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REFLECTIONS ON THE FIRST YEARS OF THE INTERNATIONAL CRIMINAL COURT

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I. INTRODUCTION

Adopted on July 17, 1998, the Rome Statute¹ of the International Criminal Court (“ICC” or “Court”) entered into force on July 1, 2002, and since that date, four situations have been referred to the Court, all concerning African countries, namely Uganda, the Democratic Republic of the Congo (“DRC”), Darfur, Sudan and the Central African Republic (“CAR”).

The past few months have been particularly important for the Court, as they have been notably characterized by significant procedural developments such as the recent arrest of Germain Katanga, a Congolese national, in October 2007.

This Idea aims at giving an overview of those developments with a particular focus on the situation in Darfur, Sudan.

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1. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, available at [http://untreaty.un.org/cod/icc/statute/english/rome_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf).

II. JUDICIAL AND PROCEDURAL DEVELOPMENT IN THE SITUATION IN DARFUR, SUDAN

As is public knowledge, the current situation in Darfur is still alarming and according to different sources the violence in Darfur might have caused the death of more than 200,000 people and the displacement of two million persons since 2003.² However, my legal background always taught me to treat these numbers with a lot of caution.

According to the findings of Pre-Trial Chamber I (“Chamber”), the conflict in Darfur started in about August 2002 when the Government of Sudan attempted to curb a rebellion that was led by rebel groups, essentially the SLM/A and the JEM.³ It also appears that the Sudanese authorities were engaged in a counterinsurgency campaign and that pursuant to this campaign, the Sudanese Armed Forces and Militia/Janjaweed, often acting together, carried out several attacks on towns predominantly inhabited by civilians primarily from the Fur, Zaghawa and Masalit populations.⁴ In the course of those attacks, the Chamber found that there are reasonable grounds to believe that they committed acts of pillage, rape, torture or persecution.⁵

A. Background

In September 2004, the United Nations Security Council (“UNSC”), upon the recommendation of the Secretary-General (“SG”), Kofi Annan, issued Resolution 1564 establishing the Commission of Inquiry on Darfur (“Commission”). According to this Resolution, the SG was requested “to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.”⁶

In that regard, the SG appointed a team of experts both in legal and humanitarian areas. These experts, of different nationality, are: Antonio Cassese, Commission Chairman, former President of the International

2. U.N. Dep’t of Pub. Info., Peace and Sec., *The United Nations and Darfur: Fact Sheet*, available at http://www.un.org/News/dh/infocus/sudan/fact_sheet.pdf [hereinafter *U.N. Fact Sheet*].

3. Prosecutor v. Harun & Abd-Al-Rahman, ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application under Article 58(7) of the Statute, ¶ 44 (Apr. 27, 2007).

4. *Id.* ¶¶ 47-48.

5. *Id.* ¶¶ 47-48, 50, 52, 58.

6. S.C. Res. 1564, ¶ 12, U.N. Doc. S/RES/1564 (Sept. 18, 2004).

Criminal Tribunal for the former Yugoslavia (Italy); Mohammed Fayek, Secretary-General of the Arab Organization for Human Rights (Egypt); Hina Jilani, UN Special Representative on Human Rights Defenders (Pakistan); Dumisa Ntsebeza, Commissioner of the Truth and Reconciliation Commission in South Africa (South Africa); and These Striggner-Scott, Chairwoman of the Ghana Law Reform Commission (Ghana).

Furthermore, one can also note the assistance provided by a legal research team who was appointed by the Office of the High Commissioner for Human Rights led by Louise Arbour as well as the assistance of forensic experts, investigators, military analysts and gender violence investigators.

