

The Referral of Darfur Crisis to the International Criminal Court: Legal Perspective

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ABSTRACT

On 31 March 2005, the United Nations Security Council adopted Resolution 1593 referring the situation in Darfur, since 2002 to the Prosecutor of the International Criminal Court ICC. Such a referral is unprecedented in the ICC's short history. On March 4, 2009 the ICC issued an arrest warrant for Sudan's president, Omar al-Bashir. This article argues that being the first referral and subsequently the first arrest warrant issued against a sitting Head of State have triggered concerns and therefore was received differently among the States of the international community. A further major concern is the undermining of the states' sovereignty and the immunity and privileges of the head of states which might create tension and lack of cooperation among states. The aim of this article is to examine the legal basis and the legitimacy of the Security Council referral of the Darfur case to the International Criminal Court (ICC), the possibility of requesting an advisory opinion from the International Court of Justice (ICJ) on the competence of the Security Council to refer a situation to the ICC, The article also examines the request of International Criminal Court's prosecutor to issue the arrest warrant against the sitting Sudanese President and its legal consequences. The research attempts to offer legal layouts for the complex situation in Darfur.

KEYWORDS: The International Criminal Court; Darfur, Security Council; Referral; Arrest Warrant

INTRODUCTION

The United Nations Organization (UN) has described Sudan's western Darfur region as one of the world's worst humanitarian crises.¹ The conflict started in 2003 when rebels in Darfur took up arms, accusing the government of neglecting the region. Since then, Darfur civilians have come under attack from government troops, nomadic militia and rebel groups. The UN says that as many as 300,000 people may have died in the conflict.² The Government of Sudan denies accusations that it has used Arab militias, known as Janjaweed, to crush the revolt.³

The Government of Sudan and one rebel faction signed a peace deal in May 2006, but two other factions refused, and many new rebel groups formed since then. Relief agencies explained that the continuing violence makes it difficult to deliver aid in parts of Darfur. A combined United Nations-African Union peacekeeping force began deployment following a protracted wrangling between the international community and the

Government of Sudan. The conflict also spilled over Sudan's borders into Chad and Central African Republic.⁴ Despite that, the Sudanese government and the most formidable rebel group in Darfur along with the Justice and Equality Movement, have signed a declaration of intent paving the way for peace talks over the coming months. Skip to next paragraph.⁵ However, hostilities resumed between the two countries days after the signing of the agreement.⁶

Security Council Referral to the ICC:

Historical background

In the early 1990s, the International Law Commission of the United Nations started to take serious steps towards the establishment of an international criminal judicial entity following the issuance of three United Nations General Assembly resolutions, in 1988 and 1989 in this respect.⁷ Since the beginning of the serious study of the subject in 1990, the prevailing perception was that the activation of the jurisdiction of the Court under a complaint filed to the prosecutor of the proposed Court is an exclusive prerogative of states.⁸

Accordingly, the idea of giving the Security Council,

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the power to refer an issue to the Court was not acceptable in this particular period of time. Some considered this as a step beyond the powers of the SC assessed under the UN's Charter.⁹ However, it was not logical to fully marginalize the role of the Security Council and, therefore, the International Law Commission proposed to give the SC a preventive role, so if a state wanted to file a complaint to the Court it would be subject to a prior approval from the SC, or in the event of the crime of aggression or the threat of aggression continuing the proceedings is conditional on an advanced report of the occurrence of such crimes.¹⁰ But since 1992, the International Law Commission started to work towards giving the SC the power to refer issues to the Court. The first sign emerged in the ILA annual report to the General Assembly in the same year.¹¹

The idea was echoed in the year 1993¹² until an agreement was reached to draft a special article on the relationship between the Security Council and the Court within the draft convention which has been achieved in 1994, and was presented to the General Assembly at its forty-sixth session of the same year for examination and to convene at an international conference for the preparation of the final form of the Statute on the establishment of the ICC.¹³

Article 23 of the draft Statute granted the Security Council three major powers: (1) The right of referral for the crimes within the jurisdiction of the Court under Chapter VII of the UN Charter, (2) A referral could not be done on an act of the acts of aggression without a SC report of the occurrence of that act, and finally the right of arrest, which will be referred to in the conclusion of this article.

