

**The International Criminal Court and the Darfur Crisis:
The Prospects of Prosecuting the Sudanese President**

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December 2012

A thesis submitted to the University of Ottawa
in partial fulfillment of the requirements of the degree of Master of Law

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Acknowledgements

I would like to extend my sincere gratitude to my supervisor, Professor Pacifique Manirakiza, for his insightful suggestions and comments and for his support. I also thank Professor Lucie Lamarche, Professor Sonya Nigam, Ben Frate and the rest of my colleagues at the HRREC for their kind support. Thanks to Mohamed Elfatih Mustafa for his valuable assistance in the editorial and other technical aspects of the manuscript.

Abstract

To date, the arrest warrants issued by the ICC against the Sudanese President, as a suspect of heinous international crimes committed in Darfur, have not been enforced.

This thesis questions and analyzes the reasons behind this failure.

The thesis also considers the question whether the official status of Omar Al Bashir, as the incumbent head of state, shields him from prosecution before the ICC. To answer this question, the thesis examines the various international law theories related to the heads of state immunity and explains their relevance and applicability to the case of Al Bashir. Finally, the thesis evaluates the likelihood of the arrest of the Sudanese President and explores the legal foundation of each possible action. The thesis concludes that the Genocide Convention remains the most instrumental and effective authority for the apprehension of Al Bashir, and it further illustrates its binding effect beyond the ICC states parties.

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List of acronyms

AMIS	African Union Mission in Sudan
AU	African Union
AUDP	African Union High Level Panel on Darfur
AUHIP	African Union High Level Implementation Panel on Sudan
AU/PSC	African Union Peace and Security Council
CPA	Comprehensive Peace Agreement
EU	European Union
GoS	Government of Sudan
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICJ	International Court of Justice
IDPs	Internally Displaced People
ILC	International Legal Compliance
JEM	Justice and Equality Movement
NATO	North Atlantic Treaty Organization
NCP	National Congress Party
NGOs	Non-Governmental Organizations
NIF	National Islamic Front
OAU	Organization of African Unity
PDF	Popular Defense Force
SCSL	Special Court for Sierra Leone
SLA/M	Sudan Liberation Army/Movement
SPLA/M	Sudan People's Liberation Army/Movement
UN	United Nations
UNAMID	African Union/United Nations Mission in Darfur
UNSC	United Nations Security Council
UNMIS	United Nations Mission in Sudan

Introduction

The creation of the ICC was heralded as a significant milestone in the development of international criminal justice. With the indictment of the incumbent Sudanese President, the Court has achieved a significant milestone and actually contributed to the emergence of a new norm of international law, which makes the official capacity of the perpetrator of core international crimes irrelevant. However, due to the peculiarities of the Darfur Situation, the ICC is going through an important test in Darfur. This thesis attempts to answer the question whether the Sudanese President, as one of the suspects of Darfur mass atrocities, will be brought before the ICC. The thesis examines the reasons behind the failure to enforce the arrest warrants issued by the ICC against Omar Al Bashir. It also explores the chances of enforcement of the arrest warrants with the assistance of other international law instruments. Among others, it considers whether the Genocide Convention could secure cooperation from states parties to the Convention and other members of the international community.

Chapter 1 discusses the origin of the Darfur crisis and seeks to correct a common misconception about the chronology and the root causes of the conflict. It clarifies that while most scholars and observers refer to the ecological and political problems as the origins of the hostilities, the actual reasons lie in ethnic, racial and ideological prejudices. It highlights the identity crisis of the Sudanese people and reveals that Darfur is only one conflict in a series of the Sudanese government's hegemonic wars against Sudanese people of African origins.

Chapter 2 highlights the situation which led to the involvement of the UNSC and the ICC, including the 2003 escalation of violence, with a brief description of the background, the role of the ICC, and the challenges ahead. The pros and cons of the ICC's relationship with the UN are also discussed.

The question whether the status of Omar Al Bashir protects him from ICC prosecution, on the basis of heads of State immunity, is an important question with profound theoretical and functional implications. This topic is thoroughly analyzed and significant conclusions are highlighted in chapter 3 of this thesis. The study of the development of heads of State immunity in this chapter suggests that the significant body of law and jurisprudence which accumulated in the last two decades warrants the emergence of customary international law limiting the scope of absolute immunity and curbing impunity.

