



## *ANALYSIS OF THE ICC ARREST WARRANT FOR OMAR AL BASHIR, PRESIDENT OF SUDAN*

On March 31, 2005, the United Nations Security Council referred the situation in Darfur to the Prosecutor of the International Criminal Court (ICC). On July 14, 2008, the prosecution filed an application for an arrest warrant for Omar Hassan Ahmad Al Bashir, president of Sudan, for his alleged criminal responsibility in the commission of genocide, crimes against humanity and war crimes against members of the Fur, Masalit, and Zaghawa groups in Darfur from 2003 to July 2008.

On March 4, 2009, Pre-Trial Chamber I issued an arrest warrant for Bashir. The Majority decided that there was sufficient evidence to issue a warrant for two counts of war crimes and five counts of crimes against humanity as a co-perpetrator. However, Judge Anita Ušacka, one of the three judges, dissented stating that genocide should be included as one of the charges. In addition, she considered that Bashir could be liable as an indirect perpetrator for all three crimes – war crimes, crimes against humanity and genocide.

### Warrant Requirements: Article 58(1) of the Rome Statute

A warrant is issued if there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and if the arrest of the person is necessary to: (1) ensure their presence at trial, (2) ensure the person does not obstruct justice, or (3) to prevent the person from continuing with the commission of that crime. The statute defines “to commit a crime” as (1) an individual, (2) in a group as an accessory, (3) inciting others to commit crimes, or (4) as a commander.

To issue a warrant for Bashir, the Court had to answer three questions in the affirmative. First, are there reasonable grounds to believe that at least one crime within the jurisdiction of the Court has been committed? Second, are there reasonable grounds to believe that Bashir has incurred criminal liability for such crimes under any of the modes of liability provided for in the statute? Third, does the arrest of Bashir appear necessary to ensure his appearance at the Court and that he will not continue to commit crimes?

### Contextual and Specific Elements of the Crimes

The first requirement in order to issue an arrest warrant is the existence of reasonable grounds to believe that at least one of the crimes within the jurisdiction of the Court has been committed. The Rome Statute and the Elements of Crimes, a separate document which assists the judges in interpreting and applying the articles of the Statute on the crimes, provide that to establish whether there is sufficient evidence to prove the perpetration of a crime, two sets of elements must be analyzed: the contextual elements and the specific elements. The former are the circumstances which surround the commission of a crime. International crimes under the Rome Statute presume a context of systematic or large scale use of force: war crimes take place in the context of an international armed conflict or a non-international conflict, while crimes against humanity take place in the context of a widespread or systematic attack on a civilian population. The contextual elements for genocide are composed of intentional destructive conduct carried out according to a manifest pattern of similar conduct. As to the specific elements, these are the different acts which are comprised within each category of crimes, such as torture as a war crime, extermination as a crime against humanity or genocide by deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.





## War Crimes

### *Contextual elements*

In the case of Bashir, the Court had to determine whether the alleged war crimes occurred in a non-international conflict and were carried out by organized groups.

A **non-international conflict** is one that takes place within the border of a state and the conflict is between the government and armed groups or between organized armed groups. Thus, it excludes isolated riots and sporadic acts of violence or similar conduct. Based on the evidence submitted by the prosecution, the Majority concluded that the conflict between the Government of Sudan (GoS) and the Sudan Liberation Movement/Army (SLM/A), the Justice and Equality Movement (JEM) and other opposition groups was of a non-international character because it took place within the Darfur region of Sudan and between domestic organized groups. In addition, the parties to the conflict entered into but did not fully implement different peace agreements, including: (1) the peace agreements signed between the GoS and the SLM/A and the JEM on September 3 and 4, 2003, (2) the ceasefire April 2004, and (3) the Darfur Peace Agreement signed on May 5, 2006.