The Commission has, *inter alia*, conducted two missions in Sudan as well as visits in the neighbouring countries, including Chad, Eritrea and Ethiopia, where most refugees from Darfur were to be found. As a result of the missions conducted by the Commission, a certain amount of materials from different sources, notably governments, international organizations as well as non-governmental organizations, have been gathered. Therefore, when its mission came to an end, the Commission was able, in light of the materials collected, to transmit to the SG a separate sealed report, a list of fifty-one names of persons thought to be responsible for the commission of crimes in Darfur. In this report, the Commission also emphasized that “resorting to the ICC would have at least six major merits” among which they stated the positive impact on peace and security; the fact that it could impel both leading personalities in the Sudanese Government and the heads of rebels to submit to investigation and possible criminal proceedings and also the fact that it will ensure a fair trial for those who will be prosecuted.⁷ It has to be noted that the Commission also concludes in its Report that the Sudanese authorities have “not pursued a policy of genocide.”⁸ The Commission indeed states that “the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned.”⁹ However, as the Commission correctly recalls in its Report, while not excluding instances where individuals, including Government officials, may commit acts with a genocidal

7. Int’l Comm’n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, ¶ 648 (Jan. 25, 2005), available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf.

8. *Id.* ¶ 640.

9. *Id.*

intent, it will be to the determination of a competent court to assess on a case-by-case basis whether that was the case in Darfur.¹⁰

The report of the UN Commission of Inquiry on Darfur was then presented to the SG on January 25, 2005. In its report, the Commission considers the Sudanese investigations and concludes that “[t]he Sudanese justice system has unfortunately demonstrated that it is unable or unwilling to investigate and prosecute the alleged perpetrators of the war crimes and crimes against humanity committed in Darfur.”¹¹ The Commission further notes that “[i]t is absolutely essential that those perpetrators be brought to justice before a competent and credible international criminal court.”¹² Hence, the Commission “strongly recommends” the Security Council to refer the situation to the ICC.¹³

On March 31, 2005, the UNSC finally issued Resolution 1593 acting pursuant to Chapter VII of the Charter of the United Nations.¹⁴ Pursuant to Article 13(b) of the Rome Statute (“Statute”), the UNSC referred the situation prevailing in the region of Darfur, Sudan since July 1, 2002, to the Office of the Prosecutor of the ICC. The Prosecutor of the Court has since received, from the SG and High Commissioner Arbour, an envelope containing the conclusion of the Commission, a sealed list of the fifty-one names suspected to have committed crimes in Darfur, as well as a certain amount of documents gathered by the Commission.¹⁵ On April 4, 2005, the Prosecutor formally informed the President of the Court of the referral by the UNSC¹⁶ and on April 21, 2005, the Presidency issued a decision assigning the situation in Darfur, Sudan to the Chamber, pursuant to Regulation 46 of the Regulations of the Court.¹⁷

On June 1, 2005 the Prosecution informed the Chamber of its decision to initiate an investigation into the Situation in Darfur, Sudan,

10. *Id.* ¶ 641.

11. *Id.* ¶ 627.

12. *Id.*

13. *Id.* ¶ 647.

14. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

15. Press Release, Int’l Criminal Court, List of Names of Suspects in Darfur Opened by the ICC OTP, ICC-OTP-20050411-98-En (Apr. 11, 2005), available at <http://www.icc-cpi.int/press/pressreleases/101.html>; Press Release, Int’l Criminal Court, Prosecutor Receives List Prepared by Commission of Inquiry on Darfur, ICC-OTP-20050405-97-En (Apr. 5, 2005), available at <http://www.icc-cpi.int/press/pressreleases/99.html>.

16. Letter from Luis Moreno-Ocampo, Prosecutor, Int’l Criminal Court, to Philippe Kirsch, President, Int’l Criminal Court, OTP/050404/LMO-dr (Apr. 4, 2005).

17. Decision Assigning the Situation in Darfur, Sudan to Pre-Trial Chamber I, ICC-02/05 (Apr. 21, 2005), available at http://www.icc-cpi.int/library/cases/ICC-02-05-1-Corr_English.pdf.

pursuant to Article 53 of the Statute and Rule 104 of the Rules of Procedure and Evidence. On that occasion, the Prosecutor emphasized that:

The investigation will require sustained cooperation from national and international authorities. It will form part of a collective effort, complementing African Union and other initiatives to end the violence in Darfur and to promote justice. Traditional African mechanisms can be an important tool to complement these efforts and achieve local reconciliation.¹⁸