With regard to the right of referral (Article 23/1), the International Law Commission has made it clear that the addition of the first paragraph is with a view to make the jurisdiction of the Court available to resort to it when necessary without the need to comply with the preconditions to the exercise of jurisdiction, which apply in respect of the referral by states.¹⁴

Giving that role to the Security Council has been subject to controversy in the discussions that took place in the Interim Committee in 1995, which was established under General Assembly Resolution of 9 December 1994 to study the draft Statute prepared by the International Law Commission in 1994.¹⁵ Despite the fact that several delegations supported the idea of the activation of the jurisdiction of the Court by the referral of the Security

Council, as it is in line with the SC key role in maintaining international peace and security. This proposal did not attract the support of other delegations. The latter delegations had some reservations, including, inter alia, to maintain the independence of the Court from political influences, as well as granting the Security Council this role, means granting it powers which are not provided for in the UN Charter.¹⁶ Discussions have continued on this subject in the preparatory committee in 1996, which had also been established by a decision of the General Assembly at the end of 1995, to replace the Interim Commission in the preparation of the Statute on the establishment of the Court.¹⁷

However, several delegations felt that the granting of this role to the Security Council is legitimate especially in the light of practical experience, which proved the ability of the Council to deal with cases which included international crimes. This led to the establishment of the International Fact-finding commission in Burundi, on violations of international humanitarian law, as well as the establishment of ad hoc tribunals for the prosecution of war criminals in the former Yugoslavia and Rwanda (ICTY and ICTR) under the terms of reference established in Chapter VII of the UN Charter.¹⁸ As well as that this proposal would ensure that there is no need in the future for the establishment of ad hoc tribunals.¹⁹

Accordingly, the paragraph on the referral from the SC was retained within the proposals prepared by the Preparatory Committee since 1996, and up to the Rome Conference in July 1998.²⁰ In Rome, the majority of delegations confirmed the need to include in the Statute a text which allows the Security Council to refer "the case of" in accordance with Chapter VII of the UN Charter. These delegations succeeded in passing the final version of the Statute, including this power.²¹ It must be recognized that granting of this role to the SC has become a reality which must be dealt with in the light of the available legal framework.

Security Council Referral of the Situation in Darfur to the ICC

Following the deterioration of the situation in Darfur which continued to constitute a threat to international peace and security, The Security Council by its resolution 1564 (2004),²² requested the Secretary-General to establish an international commission of inquiry to investigate reports of violations of international humanitarian law and human rights law.²³

On 7 October, 2004 the Secretary-General decided to establish a Commission of Inquiry.²⁴ The Commission found "government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur."²⁵

The Commission also found that "These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity." However, the commission said it does not believe the atrocities committed amount to a policy of genocide. "The crucial element of genocidal intent appears to be missing, at least as far as the central government authorities are concerned." With reference to the accountability mechanism the Commission "strongly recommended that the Security Council immediately refers the situation of Darfur to the International Criminal Court pursuant to Article 13(b) of the Statute."²⁶

In the light of the above report the Security Council in its Resolution number 1593 adopted on 31 March 2005, and acting in accordance with Chapter VII of the Charter decided "to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court."²⁷

Article (13/b) reads that "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...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".

The impact of the referral of the Security Council for the non-member states, is to create a jurisdiction or a court mandate in case of crimes committed on the territory of the non-party state or by one of its nationals.²⁸ This means for the special referral in Darfur that the Court could exercise its jurisdiction under the Statute on one of the nationals of the Sudan, the perpetrators of crimes which took place in the Darfur province, in spite of the fact that Sudan is not a party to the Rome Statute. And this is an exception to the general rule set forth in paragraph (2) of Article (12) of the Statute and in line with the principle established by the First Pre-Trial Chamber in its decision regarding the issuance of an arrest warrant on Ahmad Harun and Ali Kheish where Article 12(b) regarding the preconditions for the exercise of jurisdiction does not apply to the referral of the