Chapter 4 identifies and analyzes the reasons behind the failure to enforce the arrest warrants against Omar Al Bashir. It discusses the dilemma of the lack of an effective ICC enforcement regime and the impact thereof on the efficacy of international criminal justice. It also highlights the incongruity of some of the provisions of the Rome Statute, which engender ambiguity and lack of consensus in understanding and implementing the provisions of the Rome Statute.

Another important reason for the failure to arrest the Sudanese President is the limited scope of the language used in UNSC Resolution 1593. The nature of the language used results in confining the scope of the obligation to cooperate in the arrest and surrender of Omar Al Bashir to the ICC states parties and the Sudan. Even for the Sudan, the nature and limit of the required cooperation is highly contested as a result of this ambiguity. This limited scope of cooperation is also contrary to the practice in the *ad hoc* international criminal tribunals where cooperation of all UN member states is imposed.

The lack of UN willingness and decisiveness has also contributed to the enforcement stalemate. This chapter identifies the political considerations and interests that influenced the UNSC's handling of the cooperation crisis. The politics of the permanent members of the Security Council restrict their willingness to play a more constructive role in the enforcement of the arrest

warrants against Al Bashir. It also impairs the resolve to pass more effective resolutions. The Sudanese government's political manipulation and prevarication have succeeded in securing the necessary consolidation and support from many states and organizations. That support enabled the GoS to sustain its hostile attitude towards and public defiance of the ICC. The thesis demonstrates the ruthlessness and despotism of the Sudanese government and its preparedness to gamble with the Sudanese people's life, territory, values, wealth and integrity in order to avoid accountability for the atrocious crimes committed in Darfur.

This chapter also reveals the negative role played by the African Union in its capacity as peace keeper and peace process partner in the Darfur conflict. It shows that the AU's involvement in the Darfur crisis has been a major stumbling bloc in the pursuit of international criminal justice for Darfur.

Chapter 5 highlights the basic differences between *ad hoc* international criminal tribunals and the ICC, and considers whether the *ad hoc* tribunals' experiences offer useful guidelines to the ICC with regard to the enforcement of the arrest warrants against heads of state. Notwithstanding the difference of circumstances and contexts, the scenarios that led to the capture and hand over of the indicted Heads of State Milosevic, Karadzic and Charles Taylor are examined and the lessons learned illustrated.

Chapter 5 provides the most significant contribution as regards the possible apprehension and surrender of the Sudanese President. It investigates the implications of the decision of the ICC's Appeals Chamber to allow genocide charges against Al Bashir, and explains its impact on creating new grounds for the enforcement of the arrest warrants. Chapter 5, further, examines the scope of the international legal obligations created by the Genocide Convention as a significant instrument in the enforcement of the arrest warrants against Al Bashir. Article VI of the

Genocide Convention, for instance, creates a legal obligation on all states parties to the Convention to cooperate in the prosecution of genocide suspects. The application of the Genocide Convention on the Al Bashir arrest warrants has many advantages, and the most important are the irrelevance of the official status of the suspects and the widening of the geographical scope of cooperation through extending the obligation to all states parties to the Genocide Convention. Finally, the chances of challenging the authority or the jurisdiction of the Court on legal or political grounds would be extremely limited. The Sudan ratified the Genocide Convention and that would undermine Al Bashir's claim of immunity under other norms of international law. The combination of the Genocide Convention and UNSC Resolution 1593 provides a robust foundation for the enforcement of the warrants. The ambivalence of the international community and the UNSC will be less sustainable and states will find it difficult to ignore their obligations under the Convention. The recent political developments in the Middle East and North Africa referred to as the *Arab Spring*, increases the chances of a UN or NATO forceful action, including military intervention.

Moreover, chapter 5 explores other instruments and actions that could assist in the arrest of Omar Al Bashir. The UN peace keeping force in the Sudan is the most notable one. Similar actions which took place in the former Yugoslavia and Liberia are discussed and analyzed. This chapter demonstrates that peace keeping forces in Liberia and Bosnia played a significant role in arresting war criminals, which earned them great appreciation for their role in the enforcement of international criminal justice. The chapter highlights that this trend was not followed in the Sudan. The Sudanese government has always been aware of such possibilities. That explains why they never allowed robust peacekeeping forces or permitted mandates that could pose future threats to any government official. In this regard, even the mandate of the hybrid UN/AU forces

in Darfur (UNAMID) is limited to protecting civilians and supporting the implementation of the Darfur Peace Agreement. Ironically, the Mission failed in its primary task to protect civilians and there has never been real peace in Darfur since the inception of the conflict. It is possible and desirable to mandate the UNAMID forces in Darfur to support the work of the ICC, but without sustained pressure on the government of the Sudan and profound political will to drive the UNSC to take action, the prospects remain very slim. The victims of the Darfur “odious scourge” deserve such action and support.

