Tokyo
Darfur Commission	International Commission of Inquiry in Darfur
SLM/A	Sudan Liberation Movement/Army
JEM	Justice and Equality Movement
ICJ	International Court of Justice
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
OHCHR	Office of High Commissioner of Human Rights
AU	African Union
AMIS	African Union Mission in Sudan
UNAMID	UN-African Union Mission in Darfur
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide

# 1 Introduction

## 1.1 Background

On 17 July 1998, the international community reached an historic milestone in international criminal justice when 120 states adopted the Rome Statute of International Criminal Court (ICC), the legal basis for establishing a permanent international criminal court. Since the Rome Statute entered into force on 1 July 2002 after ratification by 60 states, ICC has already been operating for almost ten years.

The ICC is composed of four organs. They are the Presidency, the Judicial Division, the Office of the Prosecutor and the Registry. Among these organs, the Office of the Prosecutor (OTP) is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. The first Chief Prosecutor (“the Prosecutor”) was Mr Luis Moreno-Ocampo from Argentina, who was elected by the State Parties for a term of nine years.

The Prosecutor is a crucial figure among those international legal professionals in the Court, each of whose conduct would have long-term global impact, in particularly at the current phase of the Court’s whole life. Given his primary role in the selection of situations to investigate and cases to prosecute and the fact that he is a prosecutor of a permanent international criminal court, distinctive from prosecutors of *ad hoc* tribunals, he will certainly shape the way the work of the Court will be perceived. In this thesis, the role of the ICC Prosecutor will be explored to observe how he carries out his mission and fulfill his mandate, to what extent he exercises his power and discretion for the pursuit of international criminal justice and the impact of his performance.

By the time of writing, three situations have been referred to the Prosecutor by the State parties- they are situation in Uganda,<sup>1</sup> situation in the Democratic Republic of the Congo<sup>2</sup> and situation in the Central African Republic;<sup>3</sup> two situations referred by the Security Council of the United Nations-Situation in Darfur, Sudan <sup>4</sup>and

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<sup>1</sup> Situation in Uganda, ICC-02/04, 29 January 2004.

<sup>2</sup> Situation in the Democratic Republic of the Congo, ICC-01/04, 19 April 2004.

<sup>3</sup> Situation in the Central African Republic, ICC-01/05, 7 January 2005.

<sup>4</sup> Situation in Darfur, Sudan, ICC-02/05, 31 March 2005.

Situation in Libya Arab Jamahiriya.<sup>5</sup> In addition, Pre-Trial Chamber granted the Prosecution authorization to open an investigation *proprio motu* in the situation in the Republic of Kenya.<sup>6</sup>

The situation in Darfur, Sudan is selected in this thesis as a context to discuss the role of the ICC Prosecutor. It has been the first situation referred by the Security Council since the ICC was established and the state concerned Sudan is not a party to the Rome Statute, therefore this situation has its particularities compared with others. In judicial process of this situation, there are some controversies on the Prosecutor's investigative approach and prosecutorial strategy. From the activities and proceedings in the cases of this situation, the Prosecutor's performance can be observed and evaluated to see whether he appropriately exercises his power and discretion and whether his tactics serve his pursuit of international criminal justice. Given the Prosecutor's mandate and mission laid down in the Rome Statute, The Prosecutor's major task is two-fold: to investigate crimes falling within the jurisdiction of the ICC and to present cases at trial and on appeal if necessary. Hence, the prosecutor usually develops his work in two arenas: one is outside the courtroom and the other is in the courtroom. The tasks in the two places require different skills, strategies and personal qualities. For examining and evaluating the role of the ICC Prosecutor, the study would thus be based on such two scenarios. The Prosecutor's task begins outside the courtroom. He has to walk out of the court for conducting investigation of crimes, identifying suspects and seeking cooperation and support for surrender of the identified suspects. After the surrender of suspects, he will be present in the courtroom to prosecute the accused. The successful prosecution of those perpetrators committing grave international crimes will ultimately serve the object of the ICC establishment.

## **1.2 Purpose and Subject Matter**

The purpose of this thesis is to analyze the role of the Prosecutor in the pursuit of ending impunity for perpetrators of the most serious crimes of concern to the international community.

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<sup>5</sup> Situation in Libya Arab Jamahiriya, ICC-01/11, 26 February 2011.

<sup>6</sup> Situation in the Republic of Kenya, ICC-01/09, 6 November 2009.

The discussion will be based on specific activities and proceedings of the situation in Darfur. The examination and evaluation of the Prosecutor's role will be developed by following the activities carrying out by his Office, outlining the approach that he employed as well as his skills in prosecutions.

### **1.3 Methodology and Materials**

The research will employ a qualitative methodology in documentary analysis in examination and evaluation of the Prosecutor's role in the situation in Darfur. This will involve a review of literature relating to the proceedings including decisions, observations, orders, judgments and other relevant judicial documents. Policy Papers issued by the OTP, the Prosecutor's regular Reports and Statements addressed to the UN Security Council will also be utilized for the analysis. In addition, some study reports of social analysts and written of eminent publits will be referred to as second-hand resources.

### **1.4 Delimitation**

The ambit of this study is limited to *Situation in Darfur, Sudan* as a contextual background for discussion. Since the discussion will be based on the activities and proceedings of this situation, the scope of examination and assessment of the activities carried out by the Prosecutor and his Office and the proceedings in the Court are confined to those that have taken place by the time of writing.

The discussion in this thesis will be divided on the basis of location where the Prosecutor carries out his tasks: outside the courtroom and in the courtroom. Although in the situation in Darfur, very few proceedings have occurred in the courtroom so far, it is still possible to scrutinize his role on the basis of limited hearings.

### **1.5 Disposition**

Chapter I is the *Introduction*, which gives a background of the thesis topic and objective of the study.

Chapter II *The OTP and the Chief Prosecutor* gives a brief introduction of the ICC from the perspective of OTP including the powers and function of the OTP and the Prosecutor, the jurisdiction, the principle of complementarity and also outline the distinctiveness of the ICC Prosecutor.

Chapter III *The Background of the Situation in Darfur*, intends to give a factual background of the Darfur crisis and the process how the situation was referred to the Prosecutor by the UN Security Council.

Chapter IV *Activities Outside the Courtroom* follows the activities at the phase of investigation which took place mainly outside the courtroom. The approach that the Prosecutor used at this phase will be identified and some legal issues arising from these activities will be discussed in this chapter, including the experts' observations on the Prosecutor's investigative strategy, the controversies of the arrest warrants against a sitting head of state. Some reflections will be rendered to explore the understandable side of the Prosecutor's loss.

Chapter V *Proceedings In the Courtroom*, covers proceedings occurring in the courtroom though very limited hearings have taken place.

Chapter VI is the *Concluding Remarks*, which will summarize the above chapters.

## **2 Office of the Prosecutor and the Chief Prosecutor**

The established instrument Rome Statute defines the role and function of OTP in Article 42. The OTP is a separate organ of the Court and shall act independently. It shall be responsible for receiving referrals and information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court in accordance with Article 42 (1) of the Statute. The OTP is headed by the Prosecutor and he has full authority over the management and administration of the OTP.

The first Chief Prosecutor Mr. Luis Moreno Ocampo describes his mission as to put an end to impunity for the most serious crimes of concern to the international community and thus, contribute to the prevention of future crimes, and also his mandate as to select the situations where the Court should intervene, to investigate and to prosecute the gravest crimes.<sup>7</sup>

For the purpose of fulfillment of his mission and mandate, The Prosecutor must assess its jurisdiction, examining whether the alleged crimes are committed by nationals of State Parties or in the territory of State Parties. He also has to assess its temporal jurisdiction and whether alleged crimes fall under the Court's subject-matter jurisdiction. Besides, when a domestic court has concurrent jurisdiction or the proceedings take place in a domestic court, how the ICC can intervene and take over the case is also the consideration of the Prosecutor.

### **2.1 Crimes within the Scope of the Prosecutor's Investigation and Prosecution**

Four of "the most serious crimes of international concern"<sup>8</sup> fall within the scope of the Prosecutor's investigation and prosecution, they are genocide, war crimes, crime against humanity and crime of aggression, which are specifically provided for in Article 5, 6, 7, 8 of the Rome Statute. Except the crime of aggression

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<sup>7</sup> L. Moreno-Ocampo, 'The International Criminal Court-Some Reflections', *12 Yearbook of International Humanitarian Law*, (2009), p.5.

<sup>8</sup> Preamble of the Rome Statute.

which is expected to be defined when the time is ripe for amending the Statute, the other three crimes are well defined in the provisions of the Statute. Genocide in Article 6 is basically a copy of Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) (“Genocide Convention”). Crime against humanity and war crime are also provided in unprecedented detail.

## **2.2 Temporal, Territorial and Personal Jurisdiction**

The ICC is a prospective institution in that it cannot exercise jurisdiction over crimes committed prior to the entry into force of the Statute. States were unwilling to allow the ICC to deal with past practices. Article 11 (1) of the Rome Statute declares “the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute”, that is, beginning on 1 July 2002.

The Court has potentially worldwide jurisdiction, but this will be fully realized only after all states become parties to its Statute. Article 12 (2) provides that the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court: (a) The State on the territory of which the conduct in question occurred or, if the crimes was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crimes is a national.

In the event of referral by the Security Council, the Court has jurisdiction even if none of the relevant States is a party to the Statute or gives its consent.

In the light of permanent and global nature of the Court, the OTP is probably seized with more than one situation at a time. Usually each situation involved an untold number of victims and many alleged perpetrators, but given the limited resources of the OTP, not all perpetrators would be prosecuted. The Statute gives some guidance to this issue. The Preamble affirms that “the most serious crimes of concern to the international community as a whole must not go unpunished”. Article 5 of

the Statute provides that “the jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole” and Article 17, dealing with admissibility, adds that a case is inadmissible where the case is not of sufficient gravity to justify further action by the Court. When the OTP design its prosecutorial policy and strategy, it should take into account the global nature of the ICC, its statutory provisions and logistical constraints. The general rule of a preliminary recommendation is “the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the States or organization allegedly responsible for these crimes.”<sup>9</sup>

## **2.3 Triggering the Jurisdiction by the Prosecutor**

In the previous practice of war trials and existing *ad hoc* tribunals, there is no need to “trigger” the jurisdiction because the targets of prosecution have usually been specifically defined in the established legislative documents. The exercise of prosecutorial discretion is well circumscribed by the temporal, personal and territorial jurisdiction of a tribunal. But it is quite different with respect to the ICC. The Court’s focus of prosecution is not pre-determined and the Prosecutor can trigger the jurisdiction in three ways, which are provided for in Article 13 of the Rome Statute.

### **2.3.1 Self-Referral**

The first way is self-referral. According to Article 14 (1) of the Rome Statute, a State may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed, requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes. In this circumstance, the referring state must be a state party itself or have accepted the jurisdiction of the Court pursuant

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<sup>9</sup> Paper on some policy issues before the Office of the Prosecutor, ICC-OTP, 2003, p.7.

to Article 12 (3). Early on 16 December 2003, the Government of Uganda referred the situation in northern Uganda, which is the first situation referred to the Prosecutor. Later, the Democratic Republic of Congo (DRC) and the Central Africa Republic followed Uganda's example and referred the situations in their territories to the Prosecutor.

### **2.3.2 Referral by the Security Council**

The second way is the Security Council referral. According to Article 13 (b) of the Rome Statute, a situation in which one or more of crimes within the jurisdiction of the Court appears to have been committed may be referred to the Prosecutor by the UN Security Council acting under Chapter VII of the Charter of United Nations. The situation in Darfur, Sudan is the first situation referred by the Security Council which will be discussed in details in this thesis. In the most recent, the Security Council decided unanimously to refer the situation in Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor, which was the second situation referred by the Security Council.

### **2.3.3 The Prosecutor's *proprio motu* Power**

The third way is that the Prosecutor may exercise his *proprio motu* power to initiate an investigation which is provided for in Article 15 of the Rome Statute. This is a bold innovation of the Rome Statute. Such power is the very discretion of the ICC Prosecutor which is significantly different from that of the prosecutors of other *ad hoc* tribunals or special courts. The Prosecutor may initiate investigation *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. The Prosecutor shall analyse the seriousness of the information received. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation. Therefore, the Prosecutor's such power is subject to review by the Pre-Trial Chambers, which is aimed to avoid as much as possible politically motivated prosecution on the one hand, on the other

hand, the Prosecutor could not target a situation in a solitary fashion. In the absence of political backing in the form of a State or Security Council referral, the Prosecutor would need the judicial backing of the Court.<sup>10</sup>

The decision to proceed would therefore be taken in a collective manner, thus not only preventing possible abuse of power but also shielding the Prosecutor from external pressures.<sup>11</sup> Such authorization could be deemed as a mechanism of the checks and balances: when the Prosecutor requests an arrest warrant or a confirmation of charges, the decision is made by a panel of judges, subject to the review of the Appeals Chambers.<sup>12</sup> From the perspective of international criminal justice, such power is of great importance since it can guarantee independence of the Prosecutor and ultimate effectiveness of a permanent international criminal court within the complex political context of international community. In the Prosecutor's view, such power is a privilege as well as a huge responsibility. It is the first time the Prosecutor of an international court is given the mandate to independently select situations to investigate.<sup>13</sup>

## 2.4 The Principle of Complementarity

In spite of the above three ways to trigger the jurisdiction, the Prosecutor will not exercise jurisdiction over these crimes directly. In the case of genocide, crimes against humanity and war crimes, the ICC operates in parallel with national justice systems, which are also positioned to prosecute the offences in question. The underlying premise of the Rome Statute is that, when national justice systems fail, the ICC steps in, as a last resort to speak.<sup>14</sup> Thus, in cases of concurrent jurisdiction between national systems and the ICC, the former takes the priority. Paragraph 10 of the preamble of the Rome Statute emphasizes that "the International Criminal Court

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<sup>10</sup> Silvia A. Fernandez de Gurmendi, 'The Role of the International Prosecutor', in Roy S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, (Kluwer Law International, 1999), p.184.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Supra* note 7, p.5.

<sup>13</sup> *Ibid.*

<sup>14</sup> William A. Schabas, *An Introduction to the International Criminal Court*, (Cambridge University Press, 2007), p.171.

established under this Statute shall be complementary to national criminal jurisdictions”. Article 1 of the Statute repeats this principle.

The principle of complementarity represents the explicit will of States parties to create an institution that is global in scope while recognizing the primary responsibility of States themselves to exercise criminal jurisdiction. The principle is also based on considerations of efficiency and effectiveness since States will generally have the best access to evidence and witness. Moreover, there are limits on the number of prosecutions the ICC can bring.<sup>15</sup>

Consequently, in deciding whether to investigate or prosecute, the Prosecutor must first assess whether there is or could be an exercise of jurisdiction by national systems with respect to particular crimes within the jurisdiction of the Court. The Prosecutor can proceed only where States fail to act, or are not “genuinely” investigating or prosecuting, as described in Article 17 of the Rome Statute,<sup>16</sup> which provides exception to the primacy of state jurisdiction.