Council.²⁹ Therefore, it is not required to those perpetrators of crimes to be nationals of one of the states party nor that the crimes are committed in the territory of a state party as stipulated under the mentioned paragraph.³⁰

After a preliminary examination of the situation, an investigation was opened on 1 June 2005 and after a twenty-month investigation into crimes allegedly committed in Darfur since 1 July 2002, the Prosecutor presented evidence to the judges and a summon to two named Sudanese officials; one being a government minister Ahmad Muhammad Harun and the other a military officer Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), to appear was issued with regard to charges alleging the commission of war crimes and crimes against humanity. Warrants of arrest were issued on 27 April 2007 against the two officials by Pre-Trial Chamber I.³¹

The Legitimacy of the Security Council Referral of the Situation in Darfur to the ICC:

With reference to the extent of the legitimacy of the referral, as already have been mentioned, some states had expressed its reservation to give the Council this role, because it goes beyond its competence as stipulated - exclusively - in Chapter VII of the UN Charter. But it must be noted that, once the conditions stipulated in Article 39 of the UN Charter are met, namely, the Council decided in the light of its broad discretion authority³² of the occurrence of a threat to peace or breach then it may determine what measures are needed, with accordance of the provisions of Articles 41 and 42 of the UN Charter in order to maintain international peace and security or to be restored to normal.³³

Article 41 includes measures that do not require the use of armed forces to implement the resolutions of the Council, and it does not explicitly provide for measures of a judicial nature, but jurisprudence³⁴ and the international judiciary had maintained that what appeared in that article are mere examples for the arrangements which the Council may take. This interpretation was adopted by the ICTY in the Tadeetsh case when the defense argued that this article failed to mention the Council competence for establishing judicial entity. But the ICTY refused the defense argument considering the selection of suitable means to maintain international peace and security and restore it to normal is a matter left for the Council discretion.³⁵ The decision of the Security

Council to establish an international criminal tribunal is one of the measures, which falls within the scope of Article 41 of the Charter.³⁶

It could be argued that since it was established that the Security Council has the power to establish a judicial entity in order to maintain international peace and security or to restore order, by analogy, it can also take a decision to refer a matter to the ICC as one of the measures that do not require the use of armed force, pursuant to Article 41 of the UN Charter.

Since Articles 24 and 25 of the UN Charter establish a legal obligation on all states members of the United Nations to accept the decisions of the Security Council, as it had entrusted it with primary responsibility for the maintenance of international peace and security,³⁷ by doing so, the Sudan -in principle- is bound by the referral decision and the consequent of legal effects, provided for in the ICC Statute, for being a state member of the United Nations and without the requirement to be a party to the ICC Statute.

This should not be effected by the fact that the general rule set forth in Article 34 of the Vienna Convention on the Law of Treaties provides that the international treaties only obliges its parties.³⁸ As Article 103 of the Charter provides that it was decided in the event of a conflict between the obligations of states arises from the Charter and those arising from any other convention, would be the priority of the obligations of the Charter.³⁹ Therefore, to argue to that the exercise of the ICC's jurisdiction over a non-party state, within this context is contrary to the law is unsound.

However, this does not mean that the Council enjoys absolute authority without any restriction; its decisions must be in line with the provisions of the Charter, including the purposes and principles of the United Nations.⁴⁰ The Security Council decisions must respect the norms of international law, as the Council is one of the main organs of the international organization according to Article 7 of the UN's Charter operating under the international legal system.⁴¹ This is what was reached by the Appeals Chamber of the International Criminal Tribunal of Former Yugoslavia in the Tadić case when it stated that the Security Council is an organ of an international organization established under a Convention which works as a constitutional framework for the organization.