Chapter 1. History and Background of the Conflict

1.1 History of Darfur

To understand the reasons behind the violence and bloodshed that have plagued the Darfur region in western Sudan, one must examine both the incidents that have occurred, as well as the racial aspects of the conflict. This introduction is particularly useful in highlighting the root causes that led to the Darfur genocide.

Darfur is a vast region in western Sudan with a population of circa 6 million. Darfur is the home of more than 30 ethnic groups, of which about 80% have African origins. The rest of the population is nomadic herders who are self-identified as Arabs. Islam is the predominant religion for all ethnic groups. Darfur has an ancient and rich history. It was an autonomous Sultanate until 1916 when the British and Egyptian colonial forces annexed the region to form the Sudanese state that remained intact until independence in 1956.¹

Darfur literally means the home of the “Fur”, one of the major African tribes in the Darfur region. It is widely accepted that the Fur descended from the Dajo and Tunjur clans which ruled what came to be known as the current Darfur until the first quarter of the 17th century. Suleiman Solong is considered to be the founder of the Fur Dynasty. In 1821, the Ottoman Empire invaded and occupied the northern region of the Sudan and under the Turco-Egyptian rule began developing a centralized administrative system in Khartoum, allowing for slaves and other exploited goods from the surrounding regions to be shipped northward along the Nile through Egypt.² In Darfur, the Keira Sultanate maintained its independence until 1874 when overthrown

¹ See M.W. Daly, *Darfur's Sorrow: The Forgotten History of a Humanitarian Disaster* (New York: Cambridge University Press, 2010) at 1-14.

² Martin Daly, *Empire on the Nile: The Anglo-Egyptian Sudan, 1898-1934* (New York: Cambridge University Press, 1986) at 5.

by the Turco-Egyptian armies. Although they were later overthrown by the Mahadiya state in 1883,³ the Turco-Egyptian administration had profoundly altered existing power structures and together with the domination of the Arabic identity and culture, caused highly fragmented regional relations and regional resistance to the centralized authority.⁴ The region was neglected during the Anglo-Egyptian Condominium colonial rule and the central authority in Khartoum continued the marginalization of the region after the independence of the Sudan in 1956. As will be explained in the following pages, this ongoing policy of neglect and marginalization, driven by racial, ethnic and ideological motives, is the underlying cause of the conflict. Other ecological and political factors follow in terms of significance.

The legal and political literature on the Darfur crisis is voluminous. Numerous books and articles examine and analyze the various aspects of the conflict. Media and NGOs reports and advocacy campaigns have made immense contributions to uncovering the tragedy and emphasizing the need for urgent action. Several intergovernmental organizations, including the United Nations and the African Union, have been involved in the efforts to resolve the conflict. On the origins and the root causes of the tragedy, there is near consensus that the struggle over scarce resources in the context of changing ecological and environmental factors in the Darfur region is one of the main reasons behind the conflict. Disproportionate counter-insurgency has also been used to describe the roots of the conflict. Some analysts place great emphasis on the inter-tribal clashes and the legacy of British colonialism in the Sudan as the historical genesis of the problem. The impact of the war between Libya and Chad, and other regional unrest are also reported amongst the major causes of the crisis. Some studies even suggest that the split of the Islamic ruling party

³ *Ibid* at 6.

⁴ Molly Miller, "The Crisis in Darfur" (2005) 18 *Mediterranean Quarterly*, at 114.

in 1999, which sidelined the Historical leader of the Islamist movement, Hassan Al Turabi, and bolstered the power of Omar Al Bashir, is the origin of the calamity.⁵

All the above factors cannot be ignored in explaining the reasons for the conflict. However, they are not the primary causes of the crisis. It is my contention that a number of significant factors have not been adequately highlighted in most of the scholarly works that examine the causes of the violence in Darfur. Mansour Khalid, the renowned Sudanese politician and scholar asserts that “Environmental factors, as well as those emanating from inter- and intra state spillovers of conflict should only be treated as multipliers, not causes, of conflict. Suffice to say that environmental degradation neither produces armies nor furnishes arms to combatants. Men do.”⁶

1.2 Setting the record straight on the root causes of the Darfur crisis

The impact of ethnic, racial and ideological factors in the creation and exacerbation of the Darfur crisis has been largely underemphasized and sometimes deliberately downplayed. In the following lines the thesis sheds some light on the root causes of the conflict, stressing the importance of the racial, ethnic and ideological background. Such exclusion, or omission, based on the perspectives of the various sources, has led to an inaccurate diagnosis of the malady and, consequently, prolongation of the conflict. The relevance of this analysis to the enforcement of the arrest warrants against Al Bashir is thoroughly discussed in Chapter 5.