After less than two years of investigation, the Prosecution filed on February 27, 2007, an application under Article 58(7) of the Statute, in which he requested that summonses appear or, alternatively, warrants of arrest be issued for two individuals, namely Ahmad Muhammad HARUN (“Ahmad Harun”) and Ali Muhammad Ali ABD-AL-RAHMAN (“Ali Kushayb”).¹⁹ According to the Prosecutor those individuals have committed acts amounting to war crimes and crimes against humanity, such as rape, pillaging, attack against the civilian population, torture as well as persecution in the towns of Kodoom, Arawala, Bindisi and Mukjar. The Prosecutor suspected them of the commission of a total of fifty-one counts each. After examination of the Prosecution’s Application and its supporting materials, the Chamber issued two warrants of arrest against the indicated two individuals on May 1, 2007.

*B. The Decision of the Chamber Issued on May 1, 2007²⁰
Individuals Against Whom Summonses to Appear Have Been Requested*

1. Ahmad Harun

The Chamber found reasonable grounds to believe that “from in or about April 2003 until in or about September 2005, Ahmad Harun served as Minister of State for the Interior of the Government of the Sudan” and that “the Ministry of Interior worked jointly with the Ministry of Defence and the National Security Apparatus in order to

18. Press Release, Int’l Criminal Court, The Prosecutor of the ICC Opens Investigation in Darfur, ICC-OTP-0606-104-En (June 6, 2005), available at <http://www.icc-cpi.int/press/pressreleases/107.html>.

19. Prosecutor v. Harun & Abd-Al-Rahman, ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application under Article 58(7) of the Statute, ¶ 4 (Apr. 27, 2007).

20. *Id.*

respond to the rebellion in Darfur.”²¹ The Court also found reasonable grounds to believe that “by virtue of his ministerial capacity, the management of the ‘Darfur Security desk’ was assigned to Ahmad Harun and that, as such, he oversaw the activities of the Security Committees responsible for coordinating the counter-insurgency in Darfur.”²² As a consequence, the Chamber was of the view that there were reasonable grounds to believe that Ahmad Harun organised a system through which he recruited, funded and armed Militia/Janjaweed in order to supplement the Sudanese Armed Forces and that he also incited them to attack the civilian population and commit massive crimes against them. Therefore, reasonable grounds existed to believe that Ahmad Harun, while recruiting Militia/Janjaweed, had full knowledge that in the course of their attacks, mostly joint attacks with the Sudanese Armed Forces, the Militia/Janjaweed would commit crimes against the civilian population. Ahmad Harun was, at the time the warrant of arrest against him had been issued, Minister of Humanitarian Affairs in the Sudanese government.

2. Ali Kushayb

According to the Chamber, there were reasonable grounds to believe that “Ali Kushayb was one of the most senior and best known leaders in the tribal hierarchy in the Wadi Salih Locality”²³ that he joined the Sudanese Armed Forces together with his tribesmen and that around August 2003, he was formally “appointed to a position”²⁴ within the Sudanese Armed Forces. The Chamber also found reasonable grounds to believe that by virtue of his position as a senior tribal leader and as a member of the Sudanese Armed Forces, Ali Kushayb commanded thousands of Militia/Janjaweed²⁵ and implemented the counter-insurgency strategy that resulted in the commission of war crimes and crimes against humanity.²⁶ Moreover, the Chamber further considered that there are reasonable grounds to believe that “from August 2003 until in or about March 2004, Ali Kushayb participated with the Militia/Janjaweed under his command in the attacks against civilians in Darfur and the attacks upon villages and towns in the Wadi

21. *Id.* ¶ 80.

22. *Id.* ¶ 81.

23. *Id.* ¶ 95.

24. *Id.*

25. *Id.* ¶ 96.

26. *Id.* ¶ 97.

Salih area.”²⁷ As a result of the different Chamber’s findings, it can be said that Ali Kushayb was a key actor in the system as he personally delivered arms and led attacks against the civilian population.²⁸ Ali Kushayb was, at the time of the issuance of the warrant of arrest, in custody in Sudan. However, recent press releases allege that he would have been released during the first week of October 2007.