The Court will be able to declare a case to be admissible when a State is unwilling or unable genuinely to carry out the investigation or prosecution. A State is *unwilling* if the national decision has been made and proceedings are or were being undertaken for the purpose of shielding the person concerned from criminal responsibility; there has been an unjustified delay which is inconsistent with an intent to bring the person concerned to justice; or the proceedings were not or are not being conducted independently or impartially.<sup>17</sup> To assess whether a State is *unable* to act, the Prosecutor will need to determine whether “due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings”.<sup>18</sup>

A Court based on the principle of complementarity ensures the international rule of law by creating an interdependent, mutually reinforcing international

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<sup>15</sup> *Supra* note 9, p.4

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

system of justice.<sup>19</sup> The OTP encourages genuine national proceedings where possible, relies on national and international networks and participates in a system of international cooperation.<sup>20</sup> From this principle, the effectiveness of the ICC should not be measured only by the number of cases that reach the Court. On the contrary, the absence of trials by the ICC, as a consequence of the effective functioning of national systems, would be a major success.<sup>21</sup>

## 2.5 Deferral

The Prosecutor's investigation and prosecution can be intervened by the Security Council. Article 16 of the Statute provides that "[N]o investigation or prosecution may be commenced or proceeded with under the Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions." For such deferral, the Security Council will have to act under Chapter VII of the Charter, which applies only where there is "threat to the peace, breach of the peace or act of aggression". The rationale of the intervention in judicial proceedings by a political organ lies in the priority choice of peace and justice. It allows the Security Council, under its primary responsibility for the maintenance of peace and security, to set aside the demands of justice at a time when it decides the demand of peace should take the priority. If the suspension of judicial proceedings leads to negotiation and conclusion of a peace agreement, precedence should be given to peace. Of course, such suspension should be only temporary.

It is worthy noting that, among five permanent member states of the Security Council, US and China have not joined the Rome Statute yet. US, though making constructive and helpful contribution during the Statute

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<sup>19</sup> Report on Prosecutorial Strategy, The Office of the Prosecutor, ICC-OTP, 14 September 2006, p5.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Supra* note 9, p.1.

drafting, resigned its signature so as to exclude its nationals from the jurisdiction of the ICC. China did not sign the Rome Statute because it has major reservations on a series of issues such as the jurisdiction of the ICC, Prosecutor's *proprio motu* power, the definition of crimes against humanity.

## **2.6 The Distinctiveness of the ICC Prosecutor**

### **2.6.1 A Most Powerful and Independent Prosecutor**

Each international criminal judicial institution has its legal basis of foundation. The earlier International Military Tribunal at Nuremberg was established by London Treaty signed by four Allied states. The two *ad hoc* tribunals after the cold war International Criminal Tribunal for former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) are all created on the basis of the Security Council resolutions. Other special tribunals such as Special Court of Sierra Leone (SCSL), Extraordinary Chambers in the Courts of Cambodia (ECCC) and Special Tribunal for Lebanon (STL) are usually set up by the agreements<sup>22</sup> between UN and State governments concerned.

Unlike its precedents, the ICC was established by a multilateral treaty. The multilateral treaty-based court renders the ICC strikingly different from its precedents and the ICC Prosecutor bears the outcome of such differences. Given the personal, temporal and territory jurisdictions provided in the Rome Statute, the ICC Prosecutor can exercise the widest jurisdiction rather than being restricted narrowly by the Security Council resolutions or any other agreement. Moreover, the creative *proprio motu* power authorized him to decide when and where to initiate an investigation, which has never been granted to the prosecutors of other tribunals. Therefore, the ICC Prosecutor ends up being a most powerful and independent prosecutor.

### **2.6.2 A Weakest Prosecutor**

On the other side, the circumstances where the Prosecutor will act will differ from situation to situation. He may for example have to act in a situation of

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<sup>22</sup> In broad term, such agreement falls into the category of treaty.

violence over which the State authorities have no control. The Prosecutor may also be asked to act in a situation where those who have the legitimate monopoly of force in a State are themselves the ones to commit or having committed the crimes, and the enforcement authorities in that State will consequently not be available to the Prosecutor. In these circumstances, the Prosecutor will not be able to exercise his powers without the intervention of the international community, regardless through the use of peacekeeping forces or otherwise; the Prosecutor will not be able to establish an office in the country concerned without being assured of its safety. He will also have to be assured that there will be the means available for investigation, protection of witnesses and arrest of suspects.<sup>23</sup> Unlike prosecutor in national courts, a national prosecutor acts within a State which has the monopoly of force in its territory. The enforcement agencies of the State are subject to the rule of law and are at the disposal of the national prosecution system.<sup>24</sup> For ICC Prosecutor, external support is crucially important for the fulfillment of tasks.

All the contemporary international criminal judicial institutions would face a challenge -the absence of enforcement powers in that they do not have police and military force to assist the prosecutors' tasks and enforce the decisions of the courts. This problem is even more serious for the ICC due to their different established basis and background.

The earlier-Nuremberg Tribunal was a product of the London Treaty which was signed by Allied powers, which was equipped with enforcement teeth by the occupation of the Allied states. The Tokyo Tribunal was more tricky in that its foundation was rested on General MacArthur's proclamation establishing another tribunal patterned after Nuremberg Tribunal and his subsequent appointment of its judges, so the enforcement has never been a major barrier. For the recent precedents, ICTY and ICTR could at least in theory be backed up by the Security Council on the basis of Chapter VII of the UN Charter when enforcement is required. Notably, ICTY was created during the on-going armed conflicts and once faced with difficulties of lack

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<sup>23</sup> *supra* note 9, pp.5-6.

<sup>24</sup> *Ibid.*, p.1.

of an occupation army support to enforce its decisions. But later, Annex 1-A of Dayton Peace Agreement included an obligation on all the former Yugoslav States to cooperate with the ICTY<sup>25</sup> and provided that international forces in former Yugoslavia had the authority to arrest those indicted by the ICTY.<sup>26</sup>

For the courts with a hybrid nature, the SCSL was established by treaty between government of Sierra Leone and the United Nations for the request from the President of Sierra Leone to the Security Council for the creation of a special court to deal with crimes committed in the civil war. The agreement between the Government and the UN Secretary-General was signed attaching the Statute of the Court and Sierra Leone adopted implementing legislation.<sup>27</sup> An similar agreement between the UN and Cambodian government was adopted by the General Assembly, ratified by the Cambodian National Assembly and ECCC was established. The Extraordinary Chambers form part of the domestic system of Cambodia. These hybrid courts are combined with international and national elements and they can rely on domestic systems for enforcement.

For the above international criminal judicial institutions, in spite of lack of enforcement power, they are more or less buttressed by political will of some states or groups concerned.<sup>28</sup>

For the ICC, legally and theoretically speaking, it is least politically biased with least external backing if not at all. It is neither a court created by the intent of the victors of armed conflicts for legitimize their victory or their subsequent rule in their territory nor the one set up during the on-going conflicts motivated by some state group's intent to intervene in the name of whole international community. There is no denying the fact that political will, to a certain extent, in the form of legal means, guarantees the

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<sup>25</sup> Article X of Annex 1-A of Dayton Peace Agreement, available at <http://www.nato.int/ifor/gfa/gfa-an1a.htm>.

<sup>26</sup> Article IV (4) Annex 1-A of Dayton Peace Agreement.

<sup>27</sup> The Special Court Agreement (2002) Ratification Act, Suppl. Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst: An Introduction to International Criminal Law and Procedure, (Cambridge University Press, 2008), p.150-151.

<sup>28</sup> But the so-called enforcement powers were highly politicalized and thus their judicial nature were diluted.

enforcement of the judicial decisions. This is crucial for the ICC Prosecutor since he would be the first one in the Court who has to seek cooperation and support from international community for the purpose of investigation, surrender of suspects and so forth. An ambitious mandate with weakest equipment renders state cooperation and other external support of prime importance for the ICC Prosecutor, but such enforcing resources are of less predictability. In this sense, the ICC Prosecutor is the weakest prosecutor in the world.

# 3 The Background of Situation in Darfur

## 3.1 Factual Background of the Darfur Crisis

### 3.1.1 Overview of the Conflict in Darfur

For a better understand of the situation in Darfur, it is very important to obtain an overview of origins and development of the conflict.

The Sudan is the largest country in Africa with a territory bordering Egypt, Eritrea, Ethiopia, Uganda, Kenya, and the Democratic Republic of the Congo, the Central African Republic, Chad and Libya. The Darfur region is a geographically large area in the western part of the Sudan. The roots of present conflict in Darfur are very complex. In addition to the tribal feuds resulting from desertification, the availability of modern weapons, and other factors noted above, deep layers relating to identity, governance and the emergence of armed rebel movements which enjoy popular support amongst certain tribes, are playing a major role in shaping the current crisis.<sup>29</sup> The two rebel groups in Darfur, the Sudan Liberation Movement/Army (SLM/A) and Justice and Equality Movement (JEM), citing similar reasons for the rebellion including socio-economic and political marginalization of Darfur and its people, organized themselves in the course of 2001 and 2002 in opposition to the Khartoum Government, which was perceived to be the main cause of the problems in Darfur. Both rebel groups had a clearly stated political agenda involving the entirety of the Sudan, demanding more equal participation in government by all groups and regions of the Sudan.<sup>30</sup>

The conflict began in approximately August 2002 with the government attempts to control the insurgency through deployment of the Sudanese

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<sup>29</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005, [Report of Darfur Commission], para 61.

<sup>30</sup> *Ibid.*, para 62.

Armed Forces (SAF). On 25 April 2003, An attack against El Fasher, the capital of North Darfur state, by SLA inflicted unprecedented losses on the government. After the attack, the government ceased peace negotiations with the rebels and initiated a counterinsurgency campaign in North and West Darfur. As part of the campaign, the government recruited a large number of militia known as Janjaweed. SAF with Janjaweed launched attacks on towns controlled by the rebels.

In April 2004, the government and the rebels signed a ceasefire agreement. Despite the agreement, the rebels continued their attacks in South, leading the government to initiate another major military operation in December. By January 2005, government armed forces reached the base of the rebel.

### **3.1.2 Crimes Committed in Darfur**

By all accounts, the armed conflict in Darfur has been a humanitarian catastrophe. While there has been some controversy about the number of deaths caused by the conflict,<sup>31</sup> there is no doubt that the ruthless counter-insurgency led by the government forces and the Janjaweed militias involved war crimes and crimes against humanity. In the meantime, the rebels may also be responsible for a significant number of war crimes, including attacks on civilians and humanitarian workers.<sup>32</sup>

By the second half of 2004, Darfur was receiving extensive media coverage and visits of senior officials from western states. The reports of international humanitarian agencies and the media showed the existence of war crimes and crimes against humanity.

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<sup>31</sup> US State Department's estimate of deaths in Darfur was 60,000 to 160,000, in 2004, World Health Organization reported that 70,000 had died; other authorities suggest that mortality is likely to be closer to 400,000, *See Darfur's Real Death Toll*, Washington Post, <http://www.washingtonpost.com/wp-dyn/articles/A12485-2005Apr23.html>, retrieved on 8 May 2011. It is almost impossible to estimate exactly how many of Darfur's six million inhabitants are affected by the conflict although it is clear that the related insecurity has affected most of the inhabited areas of Darfur. *See* Office of UN Resident and Humanitarian Co-ordinator for the Sudan, "Darfur Humanitarian Profile No.3", 1 July 2004.

<sup>32</sup> *See* Human Rights Watch, *Lack of Conviction: The Special Criminal Court on the Events in Darfur* 3-4, <http://hrw.org/backgrounder/ij/sudan0606/sudan0606.pdf>, retrieved on 9 May 2011.

In 2005, the US government began an investigation into what was happening in Darfur which included interviews with refugees in eastern Chad and sophisticated use of satellite imagery. It produced a well-documented report with evidence that war crimes and crimes against humanity and most participants in the investigation agreed that the events met the test for genocide. US Secretary of State Colin Powell, called the government's counter-insurgency war "genocide".<sup>33</sup>

### **3.2 The Report of UN International Commission of Inquiry in Darfur**

Given the crisis in Darfur, in 2004, the Security Council adopted Resolution 1564 to "request the Secretary-General rapidly establish an international commission of inquiry in order to 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>34</sup> In October 2004, the Secretary General appointed Antonio Cassese , Mohamed Fayek, Hina Jilani, Dumisa Ntsebeza and Therese Striggner-Scott as members of the UN International Commission of Inquiry in Darfur ("Darfur Commission") and Cassese served as the Chairperson. The Commission were requested to report back on their findings within three months. The Commission engaged in a regular dialogue with the Government of the Sudan throughout its mandate, in particular through meetings in Geneva and in the Sudan, as well as through the work of its investigative team.<sup>35</sup> The Darfur Commission visited Sudan including travel to the three Darfur States. During its presence in the Sudan, it held extensive meetings with representatives of the Government, the Governors of the Darfur States and other senior officials in

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<sup>33</sup> Sudan Tribunal, "US State Dept. Still Characterizes Darfur Situation as Genocide", 19 June 2009, <http://www.sudantribune.com/US-State-Dept-still-characterizes,31555> , retrieved on 4 June, 2011.

<sup>34</sup> UNSC Res 1564 (September 18, 2004) UN Doc S/RES/1564 (2004), para 12.

<sup>35</sup> Report of Darfur Commission, p.2.

the capital and at provincial and local levels, members of the armed forces and police, leaders of rebel forces, tribal leaders, internally displaced persons, victims and witnesses of violations, NGOs and United Nations representatives.<sup>36</sup>

### **3.2.1 Key Findings of the Darfur Commission**

The Commission submitted a full report on its findings to the Secretary-General on 25 January 2005. The Report addressed the findings in relation to the key tasks referred to in the resolution 1564. In accordance with its mandate to “investigate reports of violations of human rights law and international humanitarian law”, the Commission established that the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law.<sup>37</sup> In particular, the Commission found that Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity.<sup>38</sup> While the Commission did not find a systematic or a widespread pattern to these violations, it found credible evidence that rebel forces, namely members of the SLA and JEM, also are responsible for serious violations of international human rights and humanitarian law which may amount to war crimes.<sup>39</sup> In particular, these violations include cases of murder of civilians and pillage.<sup>40</sup> But regarding the acts of genocide, the Commission concluded that the Government of the Sudan has not pursued a policy of genocide.<sup>41</sup> The Commission identified a number of individual perpetrators who are possibly responsible for the above-mentioned violations, including

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<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, p.3.

<sup>38</sup> *Ibid.*, p.3.

<sup>39</sup> *Ibid.*, p.4.

<sup>40</sup> *Ibid.*, p.4.

<sup>41</sup> *Ibid.*, p.5.

officials of the Government of Sudan, members of militia forces, members of rebel groups, and certain foreign army officers acting in their personal capacity. Some Government officials as well as members of militia forces, have also been identified as possibly responsible for joint criminal enterprise to commit international crimes. Others are named for their possible involvement in planning and/or ordering the commission of international crimes, or of aiding and abetting the perpetration of such crimes. The Commission also has identified a number of senior Government officials and military commanders who may be responsible, under the notion of superior (or command) responsibility, for knowingly failing to prevent or repress the perpetration of crimes. Members of rebel groups are also named as suspected of participating in a joint criminal enterprise to commit international crimes, and as possibly responsible for knowingly failing to prevent or repress the perpetration of crimes committed by rebels.<sup>42</sup>

### **3.2.2 Recommendations of the Darfur Commission**

With regard to the accountability mechanisms, the Darfur Commission strongly recommended the referral of the situation of Darfur to the ICC by the UN Security Council,<sup>43</sup> based on the justification of six major merits.<sup>44</sup> First, the International Criminal 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) of the Rome Statute. 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

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<sup>42</sup> *Ibid.*, p.5.

<sup>43</sup> *Ibid.*, para 569.