Therefore, the Security Council is subject to some of the constitutional constraints, regardless of the extent to

which the breadth of the powers assigned to it under the Charter.⁴² One could argue that the competence of the Security Council to refer matters to the ICC in general terms, does not mean that the content of the referral decision related to the Sudan is not spoiled with contradiction.⁴³

It would be sufficient at this point to refer to one of the most important points contained in the text of Security Council's Resolution number 1539 on the referral, which have outraged many scholars of international criminal law.⁴⁴ The sixth clause of the said resolution stipulates that "the council decides on the subjugation of citizens of any states which are not a state party to the Statute outside of the Sudan or its officials outside or current or previous individuals to the exclusive jurisdiction to that contributing state of all what is claimed of committing or refrain from doing as or result of the work of the operations aroused or allowed by the Council, or the African Union, or what is related to these operations as long as that the contributing state did not renounce of this exclusive jurisdiction clearly.⁴⁵ The addition of this paragraph of the text to the resolution is a product of pressure from the United States to avoid that its nationals from the peacekeeping forces would be brought to the ICC. The US has succeeded in passing the text itself in an earlier resolution on Liberia.⁴⁶

It is generally accepted that it would be sufficient for the convening of the jurisdiction of the Court that the crime took place on the territory of a state party or by nationals of a state party, and this means that the Court could exercise its jurisdiction over nationals of one of a non-party state if the crime was committed on the territory of a state party.⁴⁷ Thus, the subjection of the nationals of the contributing states to the exclusive jurisdiction of their state is not only a restriction on the application of the principles of territorial and universal jurisdiction, but also on the exercise of the ICC jurisdiction established under Article (12/2) of the Statute, which is considered an attempt to amend the text of the Statute exceeding the Council mandate. This is not affected by the text of Article 103 of the UN Charter since that obligations only bind member states, and that the ICC is not a state party to the Charter.

In addition to that Article 2 of the Convention on Organizing of the relations between the United Nations and the ICC provides that the UN is aware of the independence of the Court as a permanent judicial entity, and that each party to respect the status and the

jurisdiction of the other, and thus the Council - as one of the United Nations bodies - is committed to do so.

The issuance of the Security Council's resolution contrary to the Statute does not mean that the Court is not capable of carrying out by its own to examine the extent of the resolution legitimacy and its compatibility with the Statute. As the ICC is exercising its jurisdiction "accidental" that would indicate whether it can exercise its "inherent" jurisdiction or not.⁴⁸ The Court, however avoided this, and accepted the referral decision relating to Darfur, as stated by the Security Council. But this does not prevent to argue that the lack of the Court's jurisdiction since that the referral decision tainted invalidity as a result of the Security Council exceeding its prerogatives, and the Court is required to decide as it deems.

Issuance of the Arrest Warrant

On 14 July 2008, the ICC's Prosecutor Luis Moreno-Ocampo filed an application to the Pre-Trial Chamber-I requesting the issuance of an arrest warrant against Mr. Omar Hassan Ahmad Al Bashir, the Sudanese President. The Prosecutor alleged that his investigation had resulted in the availability of reasonable grounds to believe that the Sudanese President is criminally liable for the crime of genocide, crimes against humanity and war crimes. However, the Pre-Trial Chamber issued a warrant for the arrest of Omar Al Bashir, for war crimes and crimes against humanity only. The significance of the Chamber's decision is that it is the first warrant of arrest ever issued for a sitting Head of State by the ICC.

The Prosecution alleged that President Al Bashir committed the crimes not physically or directly, but through members of the State apparatus, including the armed forces, the Militia Janjaweed, the Sudanese intelligence services, the diplomatic and public information bureaucracies and the Sudanese justice system.

On 4 March 2009, having examined the Prosecution's Application and the supporting material, and on the basis of committing crimes against humanity and war crimes, the ICC Pre-Trial Chamber I issued the said warrant.

Article 58 of the Statute is the path charted by the law to issue an arrest warrant for anyone who is believed of committing any of the crimes which falls within the jurisdiction of the Court. Anytime after the initiation of an investigation, the Prosecutor may turn to the Pre-Trial Chamber to request issuing an arrest warrant.