3. Criminal Liability

According to the findings of the Chamber, Ahmad Harun and Ali Kushayb contributed to the enforcement of a common plan that consisted of attacking the civilian population in Darfur and were therefore criminally liable under Article 25(3)(d) of the Statute.²⁹

Moreover, as for Ali Kushayb, the Chamber found reasonable grounds to believe that he also had personally committed acts amounting to war crimes and crimes against humanity.³⁰ Therefore, Ali Kushayb could also be held criminally liable under Article 25(3)(a) of the Statute.³¹

Concerning Ahmad Harun, the Chamber was also of the view that there were reasonable grounds to believe that he had induced the commission of the war crime of pillaging in the town of Mukjar.³² Therefore, Ahmad Harun could also incur criminal responsibility under Article 25(3)(b) of the Statute.³³

4. Admissibility Issue

As the Prosecutor emphasized at his briefing to the UNSC on June 2005, the “admissibility assessment is not a judgement on the Sudanese justice system as a whole, but an assessment of whether the case selected by the Prosecution has been or is being investigated by the Sudan.”³⁴

I am touching upon the question of admissibility now, because this issue has been raised in the present case and particularly concerning Ali Kushayb. Indeed, according to the information submitted by the

27. *Id.* ¶ 98.

28. *See id.* ¶¶ 95-107.

29. *Id.* ¶¶ 89, 107.

30. *Id.* ¶ 97.

31. *Id.* ¶ 104.

32. *Id.* ¶¶ 90-91.

33. *Id.* ¶ 94.

34. Statement of the Prosecutor of the Int’l Criminal Court, Luis Moreno Ocampo, to the UN Security Council Pursuant to UNSCR 1593 (2005) (June 7, 2007), available at http://www.icc-cpi.int/library/organs/otp/LMO_20070607_en.pdf.

Prosecution, Ali Kushayb was arrested on November 28, 2006, on the basis of an arrest warrant issued by the Sudanese authorities in April 2005. The information provided by the Judicial Investigations Committee indicated that “Ali Kushayb was under investigation in relation to five separate incidents which occurred in Shattaya in South Darfur and Nankuseh, Tanako, Arawala and Deleig in West Darfur.”³⁵

Thus, the question is whether the Sudanese investigation(s) on Ali Kushayb relate to the same criminal conduct as those investigated by the Office of the Prosecutor. In that regard, the Chamber has held that for a case to be admissible, “it is a *conditio sine qua non*” that national proceedings do not “encompass both the person and the conduct which [are] the subject of the case before the Court.”³⁶

At this stage of the proceedings, namely the issuance of a warrant of arrest, the Chamber, based on the evidence and information provided by the Prosecution and notably the fact that the investigation against Ali Kushayb did not encompass the same conduct, decided that the case against Ali Kushayb as well as Ahmad Harun *appears to be admissible*, but also underlined that this finding *is without prejudice* to any challenge to admissibility of the case under Article 19(2)(a) and (b) of the Statute and any subsequent determination.³⁷

5. Warrants of Arrest Instead of Summonses to Appear

In his Application, the Prosecutor first seeks the issuance of summonses to appear and, *only in the alternative* warrants of arrest against both individuals. In that regard, the Prosecutor stated that any official response from the Government of the Sudan or of the individuals suggesting that they will fail to comply with the Decision of the Chamber would justify the issuance of warrants of arrest.

Here, we have to note that according to Article 58(7) of the Statute, a Chamber shall issue a summons to appear as an alternative to a warrant of arrest under specific circumstances, namely that a summons is sufficient to ensure the person’s appearance before the Court. Moreover, Article 58(7) is restricted to cases in which the person can and will appear voluntarily before the Court without the necessity of presenting a

35. Prosecutor v. Harun & Abd-Al-Rahman, ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application under Article 58(7) of the Statute, ¶ 20 (Apr. 27, 2007).

36. Prosecutor v. Dyilo, ICC-01/04-01/06-US-Corr, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case Against Thomas Lubanga Dyilo, ¶ 31 (Feb. 24, 2006).

