

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 19 April 2010

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Cuno Tarfusser

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

The Prosecutor v Ahmad Muhammad HARUN ("Ahmad Harun")

&

Ali Muhammad Ali ABD-AL-RAHMAN ("Ali Kushayb")

**Public Redacted Version of
"Prosecution request for a finding on the non-cooperation of the Government of
the Sudan in the case of *The Prosecutor v Ahmad Harun and Ali Kushayb*, pursuant
to Article 87 of the Rome Statute", filed on 19 April 2010**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Counsel for the Defence

Legal Representatives of Victims

Wanda Akins and Raymond Brown

Legal Representatives of Applicants

Unrepresented Victims

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I Introduction

1. The purpose of this filing is to notify the Chamber of continued lack of cooperation by the Government of the Sudan (GoS) in the case of *The Prosecutor v Ahmad Muhammad Harun* (“*Ahmad Harun*”) and *Ali Muhammad Ali Abd-Al-Rahman* (“*Ali Kushayb*”), and to seek a finding from the Chamber pursuant to Article 87 of the Rome Statute to be transmitted to the United Nations Security Council (UNSC).

II Procedural Background

2. On 27 February 2007, the Office of the Prosecutor (“Office or Prosecution”) submitted its application to Pre-Trial Chamber I (“the Chamber”) for summonses to appear or, in the alternative, warrants of arrest for Ahmad Harun and Ali Kushayb for 51 counts of crimes against humanity and war crimes.¹
3. In its application to the Judges, the Prosecution considered that a summons to appear could be a first alternative to ensure the appearance of the two individuals named in its application.²
4. The Prosecution noted in this regard the previous cooperation received by the GoS, including the provision of information (the report of the Sudanese National Commission of Inquiry and the report from the Sudanese Ministry of Defence on its operations), the interview of Sudanese officials as potential witnesses and 5 missions to Khartoum, the last of which took place in January/February 2007.³
5. The Prosecution also stated at that time that any official response by the GoS to the effect that they would fail to comply with the decision of the Chamber could justify the issuance of the arrest warrants.⁴
6. For two months, the GoS considered the possibility to continue cooperation; a cabinet committee was appointed to consider the issue, and in the meantime the GoS gave no public indication that cooperation would be rejected.

¹ ICC-02/05-56

² ICC-02/05-56, at para. 273.

³ ICC-02/05-56, at para. 274.

⁴ ICC-02/05-56, at para. 278.

7. By mid-April 2007, a decision was made and a document was posted on the official website of the Ministry of Foreign Affairs of the Sudan, indicating that there was no intention to cooperate with the Court.⁵ On 12 April 2007, the Office sent a letter to the GoS requesting clarification on (1) the status of the abovementioned document, and (2) its reaction to the filing. No written response clarifying the GoS' position was forthcoming but a number of statements were made publicly to the effect that the Sudan would not cooperate with the Court. In its decision on 27 April 2007, the Chamber weighed independently all relevant elements and decided to issue arrest warrants.⁶
8. In its 27 April 2007 Decision, the Chamber issued warrants of arrest for Ahmad Harun and Ali Kushayb;⁷ "on the basis of the Prosecution application and its supporting material, the Chamber consider[ed] that the arrests of Ahmad Harun and Ali Kushayb appear to be necessary at this stage pursuant to article 58(1)(b) of the Statute"⁸, and directed the Registrar to transmit the warrants of arrest and the requests for their implementation to the GoS, neighbouring States, to all Rome Statute States Parties and to the members of the UN Security Council.⁹
9. On 4 June 2007, the Registry submitted four filings to the Chamber on its implementation of the decision of the Chamber. The Registrar detailed the process of transmission of the warrants of arrest and the requests for their implementation to the GoS, neighbouring States, to all Rome Statute States Parties and to the members of the UN Security Council.
10. The warrants were successfully transmitted by courier to the GoS on 16 June 2007.¹⁰
11. The UN Security Council visited Khartoum from 16-17 June 2007 and received no indication at that time that cooperation would be forthcoming although reportedly, there were conflicting views within the Government on this issue.¹¹

⁵ DAR-OTP-0174-0261 [The public sources referred to in this filing are attached herewith as a compilation marked Annex A.]

⁶ http://www.icc-cpi.int/NR/rdonlyres/CE794D3B-ED91-4D86-A28E-3F61E6C44083/277796/OTP_ReportUNSC5Darfur_English.pdf

⁷ ICC-02/05-01/07-2-Corr and ICC-02/05-01/07-3-Corr - Warrants of Arrest for Ahmad Harun and Ali Kushayb respectively.