<sup>44</sup> Sudan signed the Rome Statute of the ICC on 8 September 2000, but has not yet ratified it and is thus not a State party. The prosecution of nationals of a State that is not party to the Rome Statute is possible under limited circumstances. First, according to article 12 (2)(a) of Rome Statute, it is obviously applicable in Darfur crisis since the crimes occurred in the Sudan and were allegedly committed by Sudanese nationals; secondly, the ICC's jurisdiction can be triggered by a referral to the Prosecutor by the Security Council acting under Chapter VII of the Charter according to article 13 (b); thirdly, the Sudan may, by declaration lodged with the Court's Registrar, accept the exercise of jurisdiction by the Court with respect to the crimes in question, para. 583.

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 trials 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 trials 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 compel both leading personalities in the Sudanese Government and the 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 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>45</sup> The Commission also excluded the advisability of other mechanisms such as setting up *ad hoc* tribunals, expanding to mandate of existing *ad hoc* tribunals and establishing mixed courts.<sup>46</sup>

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<sup>45</sup> *Ibid.*, para 572.

<sup>46</sup> *Ibid.*, para 573-582.

## **3.3 The Referral of Situation in Darfur by the Security Council**

### **3.3.1 The Referring Resolution 1593**

Soon after the Report of the Darfur Commission, on 31 March 2005, the Security Council adopted resolution 1593 by vote of 11 in favor to none against, with 4 abstentions (Algeria, Brazil, China and United States).<sup>47</sup>

In this resolution, the Security Council acted under Chapter VII of the UN Charter and referred the situation prevailing in Darfur since 1 July 2002 to the Prosecutor of the ICC. It decides the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with the Court and the Prosecutor and invites African Union to discuss practical arrangements. The Prosecutor is invited to report to the Security Council regularly on actions taken pursuant to this resolution.

Among the positions of member States, United States insisted that a better mechanism would have been a hybrid tribunal in Africa and continued to fundamentally object to the view that the ICC should be able to exercise jurisdiction over the nationals, including government officials of States not party to the Rome Statute.<sup>48</sup> China supported a political solution and preferred that the perpetrators stand trial in Sudanese courts. China believed the perpetrators must be brought to justice, but it was important to sustain the hard-won gains of the North-South peace process.<sup>49</sup> Sudanese Ambassador El-Fatih Mohamed Ahmed Erwa warned the Council that the “resolution would only serve to weaken prospects for settlement and further complicate the already complex situation”.<sup>50</sup>

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<sup>47</sup> Press release: <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> , retrived on 4 March, 2011.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

## 3.3.2 The Flaws in Resolution 1593

### 3.3.2.1 The Source of Funds

Paragraph 7 of the Resolution dealing with funds provided that UN will not burden all the expenses resulting from any judicial activities related to the referral. In this way, the Security Council precluded the financial burden arising from the referral, which in fact removed a substantial back-up from the judicial solution. In the case of *ad hoc* Tribunals formally created by the Security Council, it is normal that they be financed out of UN resources. The ICC is not a UN organ and it seems unreasonable that its facilities be offered to the UN for free. Article 15 of the Rome Statute dealing with funds of the Court specifies two sources of funds, one is assessed contributions made by State Parties and the other is funds provided by the United Nations subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referral by the Security Council. This provision *per se* is not binding upon the Security Council. But the United Nations and the ICC agreed that “the conditions under which any funds may be provided to the Court by a decision of the General Assembly of the United Nations pursuant to Article 115 of the Statute shall be subject to separate arrangements.”<sup>51</sup> In the Resolution 1593, the unilateral ruling out of the provision of funds by the United Nations to the Court in connection with Darfur is at odds not only with the decision to refer, but also with the duty of good faith negotiations, which flows from the obligation mutually agreed upon between the ICC and the United Nations.<sup>52</sup> The cut of the funds is not consistent with the initial intention of the Darfur Commission for the recommendation of referral, which expected the 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>53</sup>

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<sup>51</sup> Article 13 of the Negotiated Relationship Agreement between the ICC and the United Nations of 4 October 2004, entered into force on the same date, available online at [http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf).

<sup>52</sup> Luigi Condorelli and Annalisa Ciampi, Comments on the Security Council Referral of the Situation in Darfur to the ICC, *Journal of International Criminal Justice* 3 (2005), p.594.

<sup>53</sup> Report of Darfur Commission, para 572.

### **3.3.2.2 The Absence of Article 13 (b) of the Rome Statute**

Article 13 (b) of the Rome Statute is the legal basis of the Security Council referring a situation to the Prosecutor. And Article 16, on the other hand, defines the role of the Security Council to stop ongoing or impending proceedings before the Court. Naturally, as a resolution of referring a situation to the Court, it is necessary with reference to Article 13 in the resolution text. However, this provision is not present in any paragraph of the resolution. Such absence is somewhat suspicious when one contrasts it with the express reference to Article 16. It is not clear whether the members of the Security Council intended to avoid an express link between the referral and Article 13.<sup>54</sup>

### **3.3.2.3 The Blurring Obligation of States to Cooperate with the ICC**

Article 86 of the Rome Statute provides State parties' general obligation to cooperate with the Court. The subsequent provisions laid down in Part 9 of the Statute specify that state parties to the Statute are under an obligation to cooperate with the Court. State not party to the Statute may also be brought under an international obligation to cooperate with the Court by "any other appropriate basis" that is laid down in Article 87 (5). Such appropriate basis could be provided by a resolution of the Security Council under Article 41 of the UN Charter, imposing obligations upon all member states to apply measures to give effect to Security Council decisions. It would be perfectly conceivable that the Security Council could adopt a resolution which obliges all member states to cooperate with the Court.<sup>55</sup> In theory, It would seem natural that a decision to this effect should be included in a resolution where the Security Council decides to refer a situation to the ICC and one could even argue that at least one of the implications of such a referral is

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<sup>54</sup>Luigi Condorelli and Annalisa Ciampi, Comments on the Security Council Referral of the Situation in Darfur to the ICC, *Journal of International Criminal Justice* 3 (2005), p.592.

<sup>55</sup> For this view, see A. Ciampi, 'The Obligation to Cooperate', in A. Cassese et al.(eds), *The Rome Statute for an International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 1607-1638, at 1611. See Luigi Condorelli and Annalisa Ciampi, Comments on the Security Council Referral of the Situation in Darfur to the ICC, *Journal of International Criminal Justice* 3 (2005), p.593.

that all member states are automatically put under an international binding obligation to cooperate with the Court.

However, paragraph 2 of the resolution provided that the Government of Sudan and all other parties to the conflict *alone* are under the obligation to cooperate fully with and provide any necessary assistance to the Court. It didn't precisely provide that non-state parties to the Rome Statute have binding obligations under the Statute but only "urge" all States and regional and other international organizations concerned to cooperate fully. In this sense, it is assumed the Security Council did not intend to create binding obligations to all UN member states. Such assumption goes against the intention of drafting Article 13 (b) of the Rome Statute. At the Rome Conference, a clear majority of delegations supported the power of the Security Council to initiate proceedings of the Court. Article 13 (b) of the Statute thereby acknowledges the enforcement powers of the Council acting under Chapter VII of the Charter, to refer a situation to the Prosecutor in which one or more crimes falling within jurisdiction of the Court appear to have been committed. These enforcement powers of the Security Council bind all Members of the United Nations.<sup>56</sup> Paragraph 2 of the resolution actually implicitly allowed non-cooperation of other member states, which would be a fatal loophole of the resolution for successful operation of the judicial solution of Darfur conflict.

The flaws existing in Resolution 1593 would necessarily affect the successful operation of judicial process.

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<sup>56</sup> Lionel Yee, 'The International Criminal Court and the Security Council', Article 13 (b) and 16, in Roy S. Lee (eds.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, (Kluwer Law International, 1999), p.147.

# 4 Activities Outside the Courtroom

## 4.1 The Investigation at the Initial Phase

After the Security Council referred the situation to the Prosecutor, on 21 April 2005, President Kirsch assigned the situation in Darfur, Sudan to Pre-Trial Chamber I (PTC I).<sup>57</sup> On 1 June 2005, the Prosecutor determined that there was a reasonable basis to initiate an investigation, and he notified the Chambers and the Presidency accordingly and announced his decision to open a formal investigation, reaching out to the Khartoum government to establish a foundation for future cooperation.

In the initial phase, the main efforts of the Prosecutor were devoted to the “an extensive process of information gathering”.<sup>58</sup> The OTP took a number of practical steps. Within the OTP, a multi-disciplinary joint team has been convened, comprising staff from each of the three divisions within the Office. Additional personnel for three divisions were recruited and persons with relevant language expertise was identified and recruited. The Office applied the experience gained in relation to other situations such as DRC and North Uganda and benefited from the lessons of the *ad hoc* international tribunals.<sup>59</sup> The Prosecutor also acknowledged that the protection of victims and witnesses is a major challenge in any conflict situation and it is a core responsibility shared by OTP and the Registry.<sup>60</sup>

In Prosecutor’s second report in early 2006 to the SC, he reported that “the Office is currently screening hundreds of other potential witnesses either directly or with the assistance of states and organizations. To facilitate this

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<sup>57</sup> Decision Assigning the Situation in Darfur, Sudan to Pre-Trial Chamber, ICC-02/05-01-Corr, The Presidency, 21 April 2011.

<sup>58</sup> Report of the Prosecutor of the ICC to the UN Security Council Pursuant to UNSCR 1593 (2005), p.1.

<sup>59</sup> Report of the Prosecutor of the ICC to the UN Security Council Pursuant to UNSCR 1593 (2005), p.8.

<sup>60</sup> *Ibid.*

process, the Office has established a semi-permanent presence in the region, which provides logistical, security and other support to the process of witness identification and interview”.<sup>61</sup>

#### **4.1.1 Invitation of *Amicus Curiae* by Pre-Trial Chamber**

In 2006, more than a year after the referral, the Prosecutor didn't apply any arrest warrant or summons to appear. Some commentators deemed the Prosecutor acted too prudently.<sup>62</sup> The PTC I seemed not satisfied with the Prosecutor's slow pace in investigation. Based on Article 57 (3)(c) of the Statute<sup>63</sup> and Rule 103 of Rules of Procedure and Evidence (*Amicus curiae* and other forms of submission), PTC I considered it necessary to request some opinions from the third party. But, in reality, the judges were questioning the Prosecutor's claim that he could not conduct investigation within Darfur because of the security situation.<sup>64</sup> Two *amicus curiae* were invited for their views on issues concerning protection of victims and preservation of evidence: Professor Antonio Cassese, the first President of ICTY and also the Chair of the Darfur Commission whose report provoked the Darfur referral, and Louise Arbour, United Nations High Commissioner for Human Rights and the former Chief Prosecutor of ICTY and ICTR. Their observations<sup>65</sup> were submitted in August and September 2006 respectively. Both took the view that the Prosecutor had exaggerated the

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<sup>61</sup> Second Report of the Prosecutor of the ICC to the UN Security Council Pursuant to UNSCR 1593 (2005), p.4.

<sup>62</sup> In a journal article of the same year, in a section titled “The Exceedingly Prudent Attitude of the ICC Prosecutor”, Professor Antonio Cassese discussed the Prosecutor's activities at early stage, see Antonio Cassese, Is the ICC Still Having Teething Problems? *Journal of International Criminal Justice*, 4 (2006). pp. 434-441.

<sup>63</sup> Article 57 (3)(c) provides “In addition to its other functions under this Statute, the Pre-Trial Chamber may (c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information”.

<sup>64</sup> William A. Schabas, *supra* note 14, p.49.

<sup>65</sup> Observations on Issues Concerning the Protection of Victims and The Preservation of Evidence in the Proceedings on Darfur Pending Before the ICC, PTC I, ICC-02/05-14, 25 August 2006, [‘Cassese Observation’], Louise Arbour; Observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence, ICC-02/05-19, PTC I, 10 October 2006, [‘Arbour Observation’].

security problems involved in investigating within Darfur and acted too cautiously.

#### **4.1.1.1 Cassese Observation**

The wording of Cassese Observation reads rather critical like a teacher's worst evaluation of his student's schoolwork and instruction on what should have been done.

Cassese submitted the recommendation of general and specific measures of protection of victims and measures of preservation of evidence and proposals relating to investigative strategy and policy, modes of liability and means of proof under the Rome Statute.

Regarding the protection of victims, he submitted that the most effective way is to collect evidence about the possible criminal responsibility attributable to military forces of Sudan (as well as to armed militias) and those of the rebel groups.<sup>66</sup> The identification of chain of command can save the efforts to investigate at the crime scenes by establishing criminal responsibility of those who are in a position to forestall or stop commission of crimes since it would be no avail for a military commander to argue that he cannot identify the specific authors of crimes under his command and control.<sup>67</sup> He also suggested that, the Prosecutor could ask, either directly or through a request issued, upon his request by the PTC that the relevant Sudanese officials appear before the Chamber to report on the specific measures for the protection of victims they have adopted or intend to take or are in the process of taking.<sup>68</sup>

To sum up, in the view of Cassese, the Prosecutor had not sufficiently made use of resources available to him for effective investigation.

#### **4.1.1.2 Arbour Observation**

Unlike Cassese, Arbour used very diplomatic wording in her submission. She systemically described the tasks which have been done by the Office of

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<sup>66</sup> Cassese Observation, p.4.

<sup>67</sup> *Ibid.*, p.8.

<sup>68</sup> *Ibid.*, p.4.

High Commission for Human Rights (OHCHR) in the situation of conflict in general by drawing out some key lessons in Darfur and other locations. From the practical experience of OHCHR, she summarized some key implications for ICC investigation in Darfur. She acknowledged the existence of risk but pointed out that “[R]isks can never be eliminated absolutely but can be minimized with the use of tailored and best practice investigative techniques that, *inter alia*, give due weight to the informed wishes of the persons concerned”.<sup>69</sup> She told the PTC that “it is possible to conduct serious investigations of human rights violations during an armed conflict in general, and in Darfur in particular, without putting victims at unreasonable risk”<sup>70</sup> and “the careful assessment by the ICC Prosecutor of risks to witnesses and victims needs a balancing of different factors” ,<sup>71</sup> particularly in the case of ICC investigation in Darfur, the balancing may require a determination of whether the possible risks created by victims’ contact with ICC investigators are greater than the danger they face daily by the continuation or escalation of the conflict and commission of related crimes. In turn, this determination should also take into account the possible deterrent effect of ICC investigations on the perpetrators of the very crimes which put the civilian population at risk and thus of its impact on the general reduction of violence.<sup>72</sup> She highlighted the effectiveness of unarmed international presence in a conflict zone and was of view that ICC must clearly be part of such presence.<sup>73</sup> She also noted the clear failure or unwillingness by the Government of Sudan and suggested that the ICC must be able to exercise the full force of its mandate.<sup>74</sup> Finally she submitted that the security challenges particular to investigation of international crimes while an armed conflict is ongoing should not *per se* prevent the Court from acting in pursuance of its international mandate towards timely and effective individual criminal accountability.<sup>75</sup>

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<sup>69</sup> Arbour Observation, p.2.

<sup>70</sup> *Ibid.*, para 64.

<sup>71</sup> *Ibid.*, para 67.

<sup>72</sup> *Ibid.*, para 68.

<sup>73</sup> *Ibid.*, para 70.

<sup>74</sup> *Ibid.*, para 75.

<sup>75</sup> *Ibid.*, para 80.

She did not specifically instruct the Prosecutor what should be done and made all comments to the ICC as a whole which seemed less offensive to the Prosecutor personally.