The Darfur crisis is a continuation of the official policy of the historical Northern Sudanese ruling bloc, mainly the Shaygia, Jaaliyeen and Danagla ethnic groups, which came to be known

⁵ See, for example, Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics, and the War on Terror* (New York: Pantheon Book, 2009) at 38, 69, 207, 220, 221 and 224; Alex De Waal “Sudan: The Turbulent State” in Alex De Waal (ed.), *War in Darfur and the Search for Peace* (Global Equity Initiative: Harvard University, US 2007) at 35; Ahmed Kamal El-Din “Islam and Islamism in Darfur” in *Ibid* at 108-111.

⁶ Mansour Khalid “Darfur: A Problem Within A Wider Problem” in Salah M. Hassan and Carina E. Ray (eds.) *Darfur and The Crisis of Governance in Sudan: A Critical Reader* (Ithaca and London: Cornell University Press, (2009) at 41.

in the modern Sudanese political discourse as the *Jellaba*. It is the same group which currently governs the Sudan under the leadership of Omar Al Bashir. The priority of *Jellaba* since the independence of the Sudan in 1956 “...is the consolidation of their grip on, and privileged position in, the Empire on the Nile which was bequeathed to them by the British.”⁷ This “privileged position” was a reward for the assistance extended by the *Jellaba* to the Anglo-Egyptian Colonial forces in their war against the Mahdist state, the first genuine Sudanese nationalist government. The supremacy and domination of the *Jellaba* has resulted in several conflicts and civil wars prior to the current escalation of the Darfur crisis, notably the North-South civil war, the conflicts in Southern Kordofan (Nuba Mountains) and Southern Blue Nile (Angasana and Funj). The conflict in Southern Sudan, which left more than two million dead and displaced about four million people, erupted in 1955 and came to an end in 1972 with the Addis Ababa Accord during the reign of General Nimeri.⁸ When Nimeri reneged on his commitments under the Agreement, the war resumed in 1983 and lasted up to the conclusion of the Comprehensive Peace Agreement (CPA) in 2005 between the Sudan People’s Liberation Movement (SPLA/SPLM) and the Government of the Sudan, led by the current Islamist regime, the National Congress Party (NCP). The CPA introduced the right of self-determination for the people of Southern Sudan. The CPA stipulates that a referendum should be conducted after the end of the 6 year transition period.⁹ This referendum has been conducted and the people of Southern Sudan voted overwhelmingly in favor of independence. The new Southern Sudan officially became an independent state in July 2011.¹⁰ Unsurprisingly, the hegemonic legacy of

⁷ Peter Nyot Kok, *Governance and Conflict in the Sudan, 1985-1996: Analyses, Evaluation and Documentation* (Hamburg: Deutch Orient-Institut, 1996) at 14.

⁸ Randolph Martin, “Sudan’s Perfect War” (2002) 81 *Foreign Affairs*, at 111.

⁹ Article 2, *The Machakos Protocol*, CPA, online :< <http://www.aec-sudan.org/docs/cpa/cpa-en.pdf>>.

¹⁰ “President Bashir officially endorses South Sudan independence”, *Sudan Tribune*, February 8, 2011, online: <http://www.sudantribune.com/spip.php?iframe&page=imprimable&id_article=37905>.

the *Jellaba*, who assumed power since the independence of the Sudan in 1956, evolved to cause the fragmentation of the Sudan. It is largely responsible for the instability, underdevelopment, repression, devastation, fragmentation and genocidal policies in the Sudan.

