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# ARGUING FOR AN INTEGRATED APPROACH TO RESOLVING THE CRISIS IN DARFUR: THE CHALLENGES OF COMPLEMENTARITY, ENFORCEMENT, AND RELATED ISSUES IN THE INTERNATIONAL CRIMINAL COURT

CHRISTOPHER D. TOTTEN\* & NICHOLAS TYLER\*\*

*This Article addresses the evolution of the International Criminal Court's case regarding Darfur, Sudan. In particular, the Article examines the U.N. investigation into the human rights abuses in Darfur, the U.N. referral of the Darfur case to the ICC, the ICC's Prosecutor own investigation into the abuses, and the recent issuance of arrest warrants by the ICC for particular Darfur suspects. In addition, the Article analyzes whether the ICC complementarity principle is violated in the Sudan case as a result of local judicial activity against the ICC suspects named in the warrants. Concluding that the principle is not violated, and the ICC may therefore proceed with its case against these suspects, the Article then proposes an integrated approach to resolving the crisis in Darfur. This approach entails ICC prosecutions, Sudanese prosecutions and a truth commission process. Finally, the Article offers suggestions for executing the ICC arrest warrants in the Sudan.*

## I. INTRODUCTION

The International Criminal Court's (ICC or Court) case regarding the conflict in Darfur, Sudan sheds light on the development and meaning of the complementarity principle under the Rome Statute of the International

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Criminal Court (Rome Statute).<sup>1</sup> The case also illustrates the difficulty of enforcing ICC rulings in the territory of a non-State Party such as Sudan (a non-State Party is any country that is not a member of the ICC). The United Nations has mandated that non-State Parties, including Sudan and surrounding nations, cooperate in the ICC case in Darfur; however, recent events indicate that this case will present new challenges to this mandate.<sup>2</sup> This Article will address these challenges both in the context of complementarity and in the context of enforcement of the recent ruling by the ICC issuing arrest warrants for two particular Darfur suspects. Though the Article ultimately concludes that the ICC's complementarity principle is not violated in the case of the two named suspects in the warrants, and hence the ICC may proceed with trying these suspects, it will offer numerous suggestions for providing a role to institutions and actors both within and outside of Sudan as part of an integrated approach to managing the current humanitarian crisis in Darfur.

As a way of incorporating the concept of complementarity into a solution for the Darfur crisis, the Article outlines such an approach, providing a particular role to Sudanese actors and institutions, including the Sudanese special courts, as well as a future truth commission. For example, Sudanese special courts may be able to try some of the low-level criminals involved in the Darfur crimes while the ICC focus its efforts on the leaders

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<sup>1</sup> Complementarity refers to the shared role between the ICC and the courts of national jurisdictions, such as Sudan, in prosecuting crimes under the Rome Statute. Under the complementarity principle, if national courts like those in Sudan are able and willing to prosecute an individual for crimes covered by the Rome Statute, then the ICC must defer to those national courts and refrain from initiating its own criminal proceedings against that individual. See *infra* note 43 and accompanying text (explaining the Rome Statute's complementarity principle). If the ICC were to continue prosecuting an individual who the national courts were both able and willing to prosecute, it would violate the complementarity principle. The principle would not be violated, however, in the case of national courts that lacked the capacity or willingness to prosecute a particular individual as a result of political unrest or a non-independent judiciary. In this event, the ICC could continue its own prosecution of this individual. See, e.g., Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute], available at [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf). Article 17 contains the Court's complementarity principle. *Id.* It establishes the guidelines under which a case is to be evaluated for admissibility to the Court when the national jurisdiction has undertaken concurrent, related proceedings. *Id.* Under Article 17, a case is inadmissible before the ICC where a national jurisdiction is investigating or prosecuting a concurrent proceeding impartially and independently, and not for the purposes of shielding the individual from criminal liability. *Id.* See *infra* note 43 for the relevant statutory provisions of Article 17.

<sup>2</sup> See *infra* note 80 and accompanying text (discussing U.N. Security Council Resolution 1593); see also *infra* note 91 and accompanying text (discussing recent statements by Sudanese government officials that reflect an unwillingness to cooperate with the ICC).

of the human rights violations. A Sudanese truth commission could help create a record of the atrocities while providing specific recommendations that directly impact victims' lives in a post-conflict society.

In addition, a particular role for the U.N., the African Union (AU), ICC Member States, and Interpol will be discussed in the context of enforcement of the arrest warrants. If U.N. and AU troops currently in Sudan can not be properly authorized to execute the arrest warrants, then an ICC Member State may be able to execute the warrants with assistance from Interpol.

The effect and outcome of the Darfur case related to these developing issues of complementarity, enforcement, and integration bear serious implications for the Court's future effectiveness and legitimacy.

This Article consists of four Parts examining the on-going Darfur case. Part Two addresses background information related to the Darfur case, including: (1) the history of the ICC; (2) the structure of the Court; (3) the relevant substantive and procedural law; (4) the complementarity principle; and (5) other ICC cases. Part Three analyzes the U.N.'s involvement in Darfur, including the formation of the International Commission of Inquiry in Darfur (Darfur Commission) the Darfur Commission's comprehensive report, and the U.N. Security Council's referral of the case to the ICC. Part Four consists of a review of the progress of the Darfur case in the ICC to date, including the ICC Prosecutor's (Prosecutor) investigation in Darfur, the Prosecutor's Application for Summonses (Application) for two individuals allegedly involved in Darfur crimes, and the recent decision by the ICC's Pre-Trial Chamber to issue arrest warrants for these two individuals. Part Five analyzes emerging issues presented by the evolution of the Darfur case in the ICC, including the issues of complementarity, enforcement, and integration.

## II. BACKGROUND

In the past five years an internal conflict in the Darfur region of Sudan has drawn major international attention because of the magnitude of impact on the civilian populations within the implicated territory. Since the most recent crisis began in Darfur, villages have been burned and looted, thousands of people have been killed and raped, and millions have been displaced from their homes.<sup>3</sup> The severity of the conflict has placed

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<sup>3</sup> Int'l Comm'n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur*, § I(VI), delivered to the U.N. Secretary-General, U.N. Doc. S/2005/60 (Jan. 25, 2005) [hereinafter *Darfur Report*], available at [http://www.icc-cpi.int/library/cases/Report\\_to\\_UN\\_on\\_Darfur.pdf](http://www.icc-cpi.int/library/cases/Report_to_UN_on_Darfur.pdf). This is the report of the findings by the Commission established by U.N. Security Council Resolution 1564. S.C. Res. 1564, ¶ 12, U.N. Doc. S/RES/1564 (Sept. 18, 2004). For further discussion of the Darfur Report and the

urgency on bringing the perpetrators of the violence to justice and ending the culture of impunity.

Recently, with the issuance of arrest warrants for two Darfur suspects in the spring of 2007, the ICC's case relating to Sudan has once again received international attention.<sup>4</sup> This attention, however, is nothing new as the ICC's ongoing case in Darfur has presented a number of novel issues that will impact the functioning of the Court in future cases. Darfur represents the first time a case was referred to the ICC involving crimes taking place in the territory of a State that is not a party to the ICC.<sup>5</sup> The case also marks the first time the U.N. Security Council referred a case to the ICC, as it is permitted to do under the Rome Statute.<sup>6</sup> The Darfur case is also unique because officials of a standing government are implicated in the alleged crimes, rather than non-state actors. In other ICC cases, individuals named in arrest warrants or otherwise made the focus of an investigation were not government officials, but rather individual, private actors. In contrast, one of the individuals named in the recently issued arrest warrants in the Darfur case is a prominent official within the Sudanese government.<sup>7</sup> This case is also the first time an investigation by the ICC has been conducted in the midst of ongoing conflict.<sup>8</sup> And perhaps

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Commission's findings, see *infra* notes 51-75 and accompanying text. See also *Sixth Report of the Prosecutor of the International Criminal Court to the U.N. Security Council Pursuant to UNSCR 1593 (2005)*, ¶ 5, delivered to the Security Council (Dec. 5, 2007), available at <http://www.icc-cpi.int/library/organs/otp/OTP-RP-20071205-UNSC-ENG.pdf> [hereinafter *Sixth Report to the U.N. Security Council*] ("In Darfur today, crimes within the jurisdiction of the Court continue to be committed. There are consistent reports of targeted attacks against civilians, in particular against those 2.5 million people forcibly displaced into camps. Persons displaced are subjected to persecution, abuses and violations of fundamental rights—sexual violence, illegal detentions, unlawful killings, [and] looting.")

<sup>4</sup> Maggie Farley, *Warrants Issued in Darfur Conflict*, L.A. TIMES, May 3, 2007, at A3; Marlise Simmons, *Judges Charge 2 Top Sudanese with Atrocities in Darfur Area*, N.Y. TIMES, May 3, 2007, at A10.

<sup>5</sup> The two previous ICC cases were referred by State Parties. See *infra* notes 45-48 and accompanying text.

<sup>6</sup> S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005); see also Rome Statute, *supra* note 1, art. 13(b) (granting the Court jurisdiction where a situation has been referred by the U.N. Security Council under its Chapter VII powers of the U.N. Charter).

<sup>7</sup> See *infra* note 126 and accompanying text. Ahmad Harun, one of the suspects named in the arrest warrants, is the current Minister of State for Humanitarian Affairs in the Sudan. In the case of both the Democratic Republic of Congo (DRC) and Uganda, the individuals named in the ICC arrest warrants are members of the military, or militia. See Press Release, ICC, Warrant of Arrest Unsealed Against Five LRA Commanders (Oct. 14, 2005), available at <http://www.icc-cpi.int/press/pressreleases/114.html>; see also Press Release, ICC, Issuance of a Warrant of Arrest Against Thomas Lubanga Dyilo (Mar. 17, 2006), available at <http://www.icc-cpi.int/press/pressreleases/133.html>.

<sup>8</sup> See Press Release, ICC, The Prosecutor of the ICC Opens Investigation in Darfur (June 6, 2005), available at [http://www.icc-cpi.int/pressrelease\\_details&id=107&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=107&l=en.html).

most significantly, Darfur is the first ICC case in which a question of complementarity has been raised as between the ICC's jurisdiction and the jurisdiction of concurrently established national courts such as those in Sudan.<sup>9</sup>

#### A. HISTORY OF THE INTERNATIONAL CRIMINAL COURT

The ad hoc tribunal created in Nuremberg after World War II set a precedent for the international community to hold individuals responsible for grave crimes, even though state responsibility still maintained a role at Nuremberg.<sup>10</sup> The ad hoc criminal Tribunals established to address the crises in the former Yugoslavia and in Rwanda continued the pattern of holding individuals responsible for serious breaches of human rights law such as genocide, crimes against humanity, and war crimes.<sup>11</sup> The

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<sup>9</sup> See, e.g., Rome Statute, *supra* note 1, pmbl (“*Emphasizing* that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions”); see also *id.* art. 1 (“An International Criminal Court . . . is hereby established.”); HUMAN RIGHTS WATCH, LACK OF CONVICTION: THE SPECIAL CRIMINAL COURT ON THE EVENTS IN DARFUR 2 (2006), available at <http://hrw.org/backgrounder/ij/sudan0606/sudan0606.pdf> [hereinafter HRW Special Courts Assessment] (“On June 7, 2005, one day after the Prosecutor of the [ICC] announced he was opening investigations into the events in Darfur, the Sudanese authorities established the Special Criminal Court on the Events in Darfur (SCCED) to demonstrate the government’s ability to handle prosecutions domestically.”).

<sup>10</sup> See generally Frederic Megret, *Epilogue to an Endless Debate: The International Criminal Court’s Third Party Jurisdiction and the Looming Revolution of International Law*, 12 EUR. J. INT’L L. 247 (2001). Nuremberg dictum stating “crimes against international law are committed by men, not by abstract entities” has been used to affirm individual criminal responsibility for international crimes. *Id.* at 263 n.65 (citing The Trial of German Major War Criminals Sitting at Nuremberg, Judgment (1946), 41-42).

<sup>11</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, arts. 1-5, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]. Article 1 states, “The International Tribunal shall have the power to prosecute *persons* responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.” *Id.* art. 1 (emphasis added). Articles 2-5 contain definitions for crimes within the jurisdiction, such as genocide, crimes against humanity, and war crimes. *Id.* arts. 2-5; see also Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 Jan. 1994 and 31 Dec. 1994, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]. Article 1 states:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present

international community recognized, however, the need for a permanent court for the trial of these transgressions, rather than the continual establishment of ad hoc tribunals in response to each period of serious human rights violations.<sup>12</sup>

In response to this demonstrated need, the international community agreed on the idea of the ICC. The ICC was to be the first court established in advance of, rather than in response to, international human rights violations.<sup>13</sup> In constructing the definitions of crimes that would fall within the Court's jurisdiction, the international community relied upon the statutes for the two regional criminal courts: the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR).<sup>14</sup>

In July of 1998, the Rome Statute was adopted at the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International

Statute.

*Id.* art. 1 (emphasis added). Articles 2-4 define the related crimes within the jurisdiction. *Id.* arts. 2-4.

<sup>12</sup> Mahnoush H. Arsanjani & W. Michael Reisman, *The Law-in-Action of the International Criminal Court*, 99 AM. J. INT'L. L. 385, 385 (2005). The *ex post* tribunals benefited from their establishment after the particular conflict was resolved; the ICC, as a permanent court, will deal with problems at times while they are still occurring. *Id.* at 385.

<sup>13</sup> Previous ad hoc "tribunals at Nuremberg and Tokyo, may be called *ex post* tribunals, in that they are established *after* the acute and violent situation in which the alleged crimes occurred . . . . [*E*]x *ante* tribunals . . . are established *before* an international security problem has been resolved or even manifested itself . . . . The ICC is the archetypal *ex ante* tribunal." Arsanjani & Reisman, *supra* note 12, at 2.

<sup>14</sup> For example, Article 6 of the Rome Statute, defining genocide, contains text identical to that of Article 4(2) of the ICTY Statute. Compare Rome Statute, *supra* note 1, art. 6 ("'[G]enocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such [listing relevant acts][.]"') with ICTY Statute, *supra* note 11, art. 4 ("Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, racial, ethnical, or religious group, as such [listing relevant acts identical to ones listed in Article 6 of the Rome Statute]."). Also, the text of Article 7 of the Rome Statute, defining crimes against humanity, parallels the text of Article 5 of the ICTY Statute defining the same crime, with the exception of further defined sex crimes in Section 1(g) of Article 7 of the Rome Statute and the inclusion of the crime of apartheid in Section 1(j) of Article 7 of the Rome Statute. Compare Rome Statute, *supra* note 1, art. 7, with ICTY Statute, *supra* note 11, art. 5. Furthermore, Article 8 of the Rome Statute incorporates grave breaches of the Geneva Conventions of 1949 into its definition of war crimes. Rome Statute, *supra* note 1, art. 8. Similarly, the ICTR and ICTY Statutes also criminalize grave breaches of the Geneva Conventions. ICTR Statute, *supra* note 11, art. 4 ("Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II"); ICTY Statute, *supra* note 11, art. 2 ("Grave breaches of the Geneva Conventions of 1949").

Criminal Court, also known as the Rome Conference.<sup>15</sup> On July 1, 2002, the Rome Statute entered into force after ratification by sixty State Parties.<sup>16</sup>

## B. STRUCTURE

The International Criminal Court is comprised of the Presidency, an Appeals Chamber, the Trial Chamber, the Pre-Trial Chamber, the Office of the Prosecutor (Prosecutor's Office), and the Registry.<sup>17</sup> Judges are nominated and confirmed by the Assembly of State Parties (Assembly), and they are required to represent diverse geographic, gender, and legal backgrounds.<sup>18</sup> The Prosecutor is also nominated and confirmed by the Assembly. Critically, he or she has the independence to operate the Prosecutor's Office as a separate organ of the Court.<sup>19</sup> The Registry is responsible for all non-judicial aspects of the Court, including the Victims and Witnesses Unit that provides security and assistance for individuals testifying before the Court.<sup>20</sup> Although independent of the U.N., the ICC does have an agreement of cooperation with the U.N. whereby both parties agree to exchange information and assist each other in various ways.<sup>21</sup>

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<sup>15</sup> The Rome Statute is an international treaty. However, because it is a treaty that establishes an institution, it is referred to as a statute.