37. Prosecutor v. Harun & Abd-Al-Rahman, ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application under Article 58(7) of the Statute, ¶ 25 (Apr. 27, 2007).

request for arrest and surrender. Therefore, after close examination of the Prosecution's Application, the Chamber was not satisfied that the requirements for summonses to appear were met. Indeed, Ali Kushayb was at the time of the request in custody and could not therefore appear voluntarily and as for Ahmad Harun, several official statements of Sudanese authorities stated that Sudan will not cooperate with the Court. As a result, the Chamber decided that the arrest of the two persons was necessary to ensure their appearance before the Chamber and issued two warrants of arrest instead of the requested summonses to appear.³⁸

C. *Prospective Development in the Situation in Darfur, Sudan*

1. Judicial Aspects

In accordance with the Decision of the Chamber, the Registry was entrusted with the task of transmitting the requests for cooperation to execute the two warrants of arrest, notably to:

- All States Parties to the Statute;
- All UNSC members that are not States Parties to the Statute; and
- Egypt, Eritrea, Ethiopia and Libya.³⁹

In this regard, we have to keep several aspects in mind: The ICC has no police of its own and therefore has to rely on the cooperation of countries involved to arrest and surrender the suspects to The Hague.

The situation in Darfur, Sudan has been referred to the Court by a UNSC Resolution, acting under Chapter VII of the Charter and is therefore binding upon all State members of the UN, which includes Sudan. Indeed, according to the Resolution, the Government of Sudan and all other parties to the Darfur conflict, *shall cooperate fully* with and provide any necessary assistance to the Court and the Prosecutor pursuant to the Resolution and, while recognizing that States not party to the Statute have no obligation under the Statute, *urged* all States, concerned regional and other international organizations to cooperate fully with the Court.⁴⁰

The next crucial step in this case is obviously the arrest and surrender of those two individuals named in the arrest warrants, their

38. *Id.* ¶¶ 126-34.

39. *Id.* ¶¶ 56-57.

40. S.C. Res. 1593, *supra* note 14.

transfer to The Hague and the subsequent procedural steps, in particular, the proceedings leading to the hearing on the confirmation of charges.

Finally, it has to be noted that in his brief to the UNSC on Darfur, in June 2007 (Fifth Report to the UN Security Council pursuant to Resolution 1593), the Prosecutor informed the members that the “investigation into this case continues, in preparation for further. . . proceedings.”⁴¹

He also indicated a crucial problem—the protection of victims and witnesses. This is, in my opinion, one of the most challenging issues for the Court. How to protect victims and witnesses in countries where a conflict is still ongoing and, moreover, in a country which publicly recalls its unwillingness to cooperate with the Court, such as Sudan? In this respect, the Prosecutor works closely with the Registrar and other actors, but one should also recall that the Chamber is also under the obligation to look after the interests and security of victims and witnesses and, pursuant to Article 68 of the Statute, the Chamber can act *proprio motu* in this respect. Finally, the Prosecutor also expressed concern on recent allegations of:

- Attacks against the UN, the African Union and humanitarian personnel (between February and May 2007, eleven African Union peacekeepers lost their lives and five were seriously wounded);
- “[I]ndiscriminate and disproportionate air strikes by the Government of the Sudan”⁴² notably throughout January, February, March, and April 2007;
- Crimes committed by rebel forces; and
- Attacks against internally displaced persons.

He therefore informed the UNSC that while completing his first investigation, *he will continue to evaluate the information about recent crimes.*

2. Political and Military Aspects

Intervening as a Judge, I will just try to update you on the recent major events related to the humanitarian aid and the military assistance provided to Sudan.

41. Office of the Prosecutor, Int’l Criminal Court, Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005) (June 7, 2007), available at http://www.icc-cpi.int/library/organs/otp/OTP_ReportUNSC5-Darfur_English.pdf.

42. *Id.*

a. Humanitarian Aid: French Initiatives Led by the Minister for Foreign Affairs, Bernard Kouchner

The recently elected French President declared to make Darfur a priority and has therefore appointed Bernard Kouchner as Minister for Foreign Affairs. Bernard Kouchner is the co-founder of the international aid group Doctors Without Borders, a group that had already intervened in Sudan.