⁸ ICC-02/05-01/07-1-Corr at para. 134.

⁹ *Ibid*, at pages 56 & 57.

¹⁰ ICC-02/05-01/07-21-Conf-AnxG

¹¹ DAR-OTP-0174-0063

12. Through 2008 and 2009, the Registry continued to keep the Chamber and the Prosecution informed on the status of cooperation on the part of the GoS. In October 2007, the Registry requested information on the execution of the warrants of arrest from the Minister of State for Foreign Affairs of the Sudan through its Embassy in The Hague.¹² In February 2008, the Registry again sought information on measures taken by the Sudan to execute the warrants of arrest.¹³ Each time it was intimated to the officers of the Court that following Government's instructions, documents from the Court had to be rejected.¹⁴
13. [TEXT REDACTED],¹⁵ [TEXT REDACTED]¹⁶ [TEXT REDACTED]¹⁷, [TEXT REDACTED]¹⁸ These actions by the GoS are consistent with its repeated declarations that it has no obligation to cooperate with the ICC.
14. Pursuant to paragraph 8 of UNSC Resolution 1593 (2005), the Prosecutor is invited to report to the UNSC every six months on the activities undertaken by the Office. The Prosecutor has regularly reported the status of GoS' cooperation to the Council. In his 5 December 2007 briefing, the Prosecutor highlighted that the GoS was failing to meet its obligations under UNSC Resolution 1593 and urged UNSC members to act and put an end to this pattern of non-cooperation.
15. The Prosecutor also informed the Council at that time that the Office would proceed to inform the competent Chamber of the Court as appropriate.¹⁹
16. In his June 2008 report to the UN Security Council, the Prosecutor indicated that "The GoS has not responded [to requests for the arrest of the two individuals]. The GoS is not

¹² See <http://www.icc-cpi.int/NR/rdonlyres/D084A825-A985-4068-8320-5724AA894430/277791/OTPRP20071205UNSCENG.pdf>, at para. 27; See also http://www.icc-cpi.int/NR/rdonlyres/C4584AF2-6A72-4BB0-94E6-45F43CE18F68/277787/UNSC_2008_En.pdf, at para. 41.

¹³ http://www.icc-cpi.int/NR/rdonlyres/C6FE9E52-4845-41BA-A45D-75BA41D8647C/280448/9th_UNSCReport_Eng1.pdf, at para. 25.

¹⁴ http://www.icc-cpi.int/NR/rdonlyres/C6FE9E52-4845-41BA-A45D-75BA41D8647C/280448/9th_UNSCReport_Eng1.pdf at para. 25; See also <http://www.icc-cpi.int/NR/rdonlyres/CC15BF0D-FA88-4C95-876E-D651706FE720/281337/10thUNSCReportENG1.pdf>, at para. 8.

¹⁵ [FOOTNOTE REDACTED]

¹⁶ [FOOTNOTE REDACTED]

¹⁷ [FOOTNOTE REDACTED]

¹⁸ [FOOTNOTE REDACTED]

¹⁹ "Statement of Mr. Luis Moreno Ocampo, Prosecutor of the International Criminal Court, to the United Nations Security Council Pursuant to UNSCR 1593 (2005)" http://www.icc-cpi.int/menu/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/statement%20of%20mr_%20luis%20moreno%20ocampo%20to%20the%20united%20nations%20security%20council%20pursuant%20to%20unscr%201593%20_2

cooperating with the Court. The GoS has not complied with UNSCR 1593. The GoS has taken no steps to arrest and surrender the suspects and stop the crimes. One year after the warrants, Ahmad Harun and Ali Kushayb are free and involved in acts against civilians. Ahmed Harun is Minister of State for Humanitarian Affairs. Ali Kushayb is active with his military unit in Darfur. They are fugitives from the ICC.”²⁰

17. Accordingly, on 16 June 2008, the UN Security Council unanimously adopted Presidential Statement 21,²¹ which “recalls its decision, under Chapter VII of the United Nations Charter, in resolution 1593 (2005) that the Government of Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the International Criminal Court and the Prosecutor pursuant to that resolution, while stressing the principle of complementarity of the International Criminal Court; (...) takes note of the efforts made by the Prosecutor of the International Criminal Court to bring to justice the perpetrators of war crimes and crimes against humanity in Darfur and in particular notes the follow up by the International Criminal Court with the Government of Sudan, including the transmittal by the Registry of the International Criminal Court to the Government of Sudan on 16 June 2007 of arrest warrants and the opening by the Prosecutor of other investigations on crimes committed by various parties in Darfur, [and] in this respect, [and] (...)) urges the Government of Sudan and all other parties to the conflict in Darfur to cooperate fully with the Court, consistent with resolution 1593 (2005), in order to put an end to impunity for the crimes committed in Darfur.”