To comprehend the role and impact of the *Jellaba* in the modern history of the Sudan, it is imperative to identify the origins and evolution of the term and how it became a politically charged word. This task has been succinctly undertaken by Peter Kok, the Southern Sudanese law professor.¹¹

According to De Waal and Flint:

The state apparatus had been dominated, ever since independence, by a small group from the three Arab tribes who live along the Nile north of Khartoum, and how all the other regions had been grossly marginalized and neglected. Members of these three riverine tribes represented only 5.4 percent of Sudan's population and yet held the vast majority of government positions, from cabinet ministers to their drivers and everything in between.¹²

Low scale conflicts and tribal fights were rampant in Darfur prior to the eruption of the current war; however, the extent and proportion of the Darfur crisis, which dates back to the mid 1980s, represent a paradigm shift in the politics of hegemony in Darfur. Conflicts of earlier tribal and clannish natures were settled mostly through customary law and mediation. It is rather the state backed, racially and ideologically motivated policy, which is inherently biased and prejudiced

¹¹ Peter Kok defines *Jellaba* as follows: "In the Sudanese political and scholarly discourse, the term *Jellaba* has acquired another meaning besides its traditional and literal meaning of 'peddlers of commodities'. It has come to mean a historically traceable and contemporarily identifiable social group which inherited the Sudanese state from the British Colonialism and controls the commanding heights of the Sudanese economy (in addition to retail trade which they have historically controlled). For the origins, nature, identity and role in the Sudanese political and economic life of both the bureaucratic and the commercial wings of the *Jellaba*, see Mohammed al-Zein al-Shaddad, 'Some Recent Trends', in Francis Deng and Prosser Gifford (eds.), *The Search for Peace and Unity in the Sudan* (The Wilson Centre Press, Washington, D.C., : 1987), pp. 29-35; Mohammed Suleiman, 'Civil War in the Sudan: Impact of the Ecological Degradation', *Occasional Papers*, Centre for Security Studies and Conflict Research (ETH), (Zurich, Switzerland, December 1992). For an analyses of the *Jellaba* in a strategic context, see John Garang, in a speech delivered to the first SPLM/SPLA National Convention, April 2, 1994, reproduced in *New Sudan*, Vol. 1/94 No. 2 June/July 1994 at pp. (iii)-(iv)", *Supra* note 7 at 19.

¹² Julie Flint & Alex De Waal, *Darfur: A New History of a Long War* (London. New York: Zed Books, 2008) at 49.

against Dafurians of non-Arab origin that changed Darfur's political and humanitarian scene forever. Such policy is referred to as "internal colonialism".¹³ Francis Deng perceives the roots of the devastating civil war and debilitating conflicts since the independence of the Sudan in the mid-1950s as "an acute crisis of national identity."¹⁴ He argues that the "...dominant groups in the North, though an African-Arab hybrid, see themselves as Arab, a racial and cultural concept that defines the national identity framework as Arab-Islamic, which inevitably discriminates against the African, Animist, Christian South and even against those groups in the North who, though Muslims, are non-Arab."¹⁵ Flint and De Waal observe the *Jellaba's* hegemony and its devastating impact on Sudanese citizens of non-Arab origins. They note that "The notion of Arab superiority had been a feature of northern Sudanese society for centuries."¹⁶

Eric Reeves underscores the importance of the racial element in the Darfur conflict. He argues that:

The racial consciousness and self-consciousness have, in fact, been key elements of the Darfur conflict, particularly in the hateful racial supremacism on the part of the Janjaweed, and finally on the part of the ruling elite in Khartoum. 'Zurga', 'Nuba', 'abid' are all words with racial and strongly derogatory meanings... These words have very consistently been used, with conspicuous racial intent, by the Janjaweed in their attacks on African tribal populations.¹⁷

It is important to view the Darfur Crisis in the above context, which transcends the ecological and insurgency interpretations of the conflict. The obfuscation of the genesis of the crisis and the failure to acknowledge the ethnic, racial and ideological components of the crisis contribute to the erroneous diagnosis of the roots of the crisis and the failure to bring an end to the plight of

¹³ M. W. Daly, *Darfur's Sorrow: a History of Destruction and Genocide* (New York: Cambridge University Press, 2007) at 2.

¹⁴ Francis M. Deng (ed.), *New Sudan in the Making? Essays on A Nation in Painful Search of Itself* (Asmara: The Red Sea Press, Inc. 2010) at 499.

¹⁵ *Ibid.*

¹⁶ *Supra* note 12 at 49.