It is to be noted that the request of the Prosecutor has

received negative reactions from the Arab states, and the African Union, the League of Arab States and the Organization of the Islamic Conference.⁴⁹

There is no doubt that what is sought by the Prosecutor will pave the way for a critical step, especially that the arrest of a current head of state to be tried before an international tribunal would be difficult to be accepted by the state or even to be understood. It must be recognized that the rules of international law does not deny criminal responsibility of the Heads of States in international crimes. Although the application of international law requires in most cases, taking into account - to some extent - the political dimensions of the case.

However, the ICC, as an international judicial and independent entity specialized in international crimes, is supposed to do not overcome the political side of the legal side when making any decision, whether by the Office of the Prosecutor or of the Trial Chambers. This does not mean that the ICC operates within an isolated framework from the outside world, but means that the legal side is a dominant factor in the processes of taking decisions.

It is to be noted that in accordance of Article 58 of the ICC's Statute, there are three major controls to avoid issuing arrest warrants indiscriminately and without legal justification. The responsibility lays on the Pre-Trial Chamber to verify the existence of "reasonable grounds to believe" that the person has committed a crime of the crimes which falls within the jurisdiction of the Court, and to arrest him/her is necessary to ensure his/her appearance before the trial, or to avoid hindering the investigations or court proceedings or to endanger, or to prevent that person from continuing with the commission that crime or a crime relating thereto, which are within the jurisdiction of the Court, arising from the same circumstances.⁵⁰

The words "reasonable grounds" require a minimum standard of proof,⁵¹ from the words "substantial grounds" enshrined in the paragraph on confirmation of charges of the person concerned.⁵² However, this does not mean that issuing an arrest warrant in the light of the first criterion is an easy process, in practice.

In the decision of the First Pre-Trial Chamber on the prosecutor's request to issue an arrest warrant against Mr. Thomas Lubanga in "the situation of the Democratic Republic of the Congo", the Court affirmed in the reasons that it would refuse to issue any arrest warrant only in the

case of its full conviction that the controls referred to it are available.⁵³

In order to reach a sound and outcome, not only the Statute obliged the chamber to examine the request submitted by the Prosecutor, but also to examine the evidence or any other information submitted by him.⁵⁴ As a result of the application of the Court to a kind of substantive oversight on the requests of the Prosecutor, the Pre-Trial Chamber has responded to the request of the Prosecutor on issuing an arrest warrant against Mr. Thomas Lubanga, but refused at the same time a similar request on the arrest of Mr. Bosco Ntjanda in connection with crimes stemming from the "same Situation."⁵⁵

This demonstrates that the submission of the prosecutor to the request to arrest the Sudanese president does not assert in itself that the Pre-Trial Chamber will approve it, and if it does, it is not necessary that the Court will accept all of the charges received in the request and the facts enumerated.

Accordingly it is important to note that the decision of the Pre-Trial Chamber to respond to the prosecutor on his request to issue an arrest warrant against the Sudanese president falls within the discretion of the judges of the Court and that the Prosecutor has no authority in that at all. A question arises whether the arrest warrant in itself or the decision issued by the Pre-Trial Chamber regarding the request of the Prosecutor to issue an arrest warrant shall be challenged by appeal or not.

It is necessary to distinguish between the decision on the request of the prosecutor to issue an arrest warrant and the arrest warrant itself. The arrest warrant in itself could not be subject to appeal, because it is not a decision subject to challenge in procedural terms. While the decision issued in connection with the request, the texts on the methods to appeal did not include an explicit reference to answer this question.⁵⁶ However, the established Court precedents prove that appeal is admissible if proved by one of parties that the decision involves "a matter which shall strongly effect the fairness and speed of procedures or the result of the trial and that in the view of the Pre-Trial Chamber to take the an immediate decision by the Appeals Chamber could lead to achieving significant progress in the course of proceedings."⁵⁷