<sup>16</sup> Rome Statute, *supra* note 1, art. 126 ("This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations."). Following the adoption of the Rome Statute at the Rome Conference in 1998, the Rome Statute entered into force in 2002 with the necessary number of countries having deposited ratifications to the U.N. Coalition for the International Criminal Court, History of the ICC, <http://www.iccnw.org/?mod=icchistory> (last visited Sept. 9, 2008). On July 18, 2008, Cook Islands were added as the newest State Party to the Rome Statute, bringing the total number of State Parties to 108. Coalition for the International Criminal Court, State Parties to the Rome Statute of the ICC, July 18, 2008, [http://www.iccnw.org/documents/RATIFICATIONSbyRegion\\_18\\_July-08.pdf](http://www.iccnw.org/documents/RATIFICATIONSbyRegion_18_July-08.pdf).

<sup>17</sup> Rome Statute, *supra* note 1, art. 34.

<sup>18</sup> *Id.* art. 36(7)-(8). The Assembly consists of one representative for each State Party. *Id.* art. 112(1).

<sup>19</sup> *Id.* art. 42. The Prosecutor can be removed by a vote of the Assembly if there is evidence of misconduct. *Id.* art. 46.

<sup>20</sup> *Id.* art. 43.

<sup>21</sup> Negotiated Relationship Agreement between the International Criminal Court and United Nations, Nov. 10, 2004, available at <http://www.icc-cpi.int/legaltools/>. The negotiated agreement between the U.N. and the ICC is a basic agreement of mutual acknowledgment of status. Both organs agree to the exchange of information and cooperation in fulfilling their respective mandates. See U.N. Doc. A/58/874 (Aug. 20, 2004) (General Assembly resolution ratifying the cooperation agreement). U.N. officials are also permitted under the Agreement to testify before the Court if necessary. *Id.* art. 16.



Funding is provided by the State Parties, the U.N., and donations from non-governmental organizations (NGOs) and private donors.<sup>22</sup>

### C. SUBSTANTIVE AND PROCEDURAL LAW

The Rome Statute limits the jurisdiction of the Court to only “the most serious crimes of concern to the international community as a whole.”<sup>23</sup> Crimes within the Court’s jurisdiction at the present time are genocide, crimes against humanity, and war crimes.<sup>24</sup> Additionally, the Court only has jurisdiction over crimes that occurred after July 1, 2002, the date the Rome Statute entered into force.<sup>25</sup> The jurisdiction of the Court is also limited to crimes either committed within the borders of States having ratified the Rome Statute or committed by nationals of States having ratified the Rome Statute.<sup>26</sup>

Cases can come before the Court in three different ways: referral by a State Party, referral by the U.N. Security Council, and by referral of the Prosecutor, with the latter known as “*proprio motu* initiatives.”<sup>27</sup> For example, the Darfur case was referred to the ICC by the U.N. Security

<sup>22</sup> Rome Statute, *supra* note 1, arts. 115-16.

<sup>23</sup> *Id.* art. 5.

<sup>24</sup> *Id.* art. 5(1). In the future, the crime of aggression may fall within the Court’s jurisdiction; however, it is currently undefined in the Rome Statute. “The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted . . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to the crime.” *Id.* In other words, the Court cannot proceed with trying suspects for the crime of aggression until a definition for aggression is agreed upon by the Assembly. *Id.* art. 5(2). The crime of genocide, however, currently falls within the Court’s jurisdiction:

For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

*Id.* art. 6. See also *infra* note 30 (providing definitions of crimes against humanity under the Rome Statute); *infra* note 31 (defining war crimes).

<sup>25</sup> Rome Statute, *supra* note 1, art. 11(1) (“The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.”).

<sup>26</sup> In the case of [State Party referrals or Prosecutor initiatives], 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 in accordance with paragraph 3 [allowing States to accept such jurisdiction]: (a) The State on the territory of which the conduct in question occurred or, if the crime 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 crime is a national.

*Id.* art. 12(2).

<sup>27</sup> The *proprio motu* power allows the Prosecutor to review cases submitted by non-governmental entities, *id.* art. 13; this power has yet to be utilized by the Prosecutor.

Council.<sup>28</sup> The Prosecutor must submit *proprio motu* initiatives to the Pre-Trial Chamber for approval before initiating an investigation.<sup>29</sup> Regardless of how a case is referred to the ICC, it must allege crimes defined in the Rome Statute.

One important step the Rome Statute has taken is the listing of gender-based crimes in the definition of crimes against humanity under Article 7.<sup>30</sup> Another important inclusion in the crimes covered by the Rome Statute is the conduct of private, non-state actors, coverage of which sets the stage for the Court to prosecute not only state-sponsored crimes, but also war crimes by private actors occurring as part of an internal conflict.<sup>31</sup> Importantly,

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<sup>28</sup> The referral of the ICC case in the Democratic Republic of Congo was received as a State Party referral in the form of a letter to the Prosecutor. Press Release, ICC, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (Apr. 19, 2004), available at <http://www.icc-cpi.int/press/pressreleases/19.html> [hereinafter Prosecutor Receives Referral of the Situation in the DRC]. The ICC case in Uganda was also referred to the Prosecutor in a letter as a State Party referral. Press Release, ICC, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2004), available at [http://www.icccpi.int/pressrelease\\_details&id=16&l=en.html](http://www.icccpi.int/pressrelease_details&id=16&l=en.html).

<sup>29</sup> "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, together with any supporting material collected." Rome Statute, *supra* note 1, art. 15(3).

<sup>30</sup> "Rape, sexual slavery, enforced prostitution, forced pregnancy, [and] enforced sterilization" were specifically included as crimes against humanity. *Id.* art. 7(1)(g).

For the purposes of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

*Id.* art. 7(1).

<sup>31</sup> 1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. 2. For the purpose of this Statute, "war crimes" means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Willful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) Willfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages. (b) Other serious

this allows for individual liability during an internal national conflict.<sup>32</sup> In addition, the principle of State sovereignty had previously provided immunity to States and their actors from prosecution for internal actions, because States and their actors were believed to have the right to conduct themselves within their respective borders in whatever manner they saw fit.<sup>33</sup> Thus, while the ICC represents a new and marked infringement on the principle of State sovereignty, it limits its infringement to grave violations of international criminal law.<sup>34</sup>

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violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; . . . (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; . . . (xvi) Pillaging a town or place, even when taken by assault; . . . (xxvi) Conscription or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

*Id.* art. 8(1), 8(2)(a)-(b); *see also id.* art. 8(2)(c)-(e) (defining war crimes in the context of armed conflicts not of an international character). For further discussion of war crimes in this particular context, *see infra* note 32.

<sup>32</sup> The war crimes definition, incorporating Geneva Conventions of 1949, “applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.” Rome Statute, *supra* note 1, art. 8(2)(d); *see also id.* art. 8(2)(c) (listing acts committed during armed conflicts not of an international character that constitute war crimes). This adds a distinction between simple unrest within a State and protracted armed conflict, which is the necessary predicate before the statutory war crimes definition will apply to public and private actors involved in such an internal conflict. *See id.* art. 8(2)(f).

[War crimes definition incorporating other serious violations of the laws and customs applicable in armed conflicts not of an international character] applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

*Id.* The Rome Statute also broke precedent from Nuremberg and the ICTY and ICTR Statutes by allowing the following of superior orders as a defense in the Court unless the order was manifestly unlawful. *Compare* Rome Statute, *supra* note 1, art. 33(1)(c), *with* ICTY Statute, *supra* note 11, art. 7(3). The Rome Statute defines acts of genocide, war crimes, and crimes against humanity as “manifestly unlawful,” however, meaning that a subordinate in all likelihood could not rely upon the defense of “following orders” for these crimes. Rome Statute, *supra* note 1, art. 33; *see also id.* art. 8(c)-(f) (discussing capacity of ICC to prosecute both State and non-State, or private, actors involved in internal, armed conflicts).

<sup>33</sup> The principle of State sovereignty was first established as customary international law in the Peace of Westphalia. Treaty of Westphalia, Oct. 24, 1648, *available at* <http://www.yale.edu/lawweb/avalon/westphal.htm> (last visited Sept. 8, 2008).

<sup>34</sup> The jurisdiction of the ICC “shall be limited to the most serious crimes of concern to the international community as a whole.” Rome Statute, *supra* note 1, art. 5(1). Since 1945, the international community could intervene for the serious crimes covered by the Rome Statute pursuant to Chapter 7 of the U.N. Charter, granting the U.N. Security Council power to “determine the existence of any threat to the peace, breach of the peace, or act of

The Court may also, in some cases, rely on the U.N. Security Council to aid in enforcement of the Rome Statute, possibly through sanctions or military actions. This reliance would be particularly appropriate where the U.N. Security Council has passed a resolution referring a case to the ICC under the Rome Statute as it did in Darfur.<sup>35</sup> Additionally, the U.N. Security Council has the ability to compel cooperation of non-State Parties, such as Sudan, in investigations by the ICC.<sup>36</sup>

Once a case has proceeded to the investigation stage, it is the responsibility of the Prosecutor's Office to conduct an independent and comprehensive investigation of particular alleged crimes within the Court's jurisdiction.<sup>37</sup> In cases where there is strong evidence against an individual or individuals, the Prosecutor may submit an application to the Pre-Trial Chamber for the issuance of arrest warrants.<sup>38</sup> On the basis of an arrest

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aggression and [to] make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. Charter art. 39; *see also infra* note 41 for a discussion of these measures under Articles 41 and 42. In practice, the U.N. Security Council has used this power to intervene in internal conflicts when they are viewed as potential threats to international peace and security. *See* S.C. Res. 751, U.N. Doc. S/RES/751 (Apr. 24, 1992) for an example of the U.N. Security Council exercising Chapter 7 powers to establish a mission within an internal disturbance by creating the United Nations Mission in Somalia. Note also that State Parties voluntarily accept the Court's jurisdiction by ratifying the Rome Statute, thereby explicitly agreeing to some infringement on their sovereign rights. *See* Rome Statute, *supra* note 1, art. 12(1). In the case of actions referred by the U.N., a non-State Party and its actors may be made subject to the Court's jurisdiction, as occurred with Sudan and its actors in the Darfur context. *See id.* art. 13(b); *see also id.* art. 12(2) (applying the State Party jurisdictional requirements only to actions referred by a State Party or the Prosecutor and not to actions referred by the U.N. Security Council).

<sup>35</sup> The U.N. Security Council has used sanctions, rather than military force, as a tool to compel compliance with prior resolutions. This was done recently in response to the violations of North Korea in testing nuclear weapons. U.N. Security Council Resolution 1718 approved economic sanctions to be applied to North Korea by all U.N. Member States. *See* S.C. Res. 1718, ¶ 8, U.N. Doc. S/RES/1718 (Oct. 14, 2007).

<sup>36</sup> *See infra* note 80 and accompanying text (explaining that Resolution 1593 requires Sudan's cooperation in the ICC's investigation in Darfur). Some Rome Conference participants raised questions about this power over non-State Parties and the expanded jurisdiction it creates, believing that it violated the Vienna Convention on the Law of Treaties and customary international law. PHILIPP MEIGNER, *THE INTERNATIONAL CRIMINAL COURT CONTROVERSY* 35 (Transaction 2006). The portion of the Law of Treaties at issue raised the question of whether a treaty between two or more States can require any action or compliance by a non-signatory State. *Id.* The conclusion at the Rome Conference was that the role of the U.N. Security Council under Chapter VII of the U.N. Charter—to maintain security in the world—gives the Council the authority to compel cooperation regardless of the signatory status of a non-State Party. *Id.*

<sup>37</sup> Rome Statute, *supra* note 1, arts. 15, 42(1).

<sup>38</sup> *Id.* art. 58(1) ("At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if,

warrant issued by the Pre-Trial Chamber, the Court requests the State having custody over the defendant to surrender that person to the Court so the case may proceed.<sup>39</sup> It is the responsibility of the State Party having custody over the defendant to enforce the warrant.<sup>40</sup> When a non-State Party, such as the Sudan, has custody, the U.N. Security Council may, upon the ICC's request and using force if necessary, compel the non-State Party to surrender a suspect to the Court.<sup>41</sup>

#### D. COMPLEMENTARITY

One of the most important and distinctive features of the ICC is the complementarity regime provided in the Rome Statute.<sup>42</sup> Under this regime, the Court is intended to function solely as a court of last resort

having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The arrest of the person appears necessary: (i) To ensure the person's appearance at trial, (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.”)

<sup>39</sup> *Id.* art. 63 (“The accused shall be present during the trial.”).

<sup>40</sup> *Id.* art. 89(1) (noting that States are required to effect the arrest and surrender of a suspect in accordance with their applicable national laws).

<sup>41</sup> U.N. Charter ch. VII. Numerous articles within Chapter VII of the U.N. Charter authorize the U.N. Security Council to take various measures, including force if necessary, to ensure international peace and security:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

*Id.* art. 41 (giving the U.N. Security Council sanctions power).

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

*Id.* art. 42 (giving U.N. Security Council the power to use military force). Recall U.N. Security Council referrals of cases to the ICC are themselves based upon Chapter VII powers. *See* Rome Statute, *supra* note 1, art. 13(b).

<sup>42</sup> This is a change from the ICTY precedent. “The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute . . . .” ICTY Statute, *supra* note 11, art. 9(2); *see also* ICTR Statute, *supra* note 11, art. 8(2) (stating that the ICTR “shall have primacy over the national courts of all States”).

when courts of the national jurisdiction where crimes occurred are unwilling or unable to genuinely investigate and prosecute those crimes. Such a failure may stem, for example, from political instability in the national jurisdiction or from a non-independent judiciary.<sup>43</sup> If the courts of the national jurisdiction are unwilling or unable to prosecute an individual for a crime covered by the Rome Statute, the ICC can prosecute that individual without violating the complementarity principle. However, if a nation and its courts *are* able and willing to prosecute an individual for such a crime, the ICC must defer to these national courts under the complementarity principle.<sup>44</sup>

#### E. OTHER ICC CASES

Since the Court's inception in 2002, State Parties have referred the ICC's three other cases to the Prosecutor's Office. One case was referred

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<sup>43</sup> Rome Statute, *supra* note 1, art. 17(1)(a). The Statute says:

Having regard to paragraph 10 of the preamble and article 1 [establishing the complementarity principle], the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution . . . . In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5 [stating crimes in the Court's jurisdiction]; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances is inconsistent with an intent to bring the person concerned to justice.

*Id.* art. 17(2)(a)-(c). In order to determine inability to investigate or prosecute in a particular case, the Court considers 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. *Id.* art. 17(3).

<sup>44</sup> *Id.* art. 17(2)(a)-(c). Article 20 contains the double-jeopardy principle, *ne bis in idem*, prohibiting an individual from being tried by the ICC who was previously tried by a national court for a crime involving the same conduct. *Id.* art. 20(1). There is an exception for cases in which the national trial is conducted for the purpose of shielding the individual from criminal liability, or is not conducted impartially or independently. *Id.* art. 20(3).

No person who has been tried by another court for conduct also proscribed under article 6 [genocide], 7 [crimes against humanity], or 8 [war crimes] shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

*Id.*

by Uganda, regarding crimes committed within its territory by non-State militias.<sup>45</sup> The investigation in Uganda has resulted in the issuance of five arrest warrants by the Pre-Trial Chamber. One of the persons named in the warrants has since died in combat; the other four have so far eluded capture, most likely because the Ugandan government lacks the resources to capture these suspects.<sup>46</sup> The second case was referred by the Democratic Republic of Congo (DRC),<sup>47</sup> and also involved crimes committed within a State's territory by a non-State militia leader. One of the suspects, Thomas Lubanga, was the leader of a militia within the DRC and is charged with conscripting children under the age of fifteen to militia service. In March 2006, the first successful arrest was made for prosecution in the ICC when Lubanga was captured. In addition, two more arrest warrants were also recently executed in the DRC for two additional suspects.<sup>48</sup> This DRC case is currently pending before the ICC. Finally and most recently, at the request of the government of the Central African Republic, the ICC has begun an investigation in that country. One arrest warrant has been issued by the ICC Prosecutor for crimes committed in the Central African Republic; this warrant was executed on May 24, 2008.<sup>49</sup>

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<sup>45</sup> See Prosecutor Receives Referral of the Situation in the DRC, *supra* note 28.