The Court determined that the **organizational element** was fulfilled because: (1) the SLM/A and JEM were the two main groups opposing the GoS in Darfur, (2) these indigenous groups were organized between 2001 and 2002, and (3) these groups resorted to acts of violence within the Darfur region of Sudan between March 2003 and July 2008. Moreover, the Janjaweed militia was also an organized internal armed group because the materials provided by the Prosecutor prove it was systematically recruited and integrated into the Sudanese structure together with the Armed Forces in order to carry out the counter-insurgency campaign against the rebels. It was drawn from the evidence that the GoS provided the Janjaweed with weapons, gave the orders as where to attack and which groups to target and offered them compensation, such as land and assets seized in conflicts.

The Prosecutor also had to show that the **groups were able to carry out sustained military operations for a prolonged period of time**. The Court found that SLM/A and JEM carried out numerous military operations against GoS forces. Moreover, when determining capability, the Court considered as important the element of control of territory. The evidence presented showed that the SLM/A and the JEM controlled certain areas in Darfur during the time of the attacks.

Therefore, the Majority concluded that the contextual element of war crimes was fulfilled because from March 2003 until at least July 14, 2008, a conflict not of an international character existed in Darfur between the GoS and opposition groups and these groups were organized and able to carry out military operations for long periods of time.

### *Specific elements*

**Attacking Civilians.** The Prosecutor alleged that Bashir used the “apparatus” of the GoS to commit war crimes of attacking civilians and pillaging from March 2003 to July 2008. The “apparatus” of the GoS included the Sudan People’s Armed Forces, militia groups known as the Janjaweed, the Sudanese Police Forces, the National Intelligence and Security Service (NISS), and the Humanitarian Aid Commission (HAC).





Attacking civilians means that an **armed conflict existed** and attacks were **knowingly directed at civilians** not taking part in the conflict. According to the prosecution, Bashir used the “apparatus” to direct hundreds of attacks against the Fur, Masalit, and Zaghawa civilian population which was not directly involved in the hostilities.

In addition to attacking the civilian population, the GoS forces allegedly destroyed water resources, housing, crops, and livestock. Although these civilians were targeted on the suspicion that they were assisting the opposition groups, they were not direct parties to the conflict. Thus, the Court found that the “apparatus” of the State of Sudan planned attacks aimed at civilian populations.

**Pillaging.** To pillage means appropriating property with the intent to deprive the owner of the property and to use the property for private use – in this case, in the context of a non-international conflict. The prosecution submitted that GoS forces carried out acts of pillaging upon the seizure of towns and villages in Darfur primarily inhabited by Fur, Masalit, and Zaghawa groups. Based on the Prosecutor’s evidence, the Court concluded that there was sufficient evidence to issue a warrant for **systematically seizing and pillaging** towns and villages by GoS forces as part of this campaign.

Based on its examination of the materials submitted by the prosecution, the Court found that since the beginning of the counter-insurgency campaign, war crimes were committed by the GoS “apparatus”. In reference to Bashir’s individual responsibility, the Court considered that, as president of Sudan, he was in full control of the branches of such “apparatus”. This control was also drawn from evidence proving the existence of a three-level structure in which reports flowed from the local units up to Bashir and other high-level officials. The materials submitted also showed that Bashir also used his control to organize the “apparatus” to implement the plan he had designed, to censor media coverage about the crimes committed and to use the criminal justice system to provide impunity to the perpetrators of crimes. Therefore, Pre-Trial Chamber I issued an arrest warrant for the alleged war crimes committed.

## Crimes Against Humanity

### *Contextual elements*

Crimes against humanity are acts committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack. The acts Bashir is accused of committing are: murder, extermination, forcible transfer, torture, and rape as crimes against humanity. The contextual elements of crimes against humanity include whether the attacks were widespread or systematic and if the alleged perpetrator knew the conduct was part of or intended to be part of such attacks.