¹⁷ Eric Reeves, *A Long Day's Dying: Critical Moments in the Darfur Genocide* (Toronto: Key Publishing House Inc., 2007) at 13.

the people of Darfur. The role of the supremacist ideology of the *Jellaba* cannot be overlooked in any serious endeavor to resolve the conflict. This ethnic and racial origin of the crisis explains and informs the genocidal policies in Darfur which have been systematically denied by the government of the Sudan. Indeed, genocide is one of the ICC's several charges brought against Omar Al Bashir, the incumbent Sudanese President.¹⁸

The claim that the Darfur crisis started in 2003 with the well-known attack of the two Darfurian rebel movements against the capital of the Darfur (El Fashir), cannot withstand serious research and verification. The reality is that the conflict had been simmering for decades. It is no secret that a major shift in the policies of the government in Darfur was initiated by the Transitional Government of the Sudan, which followed the downfall of Nimerie's regime in April 1985. Following the steps of its predecessor, the elected government of Al Sadiq Al Mahdi actively launched an arming campaign for *Rizeyqat*, one of the major Arab tribes in Darfur, to help the government in quelling the advance of the Sudan People's Liberation Army/Movement (SPLM/A) in the battlefield. At that time the SPLM/A, under the leadership of the late Dr. John Garang was fighting the central government in Khartoum under the banner of the "New Sudan". On the other hand, Libyan forces were given a free hand to use Darfur as a base in its war against neighboring Chad and, most important, to spread the Libyan Pan-Arab ideology which, largely, coincides with the *Jellaba* ideology on Arab superiority.¹⁹ Libya joined actively, with better resources and finance, in arming *Baggara* tribes and unifying Arab tribes in Darfur behind the cause of Arab supremacy.²⁰

¹⁸During the Bush Administration (2004), the United States described the government of Sudan policies in Darfur as genocide. In 2010 the ICC added genocide to the list of charges against the Sudanese President, Omar Al Bashir.

¹⁹ Gerard Prunier, *Darfur: The 21st Century Genocide* (Ithaca, New York: Ithaca University Press, 2008) at 54-67.

²⁰*Ibid.*

In 1987, the newly established “Arab Gathering” movement addressed the Prime Minister, Al Sadiq Al Mahdi in a letter signed by Arab leaders and intellectuals of Darfur. The signatories “...credited the Arab race with the creation of civilization in the region in the areas of governance, religion and language.”²¹ They demanded a 50 per cent share of government posts in “...recognition of their demographic weight, contribution to the generation of wealth and knowledge in the region, and historic role as civilization bearers.”²² The letter ended with a subtle, but clear, tone of threat that if their demands were not heeded there was a fear that the “ignorant” members of the movement would take the lead and create an undesirable situation.²³

As Deng succinctly put it: “The Arab Gathering’s supremacist ideology clearly shares responsibility for eventually enabling the ignorant people, the notorious *Janjaweed*, to kill, loot and rape fellow Darfurians, whom they demonize as lesser beings.”²⁴ The aftermath of this letter confirms the belief that the Arab tribes of Darfur, supported by the Libyan and Sudanese governments are enforcing a strategy of “Forced displacement and replacement of sedentary non-Arab tribes on Darfur lands by Arab tribes.”²⁵ Darfur also witnessed the emergence of further Arab congregation organizations called Qureish I and Qureish II which followed in the foot steps of the Arab Gathering.

It is noteworthy that the concept of Arabism v. Africanism in the sociopolitical context of the Sudan is a question of self-identification. It reflects perceptions rather than realities. For the *Jellaba*, there is a prize for identifying with the Arabs. Daly observes that “Historically being a Muslim, Arabic speaking, culturally Arabized, with some claim to Arab ancestry, elevated one to

²¹ Hussain Adam El-Haj “The Arab Gathering and the attempts to cancel the other in Darfur”, in Arabic, 31 December 2003, Online: <www.sudanile.com/sudanile13.html>. Cited in Francis M. Deng “Portrait of a Divided Nation” *Supra* note 10 at 86.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Supra* note 1 at 87.

a level of dignity that contrasted sharply to the denigrated and down-trodden status of a Black African, a heathen and a legitimate target for slavery.”²⁶ Prunier observes that the Arabs of the Sudan are not quite certain of their identity. He juxtaposed their identity in the Sudan as Arabs to the denial and reluctance to accept them as ethnically Arabs in the Arab countries. This glaring reality simply reflects that the Sudanese who claim that they are Arab are not recognized as such by the other Arabs. Prunier’s further analysis of the *Jellaba* reveals that “In the Arab world they are seen as mongrels who hardly deserve that name. They desperately strive for recognition of their Arab status by other Arabs, who tend to look down upon them...even using for them the dreaded name of *abd* (slave) that they use for those more black than they are.”²⁷