<sup>46</sup> See Decision to Terminate Proceedings against Raska Lukwiya, Case No. ICC-02/04-01/05, Intl. Crim. Ct., Pre-Tr. Chamber, (July 11, 2007) (Pre-Trial Chamber decision to terminate proceedings based on the death of Raska Lukwiya); Press Release, ICC, Warrant of Arrest Unsealed Against Five LRA Commanders, *supra* note 7 (discussing warrants for arrest issued by the ICC for Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo, and Dominic Ongwen of the Lord's Resistance Army in Uganda).

<sup>47</sup> Prosecutor Receives Referral of the Situation in the DRC, *supra* note 28.

<sup>48</sup> See *infra* note 145 and accompanying text. The arrest of Lubanga was pursuant to the arrest warrant issued by the Pre-Trial Chamber on February 10, 2006. See Situation in the Democratic Republic of the Congo (Prosecutor v. Lubanga Dyilo), Case No. ICC-01/04-01/06-2, Intl. Crim. Ct., Pre-Tr. Chamber I, (Feb. 10, 2006), available at [http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2\\_tEnglish.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2_tEnglish.pdf) (last visited Sept. 8, 2008) ("Having found that . . . there are reasonable grounds to believe that Mr. Thomas Lubanga Dyilo is criminally responsible under article 25(3)(a) of the Statute for: (i) the war crime of enlisting children under the age of fifteen punishable under article 8(2)(b)(vii) of the Statute; (ii) the war crime of conscription of children under the age of fifteen punishable under article 8(2)(xxvi) or article 8 (2)(e)(vii) of the Statute; and (iii) the war crime of using children under the age of fifteen to participate actively in hostilities punishable under article 8(2)(b)(xxvi) or article 8(2)(e)(vii) of the Statute."); see also Press Release, ICC, First Arrest for the International Criminal Court (Mar. 17, 2006), available at [http://www.icc-cpi.int/pressrelease\\_details&id=132.html](http://www.icc-cpi.int/pressrelease_details&id=132.html). (official announcement of the arrest of Lubanga by the Court).

<sup>49</sup> Press Release, ICC, Jean-Pierre Bemba Gombo Arrested for Alleged Crimes in Central African Republic (May 24, 2008), available at <http://www.icc-cpi.int/press/pressreleases/370.html>.

## III. U.N. INVOLVEMENT IN DARFUR

## A. U.N. COMMISSION OF INQUIRY

In September of 2004, the U.N. Security Council responded to the violation of a ceasefire agreement between the government of Sudan and rebel groups by mandating that a commission investigate the situation in Darfur with urgency.<sup>50</sup> The U.N. formed the Darfur Commission to investigate the alleged violations of international law then occurring in Darfur and to recommend a response to the conflict. The Darfur Commission transmitted its Report to the U.N. Secretary-General in January 2005 pursuant to U.N. Security Council Resolution 1564.<sup>51</sup>

The findings of the Commission are comprehensive, examining all parties involved in the on-going conflict and the long-term historical background behind it. The primary parties involved in the armed conflict in Darfur are: (1) the Sudanese government and its associated organizations; (2) the Sudan Liberation Movement/Army (SLM/A); and (3) the Justice and Equality Movement (JEM).<sup>52</sup> The SLM/A and JEM are armed resistance movements participating in attacks on Sudanese government installations in an effort to undermine the central government's local authority and to acquire weapons for use in combat.<sup>53</sup> The government of Sudan, based in the capital of Khartoum, is a military dictatorship, having assumed power in a coup d'état in 1983.<sup>54</sup>

The impetus for the attacks by the SLM/A and JEM is the marginalization and oppression by the central government of local tribal organizations in Darfur.<sup>55</sup> The tribal structure in Darfur has been the primary mechanism for land distribution and local governing decisions for many years. However, the Sudanese government decided to abolish the tribal structure and install appointed administrators to centralize the political organization of Darfur.<sup>56</sup> In or around 2002, the SLM/A and JEM began to organize attacks against the government positions, causing government police to retreat to the urban centers of Darfur and leaving the rural areas largely in SLM/A and JEM control.<sup>57</sup> In response to these

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<sup>50</sup> See U.N. SCOR, 59th Sess., 5040th mtg., U.N. Doc. S/PV.5040 (Sept. 18 2004).

<sup>51</sup> See *id.*; see also *Darfur Report*, *supra* note 3, at 1 (issuing the Report pursuant to Resolution 1564).

<sup>52</sup> *Darfur Report*, *supra* note 3, ¶¶ 77-137.

<sup>53</sup> *Id.* ¶ 62.

<sup>54</sup> *Id.* ¶ 46.

<sup>55</sup> *Id.* ¶ 60.

<sup>56</sup> *Id.* ¶ 57.

<sup>57</sup> *Id.* ¶ 66.



assaults, the government of Sudan began to organize forces against the rebel militias.<sup>58</sup>

The Sudanese government has a regular military structure that is engaged in a protracted fight in southern Sudan for control of this oil-rich area.<sup>59</sup> The government forces in southern Sudan are insufficient in number, however, and are supplemented by militias. In particular, the government employs Popular Defense Forces (PDF), consisting of civilian volunteers, to aid and serve under the command of the regular armed forces of Sudan. The PDF are paid, equipped, and trained by the Sudanese government and take orders from within the military structure, although the members of the PDF are considered civilians.<sup>60</sup> Victims of atrocities use the term Janjaweed—translated variously as “a man with a gun on a horse” or “devil on horseback”—to describe militias such as the PDF or affiliated militias that serve the Sudanese government.<sup>61</sup>

The Darfur Commission focused considerable attention on the precise relationship between the Janjaweed and the Sudanese government.<sup>62</sup> The government gave the Darfur Commission conflicting reports about its relationship with the Janjaweed, frequently asserting that the Janjaweed are merely an independent group of bandits acting without any relationship to the government.<sup>63</sup> This, however, was contradicted by evidence showing that the government has been providing arms and funding to the Janjaweed, and, in some cases, even ordered the Janjaweed to attack civilians.<sup>64</sup> Victims and witnesses testified to the Darfur Commission that the Janjaweed acted in concert with and through the support of regular government armed forces, including receiving air support from them.<sup>65</sup>

<sup>58</sup> *Id.* ¶ 68.

<sup>59</sup> *Id.* ¶¶ 45, 50.

<sup>60</sup> *Id.* ¶¶ 81-84.

<sup>61</sup> *Id.* ¶¶ 98-105.

<sup>62</sup> *Id.* ¶ 106.

<sup>63</sup> *Id.* ¶ 98 (“Victims of attacks have indicated that the Janjaweed are acting with and on behalf of Government forces. In contrast, senior Sudanese State authorities, in Khartoum and in the three Darfur States, indicated to the Commission that any violations committed by the Janjaweed have no relationship to State actors.”).

<sup>64</sup> In many cases a ground attack began with soldiers appearing in Land Cruisers and other vehicles, followed by a large group of Janjaweed on horses and camels, all with weapons such as AK47s, G3s and rocket-propelled grenades. Many of the attacks involved the killing of civilians, including women and children, the burning of houses, schools and other civilian structures, as well as the destruction of wells, hospitals and shops. Looting and theft of civilian property, in particular livestock, invariably followed the attacks and in many instances every single item of moveable property was either stolen or destroyed by the attackers. Often the civilians were forcibly displaced as a result of the attack.

*Id.* ¶ 242.

<sup>65</sup> *Id.* ¶ 280-83.

In drafting its report, the Darfur Commission also analyzed a variety of international laws that are binding on the Sudanese government, as well as laws potentially applicable to the rebel groups.<sup>66</sup> The primary violations found by the Darfur Commission involved breaches of international human rights law and international humanitarian law, including war crimes.<sup>67</sup> Although it has not ratified the Rome Statute, Sudan is a signatory of the Rome Statute, and thereby is required to refrain from “acts which would defeat the object and purpose” of the Rome Statute.<sup>68</sup> This means that Sudan is bound to refrain from violations of human rights and humanitarian law such as genocide, crimes against humanity, and war crimes.<sup>69</sup> Sudan is also bound to numerous international treaties regarding human rights and humanitarian law.<sup>70</sup> By committing human rights violations within its territory, Sudan is failing to comply with its obligations under these treaties.<sup>71</sup> The Darfur Commission also found that the parties involved in

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<sup>66</sup> *Id.* ¶ 142.

<sup>67</sup> See *infra* note 74 (describing examples of these human rights violations, which include war crimes).

<sup>68</sup> See Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

<sup>69</sup> Rome Statute, *supra* note 1, arts. 5-8. Genocide includes acts committed “with intent to destroy . . . a national, ethnical, racial or religious group.” *Id.* art. 6. Crimes against humanity are acts committed “as part of a widespread or systematic attack directed against any civilian population.” *Id.* art. 7(1). War crimes are large scale acts which constitute “grave breaches of the Geneva Conventions . . . and other serious violations of the laws and customs applicable in international armed conflict.” *Id.* art. 8(2)(a)-(b).

<sup>70</sup> See *Darfur Report*, *supra* note 3, ¶¶ 147.

The Sudan is bound by a number of international treaties on human rights. These include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESR), the Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Convention on the Rights of the Child (CRC). . . . With regard to international humanitarian law, the Sudan is bound by the four Geneva Conventions of 1949, as well as the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction, of 18 September 1997, whereas it is not bound by the two Additional Protocols of 1977, at least *qua* treaties . . . the Sudan has signed, but not yet ratified, the Statute of the International Criminal Court and the Optional Protocol of the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, and is therefore bound to refrain from “acts which would defeat the object and purpose” of that Statute and the Optional Protocol.

*Id.* ¶¶ 147-54.

<sup>71</sup> [The crimes found by the Commission including] murder contravene[] the provisions of the International Covenant on Civil and Political Rights and of the African Charter on Human and People’s rights, which protect the right to life and to not be “arbitrarily deprived of his life.” As for international humanitarian law, murder of civilians who do not take active part in hostilities in an internal armed conflict, is prohibited both by common Article 3 of the 1949 Geneva Conventions and by the corresponding rule of customary international law, as codified in Article 4(2)(a) of Additional Protocol II. It is also criminalized either as a war crime or, depending upon

the conflict in Darfur are bound by the customary rules of internal conflict. In particular, the parties must obey the rules regarding the distinctions between civilians and armed participants.<sup>72</sup>

The Darfur Commission was charged not only with identifying the violations of international law that occurred in Darfur, but also with identifying the perpetrators of the violations.<sup>73</sup> Among its findings regarding the crimes committed, the Commission determined there was evidence of the most serious violations of human rights and humanitarian law by the Janjaweed militia. The crimes included killing of civilians, massacres, rape, looting, and many other crimes against humanity and war crimes, conducted indiscriminately against villages and resulting in large numbers of deaths and displacement of civilians.<sup>74</sup> The Darfur Commission found that vast numbers of these violations were committed by the government and its surrogate fighters (i.e., the Janjaweed) as part of its counter-insurgency tactics against the SLM/A and JEM in 2003.<sup>75</sup> The evidence found in the Commission's report provided the U.N. Security Council with ample justification for further action.

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the circumstances, as a crime against humanity, as proved by case law and by the Statutes of the various international tribunals [such as the ICTY and ICTR].

*Id.* ¶ 291.

<sup>72</sup> See *id.* ¶¶ 141-71 (providing a comprehensive list of the rules of conflict that apply to the Darfur combatants).

<sup>73</sup> *Id.* at 4.

<sup>74</sup> It is apparent from the Commission's factual findings that in many instances Government forces and militias under their control attacked civilians and destroyed and burned down villages in Darfur contrary to the relevant principles and rules of international humanitarian law. Even assuming that in all the villages they attacked there were rebels present or at least some rebels were hiding there, or that there were persons supporting rebels—an assertion that finds little support from the material and information collected by the Commission—the attackers did not take the necessary precautions to enable civilians to leave the villages or to otherwise be shielded from attack. The impact of the attacks shows that the military force used was manifestly disproportionate to any threat posed by the rebels. In fact, attacks were most often intentionally directed against civilians and civilian objects. Moreover, the manner in which many attacks were conducted (at dawn, preceded by the sudden hovering of helicopter gun ships and often bombing) demonstrates that such attacks were also intended to spread terror among civilians so as to compel them to flee the villages. In a majority of these cases, victims of the attacks belonged to African tribes, in particular the Fur, Masaalit and Zaghawa tribes. From the viewpoint of international law these violations of international humanitarian law no doubt constitute large-scale war crimes.

*Id.* ¶ 267.

<sup>75</sup> *Id.* ¶ 185 (“A common conclusion is that, in its response to the insurgency, the Government has committed acts against the civilian population, directly or through surrogate armed groups, which amount to gross violations of human rights and humanitarian law.”).

## B. SECURITY COUNCIL REFERRAL

In response to the Darfur Commission's report, the U.N. Security Council, in March of 2005, passed U.N. Security Council Resolution 1593 referring the Darfur case to the ICC Prosecutor's Office.<sup>76</sup> U.N. Security Council Resolution 1593 represented the first time that the Council referred a case to the ICC, and the first time that the Court attempted to extend its jurisdiction to the territory of a State that was not a party to the Rome Statute.<sup>77</sup> U.N. Security Resolution 1593 also required the Prosecutor's Office to give an initial update to the U.N. Security Council within the first three months of referral and every six months following the initial update.<sup>78</sup> Sudan has exhibited mixed reactions to the involvement of the ICC in Darfur, ranging from limited cooperation to outright opposition.<sup>79</sup> U.N. Security Council Resolution 1593 required the full cooperation of Sudan and any other States actively involved in the conflict. It also urged non-State Parties and regional organizations like the AU to cooperate fully in the Prosecutor's Office's investigation of the crimes.<sup>80</sup>

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<sup>76</sup> S.C. Res. 1593, *supra* note 6, ¶ 1.

<sup>77</sup> The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: . . . (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.

Rome Statute, *supra* note 1, art. 13(b).

<sup>78</sup> S.C. Res. 1593, *supra* note 6, ¶ 8 (referring to the responsibility of the Prosecutor to give updates to the Security Council).

<sup>79</sup> *Fourth Report of the Prosecutor of the International Criminal Court Pursuant to UNSCR 1593 (2005)*, at 10, delivered to the Security Council (Dec. 14, 2006), available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_ReportUNSC4-Darfur\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_ReportUNSC4-Darfur_English.pdf) [hereinafter *Fourth Report to the U.N. Security Council*]. This Report states:

An OTP mission to the Sudan took place in August 2006, during which formal witness interviews were conducted with two senior Government officials who, by virtue of their positions were able to provide information in relation to the conflict in Darfur and the activities of Government forces and other groups. . . . The government of the Sudan has also provided a limited amount of the documentation requested by the Office.

*Id.* at 9-10. After the issuance of the two arrest warrants for suspects in the Darfur crimes in the Spring of 2007, however, Sudan has shown an increasing unwillingness to cooperate with the ICC. *Id.*; see *infra* note 91.

<sup>80</sup> S.C. Res. 1593, *supra* note 6, ¶¶ 1-2 (requiring the cooperation of Sudan and other states involved in the Darfur conflict and urging all non-State Parties and regional organizations like the AU, which has a mission in Sudan, to cooperate fully with the ICC); see also *id.* ¶ 3 ("Security Council 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.").

## IV. ICC PROGRESS ON DARFUR

## A. INVESTIGATION

Following the U.N. Security Council referral, the ICC Prosecutor, Mr. Luis Moreno-Ocampo, notified the Presidency of the ICC of the entry of the case in the Court's docket.<sup>81</sup> The Presidency assigned the case to Pre-Trial Chamber I for all pre-trial judicial decisions.<sup>82</sup> As part of its preliminary analysis of the Darfur situation, the Prosecutor's Office received the Darfur Report and the evidence gathered as part of that inquiry. Included in the Darfur Commission's documents was a sealed envelope containing the names of fifty-one people that the Commission determined were most responsible for the crimes committed in Darfur.<sup>83</sup> The Prosecutor opened the document containing the suspects' names with witnesses present and then resealed it to keep the findings confidential.<sup>84</sup> The Prosecutor's preliminary analysis consisted of a determination, pursuant to the Rome Statute, that the alleged crimes were admissible before the ICC.<sup>85</sup> In June 2005, the Prosecutor decided that sufficient evidence existed to initiate a

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<sup>81</sup> See Regulations of the Court, § 2, Reg. 45, ICC-BD/01-01-04 (2004). The ICC has had one President to date, Mr. Phillipe Kirsch, who was re-elected in 2006. See Press Release, ICC, Election of the Presidency (March 11, 2006), available at <http://www.iccpi.int/press/pressreleases/131.html>.