III Factual Background - Non-Cooperation on the Part of the Government of the Sudan

(a) Consistent official statements reiterating GoS refusal to cooperate

18. In June 2007, following issuance of the arrest warrants for Ahmad Harun and Ali Kushayb, President Al Bashir publicly declared that he would never hand over Harun to the ICC but, to the contrary, Harun would continue to implement his orders.²² At that time, and since 25 September 2005, Harun was Minister of state for humanitarian

²⁰ June 2008 report to the UN Security Council, at http://www.icc-cpi.int/NR/rdonlyres/C4584AF2-6A72-4BB0-94E6-45F43CE18F68/277787/UNSC_2008_En.pdf.

²¹ DAR-OTP-0174-0257

²² DAR-OTP-0174-0255

affairs,²³ in charge of controlling the camps for persons internally displaced following the attacks he committed on their villages.

19. Concerning Ali Kushayb, on 30 September 2007, the then Foreign Affairs Minister, Lam Akol, stated that Ali Kushayb was no longer under investigation or in custody, and had returned to active duty. Ali Kushayb reportedly attended a meeting organized by the Humanitarian Aid Commission for local leaders and international actors in Darfur in November 2007.

20. In December 2007, directly after the briefing by the Prosecutor to the UNSC where the Prosecutor described the pattern of non cooperation, the GoS, through its Ambassador to the United Nations ("UN"), Ambassador Abdalmahmood Abdalhaleem Mohamad, issued a response which is available by web cast on the UN website;²⁴ an informal transcript of this response has been prepared by the Office and is attached to this filing as Annex B.²⁵ The response of Ambassador was a confirmation that the GoS did not intend to cooperate with the ICC. On the issue of jurisdiction, the Ambassador stated: *"If [the Prosecutor] wants to do any investigations, it is up to him, we are not a member of the Rome Statute, we are not party to his jurisdiction, what he wants to do he can do."* On the issue of admissibility, he added: *"In no way are we going to surrender our citizens to be tried by the ICC, we are not going to do that. If there are any accusations against our people, the Sudanese judiciary is more than capable of doing that."*²⁶

21. On 10 March 2008, commenting on the arrest warrants for Ahmad Harun and Ali Kushayb, the Sudanese Minister of Information, Zahawi Ibrahim Malik, said *"Sudan is not a party to the ICC. There is no trial for these two people. If we consider there have been any crimes, we will put them on trial ourselves."*²⁷ Ahmad Harun himself told Al Hayat newspaper in a March 2008 interview that *"the International Criminal Court has no place in this crisis at all."*²⁸

²³DAR-OTP-0174-0252

²⁴<http://www.un.org/webcast/sc2007.html> (In particular, see the entry of 5 December 2007 titled Media Stakeout: Informal comments to the media by the Permanent Representative of Sudan Ambassador Abdalmahmood Abdalhaleem Mohamad, on the situation in Sudan [Web cast: Archived Video - 20 minutes \.

²⁵ DAR-OTP-0173-0456

²⁶ DAR-OTP-0173-0456

²⁷ DAR-OTP0174-0246

²⁸ DAR-OTP-0174-0240

22. On 31 March 2008, Khalid al Mubarak, a GoS spokesman in London, underscored this position, stating that Ahmad Harun and Ali Kushayb are not up for trial because there is no evidence against them.²⁹
23. On 14 May 2008, President Omar Al Bashir confirmed publicly to a gathering of Militia/Janjaweed: *"we will not hand over any Sudanese to the International Court."*³⁰
24. This is even more noteworthy in light of an interview recently given on 22 March 2010 to German magazine Der Spiegel. President Al Bashir was asked about the ICC. Among other things, he admitted that *"of course there were crimes, even horrible crimes,"* and insisted that *"...Any member of the army and the government who breaks the law is held accountable...[and that] it is one of my duties to ensure that the laws are observed, and I am responsible for everything that happens while I perform this duty."*³¹
25. On 23 April 2009, following a meeting in Paris with French and British officials, GoS Presidential Assistant Nafie ali Nafie stated that *"No Sudanese, not Al-Bashir and not a non-Al-Bashir, will appear before the International Criminal Court, and we will not even send a lawyer to represent us there."*³²

(b) Protection and promotion of the two individuals sought by the Court

26. Following the issuance of the arrest warrants, Ali Kushayb reportedly remained active with his military unit in Darfur.³³ Ahmad Harun has been actively promoted since the issuance of the arrest warrants. Ahmad Harun continued to serve as Minister of State for Humanitarian Affairs³⁴, while receiving new responsibilities. He continued to enjoy a high profile in the Sudanese media and in public life.
27. He was promoted on 2 September 2007 as Chair of a committee on human rights violations and breaches of the transitional constitution in the south and north of the

²⁹ DAR-OTP-0173-0412

³⁰ DAR-OTP-0173-0415

³¹ DAR-OTP-0174-0234

³² DAR-OTP-0174-0227

³³ DAR-OTP-0174-0224.