The international commission created by the UN to investigate the Darfur atrocities confirms that “Khartoum, through helicopter gunships and Janjaweed militia proxies in the region, has sought to propagate a distinctly Arabist vision throughout the state, including, of course, in predominantly black African Darfur.”²⁸

The *Jellaba* control, hegemony and racial ideology have had far reaching and structural ramifications. Its impact on the Sudanese social fabric is disastrous. With the secession of the Southern Sudan in July 2011, Darfur, and probably other regions, are poised to follow suit. The troubling experience of the SPLM/A with the National Congress Party’s implementation of the Comprehensive Peace Agreement (CPA), which include foot dragging, prevarication, lack of transparency and the continuation of supremacist ideologies, contributed to the Southern Sudanese choice of independence. A few days before the referendum, President Al Bashir, who has been indicted by the ICC for several charges including genocide, declared in a public address

²⁶ *Ibid* at 91.

²⁷ *Supra* note 19 at 77.

²⁸ *Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur*, at 141. online: <http://www.un.org/News/dh/sudan/com_inq_darfur.pdf>.

that if the southern Sudan voted for secession, the government of Sudan would not tolerate cultural, religious or racial diversity. He proclaimed that the Constitution would be amended to reflect this policy.²⁹ The current Constitution recognizes the multi-ethnic, multi-cultural and multi-faith characteristics of the Sudanese state, alas, on paper only.³⁰

In the words of Jack Kalpakian, the injustices and atrocities committed by the *Jellaba* “...have become structural to the very institutions and processes of the *Jellaba* state.... such structural injuries cannot effectively be redressed in simple power-and-wealth-sharing in a federal or regional autonomous context. Such constitutional arrangements cannot dismantle the structure of hegemony.”³¹

Sadly, the grim scenarios of the fragmentation and disintegration of the Sudanese state have already started. Paradoxically, these very scenarios are the emancipation and empowerment mechanisms for the long oppressed peoples of the Sudan.

Beyond its importance to set the record straight and clarify the root causes of the Darfur conflict, this introduction sheds some light on the complex racial and ethnic background that fueled Khartoum’s genocidal policies in Darfur since 2003. Frequently raised questions concerning the “intent” and “motive” for the Darfur genocide may find some explanations in this historical narrative of the conflict and the analysis in the following chapters.

Historically, the ethnic division between victims and perpetrators indicated that crimes of genocide were taking place. In Rwanda, for example, ethnic violence was unleashed in the aftermath of the plane crash and consequent death of Rwanda’s president. Without the backdrop

²⁹ “Sudan’s Bashir endorses lashing of YouTube woman, says North will transform into Islamic state” *Sudan Tribune*, 19 December 2010, online: Sudan Tribune <<http://www.sudantribune.com/Sudan-s-Bashir-endorses-lashing-of,37345>>.

³⁰ *Ibid.*

³¹ Jack Kalpakian, *Identity Conflict and Cooperation in International River Systems* (England: Ashgate Publishing Limited, 2004) at 67.

of the ethnic tensions and the muddled racial history of the country it would be difficult to comprehend how almost one million Rwandans were massacred in the 100-day period following the plane crash.³² For the Darfur genocide denialists, “motive” and “intent” are not just inferences from the ethnic and racial background of the conflict; they have been substantiated by many credible sources.³³ Julie Flint and Alex de Waal, in their book *Darfur: A New History of a Long War*, cite a directive from Musa Hilal, a *janjaweed* leader, dated August 2004 to “change the demography of Darfur and empty it of its African tribes.”³⁴ The Sudanese government has promoted instant citizenship and grants of land to Arab immigrants from Mali, Niger, Nigeria, and Egypt. With such a policy, can there be any hope for resettlement of the 4.7 million Fur, Massalit, and Zaghawa who have been driven out of their ancestral homes and off their land, not to mention the 300,000 Darfurians who lost their lives as a result of this policy?

This chapter reveals that the Darfur crisis is an outcome of the *Jellaba*'s attempt to maintain absolute control of wealth and power over the entire Sudan. It is also the result of the *Jellaba*'s ethnic and cultural supremacy against the Sudanese tribes and ethnic groups of African origins. Since June 1989, the *Jellaba* is represented by the *Muslim Brotherhood* political party, currently renamed The National Congress Party (NCP)³⁵, which assumed power by a military coup and remained in control for the last 22 years. The *Jellaba*'s structural violence, in the form of mass atrocities, pervasive discrimination, marginalization, inequality and change of demography, created resentment and resistance that triggered armed rebellion from the targeted tribes.