<sup>82</sup> See Regulations of the Court, *supra* note 81.

<sup>83</sup> See Press Release, ICC, List of Names of Suspects Opened by the ICC OTP (Apr. 11, 2005), available at [http://www.icc-cpi.int/pressrelease\\_details&id=101&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=101&l=en.html).

<sup>84</sup> *Second Report of the Prosecutor of the International Criminal Court Pursuant to UNSC 1593 (2005)*, at 3, delivered to the Security Council (Dec. 13, 2005), available at [http://www.icc-cpi.int/library/organs/otp/LMO\\_UNSC\\_ReportB\\_En.pdf](http://www.icc-cpi.int/library/organs/otp/LMO_UNSC_ReportB_En.pdf) [hereinafter *Second Report to the U.N. Security Council*].

<sup>85</sup> *Report of the Prosecutor of the International Criminal Court Pursuant to UNSC 1593 (2005)*, at 1, 3, delivered to the Security Council (June 29, 2005), available at [http://www.icc-cpi.int/library/cases/ICC\\_Darfur\\_UNSC\\_Report\\_29-06\\_05\\_EN.pdf](http://www.icc-cpi.int/library/cases/ICC_Darfur_UNSC_Report_29-06_05_EN.pdf) [hereinafter *First Report to the U.N. Security Council*].

Prior to the commencement of a formal investigation, the Prosecutor is required to gather and assess relevant information in order to determine whether there is a reasonable basis to initiate an investigation [in accordance with article 53 of the Statute] . . . Having carried out this preliminary analysis, on 1 June 2005 the Prosecutor determined that there is a reasonable basis to initiate an investigation into the situation in Darfur since 1 July 2002.

*Id.* at 1; see also Rome Statute, *supra* note 1, art. 53(1)(a)-(c) (listing factors, including whether a case is admissible under Article 17's complementarity principle, that a Prosecutor must consider in determining whether to proceed with an investigation of a case referred by U.N. Security Council). In addition to considering admissibility under the complementarity principle, the Prosecutor, before initiating an investigation into alleged crimes, must determine whether the proceeding is in the interest of justice and whether there is "a reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed." *Id.*

full investigation.<sup>86</sup> Under the Rome Statute, the Prosecutor's Office is responsible for conducting an independent and full investigation of all crimes within the Court's jurisdiction.<sup>87</sup>

The Prosecutor's Darfur investigation presents unique challenges because it is the first time an investigation has taken place in the midst of an ongoing conflict.<sup>88</sup> In addition, because the investigation involves Sudan, a non-State Party, the Prosecutor must rely on Article 87 of the Rome Statute, which provides that specific ad hoc agreements for cooperation shall be reached in the case where a non-State Party is involved in an investigation.<sup>89</sup> As required under the relevant U.N. Security Council resolution, the Prosecutor has commented frequently on the varying levels

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<sup>86</sup> Evidence is sufficient to initiate an investigation, and findings of admissibility indicate the ICC would have jurisdiction over crimes alleged in Darfur. *First Report to the U.N. Security Council*, *supra* note 85, at 2-4; *see also* Rome Statute, *supra* note 1, art. 53(1)(a)-(c) (discussing factors the Prosecutor must consider before deciding to proceed with an investigation of a referred case).

<sup>87</sup> "The Prosecutor shall[,] in order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally." Rome Statute, *supra* note 1, art. 54. "The Prosecutor shall analyse the seriousness of the information received." *Id.* art. 15(2). Note that under Article 54, the Prosecutor may, as part of his or her investigation, "[s]eek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate." *Id.* art. 54(3)(c). If a State Party is unable to cooperate, due to unavailability of its authorities, etc., the Pre-Trial Chamber may still authorize the Prosecutor to carry out investigatory actions in the territory of a State Party. *Id.* art. 57(3)(d).

<sup>88</sup> Due to attacks by the Janjaweed against humanitarian workers, many interviews of victims and witnesses took place outside of Darfur to ensure the safety of investigators and those giving testimony. *Second Report to the U.N. Security Council*, *supra* note 84, at 2-5.

<sup>89</sup> Rome Statute, *supra* note 1, art. 87(5)(a) ("The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis."). If a non-State Party fails to comply with such an agreement, the Court may inform the U.N. Security Council if it originally referred the case:

Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

*Id.* art. 87(5)(b). Also, in the case of Darfur, the U.N. Security Council resolution referring the case required that Sudan cooperate with the Prosecutor in his investigation of the matter. *See supra* note 80 and accompanying text. Acting under its Chapter VII powers, the U.N. Security Council is charged with maintaining peace and security around the world, and is given the power to compel cooperation with its efforts to do so. U.N. Charter ch. VII. The Rome Statute gives the Court as much expanded jurisdiction over non-State Parties as the U.N. Security Council determines is necessary through its own referral. Rome Statute, *supra* note 1, art. 13.

of cooperation of the Sudanese government and other organizations.<sup>90</sup> Most recently, Sudan has indicated its unwillingness to continue cooperating with the Court.<sup>91</sup>

## B. PROSECUTOR'S APPLICATION

The Prosecutor's initial investigation took approximately twenty months to complete, focusing primarily on the crimes which constituted the gravest offenses. At the conclusion of this investigation, the Prosecutor, on February 27, 2007, submitted the first Application for Summonses, or warrants, for two suspects involved in the Darfur crimes.<sup>92</sup> The Application included the various counts of crimes charged against the two suspects and the evidence supporting the charges.<sup>93</sup> The two suspects named in the Application were Ahmad Harun and Ali Kushayb.<sup>94</sup> Harun was the

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<sup>90</sup> "The Government of the Sudan has also provided a limited amount of the documentation requested by the Office [of the Prosecutor]." *Fourth Report to the U.N. Security Council*, *supra* note 79, at 11. The Prosecutor's obligation to report to the U.N. Security Council stems from U.N. Security Council Resolution 1593 referring the case to the ICC. *See supra* note 6 and accompanying text.

<sup>91</sup> "[A] member of the parliament from the SPLM... Ahmad Isa criticized [in] a telephone call to Al-Ayyam[, a Sudanese news agency,] the proposals made by members of the [ruling] National Congress (NC) to persuade crime witnesses in Darfur not to collaborate with the ICC." Al-Ayam, *Sudan: SPLM Parliamentarians Call on Government to Hand over Darfur Suspects*, BBC MONITORING INTERNATIONAL REPORTS (May 7, 2007). "Our position is very, very clear—the ICC cannot assume any jurisdiction to judge any Sudanese outside the country," Justice Minister Mohamed Ali al-Mardi told the Associated Press... Asked whether Sudan would continue its past sporadic cooperation with the [C]ourt, al-Mardi answered, "What cooperation? It's over." Mike Corder, *International Court Issues Arrest Warrants for Darfur War Crimes Suspects*, ASSOCIATED PRESS (May 2, 2007), accessed via Access World News database.

<sup>92</sup> Prosecutor's Application under Article 58(7), ICC-02/05-56 (Feb. 27, 2007), available at [http://www.icc-cpi.int/library/cases/ICC-02-05-56\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-56_English.pdf). [hereinafter Prosecutor's Application]. Technically, under the Rome Statute, a request for summonses is distinct from a request for warrants:

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.

Rome Statute, *supra* note 1, art. 58(7).

<sup>93</sup> *See generally* Prosecutor's Application, *supra* note 92 (listing the details of the crimes alleged); *see also infra* notes 94-97 (providing examples of crimes alleged).

<sup>94</sup> Prosecutor's Application, *supra* note 92, at 4.

[The Prosecutor] has concluded that there are reasonable grounds to believe that Ahmad Muhammad Harun (hereinafter also referred to as "Ahmad Harun" or "Harun") and Ali Muhammad Ali Abd-Al-Rahman (also known as Ali Kushayb and hereinafter referred to as "Ali Kushayb" or "Kushayb") bear criminal responsibility for crimes against humanity and war

Minister of the Interior and head of the Darfur Security Desk for the government in 2003, when the majority of the crimes under investigation by the Prosecutor's Office occurred.<sup>95</sup> Kushayb, the leader of the Janjaweed militia in West Darfur, commanded thousands of personnel.<sup>96</sup> Of the fifty-one suspects transmitted to the Prosecutor, Harun and Kushayb are believed to bear the greatest responsibility for the criminal acts occurring in Darfur.<sup>97</sup>

Indeed, the findings made by the Prosecutor as a result of his investigation into the Darfur case revealed profound responsibility for the crimes in Darfur by the two named suspects. The Application contained a total of fifty-one counts of various crimes against humanity and war crimes, as defined by the Rome Statute: forty-one counts against both suspects; nine against Kushayb alone; and one against Harun alone.<sup>98</sup> The evidence

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crimes committed in Darfur in 2003 and 2004. The Prosecutor therefore requests under Article 58 of the Rome Statute that Pre-Trial Chamber I issue summonses naming Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (also known as Ali Kushayb) and directing them to appear in this Court for initial proceedings under Article 60 [requiring suspects to be informed of the charges and allowing requests for interim release pending trial].

<sup>95</sup> *Id.* ¶¶ 29-31.

<sup>96</sup> *Id.* ¶¶ 36-37.

<sup>97</sup> [The Prosecutor's] Application alleges that Ahmad Harun—with his primary responsibility for recruiting Militia/Janjaweed in Darfur—and Ali Kushayb—a well known Militia/Janjaweed leader who participated in attacking civilian towns and villages—joined each other, and others, in pursuing the shared and illegal objective of persecuting and attacking civilian populations in Darfur.

*Id.* at 5-6. The following two counts against both Harun and Kushayb from the Prosecutor's Application are included for illustrative purposes:

COUNT 1 (Persecution in the Kodoom villages and surrounding areas constituting a Crime against Humanity) . . . From on or about 15 August 2003 to on or about 31 August 2003, Ahmad Harun and Ali Kushayb, as part of a group of persons acting with a common purpose, contributed to the commission of a crime against humanity which in fact occurred, namely the persecution of the primarily Fur population of the Kodoom villages and surrounding areas in the Bundis Administrative Unit of Wadi Salih Locality in West Darfur, by acts of murder, attacking the civilian population, destruction of property and forcible transfer in violation of Articles 7(1)(h) and 25(3)(d) of the Rome Statute . . . COUNT 14 (Rape in Bindisi town and surrounding areas constituting a War Crime) . . . On or about 15 August 2003, Ahmad Harun and Ali Kushayb, as part of a group of persons acting with a common purpose, contributed to the commission of a war crime which in fact occurred, namely the rape of women and girls from the primarily Fur population of Bindisi town and surrounding areas in the Bundis Administrative Unit of Wadi Salih Locality in West Darfur, including [NAMES OF VICTIMS REDACTED], in violation of Articles 8(2)(e)(vi) and 25(3)(d) of the Rome Statute.

*Id.* at 6, 10-11. The rest of the fifty-one counts are listed sequentially. *Id.* at 6-23.

<sup>98</sup> Genocide was not included among the charges against Harun and Kushayb. While the absence of genocide charges was not addressed in the Prosecutor's Application, it was addressed in the Darfur Report:

[T]he commission concludes that the Government of Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are: first, the *actus reus* consisting of killing, or causing serious bodily or mental harm,



presented in the Application reflects an established practice of attack, murder, looting, and rape of civilians in Darfur by the Janjaweed, which Kushayb led with the support, complacency, and aid of government forces and representatives such as Harun.<sup>99</sup> The crimes committed by the two named suspects were part of the counterinsurgency program conducted by the government in response to the increased attacks by the SLM/A and JEM in 2003.<sup>100</sup>

### C. THE PRE-TRIAL CHAMBER ISSUES ARREST WARRANTS FOR HARUN AND KUSHAYB

After the submission of an application by the Prosecutor, the Pre-Trial Chamber must determine whether arrest warrants or summonses may issue to ensure the appearance of suspects before the Court.<sup>101</sup> On April 27, 2007, the Pre-Trial Chamber issued such warrants for the arrest of Harun

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or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct . . . . [O]ne crucial element appears to be missing, at least as far as the central Government authorities are concerned: genocidal intent. Generally speaking the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds. Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare.

*Darfur Report, supra* note 3, ¶¶ 513-22.

<sup>99</sup> After his appointment to the Darfur Security Desk, Ahmad Harun monitored the efforts to recruit:

Militia/Janjaweed in Darfur, and authorized the provision of funds and arms to those Militia, as a means of ensuring their effectiveness. At all times relevant to this application, Ali Kushayb was a tribal leader who, funded and encouraged by Harun, subsequently led Militia/Janjaweed in attacking the civilian populations of towns and villages in West Darfur . . . .

Prosecutor's Application, *supra* note 92, ¶ 29.

<sup>100</sup> Detailed evidence of this counterinsurgency campaign was presented in the Prosecutor's Application. *Id.* ¶¶ 38-111.

<sup>101</sup> At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The arrest of the person appears necessary: (i) To ensure the person's appearance at trial, (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

Rome Statute, *supra* note 1, art. 58(1). The Pre-Trial Chamber, upon the request of the Prosecutor, may also issue summonses for the appearance of suspects before the Court. *See id.* art. 58(7). For the relevant textual provision related to these summonses, *see supra* note 92. Summonses must be served on the person. *See supra* note 92.

and Kushayb.<sup>102</sup> The Rome Statute provides that it is the responsibility of the State having custody over suspects to ensure their safe transfer to the Court's custody.<sup>103</sup> In his fifth address to the U.N. Security Council, the Prosecutor explained that, in order to ensure compliance with the arrest warrants, the U.N. Security Council may be required to pressure the government of Sudan.<sup>104</sup>

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<sup>102</sup> The Pre-Trial Chamber “[d]ecide[d] to issue warrants of arrest for Ahmad Harun and Ali Kushayb for their alleged responsibility for crimes against humanity and/or war crimes under article 25 of the Statute . . . .” Decision on the Prosecution Application under Article 58(7) of the Statute, at 43, ICC-02/05-01/07 (April 27, 2007), available at [http://www.icc-cpi.int/library/cases/ICC-02-05-07-07\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-07-07_English.pdf) [hereinafter PTC Warrant Decision]. Apparently, the Pre-Trial Chamber believed issuing summonses for the two suspects would not have ensured their appearance before the Court.

<sup>103</sup> 1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender. 2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem* [double jeopardy] as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility. Rome Statute, *supra* note 1, art. 89(1)-(2). For the text of this double jeopardy provision, see *supra* note 44. Neither Harun nor Kushayb has yet to bring such a challenge. Though charges are currently pending against Kushayb in the Sudanese national courts, they apparently are for different crimes than those charged in the Prosecutor's Application. See *infra* notes 120-24 and accompanying text. Under the Rome Statute, because of the pending charges against Kushayb, Sudan, after complying with the warrant request, should consult with the Court: “If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.” Rome Statute, *supra* note 1, art. 89(4). Sudan must grant the request to execute the warrants because the Prosecutor has already determined the case is admissible before the Court. See *supra* note 94 and accompanying text.

<sup>104</sup> The objective is now to ensure the appearance of these individuals in Court. This major “challenge requires the unconditional cooperation of all. The Security Council and regional organizations must take the lead in calling on the Sudan as the territorial State to arrest the two individuals and ensure their appearance in Court.” *Fifth Report of the Prosecutor of the International Criminal Court Pursuant to UNSCR 1593 (2005)*, at 2, delivered to the Security Council (June 7, 2007), available at [http://www.iccpi.int/library/organs/otp/OTP\\_ReportUNSC5-Darfur\\_English.pdf](http://www.iccpi.int/library/organs/otp/OTP_ReportUNSC5-Darfur_English.pdf) [hereinafter *Fifth Report to the U.N. Security Council*]. Sudan has already indicated its reluctance to comply with the warrants. See *supra* note 91 (providing statement of Sudanese Justice Minister indicating unwillingness to comply).