As the High Commissioner, she provided some delicate analysis and experience from which OHCHR has developed in its field tasks. From her previous experience as ICTY Prosecutor, she admitted that the main terrain of the ICTY's early operations was an active war zone but she believe that her Tribunal should have attempted to increase its presence in the region as opportunities presented themselves.<sup>76</sup>

## **4.1.2 The Prosecutor's Response to Both Observations**

The Prosecutor seemed stung by PTC's intention of *amicus curiae* invitation and the observations of two experts. Under Rule 103 of Rules of Procedure and Evidence, he had a right to reply.

### **4.1.2.1 Response to Cassese Observation<sup>77</sup>**

Examining the points outlined by Professor Cassese, the Prosecutor responded that OTP do not have a mandate under the Statute to establish or promote security in Darfur generally and pointed out that “[R]esponsibility for security of the civilian population in Darfur rests with the Government of Sudan, the Security Council working with the African Union (AU) and other relevant organizations.”<sup>78</sup> Observations on the wider issues of investigative strategy and policy, modes of liability and means of proof are beyond the scope of the Decision inviting observations.<sup>79</sup> The measures recommended by Professor Cassese to protect victims and witness and preserve evidence are beyond the scope of Article 68 (1) because at that time, the OTP is not taking statements in Darfur and therefore there is no

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<sup>76</sup> Louise About, 'The Crucial Years', *Journal of International Criminal Justice* 2 (2004), p.401-402.

<sup>77</sup> Prosecutor's response to Cassese's Observation on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC, ICC-02/05-16, 11 September 2006, [Response to Cassese Observation].

<sup>78</sup> *Ibid.*, para 8.

<sup>79</sup> *Ibid.*

witness to protect there.<sup>80</sup> The Prosecutor was of view that the Cassese Observations mistakenly broadened the meaning of Article 68 (1) to encompass the provision of protective measures which might promote the creation of witnesses instead of protecting witnesses and victims within the scope of the investigation. Thus the investigative measures he suggested encroach upon the Prosecutor's discretion provided for in Article 42 (1). Nevertheless, the Prosecutor further clarified some issues for the purpose of transparency. Regarding the security situation in Darfur, in spite of the involvement of UN and AU, the security situation remained unoptimistic.<sup>81</sup> He emphasized that he decided not to conduct investigation at this time inside Darfur where either meaningful security exists or effective protective measures can be provided to victims and witnesses.<sup>82</sup> As his investigative strategy, the OTP had carried out investigations with a duty to protect victims and witness in accordance with the Rome Statute and this is the best contribution to the ICC and OTP would seek to complete the investigation and planning of the presentation of the first case and also would continue to assess on an ongoing basis the admissibility of cases.<sup>83</sup>

#### **4.1.2.2 Response to Arbour Observation<sup>84</sup>**

In response to Arbour Observation, similarly, the Prosecutor again considered that the methods outlined by her went beyond the scope of Article 68 (1) of the Statute with the same reason given in response to Cassese Observation.<sup>85</sup>

Nevertheless, he still made comments on observations made by Arbour in three aspects.<sup>86</sup> First, regarding the security situation in Darfur related to witness security, he insisted that the security situation remains extremely volatile despite numerous resolutions passed by the Security Council and

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<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*, paras 11-15.

<sup>82</sup> *Ibid.*, para 16.

<sup>83</sup> *Ibid.*, paras 18-22.

<sup>84</sup> Prosecutor's response to Arbour's observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Prosecutor and Evidence, ICC-02/05-21, 19 October 2006, [Response to Arbour Observation].

<sup>85</sup> *Ibid.*, para 8.

<sup>86</sup> *Ibid.*, para 9.

AU and this was also stated by High Commissioner.<sup>87</sup> Secondly, as for High Commissioner's broad construction of the Court's obligation in respect of witness in Darfur, the Prosecutor considered that, deterrence is a consequence of prosecution and accountability but not an independent objective, the OTP's mandate cannot be expanded to encompass a duty to protect the civilians in areas where it had chosen not to investigate. Although judicial efforts play a important role in the protection of civilians and prevention of future crimes, the Court has neither the obligation nor the authority directly to do so and the presence of investigators or international personnel which can be expected to increase security actually would be counterfactual.<sup>88</sup> Thirdly, the Prosecutor outlined significant distinctions in mandates between himself and High Commissioner Arbour. The Prosecutor's role is to investigate and establish criminal responsibility under the Rome Statute and the legal consequence of his work may be a criminal trial while High Commissioner's mandate includes promoting and protecting the effective enjoyment of human rights in all aspects covering civil, cultural, economic, political and social fields.<sup>89</sup> With respect to the issue of protection of witness, those witnesses who speak with representatives of the Court are at far higher risk than those who talk to human rights observers and members of the Darfur Commission.<sup>90</sup> The Prosecutor must protect witnesses in accordance with his legal obligations set out within the framework of the Rome Statute specified in Article 54(1)(b), 54 (3)(f) and 68 (1).<sup>91</sup>

Finally, the Prosecutor concluded that he determined the continuing insecurity in Darfur prevents the establishment of an effective system of victim and witness protection *inside* Darfur.<sup>92</sup>

Regarding both Observations, in the view of the Prosecutor, the OTP was bound by the Statute's standards of protection for witnesses and victims, the experience of the Darfur Commission and the OHCHR in their own

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<sup>87</sup> *Ibid.*, para 10.

<sup>88</sup> *Ibid.*, paras 11-14.

<sup>89</sup> *Ibid.*, para 16.

<sup>90</sup> *Ibid.*, para 17.

<sup>91</sup> *Ibid.*, para 18.

<sup>92</sup> *Ibid.*, para 20, emphasis added by the author.

operation was irrelevant. Moreover, since the Prosecutor's investigations could lead to legal action, he asserted that resistance to the ICC activities in Darfur would likely to be much stiffer than it had been to the mere information-gathering activities with which Arbour and Cassese were familiar.

In the Report to the Security Council in December 2006, however, he did not express the skirmish with the PTC and the admonitions of two experts<sup>93</sup> but simply mentioned PTC's invitation of opinions from the two experts as narrative<sup>94</sup> and his response and still insisted that "the Office has conducted its investigation from outside Darfur and therefore avoided exposing victims and witnesses to additional risks. Despite this, his Office has made significant advances in the completion of the investigation of the first case",<sup>95</sup> indicating that the Prosecutor did not accept recommendations on investigation recommended by the two experienced experts.

## **4.2 The First Major Step-The First Two Arrest Warrants**

In spite of rejection of recommendations of two Observations, it is doubtless that they worked as catalyst and the Prosecutor was instigated by the opinions and implicitly responded to PTC's dissatisfaction with his slow pace. On 27 February 2007, the Prosecutor, in accordance with Art 58(7) of the Statute,<sup>96</sup> applied to PTC I for two summonses of appear for two suspects, Ahmad Harun, Former Minister of State for the Interior of the

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<sup>93</sup>William A. Schabas, *supra* note 14, p.51.

<sup>94</sup> Fourth Reports of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), 14 December 2006, p.2

<sup>95</sup> *Ibid.*, p.3

<sup>96</sup> Art 58 (7) reads: "As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain: (a) The name of the person and any other relevant identifying information; (b) The specified date on which the person is to appear; (c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and (d) A concise statement of the facts which are alleged to constitute the crime. The summons shall be served on the person."

Government of Sudan and Minister of State for Humanitarian Affairs of Sudan and Ali Kushayb, alleged leader of the Militia/Janjaweed. In the Prosecutor's Application, he alleged that Harun and Kushayb are criminally responsible for 51 counts of war crimes and crimes against humanity. As for the modes of liability, he alleged that Haroun and Kushayb were part of a "group of person acting with a common purpose" to commit war crimes and crimes against humanity, in violation of Article 25 (3)(d) of the Rome Statute.<sup>97</sup>

Notably, the request for summonses, rather than warrants of arrest, implicitly invited the Sudanese authorities to cooperate with the ICC and turn over the two suspects. The Prosecutor appeared to trust, at a minimum degree, the Sudanese government's previous willingness to provide the OTP with documents and allow the OTP to interview high-ranking government officials. But in the Application, the Prosecutor also submitted that any official response or action of the Sudanese Government, or of Harun or Kushayb to the filing of this application to the effect that they will resist or fail to comply with any decision by the PTC on this matter, would justify the PTC's determination to issue arrest warrants instead.<sup>98</sup>

After examining the application, PTC I is of view that summonses to appear are not sufficient to ensure the persons to appear.<sup>99</sup> Regarding Ali Kushayb, he was reported to be in prison upon an warrant of arrest issued by the Sudanese authorities and the Prosecution's supporting materials would not lead to the conclusion that Ali Kushayb would appear voluntarily before the Court while being detained by the Sudanese authorities.<sup>100</sup> Moreover, the Chamber is of view that issuing a summons to appear for a person currently detained by national authorities would be contrary to the object and purpose of Art 58 (7) of the Statute<sup>101</sup> since the list of those conditions provided for in Rule 119 of the Rules indicate that a summons to appear is intended to

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<sup>97</sup> Decision on the Prosecution Application under Art 58 (7) of the Statute, ICC-02/05-01/07-1, PTC I, 27 April 2007 , para 176..

<sup>98</sup> *Ibid.*, para 278.

<sup>99</sup> Decision on the Prosecution Application under Art 58 (7) of the Statute, ICC-02/05-01/07, PTC I, 27 April 2007, para 124.

<sup>100</sup> *Ibid.*, para 119.

<sup>101</sup> *Ibid.*, para 120.

apply only to persons who are not already being detained.<sup>102</sup> In addition, the Prosecution does not indicate how it is possible, under the legal framework provided for by the Statute and the Rules.<sup>103</sup> Regarding the situation of Ahmad Harun, he has a previous record of concealing evidence in this case<sup>104</sup> and Sudanese authorities have publically stated that Sudan will not cooperate with the Court.<sup>105</sup> Therefore, the Chamber is not satisfied that Ahmad Harun and Ali Kushayb will appear voluntarily before the Court and considers that the arrests of Ali Kushayb and Ahmad Harun appear to be necessary at this stage pursuant to Art 58 (1) (b) of the Statute and therefore issued two arrest warrants.

Some commentators viewed the PTC's approval of warrants for two suspects as a major step: for the first time, the Court especially the Prosecutor had managed to conduct investigations without cooperation from the state where the alleged crimes had been committed.<sup>106</sup> But the twenty-month investigation and the naming of suspects that observers believed were not at top levels of the government showed both the independence of the Prosecutor and perhaps his caution.<sup>107</sup>

Following the issuance of the two arrest warrants, the Sudanese government refused to further engagement with the ICC. The reaction to the *Harun* case was indicative. In September 2007, the government placed him at the head of a committee to investigate violations of human rights in Darfur. It also

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<sup>102</sup> Rule 119 of Procedure and Evidence reads "The Pre-Trial Chamber may set one or more conditions restricting liberty, including the following: (a) The person must not travel beyond territorial limits set by the Pre-Trial Chamber without the explicit agreement of the Chamber; (b) The person must not go to certain places or associate with certain persons as specified by the Pre-Trial Chamber; (c) The person must not contact directly or indirectly victims or witnesses; (d) The person must not engage in certain professional activities; (e) The person must reside at a particular address as specified by the Pre-Trial Chamber; (f) The person must respond when summoned by an authority or qualified person designated by the Pre-Trial Chamber; (g) The person must post bond or provide real or personal security or surety, for which the amount and the schedule and mode of payment shall be determined by the Pre-Trial Chamber; (h) The person must supply the Registrar with all identity documents, particularly his or her passport."

<sup>103</sup> Decision on the Prosecution Application under Art 58 (7) of the Statute, PTC I, ICC-02/05-01/07, 27 April 2007, para 121.

<sup>104</sup> *Ibid.*, para 122.

<sup>105</sup> *Ibid.*, para 123.

<sup>106</sup> Benjamin N. Schiff, *Building the International Criminal Court*, (Cambridge University Press, 2008), p.241.

<sup>107</sup> *Ibid.*, pp.241-242.

appointed him to a committee overseeing deployment of the combined UN and AU peacekeeping force in Darfur (UNAMID).<sup>108</sup>

The Prosecutor reported, in his report to the Security Council in 2007, that he was investigating an ongoing pattern of crimes committed with the mobilization of the whole state apparatus and highlighted that “Ahmed Haroun is still allowed to play a role in this situation. As Minister of State for Humanitarian Affairs, he has been put in a position to control the livelihood and security of those people he displaced. The Government of Sudan has maintained him in this position with full knowledge of his past and present activities”.<sup>109</sup> The Sudanese authorities’ public opposition against the arrest warrants rendered the surrender of the two suspects of less possibility.

### **4.3 The Risky Step-The Arrest Warrants against the Head of Sudan**

In late 2007, the Prosecutor indicated to diplomats and UN officials that if Haroun and Kushayb were surrendered to the Court, he would not open a further investigation into the crimes the subject of those proceedings. In December 2007, he made it clear in his statement to the Security Council that he would go after the person responsible for protecting Haroun in particular, namely the person “who is maintaining Haroun in a position to commit crimes, who is instructing him. This is my second case.”<sup>110</sup>

#### **4.3.1 The Arrest Warrant against the Head of Sudan**

With neither tangible progress on the ground nor in peace process, the Prosecutor changed his cautious stance. The drastic shift is the public application of arrest warrant against Sudanese sitting President Al-Bashir on

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<sup>108</sup> Sudan Tribune, “What Alternative to UNAMID Will Provide Security for Darfur?”, 31 December 2007, <http://www.sudantribune.com/What-Alternative-to-UNAMID-Will,25286>, retrieved on 25 April, 2011.

<sup>109</sup> Six Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 5 December 2007.

<sup>110</sup> Statement by Prosecutor of the ICC to UN Security Council pursuant to UNSCR 1593 (2005), 5 December 2007.

14 July 2008. Upon investigation of crimes allegedly committed in the territory of Darfur, the Prosecution applied to PTC I to issue the arrest warrant alleging that there are reasonable grounds to believe that Omar Hassan Ahmad Al Bashir (hereinafter “Al Bashir”) bears criminal responsibility for the crimes of genocide under Article 6 (a) of the Rome Statute, crimes against humanity under article 7 (1) of the Statute and war crimes under Article 8 (2)(e)(i) and Article 8 (2)(e)(v) of the Statute and Al Bashir “committed crimes through members of the state apparatus, the army and the Militia/Janjaweed in accordance with Article 25 (3) of the Statute (indirect perpetration or perpetration by means)”.<sup>111</sup>

The PTC I considered that there are reasonable grounds to believe that war crimes and crimes against humanity, throughout the Darfur region, were committed by governmental forces and Militias.<sup>112</sup> Since Al Bashir has been the *de jure* and *de facto* President of Sudan and Commander-in Chief of the Sudanese Armed Forces and in that position, he played an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation of the counter-insurgency campaign, the PTC I considered that there are reasonable grounds to believe he is criminally responsible as an indirect perpetrator, or as an indirect co-perpetrator.<sup>113</sup> But the Majority of the Chamber observed that the Prosecution acknowledges that it has no direct evidence of the Sudanese Government’s genocidal intent<sup>114</sup> and decides not to include the counts of genocide. Accordingly, an arrest warrant against the sitting President Al Bashir (“Al Bashir arrest warrant”) was therefore issued by the PTC I with charges of war crimes and crimes against humanity.<sup>115</sup>

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<sup>111</sup> Application for Warrant of Arrest under Article 58, 14 July 2008. The full text of the Application was not publicly available at the time of writing. An official summary is Prosecutor’s Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad Al Bashir, available at: <http://www.icc-cpi.int/NR/rdonlyres/64FA6B33-05C3-4E9C-A672-3FA2B58CB2C9/277758/ICCOTPSummary20081704ENG.pdf>

<sup>112</sup> Decision on the Prosecution’s Application for a Warrant of Arrest against Al Bashir, ICC-02/05-01/09, PTC I, 4 March 2009. [‘Decision on Al Bashir Arrest Warrant’]

<sup>113</sup> Decision on Al Bashir Arrest Warrant, p.7.