³⁴ DAR-OTP-0174-0219.

Sudan,³⁵ and on 18 November 2007 as a member of the United Nations-African Union Mission in Darfur (UNAMID) national monitoring mechanism group, overseeing UNAMID's deployment in Darfur.³⁶

28. On 27 February 2008, one year after the Prosecution's Application, Ahmad Harun attended a ceremony in Khartoum with the Minister for Finance and National Economy, Awad Al Jaz.³⁷ He also attended security forces-related functions, such as graduation ceremonies of military officers.³⁸ On 28 April 2008, he appeared on Sudanese national television. As chairperson of the National Mine Action Authority, Ahmad Harun presided over ceremonies in April 2008, in particular in Juba, South Sudan.³⁹

29. Ahmad Harun was also involved in supervising the population census in South Darfur during which there were reports of census-related arrests and killings, some occurring while officials answerable to him were engaged in the population census in the Kalma camp in South Darfur.

30. It is also pertinent that Ahmad Harun made a number of public statements on 10 March 2009 concerning the decision to expel humanitarian aid workers. In these statements, he dismissed UN warnings that this move would place thousands at risk.⁴⁰ Tellingly, Ahmad Harun's statements came a day after President Al Bashir, at a public rally in El Fasher, North Darfur, reiterated his refusal to surrender Minister Harun.⁴¹

31. On 7 May 2009, President Al Bashir appointed Ahmad Harun as the Governor of Southern Kordofan, including the area of Abyei.⁴² As a member of the NCP-SPLM Committee, he had previously been sent to Abyei, ostensibly to manage the conflict.⁴³ Around a month later, in May 2008, Abyei was burned down, and 50,000 citizens were displaced.⁴⁴

³⁵ DAR-OTP-0174-0217.

³⁶ DAR-OTP-0174-0215.

³⁷ DAR-OTP-0174-0213

³⁸ DAR-OTP-0174-0212.

³⁹ DAR-OTP-0174-0209.

⁴⁰ DAR-OTP-0174-0204

⁴¹ DAR-OTP-0174-0200

⁴² DAR-OTP-0174-0194.

⁴³ DAR-OTP-0174-0192.

⁴⁴ DAR-OTP-0174-0190; DAR-OTP-0174-0158.

32. On 24 March 2010, Ahmad Harun attended the inauguration of the Al-Fula electricity station in South Kordofan State, where he continues to serve as Governor.⁴⁵ He is reportedly running for Governor in the upcoming elections⁴⁶, although elections for the governorship in South Kordofan have been postponed⁴⁷ by sixty days. Harun himself, as Governor, was reported by Sudanese state media on 15 March as affirming the decision of the National Election Commission.⁴⁸

(c) Attacks and threats against persons and organizations accused of cooperating with the Court

33. In addition to this pattern of non-cooperation, the Government of the Sudan is actually harassing and attacking any person suspected of cooperating with the Court.

34. The Office noted in its December 2008 briefing of the UN Security Council that “everyday we hear of human rights defenders arrested and tortured in Khartoum; three of them were arrested last week and tortured on account of allegedly giving information to the ICC; so called ‘suspected ICC witnesses’ are arrested and tried for treason. Sudanese officials are looking for possible witnesses to silence them; this is not how evidence is collected; this is how crimes are covered up.”⁴⁹

35. On 22 February 2009, Government of Sudan director of intelligence, Salah Gosh, was quoted as saying “Anyone who attempts to put his hands to execute [ICC] plans we will cut his hands, head and parts because it is a non-negotiable issue.”⁵⁰

36. The decision to expel humanitarian organizations in March of 2009 was based on the argument that, according to Ahmad Harun, such organizations were “writing fabricated reports on the situation in Sudan, and fabricating evidence and data that does not exist, and supplying it to the International Criminal Court.”⁵¹ While factually inaccurate, such a public argument demonstrates that the Government of the Sudan not only refuses to

⁴⁵DAR-OTP-0174-0157.

⁴⁶DAR-OTP-0174-0149; DAR-OTP-0174-0263.

