

Sudan, Arrest Warrant for Omar Al-Bashir

A. United Nations Security Council Resolution 1593

[Source: United Nations Security Council, Resolution 1593 (2005), 31 March 2005, Doc. S/RES/1593 (2005), available at [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1593\(2005\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1593(2005))]

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

Resolution 1593 (2005)

Adopted by the Security Council at its 5158th meeting, on 31 March 2005

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 [...], [See Sudan, Report of the UN Commission of Enquiry on Darfur]

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,

[...]

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;

[...]

1. *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;

[...]

1. *Decides* to remain seized of the matter.

B. ICC Prosecutor's Application for an Arrest Warrant

[Source: International Criminal Court, "Prosecutor's Statement on the Prosecutor's Application for a Warrant of Arrest under Article 58 Against Omar Hassan Ahmad AL BASHIR", 14 July 2008, available at <http://www.icc-cpi.int>]

Mr. Luis Moreno-Ocampo

Prosecutor of the International Criminal Court

Prosecutor's Statement on the Prosecutor's Application for a Warrant of Arrest under Article 58 Against Omar Hassan Ahmad AL BASHIR

The Hague, 14 July 2008

Good afternoon Ladies and Gentlemen.

I have submitted to the Judges an application for the issuance of an arrest warrant against Omar Hassan Ahmad AL BASHIR, for genocide, crimes against humanity and war crimes. [...]

AL BASHIR bears criminal responsibility:

- for genocide under Article 6(a), killing members of the Fur, Masalit and Zaghawa ethnic groups, (b) causing serious mental harm, and (c) deliberately inflicting conditions of life calculated to bring about their physical destruction in part;
- for crimes against humanity, including acts of (a) murder, (b) extermination, (d) forcible transfer of the population, (f) torture and (g) rapes; and
- war crimes for intentionally directing attacks against the civilian population and pillaging.

The jurisdiction of the Court comes from a referral by the UN Security Council. [...]

C. Statement of the Arab Transitional Parliament

[Source: Arab Transitional Parliament's Committee for Legislative, Legal and Human Rights Affairs, "Statement on the ICC Prosecutor's Request to Issue Arrest Warrant against President Omar Hassan Ahmad Al-Bashir, President of the Republic of the Sudan", 5 August 2008, available at <http://www.arableagueonline.org>]

Statement of The Arab Transitional Parliament's Committee for Legislative, Legal and Human Rights Affairs

At the Committee's Meeting at Damascus, Capital of the Syrian Arab Republic

On August 4-5 2008

On The ICC Prosecutor's Request to Issue Arrest Warrant against President/ Omar Hassan Ahmad Al-Bashir, President of the Republic of the Sudan

Damascus August 5th 2008

[...]

I- On the Security Council Referral Resolution to the ICC The Committee emphasizes the following:

First: The Committee is astounded at the position of the ICC towards the Sudan which discloses grave insufficiency of the legal knowledge and blatant deviation from Rome Statute as well as conspicuous political allegations underlying the ICC Prosecutor request.

[...]

Seventhly: The Committee deems this resolution absolutely null and void since the Sudan is not party to the ICC statute, and hence the Security Council may not apply the provision of Article 13 of Rome Statute to the

Sudan as long as the statute exclusively applies to parties thereto.

Eighthly: The Committee believes that the mandate of the Security Council under Chapter VII of the UN Charter is to take measures necessary to maintain international peace and security and not vice versa. Accordingly, the conflict in the Sudan is an internal affair and is not covered by the provisions of Chapter VII of the UN Charter on the grounds of which the Security Council took the decision of referral to the ICC.

II- On the ICC Prosecutor Request

The Committee believes that the ICC Prosecutor request suffers from serious legal flaws notably:

1. It is a precedent that the ICC accuses a state head who is exercising his powers and enjoys international immunity according to the internationally recognized pacts and conventions. This precedent stands in contrast with all other cases examined by the ICC and referred to it by African member states against rebel groups on their soils and the ICC provided assistance to these states against the rebels.

[...]

1. The Sudan is not party to “Rome Statute”, so the Security Council may not take a decision to refer the file to the ICC and proceed with investigation. Therefore, the arrest warrant against the President of the Sudan is null as it violates the relative effect of conventions which are only productive and effective between parties thereto subject to Article (34) of Vienna Convention on the Law of Treaties.
2. The ICC Prosecutor disregards the issue of immunity from criminal jurisdiction and its significance and the judgment delivered by the International Court of Justice (ICJ) in the case of Mr. Abdulaye Yerodia, Congolese Minister of Foreign Affairs, in 2002 [See ICJ, *Democratic Republic of the Congo v. Belgium*] which emphasized that jurisdictional immunity prevails vis-à-vis foreign and international courts. The ICJ’s judgment was in favor of the Republic of the Congo against Belgium which had to amend Article (12) of its Criminal Procedures Code in conformity with the judgment to the effect that incumbent officials who enjoy immunity may not be tried before foreign courts.