Since his appointment, Bernard Kouchner tried to boost diplomatic efforts and so far one of his achievements is the agreement to airlift emergency humanitarian aid to Chad, which has received tens of thousands of refugees who have fled the fighting in Darfur.

However, one of the major concerns of the Prosecutor, which I also share, is that one of the suspects against whom a warrant of arrest has been issued, is currently the Minister of Humanitarian Affairs in Sudan. Indeed, the current situation in Darfur is still alarming and unstable, millions of people urgently need humanitarian assistance and the attacks continue not only against the civilian population, but also target international staff. However, the person who is now in charge of all those aspects concerning the humanitarian aid is the same person who is now sought by the Court: Ahmad Harun, Minister of State for Humanitarian Affairs.

b. The Hybrid Military Force

Following intensive talks in Khartoum with a delegation of the UNSC, Sudan formally endorsed on June 12, 2007 the deployment of a hybrid United Nations-African Union peacekeeping force in Darfur region ("UN-AMID"). The purpose of this hybrid force is to boost the African Union peacekeeping force, which due to the lack of funds and poor equipment had been unable, with its only 7000 peacekeepers, to end violence in Darfur.

On July 31, 2007 the UNSC unanimously adopted, pursuant to Chapter VII of the UN Charter, Resolution 1769 by which it authorized the establishment of the UN-AMID for an initial period of twelve months.⁴³ The core mandate of this force is the "protection of civilians," the "security for humanitarian assistance" as well as "monitoring and verifying implementation of agreements," contributing to the protection of human rights and reporting on the situation along borders with Chad

43. S.C. Res. 1769, U.N. Doc. S/RES/1769 (July 31, 2007).

and the CAR.⁴⁴ It is expected that “[a]t full strength,” UN-AMID “will become one of the largest UN peacekeeping missions in history.”⁴⁵

The particularity of the situation in Darfur, Sudan is that it had been referred to the Court by the UNSC whereas the other situations in the agenda of the Court have been referred to it by the States themselves. In this regard, we should now turn to a brief update on the Court activities. What has the Court done so far?

III. THE COURT TODAY: A BRIEF UPDATE ON THE COURT’S ACTIVITIES

First and foremost it should be reminded that four situations are currently under examination, namely:

- Darfur, Sudan (referral by the Security Council);
- Uganda (State referral);
- Democratic Republic of the Congo (State referral); and
- Central African Republic (State referral).

Since the Statute of the ICC had entered into force, the Court had issued nine arrest warrants (two in the Congo situation, two in the situation in Darfur, Sudan and five in the situation in Uganda). The last few months have been characterized by important developments.

A. *The Situation in CAR*

The CAR Government referred the situation to the Office of the Prosecutor (“OTP”) on December 22, 2004.⁴⁶ Since the referral, the OTP conducted an analysis of all available information in order to determine that the jurisdiction, admissibility and interests of justice requirements of the Statute were satisfied. Following this analysis, the Prosecutor announced on May 22, 2007 the opening of investigation into grave crimes allegedly committed in CAR.⁴⁷ The Prosecutor intends to focus on the peak of violence occurring in 2002 and 2003. He also announced

44. *U.N. Fact Sheet*, *supra* note 2.

45. *Id.*

46. Press Release, Int’l Criminal Court, Background: Situation in the Central African Republic, ICC-OTP-BN-20070522-220-A_EN (May 22, 2007), available at http://www.icc-cpi.int/library/press/pressreleases/ICC-OTP-BN-20070522-220_A_EN.pdf [hereinafter Press Release, Background]; Press Release, Int’l Criminal Court, Prosecutor Opens Investigation in the Central African Republic, ICC-OTP-PR-20070522-220_EN (May 22, 2007), available at <http://www.icc-cpi.int/press/pressreleases/248.html> [hereinafter Press Release, Prosecutor Opens Investigation].