Currently, the Prosecutor is awaiting the arrest and transfer of the suspects so that he may proceed with the trial phase.<sup>105</sup> The Pre-Trial Chamber's decision to issue warrants requires that the Registry of the Court transmit warrants for the two suspects to Sudan and all other States with which cooperation has been requested.<sup>106</sup> Since 2006, Harun has been serving as the Minister of State for Humanitarian Affairs in the Sudanese government.<sup>107</sup> Kushayb is reportedly being detained in Sudan by government officials on different charges, although there is some suspicion that he may have recently been released.<sup>108</sup> Though unlikely, if Sudan were to issue additional charges against either of the named suspects, it would be for the Prosecutor and the Pre-Trial Chamber to determine under the complementarity principle whether the national courts are able and willing to prosecute Harun and Kushayb genuinely and impartially.<sup>109</sup>

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<sup>105</sup> "The next step should be the arrest and surrender of Ahmad Harun and Ali Kushayb, and thereafter, the proceedings relating to confirmation of charges." *Fifth Report to the U.N. Security Council*, *supra* note 104, at 5. The procedures for arrest of a suspect are contained in Article 59. Rome Statute, *supra* note 1, art. 59(1) ("A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws . . ."). All State Parties have received a request for execution of the arrest warrants. *See infra* note 106 and accompanying text. Sudan is obligated to cooperate with the warrant request under U.N. Security Council Resolution 1593. S.C. Res. 1593, *supra* note 6, ¶ 2. This Resolution also urges the cooperation of non-State Parties in the Darfur case. *See supra* note 80 and accompanying text. The procedures regarding the surrender of a person in the custodial State are contained in Article 89 of the Rome Statute. Rome Statute, *supra* note 1, art. 89; *see also supra* note 103 (explaining surrender procedures). "Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible." Rome Statute, *supra* note 1, art. 59(7).

<sup>106</sup> The Registry:

shall transmit such requests to the competent Sudanese authorities in accordance with rule 176(2) of the Rules and to the following States: (i) All States Parties to the Statute; (ii) All United Nations Security Council members that are not States Parties to the Statute; and (iii) Egypt, Eritrea, Ethiopia and Libya [the non-State Parties bordering Sudan].

PTC Warrant Decision, *supra* note 102, at 56-57. For a discussion on the obligations of these States to execute the warrant requests, *see supra* notes 80, 103.

<sup>107</sup> *Fifth Report to the U.N. Security Council*, *supra* note 104, at 4.

<sup>108</sup> While there are indications that Ali Kushayb is under investigation in the Sudan in relation to certain matters, the investigation does not relate to the same incidents as those investigated by the Office of the Prosecutor. Concerning Ahmad Harun, there is no indication that he is or has been subject to any criminal investigation.

*Fifth Report to the U.N. Security Council*, *supra* note 104, at 8. *See infra* note 124 concerning Kushayb's apparent release from custody.

<sup>109</sup> *See* Rome Statute, *supra* note 1, arts. 15(4), 53(2). Under article 53(3)(a), the U.N. Security Council, as the referring body, may request the Pre-Trial Chamber to review a decision by the Prosecutor not to proceed due to inadmissibility under Article 17 (which includes the complementarity principle). *Id.* art. 53(3)(a). After its review, the Pre-Trial Chamber may request the Prosecutor to re-consider the decision not to proceed. Note that

## V. EMERGING ISSUES IN THE DARFUR CASE

## A. COMPLEMENTARITY AND THE SUDANESE SPECIAL COURTS

As part of the complementarity regime created by the Rome Statute, the ICC is a court of last resort, only to be used when a national jurisdiction is unavailable, unable, or unwilling to prosecute for crimes in the Court's jurisdiction.<sup>110</sup> Article 17 of the Rome Statute states that the Pre-Trial Chamber of the ICC may determine a case is admissible before the ICC under the complementarity principle if national proceedings were initiated for the "purposes of shielding the person from criminal responsibility" or were not conducted independently or impartially.<sup>111</sup> Furthermore, in the ICC case against Thomas Lubanga Dyilo, the Court decided that in order for a case to be inadmissible before the ICC under the complementarity principle as a result of concurrent national court proceedings, these proceedings must "encompass both the person and the conduct which is the subject of the case before the Court."<sup>112</sup>

As early as 2004, Sudan and its judiciary began to take action in response to the crimes committed within its jurisdiction. In particular, the President of Sudan established a concurrent National Commission of Inquiry (NCOI) to investigate the Darfur crimes.<sup>113</sup> The findings of the NCOI were somewhat similar to the findings of both the Darfur Commission and the Prosecutor's own later investigations. The NCOI's findings addressed reports of genocide, rape as a crime against humanity, the bombing of civilians as a violation of the Geneva Conventions, forcible

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under Article 53(4), "[t]he Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information." *Id.* art. 53(4). The determination by the Prosecutor and the Pre-Trial Chamber regarding the admissibility of a case would be made pursuant to the definitions laid out in Articles 17 and 20 containing, respectively, the Court's complementarity principle and double jeopardy provision. *Id.* arts. 17(1)-(2), 20; *see also supra* note 43 and accompanying text for further discussion of the complementarity principle under the Rome Statute. *See supra* note 44 and accompanying text for a further discussion of the double jeopardy provision.

<sup>110</sup> *See supra* note 43 and accompanying text for further discussion of the complementarity principle under the Rome Statute.

<sup>111</sup> Rome Statute, *supra* note 1, art. 17(2)(a). Article 17 also provides that proceedings in a national court must be consistent with the intent to bring the person concerned to justice. *Id.* art. 17(2)(b).

<sup>112</sup> *Fifth Report to the U.N. Security Council, supra* note 104, at 7. *See also supra* notes 45-48 and accompanying text (discussing further the Lubanga case).

<sup>113</sup> Additionally, a Parliamentary Commission of Inquiry was formed to investigate crimes committed in Darfur. Prosecutor's Application, *supra* note 92, ¶ 11. A special committee for the crime of rape was also created; however, the Parliamentary Commission of Inquiry found that this committee was unnecessarily limited from investigating other forms of sexual abuse which are within the jurisdiction of the ICC. *Id.* ¶ 12.

transfer of civilians, killings, and extra-judicial killings.<sup>114</sup> The NCOI concluded that genocide did not occur in Darfur and that rape, though it did occur, did not constitute a crime against humanity.<sup>115</sup> The NCOI, acknowledged bombing and killing of civilians by government military forces and rebel groups, rape, and other crimes involving sexual violence, although it underemphasized their magnitude and severity.<sup>116</sup>

In addition, the Sudanese government responded to calls for justice in Darfur by establishing the Special Court for Darfur in June 2005.<sup>117</sup> After completing six low-level prosecutions, the Special Court for Darfur was replaced by special courts for each of the three Darfur regions: North, West, and South Darfur.<sup>118</sup> As of the late spring of 2007, the special courts had only completed thirteen cases against low-level suspects in Darfur, none of whom was charged with crimes of the same gravity or magnitude as the crimes charged in the Prosecutor's Application against Harun or Kushayb.<sup>119</sup>

If the Prosecutor determines at any time that the Sudanese special courts are able and willing to prosecute in an impartial manner the two

<sup>114</sup> *Fifth Report to the U.N. Security Council*, *supra* note 104, at 4.

<sup>115</sup> *Id.*

<sup>116</sup> *Darfur Report*, *supra* note 3, ¶¶ 456-62.

To summarise, the Executive Summary of [NCOI] states that serious violations of human rights were committed in the three Darfur States. All parties to the conflict were involved. What happened did not constitute genocide. Numbers of persons killed were exaggerated: losses of life incurred by all parties, including the armed forces and police, did not exceed a few thousands. Rape and crimes of sexual violence were committed but were not widespread or systematic to amount to a crime against humanity. [NCOI] recommends judicial investigations into some specific incidents and a setting up of a judicial committee to investigate property losses.

The [U.N.] Commission finds that while it is important for [NCOI] to acknowledge some wrong-doings, its findings and recommendations are insufficient and inappropriate to address the gravity of the situation. Simply put, they provide too little too late. The massive scale of alleged crimes committed in Darfur is hardly [sic] captured by the report of the National Commission. As a result, the report attempts to justify the violations rather than seeking effective measures to address them.

*Id.* ¶¶ 461-62.

<sup>117</sup> Prosecutor's Application, *supra* note 92, ¶ 256-57.

<sup>118</sup> "The trials conducted at that point related to purported low level suspects who were not likely to figure in any case before the Court." Prosecutor's Application, *supra* note 92, ¶ 256.

<sup>119</sup> "The cases [before the Special Courts] involved low-ranking individuals primarily accused of relatively minor offenses such as theft. None of the crimes charged reflected the massive scale and gravity of the atrocities in Darfur. No senior commanders or superiors were charged for their part in the atrocities." Human Rights Watch, *Sudan: National Courts Have Done Nothing on Darfur*, at 1, (June 11, 2007), available at [http://www.iccnw.org/documents/HRW\\_SudaneseCourts\\_Darfur\\_11june07\\_eng.pdf](http://www.iccnw.org/documents/HRW_SudaneseCourts_Darfur_11june07_eng.pdf).

named suspects for the charges in the Application, and are in fact doing so, then, under the complementarity principle, the case would become inadmissible before the ICC.<sup>120</sup> The Prosecutor has not yet made this determination and is unlikely to do so in the near future.

Under the complementarity principle, admissibility of a case before the ICC hinges on several additional considerations. The national proceedings not only must be charging the same person as the ICC, but also must be pursuing the same charges against that person involving the same criminal conduct.<sup>121</sup> In the case of Kushayb, the current proceedings against him in the Sudanese Special Court for Darfur do not pertain to the same crimes as in the Application by the ICC Prosecutor. For example, the ICC counts against Kushayb are for “attacks upon [the areas of] Kodoom, Bindisi, Mukajar, and Arawala.”<sup>122</sup> Meanwhile, the reported arrest of Kushayb in Sudan, on charges issued by the Special Court, stems from “incidents concerning the areas of Shattaya in South Darfur and Deleig in West Darfur.”<sup>123</sup> The assertion of the Prosecutor is that the ICC is pursuing different charges for different crimes against Kushayb; therefore, the case is still capable of prosecution before the ICC under the complementarity principle. Moreover, Sudan has apparently released Kushayb from custody for the crimes for which it was trying him. This act would appear to further indicate Sudan’s unwillingness to prosecute Kushayb for any crime, and hence further support the case’s admissibility under the complementarity principle.<sup>124</sup>

The complementarity principle is not violated in the ICC case against Harun because the Sudanese national courts have shown no willingness to prosecute this individual. In fact, no concurrent proceedings are in progress

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<sup>120</sup> It is important to reiterate that the admissibility assessment is not a judgment on the Sudanese justice system as a whole, but an assessment as to whether or not the Government of the Sudan has investigated or prosecuted, or is investigating or prosecuting in a genuine manner the case selected by the Prosecution for presentation to the Court.

*Fourth Report to the U.N. Security Council*, *supra* note 79, at 8. For a description of the process by which such an admissibility decision under the Statute would be made, see *supra* note 109 and accompanying text.

<sup>121</sup> See Rome Statute, *supra* note 1, arts. 17(1)(c), 20(3); see also *supra* notes 43, 109 and accompanying text (regarding the rules of admissibility).

<sup>122</sup> *Fifth Report to the U.N. Security Council*, *supra* note 104, at 3.

<sup>123</sup> *Id.* at 4, 7; see also Prosecutor’s Application, *supra* note 92, ¶ 259 (detailing the information gathered on the Special Courts).

<sup>124</sup> See *infra* note 127 (discussing substantive limitations in Sudanese law preventing the application of certain charges by government prosecutors); *Sixth Report to the U.N. Security Council*, *supra* note 3, at 3 (“In relation to Ali Kushayb, against whom the [Sudanese government] had previously indicated that there were investigations, on 30 September then Foreign Affairs Minister Lam Akol reportedly stated that he was released for lack of evidence.”).

at any level within the Sudanese court system.<sup>125</sup> Currently, Harun maintains a high position in the government of Sudan.<sup>126</sup> With the evidence of Harun's conspiracy with the Janjaweed to commit crimes against civilians in Darfur, the shared responsibility on the part of the government for supporting the activities of this militia in their extreme tactics of counterinsurgency becomes increasingly apparent. In light of this shared responsibility for the Darfur crimes, any attempt by the national jurisdiction to prosecute Harun or Kushayb in response to the Prosecutor's Application and the Pre-Trial Chamber's issuance of the arrest warrants could be seen as suspect, and the genuineness of any proceedings called into question.<sup>127</sup> Numerous human rights groups have questioned the ability of any national court in Sudan to prosecute crimes which have been committed by officials of the government.<sup>128</sup> Therefore, there are no indications that the case against Harun or Kushayb will be inadmissible before the ICC under the complementarity principle because of concurrent proceedings in the national court system in Sudan.

#### B. PROPOSALS FOR AN INTEGRATED APPROACH TO RESOLVING THE CRISIS

Though the ICC's ability to successfully prosecute Harun and Kushayb is important for its overall mission in bringing international criminals to justice, the magnitude and complexity of the human rights crisis in Darfur demands a multi-faceted, integrated response. Justice, forgiveness, and reconciliation in Sudanese society may best be achieved by combining the

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<sup>125</sup> "Concerning Ahmad Harun, there is no indication that he is or has been subject to any criminal investigation in relation to Darfur." *Fifth Report to the U.N. Security Council*, *supra* note 104, at 8; *see also Sixth Report to the U.N. Security Council*, *supra* note 3, at 3 ("All public statements concerning Ahmad Harun indicate that he would neither be surrendered nor subject to national proceedings. The [Sudanese government] has not conducted nor is conducting any proceedings in relation to the Prosecution's case.").

<sup>126</sup> "[Harun] currently serves as Minister of State for Humanitarian Affairs." *Fifth Report to the U.N. Security Council*, *supra* note 104, at 4.

<sup>127</sup> The U.N. Commission determined that the laws of Sudan do not adequately criminalize crimes against humanity and war crimes, thus making it difficult to ensure effective national prosecution under the complementarity principle for the crimes in the Application. *Darfur Report*, *supra* note 3, ¶ 451. The Human Rights Watch drew similar conclusions about the Sudanese justice system, citing a lack of proscription in the substantive law, failure to prosecute on the basis of command responsibility, and other problems. HRW Special Court Assessment, *supra* note 9, at 15-30.

<sup>128</sup> *See, e.g., Amnesty International USA, Fact Sheet*, <http://www.amnestyusa.org/Summer-action-series-2/FACTSHEET/page.do?id=1102056&n1=52&n2=201&n3=208> (last visited Sept. 8, 2008). "Statements made by senior Sudanese government officials at the time made clear that one goal in establishing the [special courts] was to divest the ICC of jurisdiction." HRW Special Courts Assessment, *supra* note 9, at 1.

efforts of criminal prosecutions, truth commissions, and local institutions. In addition, by including Sudanese actors and institutions in any proposal to resolve the crisis, the spirit of complementarity—that notion of a shared role between the ICC and Sudan—is perhaps best fulfilled.

Since it is impracticable for the ICC to prosecute the full range of crimes committed by the large number of human rights violators in Darfur, the Sudanese special courts should be encouraged to take part in the task of prosecuting at least some of the human rights violators in Darfur. In this way, more perpetrators will be held accountable for their crimes, and more victims will have the opportunity to experience first-hand the actual trial and sentencing of perpetrators, whether as testifying witnesses or as members of the public during trial proceedings. If individual perpetrators in Darfur were tried exclusively in The Hague by the ICC, victims and others would have reduced opportunities to participate in and observe criminal prosecutions, given travel costs and lack of access to media outlets broadcasting the proceedings. By increasing opportunities for victims to experience first-hand the administration and application of justice, reconciliation in a post-crisis Darfur society will be better promoted and achieved, and victims and survivors will, in turn, be better able to transition into their new society.