In the case of Joseph Kony and others, stemming from "the situation of" the Democratic Republic of Uganda democratic, the prosecutor requested from the Second Pre-Trial Chamber to allow him to a partial

appeal of the Court's decision on the request of the prosecutor to issue an arrest warrant against the abovementioned persons. However, the Pre-Trial Chamber did not accept that request. In order not to go into the details of the merits, the Court converted to a specific approach when dealing with this kind of appeals, which is to ensure the availability of a balance between the cases that call for effective intervention of the Appeals Chamber in the preliminary stages of procedures and the desire to avoid disruption of the proceedings resulting from recourse to challenge by appeal.⁵⁸

By examining the conditions prescribed by the law⁵⁹ in the light of principle, which was approved by the Chamber, it decided that the prosecutor could not prove availability of the said conditions.⁶⁰ It is worth noting that following the issuance of the arrest warrant against the Sudanese president, that such warrant could be challenged if it satisfies the above mentioned conditions.

The Possibility of requesting an Advisory Opinion from the International Court of Justice:⁶¹

It was reported in one of the Sudanese newspapers that the Sudan is trying to request an advisory opinion of the ICJ on the validity of the Council's referral to the ICC, and whether that the latter have jurisdiction over none party states or not.⁶²

The UN's Charter does not give states a direct right to request an advisory opinion from the ICJ, but could take that action by the General Assembly or the Security Council.⁶³ Here, a practical difficulty may arise, because in a situation where we seek the General Assembly, a two-thirds majority votes must be obtained. As for the Security Council, a distinction must be made between two cases: if the Council's decision on the request of the advisory opinion of the procedural matters, it is necessary for the availability of nine votes, but if it is considered of other issues, it must be nine votes including the votes of the five permanent members.⁶⁴

With regard to the development in the Sudan, it is unlikely that the Council shall approve this measure, hence as it is the source of referral to the ICC, but it is more likely that the Sudan can obtain these votes legally required by the General Assembly. In this case, the GA may request an advisory opinion related to any legal question, even if abstract or live in mystery.⁶⁵ Provided that the question stems from the scope of its activity.⁶⁶ The general principle, which was claimed by ICJ in its provisions is not to refuse the request of an advisory

opinion, however, the possibility of refusal is still there on the basis of what the Court ruled in some of its decisions that, as the availability of compelling reasons this request can be refused.⁶⁷

To check the availability of such compelling reasons falls within the discretion of the Court.⁶⁸ Inevitably, that the Darfur problem concerning the maintenance of international peace and security, and therefore it does not only fall within the jurisdiction of the Security Council, but also in the jurisdiction of the General Assembly.⁶⁹ Here the question arises whether the intervention of the General Assembly to request an advisory opinion is incompatible with the main role of the Security Council, and is contrary to Article (12/A) of the UN Charter, which provides that "when the Security Council, in connection with disarmament or a position, the posts that were drawn in the Charter, it is not the General Assembly to make a recommendation with regard to that dispute or situation unless on the request of the Security Council."⁷⁰ This point has been raised recently in the case of the Separation Wall, when Israel argued that the General Assembly went beyond the borders of its authority, when it issued a decision to request an advisory opinion from the ICJ in violation of Article 12 of the UN Charter.⁷¹ However, the Court found that the narrow interpretation of the content of that article had evolved since 1961. Over time, actual practice has proved that there was a tendency to accept the role of each of the Security Council and the General Assembly on the maintenance of peace and security in parallel, and this was seen in a number of problems, with reference to South Africa, South Rhodesia, and Somalia.

Therefore, the request of the General Assembly for an advisory opinion is not a breach to Article (12/1) of the UN Charter.⁷² Advisory opinions which are issued by the Court are not binding, but it produces important legal effects. All United Nations bodies are guided by these advisory opinions, including the General Assembly, which is used to issue decisions requiring the compliance with the opinion of the Court. In addition to these, advisory opinions have a major impact in the development of international law.⁷³

Concluding Remarks

It can be noted from the above mentioned; that the idea of referral by the Security Council is not the product of conflict in Darfur, but it was an idea embedded in the minds of many of those involved in the preparation of the Statute. The possibility of such referral became a reality

which cannot be avoided with all its advantages and disadvantages.