⁴⁷DAR-OTP-0174-0148

⁴⁸DAR-OTP-0174-0146

⁴⁹ Speech of the Prosecutor to the UN Security Council, 3 December 2008, at http://www.icc-cpi.int/NR/rdonlyres/B7AA3D04-487C-45D2-BB88-991AEB0D61D5/279082/20081203_unsc_statementENG1.pdf.

⁵⁰DAR-OTP-0173-0460

⁵¹DAR-OTP-0174-0204.

cooperate but considers that any form of cooperation would be a criminal act, punishable by the Government.

(d) Absence of new developments in relation to national proceedings

37. On 26 February 2009, the Special Prosecutor for Darfur, Nimr Ibrahim Muhammad, stated that three men, including Ali Kushayb, had been charged in a case related to events in Deleig, Mukjar, Bandas and Garsila.⁵² On 6 May 2009, Sudan Supreme Court judge Abdel-Rahman Sharfi stated that suspected Janjaweed Ali Kushayb could stand trial *"when there is enough evidence."*⁵³ However, the GoS has not made public any such indication or sent any information to the Court in this regard.⁵⁴

38. Special Prosecutor Nimr suggested in March 2009 that he might question Ahmed Harun concerning the crimes in Darfur.⁵⁵ However, the same month, on 22 March 2009, Harun stated to Al Sharq Al Awsat that he *"was leading his life in a normal way"* and felt assured that his Head of State Omar Al Bashir would keep his word not to extradite him.⁵⁶ Harun also publicly accused both Nimr and Minister of Justice Abd-al-Basit Sabdarat of taking positions *"inconsistent with the state position refusing to deal with the ICC"*.⁵⁷ Minister of Justice Sabdarat confirmed thereafter that there were no charges against Harun and on the same day, he added that judicial prosecutions in Western Darfur were not possible: *"definitely there are war crimes in Darfur....no one can deny it...if you cannot go after the people who commit the crimes, you do so whenever circumstances become favourable and then the state can pursue those people."*⁵⁸

39. In a press conference held in Khartoum, Sudan on 11 February 2010, Justice Mohamed Chande Othman, the UN Independent Expert on the situation of Human Rights in the Sudan, said "In relation to Darfur crimes, I note with concern that to date very few perpetrators have been brought to trial for crimes committed during the conflict. During my visit, I met with the Prosecutor General [Nimr Ibrahim Mohamed] appointed by the

⁵²DAR-OTP-0174-0128.

⁵³DAR-OTP-0174-0123.

⁵⁴ June 2009 report to the UN Security Council, at http://www.icc-cpi.int/NR/rdonlyres/C6FE9E52-4845-41BA-A45D-75BA41D8647C/280448/9th_UNSCReport_Eng1.pdf.

⁵⁵DAR-OTP-0174-0128.

⁵⁶DAR-OTP-0174-0204.

⁵⁷DAR-OTP-0174-0112.

⁵⁸DAR-OTP-0174-0145.

Government to investigate crimes committed in Darfur since 2003 and inquired about the status of his investigation and prosecution. He informed me that investigations are continuing and that no one has been charged and tried as yet.”⁵⁹

40. The GoS has even taken steps to minimize the risk of third parties carrying out the arrests. In December 2007, credible sources indicated to the Prosecution that Ahmad Harun intended to travel to Saudi Arabia to undertake a religious pilgrimage to Mecca. These sources further indicated that at the last minute, Harun was removed from the plane by the Sudanese National Intelligence and Security Service (NISS), for fear that he could be exposed to arrest while travelling outside of the Sudan.⁶⁰ The Prosecution has no information that Harun has traveled outside Sudan or attempted to do so since then.

41. Likewise, the Prosecution understands that the GoS monitors the movements of Ali Kushayb closely and can attest to his whereabouts, but does not take any steps to hold him accountable.

(e) Continuation of the crimes

42. As the Prosecutor indicated in his December 2009 report to the UN Security Council, crimes are continuing in Darfur. The Prosecutor indicated that “Over the last 6 months, the following crimes against civilians potentially falling within the jurisdiction of the ICC have been documented: (i) indiscriminate bombings of civilians causing casualties and forced displacement; (ii) continued imposition of conditions of life for displaced persons including reduction of access to food, water and basic services; targeting of leaders and sheiks in camps; forced returns to unsafe areas; (iii) rapes and sexual violence constituting mental and bodily harm; and (iv) enlistment and use of child soldiers.”⁶¹

43. On 10 February 2010, militia/janjaweed raided the Kass camp in South Darfur, killing two and looting the camp.⁶²

⁵⁹DAR-OTP-0174-0007

⁶⁰See DAR-OTP-0174-0108, which also reports these events.