The term “**widespread**” refers to the large-scale nature of the attack, as well as to the number of victims. The Court considered those conditions had been met because the attacks against the Fur, Masalit, and the Zaghawa affected hundreds of thousands of individuals and took place across large swathes of the territory of the Darfur region. The term “**systematic**” pertains to the organized nature of the acts of violence and to the improbability of their random occurrence. Evidence suggests that towns were encircled by the GoS forces, ground attacks were followed by air attacks, and the Janjaweed would arrive before or with members of the Sudanese Armed Forces. As a result, the Court concluded that the attacks by the GoS were widespread and systematic.





The Court also analyzed whether the violence was committed with **knowledge**, as required by the Statute. This means the perpetrator knew that the conduct was part of or intended to be part of a widespread or systematic attack against a civilian population. However, this does not mean that the Court must find that the perpetrator had knowledge of all the characteristics of the attack or the precise details of the plan or policy of the State or organization.

In the Bashir case, the Court decided that the knowledge requirement was met. Findings to support that conclusion included: (1) the attack against the above-mentioned part of the civilian population of Darfur affected at least hundreds of thousands of individuals during a period of more than five years, and (2) numerous UN reports, several Security Council resolutions and the Report of the UN Commission of Inquiry (UNCOI) all referred to the existence of a widespread and systematic attack by GoS forces on the Fur, Masalit, and Zaghawa population in Darfur.

### *Specific elements*

**Murder.** Murder is defined as the killing of one or more persons in a **widespread or systematic** attack directed against a **civilian population** and the perpetrator knew or intended that the conduct was part of an overall plan.

The Court acknowledged that there were reasonable grounds to believe that thousands of civilians belonging primarily to the Fur, Masalit and Zaghawa groups were subject to acts of murder by GoS forces as part of an ongoing counter-insurgency **campaign** of the State of Sudan that started after the April 2003 attacks on the El Fasher airport.

**Extermination.** Extermination is defined as the **widespread or systematic** killing of one or more persons, including by **inflicting conditions to bring about the destruction** of a part of the population, and the **perpetrator knew** that the attacks were part of the plan. It differs from the crime against humanity of murder in that murder only includes killing while extermination can also be perpetrated by imposing conditions that result in the death of individuals. In addition, the Elements of Crimes require that the killings constitute “a mass killing of members of a civilian population”. Accordingly, the Prosecutor submitted evidence on the killing of over a thousand civilians by the GoS forces in the attack on the town of Kailek around March 4, 2004.

Furthermore, the materials provided by the prosecution also tended to show that GoS forces systematically destroyed the means of survival including: (1) food, (2) shelter, (3) crops, (4) livestock, (5) wells and water pumps. The reports of GoS forces contaminating water sources were not considered in the allegation of crimes against humanity because the Majority did not consider the contamination of wells a core element of the attacks. However, Judge Ušacka dissented with the Majority considering that the destruction of shelter and access to water in Darfur’s hostile desert could reasonably be considered a systematic attempt to ensure that those not killed in attacks would not survive.

As a consequence, the Court found that members of the Fur, Masalit, and Zaghawa groups were subject to extermination as part of the counter-insurgency plan of the GoS.

**Forcible Transfer.** Forcible transfer requires the perpetrator **deported or forcibly transferred** one or more persons to another State or location **with knowledge** of the illegality of such actions. The prosecution





submitted that from March 2003 to July 14, 2008, GoS forces forcibly transferred up to 2.7 million civilians from the Fur, Masalit and Zaghawa groups residing throughout Darfur. In addition, evidence suggests that the GoS encouraged others to settle in the areas seized during the attacks. Based on this, the Court concluded that members of the Fur, Masalit, and the Zaghawa groups were subject to forcible transfer from April 2003 to July 2008 by GoS forces.

**Torture.** Torture means the **intentional infliction of severe pain or suffering**, whether physical or mental, upon a **person in the custody or under the control** of the accused. The prosecution’s evidence established that from March 2003 to July 14, 2008, GoS forces tortured numerous civilians from the targeted groups in the Darfur region. These acts of torture allegedly occurred directly after or during the attacks on the towns conducted by the GoS. As a result, the Court found that the GoS forces tortured members of the Fur, Masalit and Zaghawa tribes. However, the Majority did not conclude that mistreatment and torture took place in established detention camps.