<sup>114</sup> Decision on Al Bashir Arrest Warrant, para. 202.

<sup>115</sup> Warrant of Arrest for Omar Hassan Ahmad Al Bashir, No.: ICC-02/05-01/09-01, PTC I, 4 March 2009. [‘Al Bashir Arrest Warrant’]

### 4.3.2 The Reaction to Arrest Warrant

The public announcement of the warrant brought about debates and criticism both within Sudan and around international community.

Some western states such as US, UK and France were in favour of the arrest warrant. Human rights groups hailed the ICC's decision and human rights campaigners said the warrant for Bashir to go on trial would send a strong message about ending impunity and pressure the government to seek a swift and peaceful end to the six-year conflict in Darfur.<sup>116</sup>

The Government of Sudan reacted immediately expelling at least six foreign aid agencies hours after the arrest warrant was issued without any reason given for the move.<sup>117</sup> Some states and regional organizations considered the warrant would constitute a barrier to peace talks in the region. The African and Arabic states warned that the court's action would only increase tension in Sudan.<sup>118</sup> African Union Commission Chairman Jean Ping said that peace and justice should not collide and that the need for justice should not override the need for peace.<sup>119</sup>

Some observers even argued that the Prosecutor's choice to accuse a sitting head of state had complicated and weakened prospects for ICC fact-finding in Darfur. Al Bashir's immediate expelling human rights NGOs and humanitarian agencies from Darfur dried up information sources, which are deemed of great importance for prospects of ICC fact-finding in Darfur.<sup>120</sup>

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<sup>116</sup> Guardian: *Sudanese president Bashir charged with Darfur war crimes*, 4 March 2009, <http://www.guardian.co.uk/world/2009/mar/04/omar-bashir-sudan-president-arrest>.

<sup>117</sup> BBC News, *Warrant Issued for Sudan's Leader*, <http://news.bbc.co.uk/2/hi/7923102.stm>, retrieved on 26 May 2011.

<sup>118</sup> *Ibid.*

<sup>119</sup> BC News, *World reaction: Bashir warrant*, <http://news.bbc.co.uk/2/hi/africa/7923797.stm>, retrieved on 26 May 2011.

<sup>120</sup> Lyal S. Sunga: *How can UN human rights special procedures sharpen ICC fact-finding?* *The International Journal of Human Rights*, Vol.15, No.2, February 2011, p.199.

### **4.3.3 Some Controversies of Al Bashir Arrest Warrant**

Among various claims against Al Bashir Arrest Warrant, some controversies in relation to the Prosecutor's tactics in applying this warrantworth being singled out here.

#### **4.3.3.1 Why not to Target Other Senior Government Officials?**

Why didn't the Prosecutor target other senior officials instead of indicting a sitting head of state? Does it make sense to issue a warrant of arrest when the President is still in office and can exercise control over governmental forces or would it be better to do so when he is no longer in power? It seems evident that a state led by a widely supported head will not easily cooperate with the ICC, not to mention when it wants to arrest him. After the announcement of the arrest warrant, thousands of government supporters gathered in Khartoum, chanting "We love you President Bashir", and ahead of the announcement, Al Bashir assertively said that the Hague tribunal could "eat" the arrest warrant and added that it would "not be worth the ink it is written on" and then danced for thousands of cheering supporters who burned an effigy of the ICC chief prosecutor.<sup>121</sup> In early years, Karadzic and Mladic did not have such national position but the patriotism permitted them to avoid being transferred to Hague. Most prosecutions of officials of a former regime occur after a transition to democracy, in the context of a new democratic government consolidating its power. Only two arrest warrants have been issued against serving heads of state-the former Liberian President Charles Taylor and former Yugoslavian President Slobodan Milosevic, but neither of them is an informative precedent for the Sudan case.<sup>122</sup>

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<sup>121</sup> BBC News, *Warrant Issued for Sudan's Leader*, <http://news.bbc.co.uk/2/hi/7923102.stm>, retrieved on 26 May, 2011.

<sup>122</sup> Alex de Waal: "A Critique of the Public Application by the Chief Prosecutor of the ICC for an Arrest Warrant against Sudanese President Omar al Bashir", *Social Science Research Council*, para 70.

### **4.3.3.2 Why not to Apply a Summons to Appear as Alternative?**

Compared with arrest warrant, a confrontational and stronger mandate for the arrest, a summons to appear is in effect a legal invitation to appear before a court with an expectation that a would-be suspect would be willing comply. The issuance of a summons to appear for a sitting president would be less confrontational than an arrest warrant. Since most suspects indicted by the Prosecutor would be either senior government officials or leaders of rebel groups, by asking the PTC to issue a summons, the Prosecutor seeks to increase the chances of the suspects' voluntary appearance before the Court so as to avoid legal confrontation and other unfriendly forcible measures. A summon could low the cost of cooperation between the Court and other parties concerned and even avoid some possible conflicts of interests among states. The ICC is a judicial institution which is not intent to create polical discomforts among states. Regarding Al Bashir, upon the issuance of the arrest warrant, he was still an incumbent president of Sudan and could exercise his power over military mandates. A summons to appear seems to be more appropriate means to politely 'invite' this head of a state to The Hague, though practically no sitting head of state would voluntarily stand before a trial.

Furthermore, given the fact that the first two arrest warrants are not executed and both Ali Kushayb and Ahmad Harun are still at large, it is not highly possible that the third warrant would be successfully executed. It should be asked why the Prosecutor, who has not yet succeeded in arresting the first two suspects, would engage himself in the pernicious and unrealistic direction. He should have predicted the particular difficulty and little possibility of execution of warrant when making this bold decision to arrest a serving president. This kind of strategy in the exercise of his mandate risks weakening his authority, especially at the initiate stage of the ICC's life.

#### **4.3.3.3 Why not a Sealed Warrant?**

Why did the Prosecutor make a public application instead of a sealed (confidential) warrant? Since a sealed warrant would likely have preserved the element of surprise, or at least uncertainty, and hence had a better chance to be executed. The commentator's major argument for this point is the successful practice of sealed warrants in ICTY. In the ICC, it was practiced in the case of former Congo Vice President Jean-Pierre Bemba, who was arrested in Brussels in 2008 and transferred to The Hague.

#### **4.3.3.4 Why to Insist on the Genocide Charge in the Warrant?**

Among the three crimes charged, genocide is the most difficult to prove. The case law of prosecutions for genocide in *ad hoc* tribunals ICTY and ICTR, provide a relatively modest basis on which to build a robust prosecutorial strategy. For the success of charging genocide, the Prosecutor has to demonstrate three things: (i) the targeted groups qualified for protected status as "racial", "ethnic" or "national" under Article 2 of Genocide Convention as well as Article 6 of the Rome Statute; (ii) the acts committed against these groups (*actus reus*) were of sufficient nature to warrant the categorization of "genocide" under the Genocide Convention and sufficient gravity to meet the admissibility criterion of the Rome Statute; (iii) the charged individual Al Bashir possessed the required genocidal intent (*mens rea*) that the perpetrator intended "to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such".<sup>123</sup> Among the three<sup>124</sup>, the proof of genocide intent is always the most difficult to achieve especially in the phase of trial, it must withstand the test of "beyond a reasonable doubt".

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<sup>123</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ, Judgment, 27 February 2007. [*Akayesu* Trial Chamber Judgment], para 521.

<sup>124</sup> To demonstrate the three things, the proofs in the Prosecutor's Application are problematic, see Alex de Waal: 'A Critique of the Public Application by the Chief Prosecutor of the ICC for an Arrest Warrant against Sudanese President Omar al Bashir', *Social Science Research Council*, paras 9-45.

When PTC I rejected the genocidal charge, the Prosecutor was not satisfied with the PTC's decision and appealed.<sup>125</sup>

The Appeals Chamber pointed out that “[A] Pre-Trial Chamber acts erroneously if it denies to issue a warrant of arrest under article 58 (1) of the Statute on the basis that ‘the existence of ...genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution’”.<sup>126</sup> Although the Majority of PTC I recognized that the applicable standard is one of “reasonable grounds to believe”, it did in fact apply a higher level of proof, one that can be identified only with the standard of proof “beyond a reasonable doubt”.<sup>127</sup> In the view of the Appeals Chamber, “requiring that the existence of genocidal intent must be the only reasonable conclusion amounts to requiring the Prosecutor to disprove any other reasonable conclusions and to eliminate any reasonable doubt (...).”<sup>128</sup> Imposition of such a standard would be tantamount to the creation of an obligation on the part of the Prosecution to prove genocidal intent beyond a reasonable doubt, a “higher and more demanding”<sup>129</sup> standard than the one required under article 58 (1)(a) of the Statute.<sup>130</sup> The Appeals Chamber remanded to the PTC I for re-examination of the matter

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<sup>125</sup> Prosecution Document in Support of Appeal against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-25, The Appeals Chamber, 6 July 2009.

<sup>126</sup> Judgment on the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, The Appeals Chamber, ICC-02/05-01/09-73, 3 February 2010, para 1.

<sup>127</sup> Prosecution Document in Support of Appeal against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, The Appeals Chamber, ICC-02/05-01/09 OA, 6 July 2009, para 1.

<sup>128</sup> Judgment on the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, The Appeals Chamber, ICC-02/05-01/09-73, 3 February 2010, para 33.

<sup>129</sup> *Ibid.*, para 39.

<sup>130</sup> In accordance with the Rome Statute, trials at the ICC take three stages: 1. the issuance of a warrant of arrest or summons to appear under article 58 of the Rome Statute; 2. the confirmation of the charges and committal of a person for trial under article 61 of the Rome Statute and; 3. the conviction of an accused person under article 66 of the Rome Statute. Significantly, different evidential standards must be at each stage of the trial and these are progressively higher. 1. At the stage of issuing an arrest warrant or a summons to appear, the Pre-Trial Chamber need only be 'satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court'. (Article 58 (1)(a)) 2. In contrast, when deciding whether or not to confirm the charges, the Chamber must determine whether there is 'sufficient evidence to establish substantial grounds to believe that the person committed the crime charged'. (Article 61(7)) 3. Finally, at the trial stage, the Trial Chamber must 'be convinced of the guilt of the accused beyond a reasonable doubt' in order to convict an accused. (Article 66(3)).

on the application of the standard of proof-namely, in relation to Al Bashir's genocidal intent.<sup>131</sup> On the basis of the evidentiary standard identified by the Appeals Chamber, the PTC I accepted that there are reasonable grounds to believe that Omar Al Bashir acted with *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa ethnic group and there are reasonable grounds to believe that the material elements, common and specific, of each of the alleged counts of genocide were fulfilled and decided to issue the second warrant of arrest against Al Bashir<sup>132</sup> for his alleged criminal responsibility under article 25 (3) (a) of the Statute for genocide by killing, causing serious bodily or mental harm, deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction within the meaning of Article 6 (a) (b) (c) of the Statute, respectively.<sup>133</sup>

However, even if the genocidal charge could be approved by PTC in issuing the second arrest warrant, the Prosecutor still would have to experience the test of standard of beyond a reasonable doubt during the phase of trial if Al Bashir appear in The Hague and face the trial.

#### **4.3.3.5 Why to Pursue A New Mode of Liability?**

In the case law of the *ad hoc* tribunals, the modes of liability frequently used are joint criminal enterprise or common purpose liability as well as command and superior responsibility. But in the application of Al Bashir Warrant, instead of arguing for these common-used modes, the Prosecutor pursued an ambitious and innovative mode of liability: indirect perpetration or "perpetration by means", by stating that Al Bashir "committed crimes through members of the state apparatus, the army and the Militia/Janjaweed in accordance with Article 25 (3) (a) of the Statute (indirect perpetration or

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<sup>131</sup> Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", The Appeals Chamber, ICC-02/05-01/09-73, 3 February 2010, para 42.

<sup>132</sup> Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-95, PTC I, 12 July 2010.

<sup>133</sup> Second Decision on the Prosecution's Application for a Warrant of Arrest, ICC-02/05-01/09, PTC I, 12 July 2010, p. 28.

perpetration by means)".<sup>134</sup> This is deemed as "a bold precedent in prosecutorial strategy and a departure from the previous indictment",<sup>135</sup> since it has to date not been used before international criminal tribunals.

The reason why prosecutors usually preferred "common purpose" liability, including conspiracy and joint criminal enterprise is precisely because it is much easier to prove guilt in this way, inferring responsibility from involvement in an organization which has committed crimes in a systematic fashion. The avenue of superior or command responsibility also allows for prosecution on the basis that the accused should have known that a crime was going to be committed but took no steps to prevent it, or failed to punish crimes he knew had been committed.

By contrast, proving that Al Bashir committed the crimes as an indirect perpetrator in the way that the Prosecutor has employed, it is considerably harder to prove that an individual intended a specific crime and directly instructed others to commit on his behalf. This is especially the case for genocide, for which proof of intent is all-important. OTP outlined three elements of this mode of liability: (i) it requires proof that the perpetrator is able to impose his will over the direct perpetrator; (ii) in the case of perpetration through an organization or group, that organization or group must be structured in a way that it responds to the demand of an individual, and the individual in question- the indirect perpetrator-must possess sufficient authority to be able to enforce his will; (iii) the indirect perpetrator must be aware of his role and use it in order to commit the crimes.<sup>136</sup> By constructing this novel form of liability, the Prosecutor entered a legal territory with so few precedents. Establishment of legal precedent demands

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<sup>134</sup> Application for Warrant of Arrest under Article 58, 14 July 2008. The full text of the Application was not publicly available at the time of writing. An official summary is Prosecutor's Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad Al Bashir, available at: <http://www.icc-cpi.int/NR/rdonlyres/64FA6B33-05C3-4E9C-A672-3FA2B58CB2C9/277758/ICCOTPSummary20081704ENG.pdf>.

<sup>135</sup> Alex de Waal, 'A Critique of the Public Application by the Chief Prosecutor of the ICC for an Arrest Warrant against Sudanese President Omar al Bashir', *Social Science Research Council*, para 51.

<sup>136</sup> Application for Warrant of Arrest under Article 58, 14 July 2008. para 248, see Alex de Waal: A Critique of the Public Application by the Chief Prosecutor of the ICC for an Arrest Warrant against Sudanese President Omar al Bashir, *Social Science Research Council*, para 53.

not only courage but also wisdom. But the prospects of this innovation are bleak.

Some commentators concluded that, for genocide charge, Al Bashir would most probably fail to obtain a conviction and would be acquitted; and for war crimes and crimes against humanity using the mode of liability “perpetration by means”, he would also face a high likelihood of failing to obtain a conviction.<sup>137</sup>

Given the above controversies and difficulties, a less confrontational and potentially more productive option some argued for might have been to indict other lower-ranking but still senior officials for easier-to-prove atrocity crimes. Had such application, and any resulting warrant, been sealed, there may have been a greater chance of arresting the alleged perpetrator, without giving the credence to the claims of those who asserted that the ICC’s objective was not justice but regime change. This approach would have reduced the risks of a public dispute with the AU and some African states that are parties to the Rome Statute and are disturbed by mass atrocities perpetrated by government supported militias in Sudan and thus support the prosecution of African responsible for atrocity crimes.<sup>138</sup>

## **4.4 The Prosecutor’s Approach Outside the Courtroom**

### **4.4.1 From Conservative to Confrontational**

From the above activities that have been carried out by the Prosecutor and his Office, it is not difficult to draw out a clear line of the Prosecutor’s stance changing from conservative to confrontational. At the very beginning immediately after the Security Council’s referral, he was very cautious in particular in the initial investigation where his slow pace annoyed the PTC I and judges implicitly pressured him by invitation of two *amicus curiae*.