It should also be noted that the quest to request an advisory opinion from the ICJ regarding the validity of the Security Council to refer a matter to the ICC would not solve the Sudanese crisis. It is inconceivable that the ICJ will render an advisory opinion which shall doubts the legality of the referral to the ICC, particularly that practical experience has proved that the International Court of Justice have always been cautious in issuing its decisions and advisory opinions when dealing with the decisions of the Security Council.⁷⁴

This stems from the ICJ conviction that the UN Charter did not reveal the supremacy of a UN body over other United Nations bodies, but each of the ICJ and the Security Council has a role which complements each other within its terms of reference.⁷⁵ On the international judiciary level we find a close relationship between international tribunal, regional and national courts founded on understanding and respect to all judicial entities for the jurisdiction of the other.

While in fact the Court due to its desire to avoid any form of overlapping in jurisdiction that may arise from the acceptance of the proceedings, as well as to request an advisory opinion on the legitimacy of the referral from the Security Council realistically represents indirect request to consider the legality of the text of Article 13(b) of the Statute. If the advisory opinion leads to the illegality of the referral and the Security Council accepted to apply this would lead to disruption, total or partial to one of the mechanisms which activate the ICC jurisdiction. The ICJ would not favor such a decision and avoid bearing its consequences.

On 21 July 2008, the Council for Peace and Security of the African Union issued a resolution requesting the UN Security Council to use its powers under Article 16 of the ICC Statute to defer the proceeding related to the Sudanese president.⁷⁶ The same idea was echoed in the Enlarged Ministerial Meeting of the Executive Committee of the Organization of the Islamic Conference, held in Saudi Arabia on August 4, 2008.⁷⁷ Despite the lack of response of the Security Council, until present time, to this request, however, in its Resolution No. 1828 on the extension of the mandate of the mixed Operation of the African Union and the United Nations in Darfur, the SC pointed out that it has taken note of the intention to continue considering these questions, including the required request of deferral.⁷⁸

This reference suggests the possibility of raising the deferral issue in the future, particularly following the decision of the Pre-Trial Chamber to issue the arrest warrant of the Sudanese president. Article 16 grants the Security Council the power to request to delay commence or proceed in the investigation or prosecution for 12 months, renewable on a decision by the Council, pursuant to Chapter VII of the Charter.

But the deferral is a temporary solution, and does not lead to the droppings of the arrest warrants, that was issued, or deny the criminal responsibility, if proven. As well as that the deferral expires after 12 months. Although that Article 16 does not put a constraint on the number of extended times but from a legal perspective it can not be extended indefinitely, being an action taken under the umbrella of Chapter VII, and linked to the conditions established by Article 39 of the UN Charter.

This means that any attempt for an extension would require the SC to verify the existence of a case which constitutes a threat to international peace and security or breach, as well as to get nine votes, including, the votes of the five permanent members, which is a difficult task to achieve.⁷⁹ This is what has been proved in practice, when the United States succeeded in passing the deferral by a SC Resolution No. 1422 granting immunity of nationals of non-States parties of the Statute, including US citizens and which was extended under SC Resolution

No. 1487 in the following year, but failed to re-extended for a third time.⁸⁰

In the sense of proceeding in procedures to achieve true investigations by the Sudanese Government against Ahmed Haroun and Ali Khsheep about the charges against them in the arrest warrant and then argue for the inadmissibility of the case before the Court.⁸¹ Following the ICC verification of the investigation measures or a serious prosecution, then the ICC must abide by those measures taken by the national judiciary. Hence that Rule number 51 of the Procedural Rules and the confirmation Rules of the Court grant the state the right to submit any information it deems to benefit that its courts exact the rules and the criteria the confessor international judicial to pursuit independent and fair prosecution regarding a similar attitude.”

As the ICC evaluates this information at the examination of any defense related to the rejection of the case according to Article 17 (2) of the Statute. This measure even though that it does not directly lead to determine the rejection of the lawsuit regarding the Sudanese President. It is considered a step may on the case if the Sudanese government decided to initiate or start national investigations regarding what erupted against the Sudanese President as an alternative to the ICC procedures.