**Rape.** Rape includes sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other forms of sexual violence of comparable gravity. According to evidence provided by the Prosecutor, from March 2003 to July 14, 2008, GoS forces raped thousands of women from the Fur, Masalit, and Zaghawa tribes throughout the Darfur region. The UNCOI and other UN bodies and numerous NGOs, interviewed by the prosecution, reported that from March 2003 thousands of women and girls were targeted by the GoS forces. Gang rape was also a distinctive feature of sexual violence committed in Darfur. The Prosecutor asserted that rape was used as a weapon and was a critical element in the attacks. Consequently, the Court found that women of the Fur, Masalit, and Zaghawa groups were subject to rape from April 2003 to July 2008 as a result of the conflict between the GoS and opposition groups in Darfur.

The Court concluded that GoS forces including the Sudanese Armed Forces, the Janjaweed, the Sudanese Police Force, the NISS and the HAC committed crimes against humanity of murder, extermination, forcible transfer, torture and rape throughout the Darfur region. The judges considered that Bashir, as head of state, was in control of all branches of the “apparatus” of the GoS and used this control to secure the implementation of the common plan. Therefore, it is reasonable that Bashir knew of acts committed by the “apparatus” and that he may have ordered the commission of the acts himself. As a result, the Court included five counts of crimes against humanity in the arrest warrant decision.

## Genocide

In the arrest warrant application, the Prosecutor included three counts of genocide: genocide by killing, genocide by causing serious bodily or mental harm, and genocide by deliberately inflicting conditions of life to cause the destruction of a group. The Majority decision considered that genocidal intent, an important requirement for proving the crime, was not the only reasonable conclusion to be drawn from the evidence submitted. Thus, they concluded that the Prosecutor did not present sufficient evidence to prove the existence of reasonable grounds to believe that the crime of genocide had been committed. However, one of the three judges, Anita Ušacka, dissented because she believed that the prosecution had met the burden of the proof for genocide required for this stage of the proceedings. She wrote that only at the trial phase it is necessary to present evidence that allows the Court to reach a conclusion beyond a reasonable doubt. To obtain an arrest





warrant, in her interpretation, all that is required is to establish sufficient grounds to believe than an allegation is true.

### *Contextual elements*

The contextual elements of genocide are the existence of a manifest pattern of similar conduct directed against a specific national, ethnic, racial or religious group, in whole or in part. This means that there must be a concrete and real threat to the existence of the whole group or part of it.

The Majority recognized there was a controversy in international law as to whether genocide requires contextual elements. For this purpose, it concluded that the Elements of Crimes document supplementing the Rome Statute settle the question by providing that this context can be shown by a manifest pattern of conduct to destroy a specific group or part of it.

Judge Ušacka considered that the existence of a manifest pattern of behavior need not be determined by the Chamber at this stage. However, were it to be determined, the Vienna Convention on the Law of the Treaties provides that the plain meaning of this element refers to a systematic, clear pattern that the judge believed had been proven by the evidence submitted.

### *Specific elements*

The specific elements of the crime of genocide are the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” In order to analyze this aspect of genocide, three factors must be distinguished: firstly, whether the victims belong to a particular national, ethnic, racial or religious group; secondly, if Bashir acted with intent to destroy such a group in whole or in part; and finally if the group meets these qualifications.

The Majority considered that the Fur, Masalit and Zaghawa tribes are all differentiated **ethnic groups** because they have their own language, tribal customs and traditional links. Therefore the first factor of the specific element is met. However, the judges suggested that the Prosecutor should have claimed three counts of genocide, one for each ethnic group, rather than one for all three. Judge Ušacka, in her separate and dissenting opinion, pointed out that these tribes where perceived and targeted as one entity, the “African tribes”, distinct from the “Arabs” and thus they constitute a protected group.