⁶¹OTP report to the UN Security Council, 4 December 2009, at <http://www.icc-cpi.int/NR/rdonlyres/CC15BF0D-FA88-4C95-876E-D651706FE720/281337/10thUNSCReportENG1.pdf>.

⁶²DAR-OTP-0174-0104

44. In attacks reported in Jebel Marra, in central Darfur, in February and March 2010 purportedly against positions of the Sudan Liberation Army (SLA), allegations have surfaced of attacks against civilians. More than 50 civilians were killed and more than 28 young girls and 8 women raped.⁶³ Observers have suggested that as many as 250,000 have been displaced in the area, including from the market town of Deribat.⁶⁴ These reports indicate the same pattern of attacks that took place in the past, with indiscriminate aerial bombardment followed by regular and Militia/Janjaweed troops attacks, targeting civilians and the rare health and social structures still existing.

(f) Efforts by the Prosecution to encourage cooperation

45. The Office has a long experience of cooperating with the Government of the Sudan. In another case before the Court, *The Prosecutor vs Kony et al*, the Government of the Sudan signed an agreement with the Office on 2 October 2005 on the arrest of the individuals who are the objects of ICC arrest warrants⁶⁵, and in November 2005, representatives of the OTP and the Registry of the ICC visited Khartoum to discuss matters relating both to the LRA and the situation in Darfur.

46. Since 2005, following the opening of the Darfur investigation, the Office has endeavored to establish the same working relationship with the GoS, and the Sudan had provided a degree of cooperation up to February 2007. Judicial records were shared, individuals were interviewed in Khartoum under Article 55 of the Rome Statute and documents were provided to the Office under Article 53 of the Statute.

47. Such cooperation by the GoS no longer exists. Minister of State for Foreign Affairs Karti confirmed in March 2009, “*We want a clear rejection of the arrest warrant; trying to stop the decision [delaying it by using Rome Statute] is not what we want.*”⁶⁶ The Minister said

⁶³DAR-OTP-0174-0100.

⁶⁴DAR-OTP-0174-0097.

⁶⁵http://www.icc-cpi.int/NR/rdonlyres/53692E4E-2B35-41BD-8B90-91828D55880A/278540/ICC_ReporttoUN_2006_English.pdf

⁶⁶DAR-OTP-0174-0093

that his country has managed to ignore all UNSC resolutions with little repercussion as “they amounted to nothing but ink on paper”.⁶⁷

48. The Prosecution has taken every opportunity to encourage the GoS, and the two persons against whom arrest warrants are sought, to engage in the judicial process. The Office has made substantial and repeated efforts to communicate to the GoS through international leaders its legal obligation to arrest and surrender Ahmad Harun and Ali Kushayb to the ICC, and to encourage it to do so. In January 2008, the Deputy Prosecutor met on the margins of the African Union Summit in Addis Ababa, Ethiopia with Chairperson Alpha Oumar Konare, who indicated that he would convey this message. The Prosecutor also met with officials from the United Nations and from the League of Arab States as well as with Foreign Ministers from both States Parties to the Rome Statute and non-States Parties, comprising Arab, African, and European states, to this effect. The GoS continues to express its unwillingness to cooperate with the ICC in spite of encouragements from all its partners.⁶⁸

49. In sum, since the Pre-Trial Chamber issued its 27 April 2007 decision, the Government of the Sudan has not cooperated with the Court in relation to the arrest warrants for Ahmad Harun and Ali Kushayb. The Sudan has a binding legal obligation to fully cooperate with the Court, as mandated by UNSCR 1593. It has not done so. The GoS refused to comply with the UN Security Council resolution 1593, and with the Judges’ decision. The UN Security Council in its Presidential Statement 21 already called the attention of the GoS to the issue, but this has gone unheeded by the GoS.

50. To the contrary, the GoS continues to commit crimes, promotes and protects the persons sought by the Court; and harasses all persons who are considered to be in favor of justice.

51. No measure to arrest Ahmad Harun or Ali Kushayb, against whom arrest warrants were issued in 2007, has been taken.

⁶⁷DAR-OTP-0174-0013.

⁶⁸ December 2008 report to the UN Security Council, at <http://www.icc-cpi.int/NR/rdonlyres/BBA77B57-C81C-4152-988C-D8D953471453/279075/8thUNSCreportsenttoUNENG1.pdf>.