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<sup>137</sup>Alex de Waal: A Critique of the Public Application by the Chief Prosecutor of the ICC for an Arrest Warrant against Sudanese President Omar al Bashir, *Social Science Research Council*, paras 88-89.

<sup>138</sup> Crisis Group Africa Report N 152, “Sudan: Justice, Peace and the ICC”, 17 July 2009.

Perhaps hastened by the PTC I and the peer review by two experts, with the progress of the investigation and identification of suspects, he applied two summonses to appear and PTC I authorized two arrest warrants instead for the reason of ensuring their appearance before the Court. After that, due to the non-execution of the first two warrants and the defiant Government of Sudan, the Prosecutor made a bold and possibly risky step -applying a public arrest warrant against the incumbent Sudanese President Al Bashir. This is the landmark event in the judicial side of conflict resolution in Darfur region which surged worldwide attention and debates.

The Prosecutor's changing stance could also be observed in his Reports and statements to the Security Council. In the earlier reports, he refrained from criticizing the Government of Sudan, even though it had provided little cooperation in the beginning. Beyond that, he generously gave prominence to the limited assistance that the GoS had provided, crediting it with a measure of cooperation, such as providing to his Office information relating to the Sudanese legal system, as well as information relating to traditional processes for reconciliation relevant to Darfur,<sup>139</sup> allowing unfettered access to the requested officials in meetings that were formally video recorded.<sup>140</sup> The wording of the Prosecutor at that time was complimentary and it was expected that the Government of Sudan may continue to cooperate with the Court along the line. From the Fourth Report, however, he began to evaluate the attitude of governmental authorities more objectively with the wording of narrative-“The Government of the Sudan has also provided a limited amount of the documentation requested by the Office”,<sup>141</sup> and pointed out the rejection of request to question Ahmad Harun and Ali Kushayb,<sup>142</sup> In the Sixth Report, after the issuance of the first two arrest warrants against Ahmad Harun and Ali Kushayb, the Prosecutor publically

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<sup>139</sup> First Report to the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005) .

<sup>140</sup> Third Report to the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005) .

<sup>141</sup> Fourth Report to the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005) .

<sup>142</sup> Fifth Report to the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005) .

stated “that degree of cooperation no longer exist”<sup>143</sup> and the Government of Sudan has chosen to protect Ahmad Harun and Ali Kushayb instead of ensuring arresting them.<sup>144</sup> The Sudanese Government was in a position not only to cooperate in the arrest of Ahmad Harun but to break this system and contribute to halting crimes.<sup>145</sup> Until the recent Reports, the Prosecutor all the more bluntly criticized the non-cooperation of Sudan.<sup>146</sup>

Given pervasive culture of impunity which has worsened conflict in Darfur, the Prosecutor’s decision to issue the arrest warrant against Al Bashir is a heavy blow towards the impunity. But the ICC and in particular the Prosecutor is in a difficult position, as it has no capacity to execute its decisions independently. The manner in which the Prosecutor has sought to bring first Haroun and Kushayb and then Bashir to justice has risked politicizing his office and threatening to authority and credibility of the Court. But why did the Prosecutor take that confrontational and risky step apparently different from his conservative stance during the initial stage of investigation? The arrest warrant against Al Bashir not only suffered from wide criticism against the Prosecutor and the Court, but also resulted in a deadlock of this judicial process.

#### **4.4.2 The Analysis of the Prosecutor’s Approach**

Regarding the activities outside the courtroom, on one hand, to fulfill effective investigation, identification of suspects and surrender of them, the Prosecutor, with the existing resources of the OTP, has to seek state cooperation and other backing from international community and make extensive use of external resources. What approach the Prosecutor will employ largely depends on availability of the cooperation and support from outside so as to advance the judicial process. On the other hand, the

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<sup>143</sup> Sixth Report to the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), para 22.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*, para 23.

<sup>146</sup> Eleventh Report to the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), para. 60.

Prosecutor's approach will also affect the availability of such cooperation and support in subsequent process.

Among the potential cooperation and possible support that the Prosecutor could resort to, the Government of Sudan, the regional organization African Union and the referring organ UN Security Council would be the most possible options.

#### **4.4.2.1 The Government of Sudan**

The State in relation to the situation, in theory, should be the priority for the Prosecutor to seek for cooperation, although such state usually is hostile to the mandate of the ICC.

The Prosecutor's reliance on Government of Sudan was at least three-fold. First, he must cooperate with the government, bearing in mind with the principle of complementarity, to assess whether the domestic judicial proceedings are genuinely able or willing to prosecute relevant international crimes being pursued by the ICC; secondly, he must obtain cooperation from the government to conduct investigation in the field, for consideration of effective investigation such as providing evidence, and concerns of security of witness and victims; thirdly, he must maintain close relationship with the government for the purpose of handing over suspects to The Hague. At the early phase, the Prosecutor attempted to obtain trust and cooperation of the Sudanese government. This was explicitly expressed in his early reports and statements to the Security Council about his generous outline of Sudanese Government's very limited cooperation which has already been mentioned above. Beyond this, he also gave some assurance by clarifying some speculation around the content of the list of 51 names prepared by the Darfur Commission and the status of that list in relation to the investigations being carried out by the OTP. He stated that the list was opened and resealed in the presence of the OTP Executive Committee and remained sealed at that time. In order to convince the Sudanese authorities, he reiterated that the list just presented the conclusion of the Darfur Commission and was in no way binding on the Prosecutor and the activities and objectives of the Darfur Commission are entirely distinct from the work

of the OTP in implementing Resolution 1593 (2005).<sup>147</sup> And his conservative approach and reluctance to establish field presence inside Darfur in the initial stage of investigation was largely aimed to obtain cooperation as much as possible. A less offensive tactic usually is supposed to be more effective and flexible.

However, the Prosecutor's compliment and assurance did not effectuate. With the progress in the field and proceedings in the Court, Sudan presented its stiff stance by sheltering the suspects indicted by the Prosecutor and no longer cooperated with the ICC in any sense. Faced with consistent defiance of Sudanese Government, he explicitly criticized its non-cooperation and even resistance to the ICC. A public, unsealed warrant with charge of a gravest crime was the strongest signal sent to the Sudanese authorities that indicated his determination and decision. No matter carrot first or stick later, what the Prosecutor did was to seek cooperation from the government, albeit neither worked well.

#### **4.4.2.2 African Union**

AU is a significant regional organization which is always committed to solve regional conflicts and in Darfur crisis, it is also a key actor that makes substantial contributes to peacekeeping and peace negotiations. AU founded a peacekeeping force in 2004-African Union Mission in Sudan (AMIS)-to operating primarily in the western region of Darfur with the aim of performing peacekeeping operations related to the Darfur conflict. AMIS was the only external military force in Sudan's Darfur region until UN-African Union Mission in Darfur (UNAMID) was established. A more sizable, better equipped UN peacekeeping force was originally proposed for September 2006, but it was not implemented at that time due to Sudanese government's opposition. The mandate of AMIS was extend repeatedly throughout 2006, while the situation in Darfur continued to escalate, until AMIS was finally replaced by UNAMID in 2007.

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<sup>147</sup> Second Report to the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), 13 December 2005, p. 3.

In the Resolution 1593, paragraph 3 clearly invites the ICC and the AU to discuss practical arrangement that will facilitate the work of the Prosecutor and of the Court. To a certain extent, AU is supposed to play a crucial role in conflict solution no matter in political process or enforcement of judicial decision. Particularly for the execution of arrest warrants, AU is expected to be a key actor which coordinates enforcement affairs in the region especially when Sudanese Government is obstructive to the orders of the ICC.

After the announcement of arrest warrant against Al Bashir, AU responded quickly and requested the UN Security Council to defer the proceedings initiated against President Al Bahsir in accordance with Article 16 of the Rome Statute. Regrettably, such request had neither been heard nor acted upon. Besides reiterating its deferral request to the Security Council, it adopted a decision<sup>148</sup> which announced its non-cooperation policy with the ICC. In the decision, it expressed its deep concern at the indictment issued by the PTC against President Al Bashir,<sup>149</sup> noted with grave concern that the indictment had unfortunate consequences on the delicate peace processes underway in the Sudan and it would continue to undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur.<sup>150</sup> It decided that, in view of the fact that the request by the AU for deferral of the proceedings before the Court had never been acted upon, “the AU member states shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for arrest and surrender of President Omar Al Bashir of The Sudan”<sup>151</sup> AU and its member states reserve the right to take any further decisions or measures that may be deemed necessary in order to preserve and safeguard the dignity, sovereignty and integrity of the continent.<sup>152</sup>

The AU’s non-cooperation policy not only heavily marginalized the judicial solution of Darfur crisis dominated by the ICC but also weakened the

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<sup>148</sup> Decision on the Meeting of African States Parties to the Rome Statute of the ICC, Doc. Assembly/AU/13 (XIII), 3 July 2009.

<sup>149</sup> *Ibid.*, para 2.

<sup>150</sup> *Ibid.*, para 3.

<sup>151</sup> *Ibid.*, para 10.

<sup>152</sup> *Ibid.*, para 12

backing from the continent which is supposed to be significant to enforce the Court's decision.

### **4.4.2.3 The Security Council**

#### **4.4.2.3.1 The Legal Framework of the Security Council's Action**

When the situation was referred to the Security Council, most commentators deemed it as a great breakthrough as they believed the Courts action can be backed up by the Chapter VII enforcement mechanisms in case the relevant states fail to live up to their obligation to cooperate with the Court.<sup>153</sup> Against such failure, the Court was normally equipped with enforcement measures provided for in Article 87 (7) of the Rome Statute, once the Security Council has referred a situation, any refusal or lack of cooperation can trigger its entire enforcement machinery (including adoption of sanction).<sup>154</sup> And since the Security Council acts under authorization of Chapter VII of the Charter, it is natural that the Council would be the most solid back-up of the Court. When the Darfur Commission recommended the Security Council to refer the situation, it pointed out that “only the authority of the ICC, backed up by that of the United Nations Security Council, might compel both leading personalities in the Sudanese Government and the heads of rebels to submit to investigation and possibly criminal proceedings.”<sup>155</sup> The Security Council's potential guarantee is one of the major reasons that the Darfur Commission considered the referral was best way of accountability.

But such expectation seems to be over-optimistic. The position of the Security Council on Darfur situation before and after is not consistent. After the referral in 2005, the Security Council regularly adopted the resolutions of Reports of the Secretary General on the Sudan dealing with the issues but

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<sup>153</sup> Antonio Cassese, *Is the ICC Still Having Teething Problems?* *Journal of International Criminal Justice* 4 (2006), p. 436.

<sup>154</sup> Article 87 (7) provides that “Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.”

<sup>155</sup> Report of Darfur Commission, para 572.

it was not so active on the judicial solution of the crisis. It had adopted several resolutions under Chapter VII calling for Khartoum to disarm the *Janjaweed* and end the violence, but no meaningful sanctions were imposed for non-compliance or explicitly linked to future compliance.<sup>156</sup> After the issuance of the arrest warrants and particularly the arrest warrant against Al Bashir, no resolution echoed them and rendered forcible backing for execution of the warrants.

For example, in 2009, after the issuance of Al Bashir arrest warrant, there were altogether three resolutions (1870, 1881,1891)<sup>157</sup> adopted dealing with Sudan-they were three Reports of the Secretary-General on the Sudan. Only in resolution 1881, the most recent resolution after the warrant, it “emphasizing the need to bring to justice the perpetrators of such crimes and urging the Government of Sudan to comply with its obligations in this respect”,<sup>158</sup> but did not mention any word of the criminal proceedings in the Court, in particular the warrant against Al Bashir. No text dealing with the judicial solution of Darfur crisis appeared in the other two resolutions.

In the Resolution 1935<sup>159</sup> which was adopted on 30 July 2010, more than one year after Al Bashir warrant, except simply repeating “emphasizing the need to bring to justice the perpetrators of such crimes and urging the Government of Sudan to comply with its obligations in this respect”, no substantial content covered the compliance with judicial decisions. Resolution 1945<sup>160</sup> of 2010 did not mention either.

#### **4.4.2.3.2 The Prosecutor’s Failure to Seek Support from the Security Council**

If one argued that at the early time the Prosecutor preferred working independently from the Security Council’s authority though he could rely on

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<sup>156</sup> Kenneth A. Rodman, Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court, *Leiden Journal of International Law*, 22 (2009), p.118.

<sup>157</sup>UNSC Res 1870 (20 May 2009) UN Doc S/RES/1870, UNSC Res 1881(6 August 2009) UN Doc S/RES/1881, UN Res 1891(13 October) UN Doc S/RES/1891.

<sup>158</sup> UNSC Res 1881(6 August 2009) UN Doc S/RES/1881.

<sup>159</sup> UNSC Res 1935 (30 July 2010) UN Doc S/RES/1935.

<sup>160</sup> UNSC Res 1945 (14 October, 2010) UN Doc S/RES/1945.

it,<sup>161</sup> then, after the announcement of Al Bashir arrest warrant, confronted by the Sudanese Government's strong opposition and AU's non-cooperation policy, he turned to the Security Council which is supposed to be the last but strongest backing. In the Ninth Report to the Security Council, the Prosecutor reminded that "the Security Council might find it timely to start work on defining a framework to assist in the implementation of UNSC 1593 and the judicial decisions which have followed in relation to Darfur, and to enhance the cooperation of all parties concerned."<sup>162</sup> In his Tenth Report to the Security Council, in the section titled "cooperation including for the enforcement of arrest warrants", the Prosecutor repeated the paragraphs of Resolution 1593 and Presidential Statement 21 stating legal obligation of Sudanese Government and all parties to the conflict to cooperate with the Court and pointed out that Government of Sudan had the primary responsibility.<sup>163</sup> In addition, he encouraged other States to cooperate with the Court to execute the arrest warrants and expressed that he was grateful for the actions taken by States to respect their legal obligations and follow those guidelines.<sup>164</sup> He also credited commends to AU and some states, Chad, Uganda, South Africa, Kenya, Rwanda, Gambia and Mexico and EU.<sup>165</sup> In the two reports, the Prosecutor still expected the Security Council would work with the Court for enforcement of the arrest warrants and assumed that the Security Council should render some support even without any request.

In his Eleventh Report, when stating that the Government of Sudan has the primary responsibility and is fully able to implement the warrants with no external interference but it failed to do so,<sup>166</sup> he referred to his address to the Security Council in December 2009 that he would deal with all judicial challenge brought by President Al Bashir and other suspects in Court but he

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<sup>161</sup> He did not accept Professor Antonio Cassese's advise of reporting the government's non-cooperation to the Security Council.

<sup>162</sup> Ninth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), 5 June 2009, para 75.

<sup>163</sup> Ninth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), 5 June 2009, para 62-63.

<sup>164</sup> *Ibid.*, paras 64-65.

<sup>165</sup> *Ibid.*, paras 67-71.