The key element of genocide is **intent**, but it is also the most difficult to prove because it often requires proof by inference. Indeed, the prosecution acknowledged that it did not have direct evidence and that the allegations were exclusively based on inferences from facts. The prosecution submitted various sets of evidence from which intent could be deduced, such as public documents and official statements. Nevertheless, the Majority found that there could be other possible reasons for the adoption of certain measures by the government, considering that there was an ongoing armed conflict. Thus, the Chamber found that there was nothing unlawful in a government coordinating its different levels of government, the military, the police, the intelligence services and the civil administration as a counter-insurgency campaign. The Court found the attacks were unlawful because they were carried out against civilian population. Furthermore, the claims of the GoS that the attacks on the civilian population were justified because they were in close support of the rebels were not legitimate.





Moreover, the Majority considered it necessary to differentiate between the intent of the GoS and the intent of President Bashir because there was a shared control of the “apparatus” of the GoS. As to the Government’s intent, the Majority ruled that there were reasonable grounds to believe that a core component of the counterinsurgency campaign was the unlawful, widespread and systematic attack on part of the civilian population. These acts of violence indicate that crimes against humanity and war crimes may have been committed but they do not automatically lead to intent to destroy a specific group. In addition, the Chamber concluded that genocidal intent was not the only reasonable conclusion that could be drawn from the evidence and, thus, that the materials provided by the prosecution failed to provide reasonable grounds to establish the specific intent. However, Judge Ušacka disagreed with the Majority because she considered that the conclusion beyond reasonable doubt must only be required at the trial phase and not at the issuance of the warrant stage. Moreover, she asserted that such intent could be concluded from the fact that, although the Sudanese government had allegedly denied and hindered the delivery of medical and humanitarian assistance which were necessary to survive in the camps by claiming the danger of armed conflict so required, the government in fact obstructed NGO access even in safe areas, including by enforcement of a 2006 law limiting NGO activities.

In reference to Bashir’s individual criminal responsibility, the Majority found that the mental element required for genocidal intent was not fulfilled. While Article 30 of the Rome Statute requires that the crimes under the Court’s jurisdiction are committed with intent and knowledge, the Elements of Crimes go further to require that genocidal intent be decided by the Court on a case-by-case basis.

In her dissenting opinion, Judge Ušacka disagreed with the Majority when considering that Bashir’s awareness of the commission of the crimes amounted to crimes against humanity but not genocide. She highlighted that the specific intent for genocide is distinct from the specific intent of the crime against humanity of persecution. According to the International Court of Justice (ICJ), when persecution escalates to the form of willful and deliberate acts designed to destroy a group or part of it, it can amount to genocide. Moreover, this difference becomes relevant to distinguish between genocide and ethnic cleansing. The ICJ pointed out that the displacement of a group, even by force, is not necessarily equivalent to the destruction of that group. Therefore, ethnic cleansing may result in genocide only if there was a specific intent to destroy the group rather than to only displace it.

In addition, Judge Ušacka pointed out that forcible transfer alone could constitute genocidal intent when the transfer is conducted in such a way that the group can no longer reconstitute itself. She added that genocidal intent does not require the physical destruction of the group. Therefore, she concluded that although the large majority of inhabitants were neither killed nor injured, a vast majority of the civilians were forced to flee and subject to dreadful conditions which risked their survival. Moreover, her dissenting opinion determined that there can be various means employed in the course of implementing genocide. Finally, she emphasized that at the arrest warrant stage, the burden of proof should be lower and thus it is for a future trial chamber to consider whether forcible transfer falls within those acts which constitute genocide.