To improve the performance and efficiency of the special courts in Darfur, the international community, acting through the U.N., the AU, and ICC Member States, must commit itself to providing these courts with an appropriate level of financial and human resources while at the same time encouraging their impartiality and independence. Post-crisis societies like Darfur typically experience a shortage of judicial personnel, most often due to death or flight. Therefore, an attempt should be made to identify impartial individuals both inside and outside Darfur who are knowledgeable regarding Sudanese law and who could serve, at least on a temporary basis, as judges and attorneys for the numerous prosecutions that need to be carried out. Some of these newly recruited individuals could be assigned to the three special courts already prosecuting individuals for crimes related to Darfur. By increasing the number of judges and attorneys serving on the current special courts, the prosecutorial capacity of these courts will be enhanced. To further accommodate the large number of individuals who must be prosecuted, these additional judges and attorneys could be assigned to newly created special courts.

Given the problems of partiality, resource limitations, and current restrictions in Sudanese law that make it difficult to prosecute for certain grave breaches of human rights law, the Sudanese national courts should focus their efforts on low-level criminals responsible for individual acts of violence. The ICC, on the other hand, can focus its efforts on prosecuting



high-level criminals, such as Harun and Kushayb, who allegedly organized and carried out the full-scale plan to kill and displace the civilians in Darfur.<sup>129</sup> By limiting the Sudanese special courts to trying only low-level Darfur suspects, these courts will not generally be prosecuting the high-level government officials and their proxies who played a significant role in the orchestration and execution of the human rights abuses. Hence, the impartiality and independence of the courts will be tested less frequently. Also, current Sudanese law should be adequate to respond to most of the criminal conduct engaged in by these low-level offenders, such as theft and murder. The ICC, on the other hand, is the better forum in which to prosecute high-level offenders because of its greater independence and impartiality, as well as its broader range of substantive law that allows the Prosecutor to charge these types of offenders with the crimes they actually committed, including genocide, crimes against humanity, and war crimes.

Under this bifurcated approach to prosecutions for Darfur crimes, certain procedural measures should be adopted to ensure both uniformity and fairness in the application of the law. For instance, since the ICC prohibits the imposition of the death penalty for convicted criminals, Sudan should also bar the death penalty as a possible punishment for those convicted of crimes related to the Darfur crisis. Instead, Sudanese prosecutors should rely exclusively on prison and other non-capital sentences. This will ensure that those convicted of crimes related to Darfur

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<sup>129</sup> Such an approach would be similar to the approach followed in the wake of the genocide in Rwanda. For example, Article 8(1) of the ICTR Statute allows both Rwandan national courts and the ICTR concurrent jurisdiction for crimes coming within the latter's jurisdiction, though the ICTR retains primacy over the jurisdiction of all States, including Rwanda. ICTR Statute, *supra* note 11, art. 8(1)-(2). One issue that arose in the case of Rwanda, where low-level criminals of the genocide have been tried in national courts and genocidal leaders in ICTR proceedings, is the disparity in punishment for those convicted. Because Rwanda has the death penalty and the ICTR does not, convicted low-level criminals in Rwandan courts are subject to this penalty while genocidal leaders convicted before the ICTR escape the ultimate penalty. *Id.* art. 23(1) ("The penalty imposed by the Trial Chamber shall be limited to imprisonment."); see also MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 40-41 (1998) (explaining this disparity of punishment between criminals tried before the ICTR and those tried before Rwandan national courts). This same disparity in punishment may result if the ICC continues to exert its jurisdiction over Darfur suspects, who would be subject to the death penalty in Sudan, but not before the ICC. See Amnesty Int'l website, Document: "Death Sentences and Executions in 2007," available at <http://www.amnesty.org/en/library/asset/ACT50/001/2008/en/b43a1e5a-ffea-11dc-b092-bdb020617d3d/act500012008eng.html> (noting that in 2007 in Sudan, at least seven individuals were executed, and at least twenty-three individuals received a death penalty sentence). The death penalty, of course, is not included among the list of applicable penalties that the ICC may impose on those convicted of crimes under the Statute. Rome Statute, *supra* note 1, art. 77.

will receive the same forms of punishment regardless of whether they are tried before the ICC or Sudanese national courts.<sup>130</sup>

In addition, though high-level Sudanese government officials responsible for orchestrating the human rights abuses and the military commanders who carried out these abuses will mostly be tried before the ICC, the current obstacles in the Sudanese judicial system to trying individuals for grave human rights violations, such as war crimes and crimes against humanity, should be removed. This will allow national prosecutors to try individuals for these crimes if circumstances warrant, and avoid the possibility that a defendant can avoid trial and conviction on more serious charges simply because he or she is tried by the national system, and not the ICC.<sup>131</sup> National prosecutors may need to rely upon these charges if the ICC becomes unable to prosecute all of the high-level participants in the abuses as a result of a backlog of cases, inability to execute warrants, or for some other practical reason. There may be circumstances where a national prosecutor could try an individual for war crimes or crimes against humanity who, though not a high-level participant in the abuses, engaged in conduct falling within the scope of these crimes. Eliminating this current omission in Sudanese law will also help ensure that individuals committing these types of serious crimes receive the punishment of which they are most deserving. In this way, reconciliation among members of the survivor population will be better achieved.

Moreover, to ensure that the prison sentences for those convicted of Darfur crimes before the ICC and the Sudanese special courts are served under similar conditions, a fund should be set up by the international community to construct suitable prisons in Sudan and to improve those prisons already existing in Sudan to the point that they are comparable to prisons in other countries which hold those convicted by the ICC.

In this way, victims and others in the post-crisis society will not experience the injustice of high-level human rights offenders serving prison sentences in conditions substantially better than those in Sudanese prisons holding mostly low-level offenders. Avoiding such disparities in the

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<sup>130</sup> See *supra* note 129 for further discussion of the need to maintain equivalent criminal penalties between international tribunals and national courts addressing the same human rights crisis.

<sup>131</sup> Such lack of symmetry in substantive criminal law between an international court like the ICC and a national court system like Sudan may be one of the principal difficulties faced by regimes based on the concept of complementarity. That is, if the national court system has certain limitations in its substantive criminal law, the international court may, in a regime based on complementarity, become responsible for a disproportionate number of cases. This stems from the fact that in a such a regime, the national court would be "unable" to fully prosecute individuals. For further discussion of this issue in the Sudanese context, see *supra* note 127.

application of sentences will further contribute to the goal of reconciliation, and help facilitate victims' transition from the period of human rights abuses to a relatively more stable and democratic period.

In addition, if prison conditions in Sudan are made comparable to those of other countries holding individuals convicted of Darfur crimes before the ICC, it may be possible to transfer some individuals convicted before the ICC to Sudan. This is desirable because, if these prison sentences are carried out entirely outside the Sudan, those affected most by the human rights abuses are deprived of the experience associated with the oversight and application of punishment to those who committed the worst atrocities. Fostering both the sense and notion in Sudan that justice is being served upon those who committed the worst crimes becomes difficult when the prisoner is potentially thousands of miles away and subject to an unknown, foreign law. This difficulty is exacerbated by the fact that Sudan is a poor country where many citizens would lack access to an international or even domestic media source providing information concerning the externally meted-out punishment.

If the ICC and Sudanese national courts combine their efforts, the two jurisdictions will be able to try more individuals who have taken part in the atrocities, and in the process, better capture the entire spectrum of criminal acts that have taken place in Darfur, from the decisions of leaders to implement an illegal policy of attacking and murdering civilians to the isolated cases of criminal acts that are adequately covered by local Sudanese law. This broadened prosecutorial undertaking will, in turn, help to end the culture of impunity that currently exists in the Sudan and contribute, at least in part, to the goal of national reconciliation for the survivor population.

More prosecutions alone, however, may not achieve these goals. These prosecutions should be accompanied by the establishment of a truth commission in the Sudan, which can help establish a record of the atrocities, prevent future human rights abuses, and promote reconciliation among the survivors.<sup>132</sup> Although Sudan should, of course, have a

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<sup>132</sup> A recommendation for a truth commission was also made by the U.N. Security Council in its resolution referring the case to the ICC. See S.C. Res. 1593, *supra* note 6, ¶ 5 (recommending the establishment of a truth commission in Sudan supported by the AU and the international community and “emphasiz[ing] the need to promote healing and reconciliation [in Sudan] and encourag[ing] 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”). For a discussion of the goals of a truth commission, see *infra* note 170. In the wake of the Rwandan genocide, Professor Mark Drumbl argued that a truth commission, as a potential re-integrative shaming mechanism, would promote restorative justice and national

significant role in the construction of such a commission, non-Sudanese sources should not hesitate to contribute funding.<sup>133</sup> The truth commission could be sponsored and funded by the U.N. or AU. Other sponsors might include nations who are members of the ICC or perhaps even NGOs from these nations. These bodies or nations could provide the financial resources necessary to ensure the continuing operation of the truth commission as well as the realization of the commission's recommendations.

Once the resources have been secured, Sudan itself should be given a significant role in the operation of the commission under certain prescribed guidelines. For example, the current or any future Sudanese government should be able to choose the members of the truth commission as long as these representatives adequately reflect the political, ethnic, religious, and cultural diversity of Sudan. To ensure that the commission's members reflect a cross-section of Sudanese society, continued funding for the work of the truth commission should hinge on the satisfaction of this requirement. Apart from a requirement that the truth commission publish a report of its findings related to the human rights abuses in a fixed amount of time, for instance between twelve and eighteen months from the time it commences its investigative function, the specific content of that report should largely be left up to the Sudanese members of the truth commission.

Possible topics or ideas for inclusion into the commission's investigative agenda and findings might be: (1) the essential facts surrounding particular human rights violations in Darfur; (2) the names of the victims of human rights abuses; (3) historical background relevant to the development of the human rights crisis; (4) the effects particular human rights violations had on these victims; and (5) specific recommendations to promote reconciliation and forgiveness among the survivors of the crisis.

For example, the truth commission could recommend providing financial or other reparations to victims, erecting monuments naming the victims of human rights violations, building public parks in the victims'

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reconciliation by (1) pursuing accountability at the social and organizational levels; (2) forcing genocidal participants to acknowledge the suffering they caused; (3) creating ideas for preventing war crimes in the future; (4) establishing an historical narrative of what happened; and (5) providing for a mutuality of shaming. See Mark Drumbl, *Punishment, Postgenocide From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1267-76 (2000).

<sup>133</sup> For example, Rwanda had a role in the creation of a truth commission established prior to the genocide in 1994. Referred to as the International Commission of Investigation on Human Rights Violations (ICIHRV) in Rwanda Since October 1, 1990, the ICIHRV was the result of a politically negotiated settlement between the Hutu and Tutsi ethnic tribes. Upon the request of Rwandan NGOs, the ICIHRV was actually sponsored by foreign NGOs from the United States, Canada, France, and Burkina Faso. See Priscilla B. Hayner, *FIFTEEN TRUTH COMMISSIONS—1974 TO 1994: A COMPARATIVE STUDY* 604, 630 (1994).

memory, and organizing campaigns and cultural acts to create a climate of national reconciliation and restore the dignity of victims.<sup>134</sup> Other possibilities for the commission's recommendations may include: (1) the creation of special programs to address the physical and mental health problems of victims of the human rights violations; (2) the establishment of educational programs in schools and elsewhere that promote understanding, reconciliation, and forgiveness among survivors; (3) the creation of a foundation or other similar entity to search for disappeared victims; (4) the promulgation of laws making it a crime to conceal information relating to the location of victims and victims' remains; and (5) the removal of obstacles for victims and their families in gaining access to governmental benefits and documents, including death certificates.<sup>135</sup>

A future Sudanese truth commission should play a substantial part in ensuring compliance with and respect for basic human rights norms. To this end, the truth commission could put forth specific suggestions to help ensure the future observance of human rights in Sudan. These suggestions should address the harmonization of Sudanese law with established international human rights principles as well as the promotion of an independent Sudanese judiciary capable of guaranteeing these rights. In addition, the truth commission should focus on ways to foster respect for human rights among the military and police as well as address needed changes in Sudanese constitutional and criminal procedural law so as to ensure further protection for these rights.<sup>136</sup>

One other important power that should be bestowed upon a future truth commission in Sudan is the ability to identify perpetrators by name whenever its investigatory work establishes a clear link between a particular human rights violation and an individual or group of individuals. This ability will widen the possibility for reconciliation in the post-crisis society by providing victims with a real opportunity to both know and forgive their perpetrators. To assist the truth commission in identifying perpetrators, an incentive should be provided for these individuals to come forward on their own and testify before the commission as to their role in the human rights crisis. This could take the form of a promise from the truth commission that any testimony provided by perpetrators that significantly assists the commission in completing its work (e.g., describes the manner in which particular abuses were carried out, the location of victims' remains, the

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<sup>134</sup> Some of these topics and recommendations were addressed in the Chilean Truth and Reconciliation Commission Report, known as the Rettig Report. See CHILEAN TRUTH AND RECONCILIATION REPORT, pt. II, at 6 [hereinafter CHILEAN REPORT].

<sup>135</sup> Some of these recommendations were also part of the Chilean Report. *Id.* pt. II, at 6-9.

<sup>136</sup> *Id.* pt. III, at 9-10.

identity of co-perpetrators, or includes an apology to specific victims), will be looked upon favorably if the perpetrator is later convicted following criminal prosecution. The truth commission could work with government prosecutors to secure an agreement that would, for example, assure more favorable sentencing terms for the particular class of perpetrators who testify before the commission, provide useful information, and are later convicted in a criminal trial for their abuses.

Individual perpetrators, once identified, could be asked to make a public apology to victims before the commission followed by a payment to compensate victims for the harm they inflicted. To the extent that individual perpetrators are unable or unwilling to provide adequate compensation, reparation payments to victims should be made by the government or by the truth commission from a fund set up for these purposes.

While the creation of such a truth commission in Sudan will provide a forum for victims to express their grief and begin the lengthy process towards forgiveness and reconciliation, its impact may be enhanced by incorporating and operating in conjunction with local, customary mechanisms for dispute resolution. For example, local mechanisms for achieving justice in the Sudan, which include Diya ceremonies, peace meetings, and “judiyya,” a mediation process, should also be utilized for their capacities to promote reconciliation and forgiveness.<sup>137</sup> Since Diya ceremonies rely upon certain forms of compensation for victims (for

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<sup>137</sup> In southern Sudan, the principle of compensation, known as “Diya”, is central to resolving conflict. There is a notion in traditional justice mechanisms that, for instance, cattle can be given for a life. Diya ceremonies could serve as the equivalent of “gacaca” courts, where compensation has an important role, sometimes taking the form of community service.

Katy Glassborow, Dr. Jan Coebergh & Ayesha Kajee, A Question of Justice, <http://reliefweb.int/rw/rwb.nsf/db900sid/EK0I-73236S?OpenDocument> (last visited Sept. 8, 2008). For a discussion of gacaca courts in Rwanda, see *infra* note 138. Also, “peace meetings” may help contribute to reconciliation among the Darfur survivors:

[L]ocal-level peace meetings [emphasize] indigenous traditions of arbitration, reconciliation, forgiveness and resolution. The report points out that the sacrifice of a white bull (a feature of Nuer and Dinka religious practice) at [one] meeting set the tone for the ritual component of peace meetings in the . . . area.

*Id.* (citing MARK BRADBURY ET AL., LOCAL PEACE PROCESSES IN SUDAN: A BASELINE STUDY 13, 46 (2006)). This study also explains a local form of mediation known as “judiyya,” which has been customarily used in Sudan to resolve disputes. Bradbury, *supra*, at 88. Mediators, known as “ajaweed,” are community elders with knowledge of local customs and laws. The ajaweed are not neutral but rather apply pressure on resisting parties until these parties agree to the terms stipulated by the ajaweed. Mediations begin with a prayer (sometimes the mediator is also a religious figure) followed by each party to the dispute presenting their complaints and demands both verbally and in writing. The ajaweed then meet privately to reach their decision, and upon returning, attempt to convince each side to agree to their solution. *Id.* at 88-89.

example, perpetrators provide victims with cattle as a way of seeking forgiveness or perform certain types of community service activities that positively impact victims and their families), a truth commission established in Sudan should make efforts to incorporate practices of this type into its own proceedings and recommendations. Also, to the extent that in the post-crisis Sudanese society community elders are able and willing to conduct the mediation proceedings, a truth commission should consider requiring victims and perpetrators to participate in this form of dispute resolution. By relying on this more traditional forum to resolve particular disputes between victims and perpetrators, the truth commission may be able to complete its work more efficiently while also dispelling any suggestion that it has failed to take into account local Sudanese structures and practices for achieving justice and reconciliation. Such an integrated approach, which relies upon prosecutions, inquiries by a truth commission, and local mechanisms for resolving disputes, may be the most effective response to the human rights crisis in Darfur.<sup>138</sup>

With proper financial assistance and encouragement from the international community, including the AU, the formation of a truth commission in Sudan would appear to be a realistic step for that country to take in its efforts to promote reconciliation and justice in a post-conflict society. In fact, the work of a truth commission can be devoted principally to creating a factual record of the past and making specific recommendations so that the more troubling aspects of that past can be

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<sup>138</sup> See Drumbl, *supra* note 132, at 1221. Drumbl argues for such a blended response in Rwanda. Specifically, he explains that in Rwanda:

a truth commission could operate in tandem with prosecutions on two fronts: First . . . criminal prosecutions could be brought against those who fail to participate in the truth commission and against whom evidence of involvement in the genocide is available. This could ensure some form of accountability for those who are simply beyond shaming. It could also create an incentive to disclose fully one's wrongdoing to the truth commission. Second, criminal prosecutions could be initiated against the leaders, coordinators, instigators, and planners of the genocide.