IV Non-compliance procedure

52. Under Article 87 of the Rome Statute, the Chamber may make a finding on non-cooperation and transmit it to the Assembly of States Parties or, where appropriate, to the Security Council. Article 17(3) of the Relationship Agreement between the United Nations and the International Criminal Court, moreover provides: “Where a matter has been referred to the Court by the Security Council and the Court makes a finding, pursuant to article 87, paragraph 5 (b) or paragraph 7, of the Statute, of a failure by a State to cooperate with the Court, the Court shall inform the Security Council or refer the matter to it, as the case may be, and the Registrar shall convey to the Security Council through the Secretary-General the decision of the Court, together with relevant information in the case. The Security Council, through the Secretary-General, shall inform the Court through the Registrar of action, if any, taken by it under the circumstances”.⁶⁹
53. The Prosecution submits, firstly, that the Chamber has the inherent power to make a finding determining the failure by a State in the fulfillment of its cooperation obligations toward the Court. Article 87, in this regard, reflects this competence and describes the procedural vehicle by which the Court may communicate its finding to the Assembly of States Parties or the Security Council, as appropriate.⁷⁰
54. The Prosecution recalls that the Chamber itself has previously invoked Article 87(7)⁷¹ in its decision issuing the arrest warrant for Omar Al-Bashir, stating that “Moreover, the Chamber emphasises that, according to article 87(7) of the Statute, if the GoS continues failing to comply with the above-mentioned cooperation obligations to the Court, the competent Chamber “may make a finding to that effect” and decide to “refer the matter [...] to the Security Council.”⁷². While Article 87(7) addresses the obligation of States Parties, this provision, as all other provisions of the Statute, may be applied *mutatis mutandis* with respect to the obligations imposed on the GoS pursuant to UN Security Council Resolution 1593, adopted under Chapter VII of the UN Charter.

⁶⁹ ICC-ASP/3/Res.1 (2004)

⁷⁰ The Prosecution also recalls the procedure described in Regulation 109 of the Regulations of the Court.

⁷¹ Art. 87(7) states: “Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.”

⁷² ICC-02/05-01/09-3 at para 248.

55. The Chamber could also examine non-compliance pursuant to Article 87(5), which refers to the obligations of States not party to the Statute to cooperate with the Court on the basis of “an *ad hoc* arrangement, an agreement with such State or any other appropriate basis.”⁷³ In contrast to the first two legal bases, which are voluntary, the third may refer to cooperation duties which are of an obligatory character. In particular, the phrase “other appropriate basis” refers to a legal basis for cooperation that may stem from legal sources other than the Statute. As the Chamber has previously held,⁷⁴ a Security Council resolution imposing cooperation duties on a UN Member State under Chapter VII of the UN Charter provides the legal basis for its obligations toward the Court.⁷⁵
56. The Prosecution notes the difference in wording between the two provisions, which refer to the Court making a ‘finding’ and ‘referral’ under article 87(7) of the Statute and ‘informing’ under article 87(5). As commentators have noted, the difference in wording does not substantively affect the power of the Court to render a decision determining the failure by a State to fulfill its cooperation obligations towards the Court.⁷⁶ Moreover, the Relationship Agreement, which was approved by the Assembly of States Parties⁷⁷ and the UN General Assembly⁷⁸ refers in equal terms to the power of the Court to make “a finding, pursuant to article 87, paragraph 5 (b) or paragraph 7, of the Statute, of a failure by a State to cooperate with the Court”.⁷⁹
57. The jurisprudence of ICTY⁸⁰ and ICTR is also relevant to the present case because both Tribunals were created on the basis of a UN Security Council resolution and on the basis of Chapter VII of the Charter of the United Nations. In respect of Darfur, the UNSC referred the Situation to the Court on the basis of such a resolution.

⁷³ Art. 87(5)b states: “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.”

⁷⁴ ICC-02/05-01/09-3, paras. 243-249.

⁷⁵ Claus Kreß/ Kimberly Prost, ‘Article 87’ in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court* (2nd Edition, 2008), 1523.

⁷⁶ Kreß/ Prost, p. 1525.

⁷⁷ ICC-ASP/3/Res.1 (2004)

⁷⁸ A/RES/58/318 (2004)

⁷⁹ Article 17(3), Relationship Agreement between the United Nations and the International Criminal Court - http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf

⁸⁰ The Appeals Chamber of the ICTY has also elaborated on the meaning of the term ‘finding’ in the context of Article 29 of the Tribunal’s statute. It held that the finding of the Court constitutes the formal establishment of the existence of an internationally wrongful act of the non-cooperating State. (Kreß/ Prost, p.1530). It added that the ICTY cannot go beyond making such a finding and referral of the matter by, for example, making recommendations or suggestions as to the appropriate course of action to be taken by the Security Council