47. Press Release, Prosecutor Opens Investigation, *supra* note 46.

that he will focus on crimes of sexual violence. In this regard he noted that “[t]his is the first time that [he] is opening an investigation in which allegations of sexual crimes far outnumber alleged killings.”⁴⁸

B. *The Situation in Uganda*

On December 16, 2003, Uganda referred the situation concerning the Lord’s Resistance Army (“LRA”) to the Prosecutor of the ICC. It was the first time that a State Party used Articles 13(a) and 14 of the Statute in order to vest the Court with jurisdiction.⁴⁹ After more than a year of investigation the Prosecutor applied, on May 6, 2005, for arrest warrants to be issued by Pre-Trial Chamber II (“PTC II”).

In this regard, after having considered that the Chamber has jurisdiction and the case is admissible, the Chamber concluded that there were reasonable grounds to believe that Thomas Lubanga Dyilo had committed crimes that fell within the jurisdiction of the Court and that his arrest appeared necessary. The Chamber, therefore, issued a warrant of arrest on February 10, 2006⁵⁰ and a request for his arrest and surrender was then transmitted to the DRC on February 24, 2006.⁵¹

1. Arrest and Surrender to the Court

Consequently, Thomas Lubanga Dyilo was arrested in DRC on March 17, 2006, surrendered to the Court, and then transferred to the Court’s detention centre in The Hague.

2. First Appearance

On March 20, 2006, Thomas Lubanga Dyilo made his first appearance before the Chamber. During this hearing, the Chamber satisfied itself that he had been informed of the alleged crimes and of his rights.

48. *Id.*

49. Payam Akhavan, *The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT’L L. 403, 403 (2005); Press Release, Int’l Criminal Court, President of Uganda Refers Situation Concerning the Lord’s Resistance Army (LRA) to the ICC, ICC-20040129-44-EN (Jan. 29, 2004), available at <http://www.icc-cpi.int/press/pressreleases/16.html>.

50. Prosecutor v. Dyilo, ICC-01/04-01/06-2-tEN, Warrant of Arrest (Feb. 10, 2006).

51. Prosecutor v. Dyilo, ICC-01/04-01/06-8-US-Corr, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case Against Thomas Lubanga Dyilo (Feb. 24, 2006), rendered public pursuant to Prosecutor v. Dyilo, ICC-01/04-01/06-37 (Mar. 17, 2006).

3. Disclosure

Pursuant to Article 61(3) of the Statute, the suspect shall, within a reasonable time before the hearing, be provided with a copy of the document containing the charges on which the Prosecutor intends to bring him at trial and shall also be informed of the evidence on which the Prosecutor intends to rely at the hearing. The Chamber shall then ensure that the disclosure of those documents is made properly.

It is important to note here that pursuant to Article 67(2) of the Statute, the Prosecution shall, as soon as practicable, disclose to the Defense any exculpatory material.

4. Confirmation of Charges Hearing

The first confirmation of charges hearing at the Court was held from November 9-28, 2006. During the hearing, the Prosecution only called one witness to testify and no witness was called by the Defense.

It is also important to underline that prior to the hearing the Chamber issued a decision on the practice consisting in proofing a witness. Indeed, the Prosecutor intended, prior to the hearing, to meet with the witness in order, *inter alia*, to familiarize her with the Court, but also aimed at detecting and addressing differences and deficiencies in her recollection prior to her testimony by, *inter alia*:

- (i) allowing the witness to read her statement;
- (ii) refreshing her memory in respect of the evidence that she will give at the confirmation hearing; and
- (iii) putting her the very same questions and in the very same order as they will be asked during her testimony.⁵²

The Chamber had decided to forbid this practice, but entrusted the Victims and Witnesses Unit with the task to proceed with the familiarization of the witness, in respect of, *inter alia*, Court proceedings and also questions related to her security and protection. This decision has not been subsequently followed by the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) despite motions based on this decision.

52. Prosecutor v. Dyilo, ICC-01/04-01/06-679, Decision on the Practices of Witness Familiarisation and Witness Proofing, ¶ 17 (Nov. 8, 2006).