<sup>166</sup> Eleventh Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), para 60.

will need the full support of the Council. He even precisely sketched how the Security Council could do:

“the UNSC can act upon UNSC 1593 and Presidential Statement 21 to secure the cooperation for the arrest of Ali Kushayb and Ahmad Harun. The Prosecution understands that the Council can accomplish this under various mechanisms including the existing UNSCR 1591 regime. UNSCR 1591, para 3(c) provides for application of these measures to individuals “who (...) commit violations of international humanitarian or human rights law or other atrocities.” The UNSCR 1591 regime has already been put into practice through UNSCR 1672, which added four names of individuals to be subject to the measures set out in UNSCR 1591, namely freezing all funds, other financial assets and economic resources owned or controlled by the individuals in question.”<sup>167</sup>

Moreover, besides pointing out that the legal framework for cooperation established by the Security Council through Resolution 1593 and Presidential Statement 21 is clear,<sup>168</sup> the Prosecutor cited the case of ICTY as a precedent, where Presidential Statement of August 8, 1996 raised the prospects of economic sanctions in the event of continued non-compliance with the orders of the ICTY. In Resolution 1088 (1996), the Security Council threatened to discontinue international financial aid in the face of lack of compliance with the Tribunal’s order.<sup>169</sup> The Prosecutor, by recalling the action of the Security Council at the time of ICTY, aimed to enhance some prospects of support and implied the Security Council to take some similar measures for the enforcement of the arrest warrants. Unfortunately, such reminder and explicit request had not been echoed by the Security Council.

The Security Council’s inaction in Darfur affairs can be apparently compared with its clearly strong position in the most recent situation in Libya. As the second referral to the Prosecutor by the Council, it acted more actively than it did in Darfur. No more than one month after the referral, it

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<sup>167</sup> Eleventh Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), para 63.

<sup>168</sup> *Ibid.*, para 65.

<sup>169</sup> *Ibid.*, para 64.

adopted Resolution 1973, approving “no-fly zone” over Libya and authorizing “all necessary measures” to protect civilians.<sup>170</sup> The Resolution 1973 was adopted no more than one month after the referring Resolution 1970 of 26 February 2011. This is the drastic contrast with its inaction in Darfur crisis. It can be predicted that, if the Prosecutor decided to indict Omar Mouammer al Gaddafi and the PTC approved the arrest warrant against this Libyan leader, it would be likely that the Security Council take some necessary measures even sanction if Libyan government did not cooperate with the Court in arresting Gaddafi.

Given the inaction and even indifference of the Security Council as well as the inherent flaws in the Resolution 1593 which has been analyzed in Chapter II, it appears to be legally paradoxical that the Security Council, on one hand, referred the situation in Darfur to the Court, and on the other hand, cut the funds, blurred its authorization and reacted passively to the Prosecutor’s request for support. Its unwillingness to authorize enforcement is incompatible with the referral because it cannot simultaneously subject the government to criminal scrutiny and non-coercively seek its cooperation and compliance. Of course, what seems hardly conceivable from the perspective of law and logic may be perfectly explained in terms of politics.<sup>171</sup> The referral by the Security Council, like the creation of ICTY in the early phase of the Bosnian war, created a criminal justice process unaccompanied by enforcement actions against behavior deemed to be criminal. The Prosecutor, upon receiving the situation in Darfur referred by the Security Council, may have been handling a task which is bound to fail.

### **4.4.3 Some Reflections on the Prosecutor’s Approach Outside the Courtroom**

In dealing with the situation in Darfur referred by the Security Council, the Prosecutor seemed to move forward under skepticism and criticisms from

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<sup>170</sup> UNSC Res 1973(17 March 2011), UN Doc S/RES/1973.

<sup>171</sup> Luigi Condorelli and Annalisa Ciampi, Comments on the Security Council Referral of the Situation in Darfur to the ICC, *Journal of International Criminal Justice* 3 (2005), p. 593.

all around: the PTC, the experts who have similar professional background and expertise with him, the state concerned, civil society organizations and others. The critical voice achieved to the summit when he applied Al Bashir arrest warrant. While perhaps it held true that the prosecutorial strategy suggested that the Prosecutor is not only gambling with the future of Sudan, but with the future of the ICC as well,<sup>172</sup> bearing in mind with complex non-legal factors, some observations could be summed up in the following aspects to assuage his fault.

First, at the initial stage of investigation, the PTC I was not satisfied with the Prosecutor's slow pace and lit a fire between PTC and OTP by inviting two *amicus curiae* to submit their observations on the investigative strategy the Prosecutor employed. However, the mandate of the ICC is to punish the perpetrators who have committed grave crimes and prevent future commission of such crimes but not to make political discomfort or diplomatic chaos between states concerned and the court. What's more, given the fact that the state concerned is not a party to the Rome Statute and it is potentially hostile to the ICC, the Prosecutor had to adopt a diplomatic and flexible strategy rather than a aggressive one in particular at the early phase of investigation.

Though Cassese suggested in his observation that the Prosecutor should have reported the refusal and non-cooperation of Sudanese authorities, if any, to the Security Council,<sup>173</sup> taking such advice may not contribute to improvement of investigation considering the indifference of the Security Council. The only benefit for the Prosecutor to follow this piece of advice is to transfer the fault to the Security Council so as to avoid criticism directly against himself.

Secondly, regarding the claim that the Prosecutor should have accused other senior officials instead of a sitting President, he probably made the decision on basis of practice of solution of other conflicts. The recent history shows that stigmatizing and marginalizing leaders who are under warrant for arrest

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<sup>172</sup> Alex de Waal, 'A Critique of the Public Application by the Chief Prosecutor of the ICC for an Arrest Warrant against Sudanese President Omar al Bashir', *Social Science Research Council*, para 94.

<sup>173</sup> Cassese Observation, p. 6,10, also see Antonio Cassese, 'Is the ICC Still Having Teething Problems?', *Journal of International Criminal Justice*, 4 (2006), p.439.

can strengthen peace processes. The arrest warrants against Charles Taylor of Liberia and Radovan Karadzic in Bosnia and Herzegovina removed them from peace processes and ultimately facilitated the reaching of agreements. In addition, many credit the ICC warrants against the leaders of the Lord's Resistance Army in Uganda for their willingness to participate in peace talks for the first time in years.<sup>174</sup> But for the situation in Darfur, Al Bashir has not been committed in the peace negotiation and peace process has already been fragile and trapped in stalemate even if no warrant against him was issued. What's more, Al Bashir can exert influence over his Party and armed force and openly opposed the Court's decisions, eg., after the PTC I issued the arrest warrant against Haroun, Al Bashir still allowed him to play a role in the government ministry. Removing Bashir from power status seems to be the only way for the ultimate solution of Darfur conflict.

Thirdly, it is possible that the Prosecutor's seeking of a public application of the arrest warrant instead of a sealed summons to appear is to pursue the effect of public advocacy, though such attempt is risky. When confronted with stiffer Government of Sudan and indifference of the Security Council, a sealed summons to appear or even a sealed arrest warrant would not necessarily have the supposed elements of surprise and uncertainty, while a more aggressive public arrest warrant, to a certain extent, could send a message that the ICC dare to prosecute a serving president of the state and it is speculated that the Prosecutor attempted to resort to assertive means to call for serious concerns from the whole international community.

Moreover, a sealed indictment in fact is not always useful. At the Special Court of Sierra Leone, Liberian President Charles Taylor was the subject of a sealed indictment but it never helped to arrest Charles Taylors. The utility of the practice seemed marginal at best.<sup>175</sup> At the ICC, in the situation in Uganda, the practice of sealed arrest warrant seemed not so effective, either. The Prosecutor applied for five sealed arrest warrants. Yet, more than one year after the unsealing, none of the warrants had been executed. At the time

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<sup>174</sup> Human Rights Watch: *Q&A: International Criminal Court 's Action Against Al Bashir*, <http://www.hrw.org/en/news/2008/11/02/q-international-criminal-court-s-action-against-al-bashir>.

<sup>175</sup> William A. Schabas, *supra* note 14, p.184.

of writing, except the decision of PTC II to terminate the proceedings against Raska Lukwiya, the warrant of arrest is rendered without effect and the other four accused are still at large.

Regarding the situation in Darfur, the posture of Sudanese authorities, the worsening of the situation in Darfur and inaction of the whole international community clearly indicate that the ICC's decision does not yet have a surprising effect. There actually seems no significant difference between a sealed warrant and a public one. A public indictment against a sitting leader probably was the last chance to which the Prosecutor could resort to move proceedings forward when external resources have been almost exhausted.

Fourthly, the Prosecutor's characterisation of crimes in Darfur as genocide has some other possible consequences which could explain why he insisted this charge even if it is extremely difficult to establish. Under Article 1 of the Genocide Convention, all state parties are obliged to prevent and punish the crime of genocide. As interpreted by the International Court of Justice in the *Bosnian Genocide* case,<sup>176</sup> the obligation to prevent genocide is not limited to the state's own territory.<sup>177</sup> The obligation is incumbent on all states, and it requires them to exercise due diligence and "employ all means reasonably available to them, so as to prevent genocide so far as possible."<sup>178</sup> A State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.<sup>179</sup> Though genocide charge is particularly difficult to prove, at the minimum, an arrest warrant with genocide charge can oblige all state parties to the Genocide Convention to respond to the decision of the ICC on the legal basis of Genocide Convention even if they find no obligation to cooperate with the ICC flowing from the Rome Statute or Resolution 1593. Roughly 140 states have ratified or acceded to the Genocide Convention. In particular, on October 13, 2003, Sudan deposited instruments of accession to the Genocide Convention with the United Nations and the Genocide

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<sup>176</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgment, 27 February 2007, [Genocide Judgment].

<sup>177</sup> Genocide Judgment, para 183.

<sup>178</sup> Genocide Judgment, para 430.

<sup>179</sup> Genocide Judgment, para 431.

Convention entered into force for Sudan on 11 January 2004.<sup>180</sup> Hence, in addition to cooperation obligation arising from the Resolution 1593, the Genocide Convention provides another guarantee even if Sudan does not accede to the Rome Statute.

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<sup>180</sup> List of parties to the Genocide Convention,  
[http://en.wikipedia.org/wiki/List\\_of\\_parties\\_to\\_the\\_Genocide\\_Convention](http://en.wikipedia.org/wiki/List_of_parties_to_the_Genocide_Convention) ,

# 5 The Prosecutor's Performance

## In the Courtroom

### 5.1 Failure of Confirmation of Charges in *Abu Garda Case*

Sooner after the warrant against the President Al Bashir, the PTC issued a summons to appear under seal against a senior member of the Justice and Equality Movement (JEM), Abu Garda,<sup>181</sup> in relation to commanding about 1000 men to attack international peacekeepers and killing twelve African Union peacekeepers in Haskanita in 2007. Ten days later, the summons was unsealed. PTC I held that he committed three war crimes: violence to life under article 8 (2) (c)(i) and 25 (3) (a) and/or (f) of the Statute (Count 1), intentionally directing attacks against personnel, installations, material, units and vehicles involved in a peacekeeping mission under article 8 (2) (e) (iii) and 25 (3) (a) of the Statute (Count 2) and pillaging under article 8 (2) (e) (v) and 25 (3) (a) of the Statute (Count 3).<sup>182</sup> Abu Garda is alleged that he is individually criminally responsible as a co-perpetrator or as an indirect co-perpetrator for the counts of war crimes.<sup>183</sup>

Some day after the unsealing, Abu Garda appeared voluntarily before the Court. Abu Garda was the first person to appear voluntarily before the ICC. The rebel chief agreed to surrender himself voluntarily to face the charges saying he is confident of his innocence.<sup>184</sup>

Promptly upon arriving at the Court, Abu Garda would be heard before the PTC, in the presence of the Prosecutor for confirmation of charges in

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<sup>181</sup> Summons to Appear for Bahr Idriss Abu Garda, ICC-02/05-02/09-2, PTC I, 7 May 2009.

<sup>182</sup> ICC, Counts:<http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/Related+Cases/ICC02050209/ICC02050209.htm>,

<sup>183</sup> *Ibid.*

<sup>184</sup> Sudan Tribune: *ICC Prosecutor to Appeal Ruling Against Darfur Rebel*, [http://www.sudantribune.com/spip.php?page=imprimable&id\\_article=34151](http://www.sudantribune.com/spip.php?page=imprimable&id_article=34151).

accordance with Article 61 of the Statute. Article 61 (1) specifies that the confirmation hearing “shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel”. But a confirmation hearing is not a trial.

On 8 February 2010, in the confirmation of charges, PTC I dismissed the charges of prosecution. In the “Decision on the Confirmation of Charges”, PTC I found that the evidence brought by the Prosecution was not sufficient to establish substantial grounds to believe that the suspect could be held criminally responsible for the crimes charged by the Prosecution<sup>185</sup> and hence refused to confirm the charges against Abu Garda, The Prosecutor applied for leave to appeal the “Decision on the Confirmation of Charges”.<sup>186</sup> The Prosecution argued that the Chamber wrongly discounted evidence, applied an incorrect legal test in its evaluation of the evidence of Abu Garda’s authority and control over the group that carried out attacks in Haskanita and ignored critical factual allegations and evidence concerning events during the immediate aftermath of the attack.<sup>187</sup> It submitted that the evidence it has presented, when assessed under the correct standard, already suffices to justify confirmation.<sup>188</sup>

On 23 April 2010, PTC I rejected the Prosecutor’s application for leave to appeal the decision on confirm charges against Abu Garda. It held that the alleged issue amounts to a mere disagreement with the findings of the Chamber, stemming from the exercise of its discretionary powers to freely assess the evidence submitted by the Prosecution for the purposes of the confirmation hearing and such disagreement does not amount to an issue under Article 82 (1)(d).<sup>189</sup> Hence, all charges against Abu Garda were dismissed. But in accordance with Article 61 (8) of the Rome Statute, the decision does not preclude the prosecution from subsequently requesting

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<sup>185</sup> Decision on the Confirmation of Charges, PTC I, ICC-02/05-02/09-243-Red, 8 February 2010, paras 231-233.

<sup>186</sup> Prosecution’s Application for Leave to Appeal the “Decision on the Confirmation of Charges”, ICC-02/05-02/09-252-Red, PTC I, 15 March 2010.

<sup>187</sup> *Ibid.*, para 1.

<sup>188</sup> *Ibid.*, para 2.

<sup>189</sup> Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'", PTC I, 23 April 2010, para 25.

confirmation of the charges if such a request is supported by additional evidence.

Judge Cuno Tarfusser gave his separate opinion on the "Decision on the Confirmation of Charges". He dissociated himself in several respects from the reasoning developed by the Majority. Regarding the Prosecutor's assessment of evidence, he pointed out that "the lacunae and shortcomings exposed by the mere factual assessment of the evidence are so basic and fundamental that the Chamber need not conduct a detailed analysis of the legal issues pertaining to the merits of the case, in particular as to the existence of the material elements constituting any of the crimes charged."<sup>190</sup>

The findings of PTC and the separate opinion are surely damaging for the Prosecutor. Some commentator is view of that "it is not just another setback for Chief Prosecutor. It is an astonishing tale of incoherence, inconsistency and poor legal practice, surely unprecedented in a court of this stature" and even doubted his capacity to lead the OTP, already so damaged by his tenure.<sup>191</sup>

## 5.2 Reflection on the Procedure of Confirmation of Charges

The procedure of confirmation of charges has no equivalent in national legal systems. Establishment of the confirmation hearing within the procedural architecture of the Rome Statute is an important example of the increased judicial control by the judiciary over the Prosecutor that sets the ICC apart from other international criminal justice institutions.<sup>192</sup> According to PTC I, in the first confirmation hearing, the purpose of the confirmation hearing is to protect the defendant against abusive and unfounded accusations.<sup>193</sup>

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<sup>190</sup> Decision on the Confirmation of Charges, Separate Opinion of Judge Cuno Tarfusser, p. 99.