NOTES

- (1) “UN Darfur mission within days” BBC, April 20, 2004 available at: <http://news.bbc.co.uk/1/hi/world/africa/3641457.stm>
- (2) For more up to date information on the current humanitarian presence in Darfur see Darfur Humanitarian Needs Profile No.34, January, 01, 2009 on <http://www.unsudanig.org/docs/090330%20DHP%2034%20narrative%201%20January%202009.pdf>
- (3) For more details on the current situation in Darfur see international crisis group website: <http://www.crisisgroup.org/home/index.cfm?id=3060&l=1&gclid=CNfu8bHjpoCFYKB3godWTrBFQ>
- (4) In a recent development in Darfur the United Nations secretary-general Ban Ki moon has urged Khartoum to reinstate key international aid groups that were expelled from Darfur last month following an arrest warrant for Sudan's President on alleged war crimes. See the UN Secretary General Report to the Security Council issued on Wednesday, April 22, 2009.
- (5) ‘Sudan and Darfur Rebel Group Agree to Peace Talks’ in New York Times on 18 February 2009. <http://www.nytimes.com/2009/02/18/world/africa/18sudan.html>
- (6) Sudan: Chad 'launches fresh raid' found in [aljazeera.net](http://english.aljazeera.net/news/africa/2009/05/200951611362621423.html) on 16 May 2009. <http://english.aljazeera.net/news/africa/2009/05/200951611362621423.html>
- (7) G.A Res. 164/43; G.A. Res. 44/39.
- (8) 1990 YILC Vol. II, Part Two, Para. 135; Summary Record of the 2207 the mtg., 191 YILC, Vol. I, para. 3; Summary Record of the 2210 the mtg., Paras. 8-9; Summary Record of the 2210 the mtg., 1991 YILC. Vol. I paras. 50; Summary Record of the 2207 the mtg., 1991 YILC, Vol. I paras 8-9; Summary Record of the 2213 the mtg., 1991 YILC, Vol. I, para. 10.

- (9) 1991 YILC, Vol. II, Part One, Para. 57.
- (10) 1990 YILC, Vol. II, Part Two, paras. 136-137, 140; Summary Record of the 2212th mtg., 1990 YILC, Vol. I., paras 8.; Summary Record of the 2213th mtg., 1990 YILC. Vol. I, para. 10.
- (11) 1992 YILC, Vol. II, Part Two, paras 121.
- (12) 1993 YILC, Vol. II. Part Two. Paras. 74, 18, 112.
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- (35) See, UN Charter, Art 39.
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- (38) The leading authority on this rule (*pacta tertiis nec nocent nec prosunt*) is the Permanent Court of International Justice in *Free Zones of Upper Savoy and The District of Gex*, Judgment of 1932/06/7, P. C. I. J, Series A/B., No. 46, p. 141.
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- (40) UN Charter, Arts 2,1; See also Preamble, para. 3 and G.A. Res. 2625 (XXV) developing those purposes and principles; A. Orakhelashvili, "The Acts of the Security Council: Meaning and Standards of Review", II Max Planck YUNL 143, 149 (2007).
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- (52) Rome Statute, Art. 61(5); ICC-04/01-06/01-803-TEN, paras. 38-39.
- (53) What is meant by the term "issue" is what the Court receives in an "issue" includes committing crimes in a territory without a reference to specific persons. The prosecutor examines the evidence in order to file particular personal accusation. It has been agreed to use this term to guarantee that the Court would be used for political purposes. ICC-04/1-06/01-8- Corr, unsealed pursuant to the Decision ICC-04/01-06/01-37, para,9.
- (54) *Ibid.*, para. 10.
- (55) For the legal reasons of rejection, see ICC-04/01-520- Anx2, Paras. 86-89. (The Appeals Chamber overturned this decision on the basis of a request for leave to appeal submitted by the prosecutor. In turn, Pre-Trial Chamber 1 Later issued a warrant of arrest against Natganda. Yet, this conclusion should not be negatively received; rather it shows the high degree

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