*Id.* at 1267-76. Drumbl continues: "True justice after a period of sustained political violence best may emerge from policy responses that blend restorative, reparative and transformative initiatives with the prosecution of paradigmatic violations of human rights. In the end, blended solutions may promote . . . accountability . . ." *Id.*

Drumbl, in arguing that local mechanisms for resolving disputes should also be relied upon when available, explained the use of *gacaca* in Rwanda. *Gacaca* is a form of extra-judicial dispute resolution that Rwandans have used for centuries to settle interpersonal disputes within particular villages. *Id.* at 1263-66. Village leaders bring the opposing parties together, and participation by all residents in the village is encouraged. Victims of the crimes, along with others in the village, judge the alleged wrongdoer, and if found responsible, this individual could face a range of penalties, including community service, apologies, rituals, and public shaming. *Id.*; see also MINOW, *supra* note 129, at 90 ("A truth commission could generate the evidence to support prosecutions.").

avoided or ameliorated for present and future generations. A Sudanese truth commission, unlike a court or tribunal, does not necessarily have to engage in the tasks of assigning blame on particular individuals for their past conduct and punishing those individuals as a result of that conduct. As a result, Sudanese actors themselves will be more likely to participate in a truth commission and be more willing to include individuals from diverse backgrounds in the work of the commission. The formation of a truth commission in Sudan may be delayed until the local political climate improves to the point that a commission reflecting a cross-section of Sudanese society can be instituted. And, as suggested above, the scope of the actual work of that commission may depend, in large part, on the ability of the various segments of the post-conflict society to agree upon the purposes and goals for the commission. For example, a more politically fractured Sudanese post-conflict society may support a truth commission of more limited dimensions. Such a commission may be restricted to discovering relevant facts and generating recommendations as opposed to identifying perpetrators for future prosecution. A more limited truth commission, however, can still be a valuable mechanism for contributing to reconciliation in Sudan.

#### D. EXECUTION OF ARREST WARRANTS FOR HARUN AND KUSHAYB

The case against Harun and Kushayb will not proceed to the Trial Chamber of the ICC until the suspects appear before the Court in person, probably as the result of successful execution of the arrest warrants issued by the Pre-Trial Chamber. The ICC relies on State Parties to execute arrest warrants as it lacks its own police force.<sup>139</sup> Sudan has indicated that it does not intend to execute the arrest warrants for either Harun or Kushayb issued by the ICC despite its obligation to do so under U.N. Security Council Resolution 1593.<sup>140</sup> The Pre-Trial Chamber's warrant decision included

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<sup>139</sup> "A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws . . ." Rome Statute, *supra* note 1, art. 59(1); *see also supra* notes 104-06 (discussing Sudan's and other non-State Party's obligation to execute the arrest warrants). The ICC's situation is similar to that of the ICTR, which also lacks its own police force. The ICTR has experienced difficulty in ensuring the appearance of suspects for trial. *See* Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with Mass Atrocities of 1994*, 18 B.U. INT'L L.J. 173, 183 (2000) ("[Having no policing authority of its own, the [Rwandan Tribunal] operates at the whim of other countries to produce suspects for detention and trial.") (providing example of Elizaphan Ntakirutimana, whom the United States took four years to extradite to Tribunal headquarters in Tanzania).

<sup>140</sup> *See supra* note 91 and accompanying text regarding Sudanese cooperation; *supra* notes 80, 105 and accompanying text for a discussion of Sudan's obligation to cooperate with the ICC under U.N. Security Council Resolution 1593.



instructions for the Registry to transmit the requests for arrest to all State Parties to the Rome Statute, the remaining non-State Party members of the U.N. Security Council, and the nations bordering Sudan which are not party to the Rome Statute.<sup>141</sup> Under the Rome Statute, State Parties receiving these Registry requests for the arrest of Harun and Kushayb must honor them.<sup>142</sup> Along with a travel ban already in place from a previous U.N. Security Council resolution, these requests help ensure that Harun and Kushayb will not flee Sudan to escape arrest.<sup>143</sup>

The execution of previous arrest warrants issued by the ICC has had mixed results. As of yet, none of the five warrants issued by the ICC in the Uganda case have been executed successfully.<sup>144</sup> The arrest warrants for three ICC suspects in the DRC, however, have all been executed. Indeed, the first successful arrest for the ICC came with the surrender of Thomas Lubanga Dyilo in the DRC; this arrest was carried out by the government of the DRC, and Lubanga was transferred to the Court via French military air transport. The second and third successful arrests by the ICC came in October of 2007 and February of 2008 in the DRC when Germain Katanga and Mathieu Ngudjolo Chui were surrendered and transferred to the court by Congolese authorities.<sup>145</sup> Cooperation by the DRC in the execution of

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<sup>141</sup> See *supra* note 106 for the text of the Pre-Trial Chamber's warrant decision regarding transmission of these requests.

<sup>142</sup> Rome Statute, *supra* note 1, art. 59(1) ("A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question . . ."). Non-State Parties to the Rome Statute also have a responsibility to comply with the requests for arrest in the Darfur conflict because U.N. Security Resolution 1593, which referred the Darfur case to the ICC, urged non-State Parties to cooperate fully with the Court and Prosecutor. Of course, under this same Resolution, Sudan must cooperate with the ICC's investigation in Darfur, including execution of arrest warrants. See *supra* note 80 and accompanying text.

<sup>143</sup> "[A]ll States shall take the necessary measures to prevent entry into or transit through their territories of all persons as designated by the Committee." S.C. Res. 1591, ¶ 3(d), U.N. Doc. S/RES/1591 (Mar. 29, 2005).

<sup>144</sup> See *supra* notes 45-48 and accompanying text for further discussion regarding the status of the ICC Uganda case.

<sup>145</sup> On 17 March 2005, in Kinshasa, Mr Thomas Lubanga Dyilo, a Congolese national and alleged founder and leader of the Union des Patriotes Congolais (UPC) was arrested and transferred to the International Criminal Court as part of the judicial proceedings under the Rome Statute (the "Statute"). . . . As provided under article 59 of the Statute, Mr Lubanga appeared before the competent judicial authority in Kinshasa. The Congolese authorities cooperated with the Court in the spirit of the Statute by promptly executing its request.

Press Release, ICC, *supra* note 48. Germain Katanga's arrest was also explained in a recent press release by the ICC. See Press Release, ICC, Second Arrest: Germain Katanga transferred into the custody of the ICC (Oct. 18, 2007), available at <http://www.icc-cpi.int/press/pressreleases/284.html>. Likewise, Mathieu Ngudjolo Chui's arrest recently appeared in an ICC press release. See Press Release, ICC, Statement by the Office of the

these warrants appears to stem from both its obligation to assist the ICC as a State Party to the Rome Statute and from its status as the party that originally referred the human rights situation to the ICC.

In contrast to the DRC's assistance, it appears that Sudan, not a State Party to the Rome Statute but still obligated to arrest Harun and Kushayb, does not intend to do so. Sudan's lack of cooperation may reflect the fact that unlike in the case of the DRC, Sudan did not refer the human rights situation in its country to the ICC for investigation. Instead, an external entity, the U.N., originally brought the situation in Sudan to the ICC's attention. Sudan has gone so far as to recently take steps to protect the two suspects from arrest. For example, Kushayb apparently has been released from Sudanese custody, while Harun continues to serve as a high-level government minister and even received a recent promotion. As ICC Prosecutor Moreno-Ocampo indicated to the U.N. Security Council in his June 2007 update, "[T]he Security Council and regional organizations must take the lead in calling on the Sudan as the territorial State to arrest [Harun and Kushayb]."<sup>146</sup> The Prosecutor renewed this request for U.N. Security Council assistance in arresting the two suspects in his latest report to the Council in December 2007.<sup>147</sup>

In light of the fact that the Sudanese case was referred to the ICC by the U.N. Security Council in the first place, and in accordance with the ICC Prosecutor's request, the U.N. Security Council should serve as the starting point for enforcement of the arrest warrants. It must first determine that the continued refusal of the Sudanese government to execute the arrest warrants for Kushayb and Harun, combined with that government's recent efforts to

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Prosecutor Following the Transfer to the Hague of Mathieu Ngudjolo Chui (Feb. 7, 2008), available at <http://www.iccpi.int/press/pressreleases/330.html>.

<sup>146</sup> *Fifth Report to the U.N. Security Council*, *supra* note 104, at 12.

<sup>147</sup> See *supra* note 104 for the text of this statement from the Prosecutor in his Fifth Report to U.N. Security Council. This request by the Prosecutor for U.N. Security Council assistance with the arrest warrants was renewed most recently in December, 2007. See *Sixth Report to the U.N. Security Council*, *supra* note 3, at 15 ("The UN Security Council must ensure compliance with UNSCR 1593 (2005) and the full and immediate cooperation of the [Sudanese government] through the arrest and surrender of Ahmad Harun and Ali Kushayb."). The Sixth Report to the U.N. Security Council also describes the Sudanese government's recent lack of cooperation:

As reported before to the Security Council and in its application to the Court, the [Office of the Prosecutor] had noted that "the Government of the Sudan . . . has . . . provided a degree of cooperation in response to the Prosecution's requests." That degree of cooperation no longer exists. Instead of ensuring the arrests of Ahmad Harun and Ali Kushayb, the [Sudanese government] has chosen to protect them. Ahmad Harun continues to serve as a [Sudanese] Minister and has been granted additional responsibilities, including serving as Acting Minister for Humanitarian Affairs.

*Id.* at 4. Kushayb has apparently been released from Sudanese custody. *Id.* at 5.

protect Kushayb and Harun, represents a threat to international peace and security pursuant to Chapter 7 of the U.N. Charter.<sup>148</sup> In particular, Harun's continued role as Minister of Humanitarian Affairs, as well as his recent promotion, serve to perpetuate the abuse inflicted on victims by the Janjaweed, prevent international relief organizations and NGOs from doing their work, and generally threaten the security of the region, including the camps of internally displaced persons as well as principal roadways.<sup>149</sup> The U.N. Security Council should communicate this determination in writing to Sudan along with a reminder of its obligation to assist the ICC in all matters related to the Darfur investigation, including the execution of arrest warrants.

The U.N. Security Council should also explain to Sudan any direct, non-military consequences for failing to execute the ICC warrants for Harun and Kushayb, which may include economic sanctions, such as restrictions on trade, monetary fines, limitations on air travel, or some other penalty as permitted under the Council's Chapter 7 powers.<sup>150</sup> It should include in its written communication a deadline for Sudan to hand over the

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<sup>148</sup> U.N. Charter art. 39. Article 39 of Chapter VII of the U.N. Charter states:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

*Id.*

<sup>149</sup> See *Sixth Report to the U.N. Security Council*, *supra* note 3, at 13-14 (“[T]he information gathered points to an ongoing pattern of crimes against the persons displaced; continued targeting and attacking of civilians in villages; aerial bombardments; attacks against persons displaced; dire conditions of life within the camps; hindering delivery of humanitarian assistance; continuing forcible transfers; resettlements on land belonging to persons displaced. There are reasons to believe that Ahmad Harun still plays a critical role in these events.”). The Report continues:

The Ministry's own documents demonstrate how Ahmad Harun is responsible for providing relief, for coordinating and controlling the work of NGOs, international relief and other voluntary organizations, and for coordinating with relevant security organs to enhance the security of roads and IDP camps. In essence, he shares responsibility for the security and well-being of the displaced population. As persons displaced continue to suffer constant abuses by Militia/Janjaweed and other [Sudanese government] agents, Ahmad Harun has done nothing to ameliorate their situation. It is inferred that either he is directly involved in those activities or he is entirely failing in his responsibility to take steps to prevent and put an end to those acts. Ahmad Harun's presence is alleged during specific operations in IDP camps.

*Id.*

<sup>150</sup> See U.N. Charter art. 41 (“The Security Council may decide what measures not involving the use of armed forces are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”).

two suspects under the warrant. If Sudan fails to meet this deadline, and shows no good faith efforts towards the successful execution of the warrants, the U.N. Security Council should take additional action, including the imposition of non-military penalties on Sudan under Chapter 7. All members of the Council would, of course, need to agree on the application of these penalties or sanctions to Sudan. Ostensibly, since they all agreed to refer the Darfur case involving human rights violations to the ICC in the first place, these same members would agree on the necessity of sanctions to ensure that the alleged perpetrators of these violations are brought to justice before the Court. Sanctions would help ensure Sudan's cooperation in the enforcement of the ICC warrants for the two Darfur suspects, Kushayb and Harun. In addition, the U.N. Security Council has recently agreed on the use of economic, non-military sanctions in the context of penalizing a nation for not abiding by certain pre-established obligations related to nuclear weapons testing.<sup>151</sup> This would at least suggest receptivity on the part of the Council to utilizing economic measures to compel Sudan's compliance with its obligation to arrest the two suspects.

If Sudan fails to respond after a reasonable time to any U.N.-imposed non-military penalty, then, and only then, should the U.N. consider the use of force to execute the warrants under Chapter 7 of the U.N. Charter.<sup>152</sup> In particular, the U.N. Security Council should take the necessary measures to equip the principal missions already in Sudan with the authority to use force to execute the arrest warrants for Harun and Kushayb.<sup>153</sup> The U.N. Mission in Sudan (UNMIS) consists of 10,000 military personnel from various U.N.

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<sup>151</sup> See *supra* note 35 and accompanying text (explaining U.N. Security Council approval of economic sanctions against North Korea for violating certain rules and obligations related to the testing of nuclear weapons).

<sup>152</sup> See U.N. Charter art. 42 ("Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.").

<sup>153</sup> The U.N. Mission in Sudan's (UNMIS) forces could be mobilized under Chapter VII powers of the U.N. Charter to ensure that the requirements of Resolution 1593 are fulfilled. See *supra* notes 41, 152 for a description of Chapter VII powers of the U.N. Security Council. See *supra* note 80 and accompanying text for a discussion of Resolution 1593 (requiring the cooperation of Darfur and urging the cooperation of the AU and non-State Parties in the Darfur investigation). Under the Rome Statute, the Court is permitted to request the assistance of intergovernmental organizations such as the AU: "The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate." Rome Statute, *supra* note 1, art. 87(6).

Member Countries.<sup>154</sup> In light of Sudan's apparent unwillingness to cooperate, collaboration between the UNMIS and the African Union Mission in Sudan (AMIS) to execute the arrest warrants for Harun and Kushayb may be the most effective method currently available to ensure the appearance of Harun and Kushayb before the ICC.