The Majority decision also highlighted that there was a considerable difference between the Prosecutor’s Application and the materials submitted to support it. Nevertheless, Judge Ušacka argued that the conditions since 2005 had changed. She considered that it was irrelevant that the Prosecutor had not included the existence





of detention camps in the Application or that he had not alleged genocide in the case against Ahmad Harun, former Minister of State for the Interior of the GoS and current Minister of State for Humanitarian Affairs.

The last component of the specific elements of genocide is the consideration of the group “**as such**”. This means that the perpetrated acts put at risk the viability of the targeted group. However, it does not only rely on the number of persons affected. The jurisprudence of the ad hoc tribunals for Rwanda and the former Yugoslavia has established that other factors must be considered, such as the proportion and the prominence of the targeted group in relation to the protected group as a whole, as well as the area under the control of the perpetrator. Judge Ušacka pointed out that 97% of the Fur tribes and 85% Masalit people that lived within Bashir’s area of control were attacked.

The Majority concluded that the evidence submitted by the prosecution amounted to war crimes and crimes against humanity, but there were insufficient reasonable grounds to believe that genocide had been committed. However, if the prosecution was to submit additional evidence, it could seek to include genocide. In her dissenting opinion, Judge Ušacka considered that the standard of proof established with respect to the inference of intent for the issuance of a warrant of arrest should be lower than the one required for trial and, thus, that genocide should be included within the charges against Bashir.

#### *Prosecution’s application for leave to appeal the inclusion of genocide in the arrest warrant*

On March 10, 2009, further to the Majority’s decision, the prosecution submitted an application for permission to ask the Appeals Chamber to establish whether the charge of genocide should be included or not. On June 24, 2009, Pre-Trial Chamber I issued a decision on the application, allowing the Prosecutor to appeal one of three issues to the Appeals Chamber. This is whether the Pre-Trial Chamber used the correct standard of proof in examining the prosecution’s evidence on genocide.

The prosecution argued in its application that article 58 of the Rome Statute does not require that genocidal intent be the **only** reasonable inference drawn from the evidence, as interpreted by the Court. Thus, by increasing the standard of proof at this stage of the proceedings, different factors were put at risk. Firstly, if the Prosecutor is to provide more evidence, this would require longer investigations that would prolong the proceedings unnecessarily. Furthermore, if the new evidence was evaluated under the same standard it would probably not reach the threshold imposed by the Chamber to determine genocide was committed. Moreover, Pre-Trial Chambers would also have to invest more time to analyze all of the evidence. In addition, if the burden of proof required at the arrest warrant phase is the same one that the trial phase one, then the defendant’s rights would be violated. Whereas at trial the defendant is given the opportunity to be heard, to test the evidence presented by the prosecution, and to present his own evidence in rebuttal, such an opportunity is not given at the warrant stage. Thus, the principle of fair trial would not be observed. Furthermore, the higher standard of proof could set a precedent and establish a restriction for future cases. Finally, the Prosecutor also argued that his authority to conduct investigations was damaged by the Court’s decision. He considered that if the evidence submitted was analyzed separately and correctly by the Majority, the Chamber would find that the requirements for the proof by inference of Article 58 of the Rome Statute had been met.





## *Explanation of Pre-Trial Chamber I's decision on the Prosecutor's application for leave to appeal*

Article 58 of the Rome Statute states that to issue an arrest warrant the Prosecutor must submit evidence sufficient to make it reasonable to believe that a crime was committed within the jurisdiction of the Court and that the person named committed the crime. The “reasonableness standard” is not unique to the ICC. Indeed, it is used by US courts as well. An application for an arrest warrant both at the ICC and in the US is not a request to determine guilt or innocence. Instead, it is a presentation of evidence to determine whether it is reasonable to believe that the suspect committed the crime alleged. There is no determination of guilt or innocence at the pre-trial phase; at trial, a defendant is presumed innocent and the Prosecutor must prove his or her guilt beyond a reasonable doubt.