[...]

1. Disregard on the part of the ICC Prosecutor of the distinction between member state and non member state has caused him to invoke Article (21) which disregards immunity of state heads though this Article exclusively applies to member states at the time of trial, for immunity from criminal jurisdiction precludes both national and international judiciaries.

[...]

D. ICC Pre-Trial Chamber’s Decision on the Application for an Arrest Warrant

[Source: International Criminal Court, “Decision on the Prosecution’s Application for a Warrant of Arrest

Date: 4 March 2009

PRE-TRIAL CHAMBER I

[...]

**SITUATION IN DARFUR, SUDAN
IN THE CASE OF
THE PROSECUTOR**

**v.
OMAR HASSAN AHMAD AL BASHIR (“OMAR AL BASHIR”)**

[...]

Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir

[...]

III. Whether the case against Omar Al Bashir falls within the jurisdiction of the Court and is admissible

A. The case against Omar Al Bashir falls within the jurisdiction of the Court

1. Article 19(1) of the Statute requires the Chamber to satisfy itself that any case brought before it falls within the jurisdiction of the Court.
2. In this regard, the Chamber previously stated that:

[...]

[...] article 12(2) does not apply where a situation is referred to the Court by the Security Council acting under Chapter VII of the Charter, pursuant to article 13(b) of the Statute. Thus, the Court may, where a situation is referred to it by the Security Council, exercise jurisdiction over crimes committed in the territory of States which are not Party to the Statute and by nationals of States not Party to the Statute.

[...]

1. Furthermore, in light of the materials presented by the Prosecution in support of the Prosecution Application, and without prejudice to a further determination of the matter pursuant to article 19 of the Statute, the Chamber considers that the current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court’s jurisdiction over the present case.
2. The Chamber reaches this conclusion on the basis of the four following considerations. First, the Chamber notes that, according to the Preamble of the Statute, one of the core goals of the Statute is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which “must not go unpunished”.
3. Second, the Chamber observes that, in order to achieve this goal, article 27(1) and (2) of the Statute

provide for the following core principles:

- (i) “This Statute shall apply equally to all persons without any distinction based on official capacity;”
 - (ii) “[...] official capacity as a Head of State or Government, a member of Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence;” and
 - (iii) “Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”
1. Third, the consistent case law of the Chamber on the applicable law before the Court has held that, according to article 21 of the Statute, those other sources of law provided for in paragraphs (l)(b) and (l)(c) of article 21 of the Statute, can only be resorted to when the following two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the Vienna Convention on the Law of the Treaties and article 21(3) of the Statute.
 2. Fourth, as the Chamber has recently highlighted in its 5 February 2009 “Decision on Application under Rule 103”, by referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.

[...]

FOR THESE REASONS

DECIDES to issue a warrant of arrest for Omar Al Bashir for his alleged responsibility for crimes against humanity and war crimes under article 25(3)(a) of the Statute [...].

E. Decision of the African Union following the issuance of the Warrant of Arrest

[**Source:** African Union, “Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court”, 3 July 2009, Doc. Assembly/AU/13(XIII), available at <http://www.africa-union.org>]

DECISION ON THE MEETING OF AFRICAN STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

Doc. Assembly/AU/13(XIII)

The Assembly,

[...]

1. **EXPRESSES ITS DEEP CONCERN** at the indictment issued by the Pre-Trial Chamber of the ICC against President Omar Hassan Ahmed El Bashir of the Republic of The Sudan;
2. **NOTES WITH GRAVE CONCERN** the unfortunate consequences that the indictment has had on the delicate peace processes underway in The Sudan and the fact that it continues to undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur;

[...]

1. **FURTHER TAKES NOTE** that any party affected by the indictment has the right of legal recourse to the processes provided for in the Rome Statute regarding the appeal process and the issue of immunity;

[...]

1. **DEEPLY REGRETS** that the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of the ICC, has neither been heard nor acted upon, and in this regard, **REITERATES ITS REQUEST** to the UN Security Council;
2. **DECIDES** that in view of the fact that the request by the African Union has 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 the arrest and surrender of President Omar El Bashir of The Sudan;
3. **EXPRESSES CONCERN OVER** the conduct of the ICC Prosecutor and **FURTHER DECIDES** that the preparatory meeting of African States Parties to the Rome Statute of the ICC scheduled for late 2009 should prepare, *inter alia*, guidelines and a code of conduct for exercise of discretionary powers by the ICC Prosecutor relating particularly to the powers of the prosecutor to initiate cases at his own discretion under Article 15 of the Rome Statute;

[...]

Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009

Discussion

1. Is the non-international armed conflict in Sudan an internal affair of Sudan? Are violations of IHL committed in such a conflict internal affairs of Sudan? May the United Nations Security Council adopt resolutions under Chapter VII of the UN Charter concerning internal affairs of a Member State? (See UN Charter, Art. 2(7))
2. What is the basis for the ICC's jurisdiction in the present case? Does the referral of the situation by the UN Security Council acting under Chapter VII give jurisdiction to the ICC, even though Sudan is not party to the Rome Statute? Or do you agree with the Arab Transitional Parliament that Article 13 of the Rome Statute only applies to States Parties? (ICC Statute, Arts 12 and 13)
3. Does Sudan have an obligation to cooperate with the ICC, although it is not party to the ICC Statute?

[See The International Criminal Court] May Sudan invoke the complementarity principle and argue that the case is not admissible under Art. 17 of the ICC Statute, because Sudan itself will investigate and prosecute alleged perpetrators? [See also Sudan, Report of the UN Commission of Enquiry on Darfur [Para. 608]]

4. What does Art. 16 of the ICC Statute say? Why does the African Union request the Security Council to defer proceedings? What would the consequences of a deferral be? Should the ICC have waited until the end of Al-Bashir's mandate as President of Sudan before issuing a warrant of arrest? Would this have been in accordance with the purpose of the Statute to end impunity? (ICC Statute, Preamble)
5. Is para. 6 of Resolution 1593 a deferral under Art. 16 of the ICC Statute? Is it valid only for 12 months? Is para. 6 compatible with IHL relating to compulsory universal jurisdiction over grave breaches? (GC I-IV, Arts 49/50/129/146 respectively) If it is not, which prevails (See also UN Charter, Art. 103)
6. May the ICC open an investigation and prosecute incumbent heads of State? What kind of immunities does an incumbent head of State enjoy? What was the International Court of Justice's conclusion in the DRC v. Belgium case regarding criminal proceedings against heads of State before international courts? [See ICJ, Democratic Republic of the Congo v. Belgium [Para. 61]] What was the Special Court for Sierra Leone's conclusion on the same subject in the Taylor case? [See Sierra Leone, Special Court Ruling on Immunity for Taylor [Paras 44-57]] Are incumbent heads of State only protected from prosecution by foreign courts? Are they also protected from prosecution by international courts?
7.
 - a. How does the ICC Pre-Trial Chamber justify the fact that the position of Al-Bashir as President of Sudan has no effect on the Court's jurisdiction? What do you think of the first argument (*Pre-Trial Chamber, para. 42*)? Is the ICC Statute's Preamble binding? Does the reference to the Preamble mean that immunities would be inconsistent with the object and purpose of the ICC Statute? Is Sudan under an obligation not to act contrary to the object and purpose of the ICC Statute? (The Sudan signed the Rome Statute on 8 September 2000 but later declared that "Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000.") [See United Nations Treaty Collection, available at <http://treaties.un.org>]
 - b. Does Art. 27(2) of the ICC Statute waive the jurisdictional immunity that incumbent heads of State enjoy? Does Art. 27(2) apply to Sudan, even though it is not party to the ICC Statute? May a treaty create obligations for non-States Parties? Did the UN Security Council's resolution make the whole of the ICC Statute applicable to Sudan? Even though the resolution clearly says that the Security Council recognizes "that States not party to the Rome Statute have no obligation under the Statute"? (Vienna Convention on the Law of Treaties, Art. 34)
 - c. What does para. 44 of the Pre-Trial Chamber's decision mean? Why does the Chamber refer to other sources of law? Does it mean that the ICC Statute takes precedence over the international rules on immunities? Where can the rules on immunities be found?
 - d. What does para. 45 of the Pre-Trial Chamber's decision mean? Does it mean the UN Security Council implicitly agreed that the rules on immunities enshrined in the ICC Statute would apply? Would you agree with such an argument? Even though the resolution made no reference to the possibility that State officials would be prosecuted?
8.
 - a. Are other States Parties to the ICC Statute under an obligation to cooperate with the ICC? On what legal basis? Are they under an obligation to surrender President Al-Bashir to the ICC if he is

present on their territory? What does Art. 98 of the Statute mean? Does the UN Security Council's resolution take precedence over Art. 98?

- b. Does the UN Security Council's resolution create obligations for States that are not party to the ICC Statute? Are they under an obligation to cooperate with the ICC and to surrender Al-Bashir if he is present on their territory? On what legal basis?

9.

- a. Does IHL say anything about immunities? Is there an obligation under IHL to prosecute persons suspected of having committed war crimes? When does the obligation exist? (GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85)
- b. Would it make a difference if the alleged crimes amounted to grave breaches? Does IHL allow for immunity when grave breaches have been committed? Can there be any exception to the obligation to search for and bring to court persons having committed or ordered to commit grave breaches? (GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85)

- 10. May President Al-Bashir be tried for violations of the ICC Statute, although the UN Security Council made the Statute applicable to him only after he had allegedly committed the crimes concerned?