58. Rule 7 *bis* of the ICTY Rules of Procedure and Evidence creates a procedure by which an ICTY Chamber, a Judge or the Prosecutor may raise the matter with the President of the Court who shall then notify the Security Council.⁸¹
59. In terms of the substance of the finding, and although account is always taken of the circumstances of each specific case, it is arguable from ICTY jurisprudence that as long as the Court has taken reasonable steps (recourse to the appropriate authorities of the State in whose territory the accused resides, publicity of the warrant) to secure the appearance of the person, the requested State has been given sufficient time for compliance and the request is identifiable, relevant to investigations and prosecutions and succinctly reasoned, there is no justification for continued non-cooperation.⁸² ICTR jurisprudence seems to suggest that a referral of a State to the Security Council for non-compliance is a remedy of last resort. The Chamber may take into consideration the question of prior cooperation in order to assess whether current non-cooperation is in bad faith or is intended to impede the fair and expeditious conduct of proceedings.⁸³ In the instant case, previous cooperation by the GoS demonstrates that when the authorities are willing, they are able to provide diverse forms of cooperation respecting the relevant provisions of the Statute.
60. In light of the above, the Prosecution submits that the Chamber should proceed to enter a judicial determination of the failure by the Government of the Sudan to comply with its cooperation obligations towards the Court pursuant to Security Council resolution 1593, in order to enable the President to refer the matter to the Security Council.⁸⁴

⁸¹ Rule 7 *bis* of the ICTY Rules of Procedure and Evidence states: "(A) In addition to cases to which Rule 11, Rule 13, Rule 59 or Rule 61 applies, where a Trial Chamber or a permanent Judge is satisfied that a State has failed to comply with an obligation under Article 29 of the Statute which relates to any proceedings before that Chamber or Judge, the Chamber or Judge may advise the President, who shall report the matter to the Security Council. (Amended 12 Apr 2001)

(B) If the Prosecutor satisfies the President that a State has failed to comply with an obligation under Article 29 of the Statute in respect of a request by the Prosecutor under Rule 8, Rule 39 or Rule 40, the President shall notify the Security Council thereof."

⁸² Blaskic, Appeals Chamber judgement on the request of the republic of Croatia for review of the decision of trial chamber II of 18 July, 1998, para 32-33.

⁸³ Nzabonimana, Trial Chamber III, Decision on motion asking the chamber to request the President to report the matter of France's refusal to cooperate to the security council., 19 October 2009

⁸⁴ Regulation 109(4), Regulations of the Court.

61. The Prosecution submits that President is not precluded from also referring the matter to the Assembly of States Parties. This would enable the Assembly of States Parties to consider, in accordance with Article 112(2)(f), any question relating to non-cooperation.⁸⁵
62. As demonstrated above, the Government of the Sudan has been given sufficient time for compliance. It has been three years since the arrest warrants and the accompanying requests for arrest and surrender for Ahmad Harun and Ali Kushayb were issued. The Government of the Sudan has not sought consultations with the Court, in line with the procedure envisaged under Article 97 of the Statute, in order to resolve any matters related to the execution of the Court's requests for arrest and surrender. Given the repeated statements and actions taken to convey the GoS' intention not to cooperate, the Chamber should conclude that the Government of the Sudan's actions as well as inactions are intended to impede the fair and expeditious conduct of proceedings.
63. The Prosecution believes that a decision from the Court relating to the Government of the Sudan's continuing failure to comply with requests to cooperate by the Court, and a referral of the matter by the President to the Security Council would therefore be timely. This would not preclude consultation in the future with the Government of the Sudan, should it choose to engage with the Court on the arrest and surrender of the two sought individuals.

V Relief Sought/ Request for a Decision on Non-Cooperation

64. For the above reasons, the Prosecution requests that the Chamber:
- Render a finding on non-cooperation by the Government of the Sudan in the case of *The Prosecutor v Ahmad Harun and Ali Kushayb*, pursuant to Article 87 of the Rome Statute; and

⁸⁵ In this regard, the Prosecution recalls Recommendation 17 of the *Report of the Bureau on cooperation*, ICC-ASP/6/21 (19 October 2007) which provides: "All States Parties should contribute where appropriate to generating political support and momentum for the timely arrest and surrender of wanted persons both in their bilateral contacts and activities in regional and international organisations." The recommendations of the report were endorsed by the ASP Resolution ICC-ASP/6/Res.2, 14 December 2007.

- Notify its decision to the President for transmission to the UN Security Council and, if so decided, to the Assembly of States Parties.



Luis Moreno-Ocampo,
Prosecutor

Dated this 19th day of April 2010
At The Hague, The Netherlands