Here, the Pre-Trial Chamber found insufficient evidence because, according to the Prosecutor, it wanted enough evidence to make the Prosecutor's allegations the only reasonable outcome, the correct standard of proof at trial. Since at the pre-trial phase the Prosecutor is not arguing the merits of the case, the Appeals Chamber will now have to determine whether the standard of proof used by Pre-Trial Chamber to examine the Prosecutor's evidence on genocide was correct instead.

The Pre-Trial Chamber dismissed for appeal two other issues raised in the Prosecutor's application because in its view the Appeals Chamber only resolves questions of law. Under Article 82 of the Rome Statute, a party may appeal an issue only when its resolution significantly affects the fair and speedy conduct of the proceedings or the outcome of the trial. In addition, the Chamber permitting the appeal must agree that the immediate resolution of this issue by the Appeals Chamber may advance the proceedings. The Majority's assessment of the Prosecutor's evidence on genocide is, according to the Pre-Trial Chamber, a simple disagreement between the Prosecutor and the judges. However, if the Chamber used a standard of proof which is incorrect for this phase of the proceedings, then the law was applied wrongly and the Appeals Chamber would correct the error in order to ensure the fairness of the proceedings and the legitimacy of the Court.

This ruling should not be viewed as ineffectiveness of the ICC or the failure of the Prosecutor to comply with his mandate. The appeal of pre-trial rulings is a common practice at the ICC and in US domestic courts. There are many steps between arrest and trial that are equally important. This decision shows that the ICC is functioning effectively and as intended under its rules of procedure and evidence.

The next step is for the Appeals Chamber to determine whether the Pre-Trial Chamber used the correct standard of proof to at the arrest warrant stage and, thus, if this charge should be included in the arrest warrant.

## Mode of Liability

The Chamber decided that there was sufficient evidence to issue an arrest warrant for Bashir based on two counts of war crimes and five counts of crimes against humanity. The Majority considered he should be held accountable as a co-perpetrator because he shared control with other members of the Government of Sudan in carrying out an unlawful counter-insurgency campaign that resulted in the killing of civilians. However, Judge Ušacka concluded that it is unclear if President Bashir shared power with others and thus he should be held accountable as an indirect perpetrator.





## Execution of the Warrant

The Pre-Trial Chamber is the competent organ to issue and amend the arrest warrant and to make and transmit the cooperation requests for arrest and surrender of Bashir to the Sudanese authorities and to all the State Parties. Moreover, the Pre-Trial Chamber is also responsible for following up of the execution of cooperation requests.

Although Sudan is not party to the Rome Statute of the International Criminal Court, according to Pre-Trial Chamber it has an obligation to fully cooperate and provide any necessary assistance pursuant to Security Council Resolution 1593 by which the case was referred to the Court. In addition, under articles 24(1) and 25 of the UN Charter, all UN Member States agree to accept and carry out the decisions of the Security Council. Even if there were a conflict between the Rome Statute or any other international agreement and the UN Charter, the latter would prevail. Therefore, if Sudan continues to fail to comply with its cooperation obligation, the Security Council may order the interruption of Sudan's economic and diplomatic relations and their means of communication and other sanctions.

Finally, the prosecution was also requested inform to the Court about any potential risks that the transmission of the cooperation requests for the arrest and surrender may cause to victims and witnesses, as well as to give the Court all the information that may facilitate the speedy execution of the arrest warrant by the Sudanese authorities.

## Conclusion

The Court considered that the requirements to issue an arrest warrant were met because there are sufficient grounds to believe that Omar Hassan Ahmad Al Bashir, President of Sudan, is individually responsible for crimes against humanity and war crimes. Additionally, his arrest is necessary to ensure that he does not endanger or obstruct the proceedings nor he continues to commit crimes. This is the first time that the ICC has issued a warrant of arrest for a sitting head of state. In issuing the warrant, the Court is functioning as a judicial institution in accordance with the Rome Statute. At this time Bashir is still at large and the Court has called on all State Parties and on the authorities of Sudan to cooperate in the execution of the warrant.

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