Such collaboration has been facilitated by the recent creation of a joint, or unified, mission in Sudan by the U.N. Security Council.<sup>155</sup> Known as the United Nations-African Union Mission in Darfur, or UNAMID, this unified mission currently consists of 9,080 total uniformed personnel from other African, Asian, European, and North American countries.<sup>156</sup> UNAMID's current mandate does not specifically authorize it to execute the arrest warrants for the two Sudanese suspects. However, since the mandate encompasses the preservation of security and human rights in Sudan,<sup>157</sup> and since the non-arrest of the two named suspects certainly threatens both of these matters, the U.N. Security Council would be justified in using its powers under Chapter 7 of the U.N. Charter to authorize UNAMID to use the necessary force to arrest Kushayb and Harun. Though unusual, this would not be the first time that an intergovernmental organization was called upon to enforce arrest warrants issued by an international court.<sup>158</sup> For example, the North Atlantic Treaty Organization, or NATO, has

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<sup>154</sup> United Nations Mission in Sudan, Military Component, <http://www.unmis.org/english/military.htm> (last visited Sept. 8, 2008). UNMIS was established under U.N. Security Council Resolution 1590. S.C. Res. 1590, U.N. Doc. S/RES/1590 (2005). While the current mission of the UNMIS is linked to the implementation of the comprehensive security peace agreement in Sudan, the mission could be altered by further U.N. Security Council resolutions. See *id.* for the stated details of the UNMIS mission objectives.

<sup>155</sup> A joint African Union/United Nations Hybrid operation in Darfur was authorized by UN Security Council Resolution 1769 of 31 July 2007. The UN Security Council, acting under Chapter VII of the United Nations Charter, authorized UNAMID to take necessary action to support the implementation of the Darfur Peace Agreement, as well as to protect its personnel and civilians, without "prejudice to the responsibility of the Government of Sudan." The Council decided that UNAMID shall start implementing its mandated tasks no later than 31 December 2007.

United Nations-African Union Mission in Darfur, AU-UN Hybrid Operation in Darfur, <http://www.un.org/depts/dpko/missions/unamid/index.html> (last visited Sept. 8, 2008).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> The only prior example of an intergovernmental organization making arrests for an international tribunal is the work NATO has done in this regard for the ICTY. "NATO is the only organization in modern history that has been directly involved on a significant scale in the apprehension of persons indicted by an international criminal tribunal." Han-Ru Zhou, *The Enforcement of Arrest Warrants by International Forces*, 4 J. INT'L. CRIM. JUST. 202, 204 (2006), available at <http://jicj.oxfordjournals.org/cgi/reprint/4/2/202>.

assisted the ICTY in the past in arresting, detaining, and transferring suspects to ICTY custody.<sup>159</sup>

Of course, all members of the U.N. Security Council must agree before force could be used by U.N. troops to execute the warrants for the two Darfur suspects. Such agreement is possible on this issue, however, in light of the fact that the U.N. Security Council was able to agree in the first place to refer the Darfur case to the ICC. Moreover, the Council has already agreed on the presence of its troops in Sudan to both preserve and foster human rights. The idea of using these same troops to enforce arrest warrants in a case which was referred to the ICC by the U.N. Security Council itself should not, under the circumstances, be met with objection by individual U.N. Security Council members. If, for a particular reason, certain members would not agree to this rather limited use of force by U.N. troops, then AU troops could potentially be relied upon to execute the warrants without the necessity of obtaining U.N. Security Council approval.

In addition to relying on an inter-governmental organization like the U.N. or AU to enforce the arrest warrants for the Sudanese suspects, a State Party to the ICC with the necessary resources might also be able to assist in the capture of these suspects. For example, in the ICC case in the DRC, one warrant was successfully executed with the help of French authorities.<sup>160</sup> Given the history of Sudan, perhaps France or another State Party to the ICC that has historical ties to Sudan, such as Belgium or the United Kingdom, could offer its assistance to Sudan to arrest the ICC suspects.<sup>161</sup> What may make the State Party option less viable in Sudan, however, is the lack of cooperation that Sudan itself has thus far displayed with respect to executing the arrests. In the case of French assistance in executing an ICC arrest warrant for a suspect in the DRC, the government of the DRC cooperated in the execution of the warrant. Without Sudanese permission, the French or any other State Party may be reluctant to enter Sudanese territory to execute the warrants given the lack of respect for Sudanese sovereignty such conduct would necessarily reflect. Of course, a State Party that was inclined to assist the ICC in this way could justify its actions related to execution of arrest warrants in Sudan by noting that under

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<sup>159</sup> See *supra* note 158; see also Press Statement, NATO, On Signing of the Memorandum of Understanding between Shape and the International Criminal Tribunal for Former Yugoslavia (May 9, 1996), available at <http://www.nato.int/docu/pr/1996/p96-074e.htm> (explaining how ICTY and NATO have agreed upon certain arrangements for the detention and transfer of suspects by NATO forces to ICTY).

<sup>160</sup> See *supra* note 145 and accompanying text.

<sup>161</sup> Dr. Riek Machar, University of Pennsylvania–African Studies Center, *South Sudan: A History of Political Domination—A Case of Self-Determination*, available at [http://www.africa.upenn.edu/Hornet/sd\\_Machar.html](http://www.africa.upenn.edu/Hornet/sd_Machar.html) (last visited Sept. 8, 2008).

the ICC Statute, State Parties have a formal obligation to provide such assistance.<sup>162</sup>

Finally, the international police organization, Interpol, may be able to play a role in the execution of the arrest warrants in Sudan. In fact, in the December 2007 Report by the ICC Prosecutor to the U.N. Security Council, a Sudanese official expressed concern that Interpol might facilitate the execution of the arrest warrants in Sudan.<sup>163</sup> Notably, Interpol or its agents could not actually carry out arrests of individual suspects. Rather, Interpol's principal function is to facilitate communication between national police forces as well as between courts, including international tribunals, and these forces.<sup>164</sup> One mechanism Interpol relies upon to facilitate this communication is a "red notice," which publicizes the fact that an arrest warrant has been issued by a national or international court for a particular individual. Interpol has issued such red notices as a way of publicizing the ICC warrants for the two Sudanese suspects.

Of course, if an Interpol Member State and its police forces wished to execute an arrest warrant publicized by Interpol in the form of a red notice, that State could request the assistance of Interpol. This assistance from Interpol may include investigative services related to identifying and

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<sup>162</sup> See *supra* note 105 and accompanying text.

<sup>163</sup> Machar, *supra* note 161:

Sudan's Justice Minister Ali Al Mardi—who in June [2007] was quoted as saying that any attempts to arrest Harun and Kushayb through Interpol would amount to kidnapping and international piracy—reiterated on 2 October through the Sudanese Media Centre the [Sudanese government's] refusal to surrender any Sudanese, stating that the Sudanese judiciary is capable of holding accountable all of those who violate internal laws.

<sup>164</sup> See, e.g., James Sheptycki, *The Accountability of Transnational Policing Institutions: The Strange Case of Interpol*, in *GLOBAL CRIMINOLOGY AND CRIMINAL JUSTICE: CURRENT ISSUES AND PERSPECTIVES* 247, 254 (Nick Larsen and Russell Smandych eds., 2008):

Interpol facilitates the transnational police mission by providing channels of communication between police agencies in its 181 member countries. Interpol itself has no operational role. The man from Interpol never arrested anyone. Having no operational capacity, it cannot initiate investigations or undertake judicial enquiries on its own behalf. Interpol's primary role is facilitating the exchange of messages—for example requests for information about a given person's criminal history or requests that enquiries be undertaken—between police and judicial authorities of the member countries. The organization uses a system of coloured "notices" to facilitate police-to-police communication. Red notices amount to a worldwide diffusion of national arrest warrants and could therefore be viewed as a semi-official international arrest warrant.

The Interpol Red Notice for Harun can be found at INTERPOL, Harun, Ahmad Muhammad, [http://www.interpol.int/public/Data/Wanted/Notices/Data/2007/10/2007\\_28110.asp](http://www.interpol.int/public/Data/Wanted/Notices/Data/2007/10/2007_28110.asp) (last visited Sept. 8, 2008). The Interpol Red Notice for Kushyab can be found at INTERPOL, Abd Al-Rahman, Ali Muhammad Ali, [http://www.interpol.int/public/Data/Wanted/Notices/Data/2007/92/2007\\_43292.asp](http://www.interpol.int/public/Data/Wanted/Notices/Data/2007/92/2007_43292.asp) (last visited Sept. 8, 2008).

locating individual suspects.<sup>165</sup> Sudan, though a member of Interpol,<sup>166</sup> is unlikely to request this assistance for Harun and Kushayb given its past unwillingness to cooperate with the ICC in arresting these individuals. Another Interpol Member State, in particular those Member States that are also State Parties to the ICC, may wish to consider requesting this assistance from Interpol.<sup>167</sup> In this way, an individual Interpol Member State or group of such States would actually carry out the arrests while relying upon, as necessary, the logistical assistance of Interpol. In fact, Interpol itself has recommended that its members assist each other as well as international tribunals in the apprehension of war criminals.<sup>168</sup> Finally, the ICC, as part of its formal relationship with Interpol,<sup>169</sup> should seriously

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These Red notices “[have] been recognised in a number of countries as having the legal value to serve as a basis for provisional arrest.” See Interpol, Wanted, <http://www.interpol.int/Public/Wanted/fugitiveInvestServ.asp> (last visited Sept. 8, 2008).

<sup>165</sup> Interpol created the Fugitive Investigative Service to offer more proactive and systematic assistance to member countries by:

- providing investigative support to member countries in ongoing international fugitive investigations with a view to locating and arresting wanted persons;
- co-ordinating and enhancing international co-operation in the field of fugitive investigations;
- collecting and disseminating best practice and expert knowledge;
- conducting and co-ordinating relevant research and serve as a global point of reference for fugitive-related information.

*Id.*

<sup>166</sup> For a list of the 186 Interpol member countries, including Sudan, see INTERPOL, List of Member States, <http://www.interpol.int/Public/Icpo/Members/default.asp> (last visited Sept. 8, 2008).

<sup>167</sup> For example, the United Kingdom, France, and Belgium are Interpol members as well as ICC State Parties. For a complete list of Interpol members, see *id.* For a list of ICC State parties, see International Criminal Court, State Parties to the Rome Statute, <http://www.icc-cpi.int/asp/statesparties.html> (last visited Sept. 8, 2008).

<sup>168</sup> See Increased ICPO-Interpol support for the investigation and prosecution of genocide, war crimes and crimes against humanity, Resolution No AG-2004-RES-17, available at <http://www.interpol.int/Public/ICPO/GeneralAssembly/AGN73/resolutions/AGN73RES17.asp> (The Interpol General Assembly “RECOMMENDS that, within the limits of national and international law, ICPO-Interpol member countries co-operate with each other and with international organizations, international criminal tribunals, and non-governmental organizations as appropriate in a joint effort to prevent genocide, war crimes, and crimes against humanity, and to investigate and prosecute those suspected of committing these crimes[.]”).

<sup>169</sup> See Co-operation agreement between the office of the prosecutor of the International Criminal Court and the International Criminal Police Organization—Interpol, available at <http://www.interpol.int/Public/ICPO/LegalMaterials/cooperation/agreements/ICC2005.asp>, at Art. 5 (“Other assistance from Interpol”): “The ICC-OTP may seek the expertise of the Interpol General Secretariat’s specialized staff, in particular in matters related to the search for fugitives and to criminal analysis, subject to any provisions of confidentiality which may prove necessary and within the limits of available resources.”



consider requesting assistance from this organization in executing the warrants for Harun and Kushayb. Such action by Interpol members without Sudanese consent would technically be an infringement on Sudanese sovereignty, but might be justified by the fact that Sudan, as an Interpol member, has a responsibility to assist in the apprehension of war criminals, a responsibility that it has clearly not lived up to in the case of the two Darfur suspects.

In sum, execution of the arrest warrants in Sudan may result from a combination of efforts by Interpol, intergovernmental organizations like the U.N. and AU, and certain ICC Member States.

## VI. CONCLUSION

The Rome Statute entered into force in 2002 amid high aspirations for the new level of responsibility being placed on international tribunals for the enforcement of international criminal law norms. Given the relative infancy of the ICC, the Darfur case is poised to set significant precedent. The developing case is already providing a better understanding of the application of the Rome Statute's complementarity principle. And, if the case against Harun and Kushayb proceeds to trial, the case will certainly have an impact in future international war crimes trials for similar crimes, be they future ICC cases or future proceedings in ad hoc tribunals such as the ICTY and ICTR.

The Court's assertion of jurisdiction over the case in Darfur is an important step in seeing that justice is served for the horrific atrocities committed by government officials and their affiliated militia fighters in the Janjaweed. The half-hearted efforts thus far by the Sudanese judicial system with Special Court proceedings will not prevent the international community, acting through the ICC, from responding to the atrocities committed in Darfur by Kushayb, Harun, and others. In short, the complementarity principle has not been violated, and the ICC may proceed with trying the case. However, efforts should be encouraged to improve the functionality and effectiveness of the special courts in Darfur to handle the high number of low-level prosecutions that need to be processed as a result of the atrocities. The ICC could then focus its efforts on the individuals who orchestrated and carried out the killings and other atrocities against civilians in Darfur. Also, a truth commission combined with local mechanisms such as *Diya* and *judiyya* may also prove useful in responding to the crisis in Darfur.

The issuance of arrest warrants by the ICC for Harun and Kushayb is a large step towards resolving the conflict in Darfur. The execution of the arrest warrants for Harun and Kushayb poses a particular challenge in light of the Sudanese government's current refusal to cooperate. If either suspect

attempts to flee the country, the surrounding nations have been requested to arrest and surrender them to the ICC. The best chance of effecting the arrests within Sudan without the cooperation of the Sudanese government is for the U.N. Security Council to give authority to UNAMID, the joint U.N.-AU mission in Sudan, to arrest the two suspects. If the U.N. Security Council is unable to convey such authority on UNAMID, then the AU or an ICC Member State, with the assistance of Interpol, should take steps to execute the arrest warrants.

In the interest of justice, the ICC must continue to act to uncover the truth of the criminal violations that have occurred in Darfur, end the culture of impunity, and promote reconciliation, forgiveness, and healing among the surviving population.<sup>170</sup> Despite the movement in the ICC on the case, the crimes in Darfur continue to occur and millions of people are still dying in the refugee camps. The Janjaweed is still operating and threatens the lives of humanitarian aid workers trying to help in Darfur.<sup>171</sup> In light of the

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<sup>170</sup> Uncovering the truth behind actions and events occurring in a human rights crisis as well as promoting reconciliation, healing, and forgiveness in a post-crisis society may not come from national and international prosecutions alone; truth commissions may also contribute to these goals. See HAYNER, *supra* note 133, at 609. Hayner suggests that the reason truth commissions lessen the likelihood of future human rights violations may be because of their publishing of a reliable record of these violations “with the hope that a more knowledgeable citizenry will recognize and resist any sign of return to repressive rule.” *Id.* Martha Minow posits that truth commissions may actually be better than trials in producing “a coherent, if complex narrative, about [an] entire nation’s trauma, and the multiple sources and expressions of its violence.” See Minow, *supra* note 129, at 58, 78. On the other hand, “trial records do not seek a full historical account beyond the action of particular individuals.” *Id.* at 78. However, truth commissions, through:

[C]lose historical analysis of testimony and documents [exposing] the influences of [various factors in causing the mass violence] . . . can do more than verdicts of guilt or innocence to produce a record for the nation and world, and a recasting of the past to develop bases for preventing future atrocities.

*Id.* at 79. Finally, Minow argues that “when the societal goals include restoring dignity to victims, offering a basis for individual healing, and also promoting reconciliation across a divided nation, a truth commission again may be as powerful as or more powerful than prosecutions.” *Id.* at 89. But see HAYNER, *supra* note 133, at 609 (pointing out that some scholars have argued that commissions can “create deeper resentment and exacerbate old issues that have been dug up anew”). See also KENNETH CHRISTIE, THE SOUTH AFRICAN TRUTH COMMISSION 62 (Palgrave 2000) (quoting HAYNER, *supra* note 133 (“A Truth Commission can play an important role in transition, either by affirming a real commitment to change in the human rights practices of a government and respect for the rule of law in the country, or by helping to legitimize or strengthen the authority and popularity of a new head of state or both.”)). Local mechanisms may also help to uncover details of events in a human rights crisis. See *supra* note 137 for a description of such mechanisms in place in the Sudan.

<sup>171</sup> UNMIS, *Report of the Security Council Mission to the Sudan and Chad, 4-10 June 2006*, S/2006/433, at 12, available at <http://www.un.org/Docs/sc/missionreports.html> (last visited Sept. 8, 2008).

ongoing crisis, additional work needs to be done on the part of the international community as a whole, and the ICC in particular, to quell the violence in Darfur.