5. Confirmation of Charges Decision

In compliance with regulation fifty-three of the Regulations of the Court, the Chamber had sixty days from the date of the confirmation hearing's end to render its decision. The Chamber did so on January 29, 2007 and confirmed the charges against Thomas Lubanga Dyilo.

The Chamber indeed found sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo was the founder and leader of the Union des Patriotes Congolais ("UPC") and Commander-in-Chief of the Forces Patriotiques pour la Liberation du Congo ("FPLC") and that he is criminally responsible as a coperpetrator for all three charges he is accused of for the period beginning September 11, 2002, when the FPLC was founded, and ending on August 13, 2003. Finally, this is also an important decision as it is the first one rendered by an international jurisdiction on the issue of child soldiers. The Chamber had in its decision explained the difference to be made between "enlistment" and "conscription." According to the findings of the Chamber, "enlistment" and "conscription" are both a form of recruitment, the former being voluntary and the latter compulsory.

6. Trial

Having confirmed the charges, the Chamber committed Thomas Lubanga Dyilo to a Trial Chamber. Trial Chamber I has been constituted on March 6, 2007 by a Presidency Decision and has been assigned the case *The Prosecutor v. Thomas Lubanga Dyilo*. Trial Chamber I decided, on November 9, 2007, that the trial shall commence on March 31, 2008.

C. *The Second Case: The Prosecutor v. Germain Katanga*

Following the confirmation of the charges against Thomas Lubanga Dyilo, the Prosecutor expressed his intention to continue investigating on alleged crimes committed in the DRC and that therefore some new arrest warrants should be expected soon. This has been achieved on July 2, 2007, when the Chamber issued a warrant of arrest for Germain Katanga.⁵³ The Chamber has indeed found reasonable grounds to believe that Germain Katanga is the highest ranking FRPI commander and that other senior FNI and FRPI commanders carried out an indiscriminate

53. *Prosecutor v. Katanga*, ICC-01/04-01/07-55, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga, ¶ 7 (Nov. 5, 2007).

attack on the village of Bogoro on or around February 24, 2003 in the course of which criminal acts amounting to crimes against humanity and war crimes were committed. The Chamber also found reasonable grounds to believe that Germain Katanga's contribution, by designating the common plan and ordering his subordinates to execute it, was essential to its implementation. Therefore, the Chamber found reasonable grounds to believe that Germain Katanga is criminally responsible under Article 25(3)(a) or, in the alternative, under Article 25(3)(b) of the Statute.⁵⁴

IV. CONCLUSION

Having been the Presiding Judge of the Chamber, I can only conclude on some reflections arising from my own direct experience at the Court. The Chamber has tried, within the allotted time, to auto-investigate itself in order to make this Court more efficient, and more protective. I am also confident that it will keep doing so in the new DRC case. However, it should be emphasized that the Chamber and the Court as a whole had to deal with a particularly complex Statute and Rules of Procedure and Evidence, where certain provisions are ambiguous or even contradictory. In my opinion, a core reflection should be done in this regard.

Should we adopt, like the ICTY, practice directions, on which the Chambers will agree upon in order to put into place a "common" system? As a former President of the ICTY, a former President of the Appeals Chamber of both ICTY and ICTR, I would like to insist on the fact that the ICC will not be able to work if a minimum of agreement is not reached among the Judges. The independence of the judges is fundamental and has to be recognized by all Judges. However, a good judicial system is nothing else but a system based on a practical vision of the events. The ICTY has worked because it has been speaking with one voice, and I am not talking here of the substantial debates on the criminal liability of the superior, but more about a guiding line on the application of the provisions. In my view, for the Court to move forward, today, it is more about making an institutional work practical and, if possible, simplified. A number of modifications can be adopted through practice directions. The Court is at a turning point in its history. Since the Judges have no control on the policy of the Prosecutor, and since the States Parties wish to implement a budget of 0% growth, there

54. *Id.* ¶ 60.

is not much left except a modification of the provisions of the Statute and the Rules during the Review Conference to be held in 2009. Otherwise, with the probable arrival of about ten or more suspects I accused, the Court will not be able to fulfill its mission.