<sup>191</sup> The Abu Garda Case and the OTP, <http://blogs.ssrc.org/sudan/2010/02/09/the-abu-garda-case-and-the-otp/>.

<sup>192</sup> M. Cherif Bassiouni (eds.), *The Statute of the International Criminal Court, A Documentary History*, (Transnational Publisher, 1998), p.735.

<sup>193</sup> *Prosecutor v. Lubanga*, Case No.ICC-01/04-01/06.

The proceeding requirements of confirmation of charges are laid down in Article 61 of the Statute. According to this article, within a reasonable time after the accused person's appearance before the Court, the PTC must hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. At the hearing, which must be held in the presence of the Prosecutor, the accused and his or her counsel, the PTC has to be satisfied that there are substantial grounds to believe that the person committed the crimes with which he or she is charged. In the 1996 session of the Preparatory Commission of Rome Statute, some delegations feared that, without some degree of judicial intervention and assistance, an accused would be *de facto* precluded from collecting evidence essential to the preparation of his or her defense.<sup>194</sup>

From the perspective of right to a fair trial, the confirmation of charges provides the accused with procedural guarantee of a certain degree. Nevertheless, ICTY former Chief Prosecutor Louise Arbour took a critical view on this procedure. In her view, such provision "permitted judges to call on the Prosecutor to seek a public reconfirmation of indictments for the purpose of issuing international arrest warrants when arrests had not yet been effected. The benefit of this process was obviously to satisfy the appetite of the press for access to the investigative phase of the work of the Tribunal—a phase not typically conducted in public. In turn, the process led to the increased visibility of the Tribunal, and provided a forum to mobilize public opinion in favor of aggressive arrest initiatives and budgetary support."<sup>195</sup> But she personally does not know if recourse to this provision was either necessary or effective for this purpose. On the other hand, she believed that recourse to this provision was detrimental to the work of the Prosecutor and she was never persuaded that its benefits outweighed its deleterious effects. It monopolized important and scarce resources within OTP with investigators and prosecutors re-examining the case for hearing preparation rather than moving on to developing new cases and it also gave

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<sup>194</sup> William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, (Oxford University Press, 2010), pp.236-237.

<sup>195</sup> Louise Arbour, 'The Crucial Years', *Journal of International Criminal Justice* 2 (2004), p.399.

the trial attorneys a false sense of security and confidence in the quality of their case. Evidence always looks better when it is unopposed and unchallenged.<sup>196</sup>

For the ICC Prosecutor, *Abu Garda* case is crucially important for the situation in Darfur because when other suspects are all at large, Abu Garda is the first one who voluntarily appeared before the Court. His appearance advanced the proceeding into stage of confirmation of charges and drugged the proceedings out of the deadlock. The successful confirmation of charges would have been a possible opportunity where the Prosecutor could use it to save the credibility of the Court and his own fame which were doubted worldwidely due to Al Bashir Arrest Warrant. However, he was definitely confronted with the very challenge that Louise Arbour had been afraid of and lost the case.

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<sup>196</sup> *Ibid.*

## 6 Concluding Remarks

It seems that, the ICC Prosecutor have been faced with more criticism than compliment when he play his role in dealing with Darfur crisis at the arena of internatioal criminal justice, both the manner in which he has carried out investigation, identified suspects to arrest outside the courtroom and proved charged crimes in the courtroom.

Nevertheless, it is unwarranted to evaluate whether the Prosecutor is a well qualified or not and whether he performs his mandate appropriately, without taking into other variables.<sup>197</sup> His role as a Prosecutor of a permanent international criminal court depends on many factors, such as the mechanism designed in the Rome Statute including powers of the Prosecutor, the relationship between the ICC and the UN Security Council, and even rules of proof and evidence.

Mr. Luis Ocampo-Moreno is the first Chief Prosecutor of the ICC and he doubtlessly understood the structural and political constraints he faced as the first chief prosecutor. For such a figure with a huge mandate but weak equipment, he was making headway against the huge difficulties of building and operating the OTP while under crushing pressure to avoid political missteps but to stride boldly against a wide range of crimes and criminals.

Though it would blend justice with politics when talking of these issues in the framework of politics, it is unrealistic to isolate international justice from the complex political environment where it is seated. And there is no doubt that Prosecutor's assessment of world climate and attitudes of states concerned is the very leverage that he utilizes to identify situations and cases, suspect targeting and strategy employment.

As the first situation referred by the Security Council, it is also the first time to test his ability to deal with defiant state government, non-cooperative regional organization and inactive Security Council at the same time. Confronted by the challenge of establishing the credibility of the Court and

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<sup>197</sup> Some commentators gave a particularly critical assessment, *see* Julie Flint and Alex de Waal, 'Case Closed: A Prosecutor Without Orders', *World Affairs Journal*, spring 2009.

demonstrating that it is able to share the role in conflict resolution in a judicial approach with a political organ the Security Council, some attempts have to be made.

Some lessons and experience could be drawn from these unsuccessful attempts for the future similar situations and for his successors. At least two respects could be sketched here.

First, almost each situation arriving at the ICC, regardless referred by the Security Council, by the State parties or initiated by the Prosecutor on his own, would be necessarily mixed with political elements. Confronted with the tension between justice and politics, though some attempts could be and should be explored for the pursuit of justice, the Prosecutor, before making decisions and implementing them, should predict possible outcomes and impacts by assessing political climate and availability of resources he could obtain and keep in mind that the Court always suffers from its fatal weakness in lack of enforcement power. It would be unwise to make risky attempts at the cost of the credibility of the ICC and authority of his own, particularly when the ICC is young.

Secondly, it is understandable that as the first chief prosecutor, like those law elite in *ad hoc* Tribunals who developed smart prosecutorial strategy and outstanding doctrines of international criminal law in their judicial practice, Mr. Ocampo-Moreno also would like to make some innovations by every means, such as a new mode of liability in the Al Bashir Arrest Warrant, either for better realization of international criminal justice or for development of international criminal law and contribution to academics, but such ambitious prospects should not override his mandate and mission as a prosecutor-to successfully prosecute the perpetrators who otherwise would go unpunished.

# Supplement

## UNSC Resolution 1593

*“The Security Council,*

*“Taking note* of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60),

*“Recalling* article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

*“Also recalling* articles 75 and 79 of the Rome Statute and encouraging States to contribute to the ICC Trust Fund for Victims,

*“Taking note* of the existence of agreements referred to in Article 98-2 of the Rome Statute,

*“Determining* that the situation in Sudan continues to constitute a threat to international peace and security,

*“Acting* under Chapter VII of the Charter of the United Nations,

“1. *Decides* to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;

“2. *Decides* that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no

obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;

“3. *Invites* the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;

“4. *Also encourages* the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur;

“5. *Also emphasizes* the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace, with African Union and international support as necessary;

“6. *Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;

“7. *Recognizes* that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;

“8. *Invites* the Prosecutor to address the Council within three months of the date of adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;

“9. *Decides* to remain seized of the matter.”

# Bibliography

## Books

William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, 2007.

William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010.

Roy S. Lee (eds.), *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, Kluwer Law International, 1999.

Benjamin N. Schiff, *Building the International Criminal Court*, Cambridge University Press, 2008.

Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article, Second Edition*, C. H. Beck-Hart-Nomos, 2009.

M. Cherif Bassiouni (eds.), *The Statute of the International Criminal Court, A Documentary History*, Transnational Publisher, 1998.

Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2008.

## Articles

Antonio Casses, 'Is the ICC Still Having Teething Problems?', *Journal of International Criminal Justice*, 4 (2006). pp. 434-441.

Manisuli Ssenyonjo, 'The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan', *International and Comparative Law Quarterly*, vol 59, January 2010, pp.205-225.

Victor Peskin, 'Caution and Confrontation in International Criminal Court's Pursuit of Accountability in Uganda and Sudan', *Human Rights Quarterly* 31 (2009), pp. 655-691

Matthias Neuner, 'The Darfur Referral of the Security Council and the Scope of the Jurisdiction of the International Criminal Court', *Yearbook of International Humanitarian Law*, Vol.8, 2005, pp.320-343.

Lutz Oette, 'Peace and justice or neither? The Repercussions of the al-Bashir case for International Criminal Justice in Africa and Beyond', *Journal of International Criminal Justice* 8 (2010) pp.345-364.

Luigi Condorelli and Annalisa Ciampi, 'Comments on the Security Council Referral of the Situation in Darfur to the ICC', *Journal of International Criminal Justice* 3 (2005), 590-599.

Carla Del Ponte, 'Investigation and Prosecution of Large-scale Crimes at the International Level-The Experience of the ICTY', *Journal of International Criminal Justice*, 4 (2006), 539-558.

Louise Abour, 'The Crucial Years', *Journal of International Criminal Justice* 2 (2004), 396-402.

L. Moreno-Ocampo, 'The International Criminal Court-Some Reflections', *Yearbook of International Humanitarian Law*, Vol.12, 2009, pp.3-12.

Carla Del Ponte, 'Prosecuting the Individuals Bearing the Highest Level of Responsibility', *Journal of International Criminal Justice* 2 (2004), pp.516-519.

Kenneth A. Rodman, 'Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court', *Leiden Journal of International Law*, 22 (2009), pp.99-126.

Alex de Waal, 'A Critique of the Public Application by the Chief Prosecutor of the ICC for an Arrest Warrant against Sudanese President Omar al Bashir', *Social Science Research Council*.

### **UN Documents and Reports**

Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005.

UNSC Res 1564 (September 18 2004) UN Doc S/RES/1564.

UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593.

UNSC Res 1870 (20 May 2009) UN Doc S/RES/1870.

UNSC Res 1881 (6 August 2009) UN Doc S/RES/1881.

UNSC Res 1891 (13 October 2009) UN Doc S/RES/1891.

UNSC Res 1881 (6 August 2009) UN Doc S/RES/1881.

UNSC Res 1935 (30 July 2010) UN Doc S/RES/1935.  
UNSC Res 1945 (14 October, 2010) UN Doc S/RES/1945.

UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

### **ICC Documents**

Paper on some policy issues before the Office of the Prosecutor, ICC-OTP, 2003.

Report on Prosecutorial Strategy, The Office of the Prosecutor, ICC-OTP, 14 September 2006.

Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), First to Twelfth.

### **Internet**

Washington Post, *Darfur's Real Death Toll*, <http://www.washingtonpost.com/wp-dyn/articles/A12485-2005Apr23.html>

Human Rights Watch, *Lack of Conviction: The Special Criminal Court on the Events in Darfur* 3-4, <http://hrw.org/backgrounder/ij/sudan0606/sudan0606.pdf>

Sudan Tribune, *US State Dept. Still Characterizes Darfur Situation as Genocide*, <http://www.sudantribune.com/US-State-Dept-still-characterizes,31555>.

Guardian, *Sudanese president Bashir charged with Darfur war crimes*, 4 March 2009, <http://www.guardian.co.uk/world/2009/mar/04/omar-bashir-sudan-president-arrest>.

Sudan Tribune: *ICC Prosecutor to Appeal Ruling against Darfur Rebel Commander*, [http://www.sudantribune.com/spip.php?page=imprimable&id\\_article=34151](http://www.sudantribune.com/spip.php?page=imprimable&id_article=34151)

List of State Parties to the Genocide Convention, [http://en.wikipedia.org/wiki/List\\_of\\_parties\\_to\\_the\\_Genocide\\_Convention](http://en.wikipedia.org/wiki/List_of_parties_to_the_Genocide_Convention).

The Abu Garda Case and the OTP, <http://blogs.ssrc.org/sudan/2010/02/09/the-abu-garda-case-and-the-otp/>

(All links are retrieved on 26 May 2011)

# Table of Cases

## **International Criminal Court (ICC)**

*Situation in Uganda*, ICC-02/04, 29 January 2004.

*Situation in the Central African Republic*, ICC-01/05, 7 January 2005.

*Situation in Libya Arab Jamahiriya*, ICC-01/11, 26 February 2011.

*Situation in the Republic of Kenya*, ICC-01/09, 6 November 2009.

*Situation in Darfur, Sudan* (ICC-02/05-1), 31 March 2005

Decision Assigning the Situation in Darfur, Sudan to Pre-Trial Chamber I (PTC I), ICC-02/05-1, The Presidency, 21 April 2005.

Observations on issues concerning the protection of victims and the preservation of evidence in the proceedings on Darfur pending before the ICC, ICC-02/05-14, PTC I, 1 January 2006.

Observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence, ICC-02/05-19, PTC I, 10 October 2006.

Prosecutor's response to Cassese's Observation on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC, ICC-02/05-16, PTC I, 11 September 2006.

Prosecutor's response to Arbour's observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence, ICC-02/05-21, PTC I, 19 October 2006.

Case *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, ICC-02/05-01/07  
Prosecutor's Application under Article 58 (7), ICC-02/05-01, PTC I, 27 February 2007.

Decision on the Prosecution Application under Art 58 (7) of the Statute, ICC-02/05-01/07-1, PTC I, 27 April 2007.

Case *The Prosecutor v. Omar Hassan Ahmad Al Bashir ("Al Bashir")*, ICC-02/05-01/09

Application for Warrant of Arrest under Article 58, 14 July 2008. The full text of the Application was not publicly available at the time of writing. An official summary is Prosecutor's Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad Al Bashir, available

at: <http://www.icc-cpi.int/NR/rdonlyres/64FA6B33-05C3-4E9C-A672-3FA2B58CB2C9/277758/ICCOTPSummary20081704ENG.pdf>

Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-1, PTC I, 4 March 2009.

Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, PTC I, 4 March 2009. [Decision on Al Bashir Arrest Warrant]

Prosecution Document in Support of Appeal against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-25, The Appeals Chamber, 6 July 2009.

Judgment on the Appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-73, The Appeals Chamber, 3 February 2010.

Second Decision on the Prosecution's Application for a Warrant of Arrest, Pre-Trial Chamber I, ICC-02/05-01/09-94, PTC I, 12 July 2010.

Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-95, PTC I, 12 July 2010.

Case *The Prosecutor v. Abu Gardu* (ICC-02/05-02/09)

Summons to Appear for Bahr Idriss Abu Garda, ICC-02/05-02/09-2, PTC I, 7 May 2009.

Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, PTC I, 8 February 2010.

Prosecution's Application for Leave to Appeal the "Decision on the Confirmation of Charges", ICC-02/05-02/09-252-Red, PTC I, 15 March 2011.

Decision on the "Prosecution's Application for Leave to Appeal the 'Decision on the Confirmation of Charges'", ICC-02/05-02/09-267, PTC I, 23 April 2010.

Case *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09

Summons to Appear for Saleh Mohammed Jerbo Jamus, ICC-02/05-03/09-2, PTC I, 27 August 2009.

Summons to Appear for Abdallah Banda Abakaer Nourain, ICC-02/05-03/09-3, PTC I, 27 August 2009.

*Situation in Uganda* (ICC-02/04-01/05-20), 29 January 2004

Case *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Domonic Ongwen*, ICC-02/04-01/05  
Prosecutor's Application for Unsealing of the Warrants of Arrest, ICC-02/04-01/05-136, PTC II, 9 September 2005.

*Situation in the Democratic Republic of the Congo*, ICC-01/04, 19 April 2004.

Case *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06.

### **International Criminal Tribunal for Rwanda (ICTR)**

*The Prosecutor v. Jean Paul Akayesu*, ICTR-96-4-T, Judgment, Trial Chamber, September 2, 1998.

### **International Court of Justice (ICJ)**

*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ, Judgment, 27 February 2007.