³² Jeffrey S. Morton and Neil Vijay Singh, “The International Legal Regime on Genocide” (2003) 5(1) *Journal of Genocide Research* 47 at 68.

³³ See generally: John Hagan, *Darfur and the Crime of Genocide* (Cambridge 2008).

³⁴ Alex de Waal and Julie Flint, *Supra* note 12.

³⁵ *Infra* note 41.

The following Chapter describes and analyzes the UNSC's consideration of the Darfur situation and the subsequent referral to the ICC.

Chapter 2. The Referral of the Darfur Situation to the ICC

2.1. Escalation of the violence and the UNSC involvement in the Darfur crisis

The 2003 Darfur rebels' attack on the airport in El Fashir, capital of Darfur Province, was only a chapter in the abominable saga of the Darfur crisis which had been going on for decades. The offensive launched by the Sudan Liberation Movement (SLM) and the Justice and Equity Movement (JEM) brought the two movements to the limelight. The onslaught destroyed several army planes and helicopters at Al Fashir airport and resulted in killing and capturing a number of officers and soldiers.³⁶ As highlighted in the previous chapter, the violence as well as the growing number of casualties started long before the aforementioned incident. Apart from the relatively low scale atrocities and historical grievances, the origins of the conflict date back to the eighties when the Arab tribes in Darfur formed the so called Arab Gathering³⁷, alluded to in the previous section. It is a racial and supremacist group constituted under the ideological and financial patronage of Libya and the blessing and support of the central government in Khartoum. They demanded, inter alia, the redistribution of land and pasture tracts in the region and called even for the change of the name of Darfur on the basis that it does not reflect the realities of the region. The emergence of this movement led to divergent results; on the one hand, the recruitment of members of Arab tribes in the Pan-Arabist organization increased significantly; on the other hand the African tribes felt the need to organize themselves to resist the encroachment on their lands and to prevent the change of Darfur's demographic characteristics.³⁸ The undisguised support of the Sudanese and the Libyan governments gave the Arab militias a free rein to kill, rape, loot, and displace African communities in Darfur.

³⁶ *Supra* note 19 at 95-96.

³⁷ Also translated as "Arab Congregation" or "Arab Alliance".

³⁸ Abdullahi Osman El-Tom "Darfur People: Too Black for the Arab-Islamic Project of Sudan" in *supra* note 6 at 91.

There is abundant evidence of the severity of the situation in Darfur and the resultant high mortality rates before the 2003 attack. Prunier observes that "...by January 1988 an independent journalist familiar with Darfur estimated the number of deaths through fighting in the province during the past year at 3,000."³⁹

In June 1989, the National Islamic Front (NIF) staged a successful coup against the elected government of Al Sadiq Al Mahdi, the then Prime Minister of the Sudan. The new regime introduced strict Islamic laws and adopted the Islamic concept of *Jihad* (meaning Islamic holy war). Hassan Al Turabi was the leader of the NIF but it is widely believed that his right-hand, Ali Osman Taha, was the mastermind of the coup. In the beginning Al Turabi had been detained along with other politicians as a cover-up and a precautionary measure in the case of failure of the coup. Al Baqir Al Afif succinctly describes the political stage in the first years following the coup as follows:

Its leaders imposed on the Sudanese Muslim and non-Muslim masses an Islamic culture that is totally alien and abhorrent to them, causing incalculable damage to their material and spiritual well-being. They established a system of governance that could be classified as 'bruising thuggery'. They summarily executed their political opponents, and established secret detention centers, called 'ghost houses', where political opponents were held 'incommunicado' and tortured.⁴⁰

The new National Islamic Front (NIF)⁴¹ government began to arm Arab militias and attempted to disarm the largely African ethnic groups. In 1990, Daud Bolad, an ex- NIF high-ranking member, joined the SPLM/A, and led the first force in Darfur against the Islamist regime.

³⁹ *Supra* note 19 at 63.

⁴⁰ AlBaqir Alafif "Assault on Indigenous Islam" in *Supra* note 14 at 175.

⁴¹ The initial name of the Party was *Muslim Brotherhood* which started more or less as a Chapter of the original Egyptian "Muslim Brotherhood". Thereafter the name changed to *National Charter Front*, then *National Islamic Front* (NIF) during Nimeiri's Regime. After their successful coup in June 1989, the Party has been renamed *National Congress Party* (NCP), which is the current name. The last two names are used interchangeably by some scholars.

However, his forces were easily defeated with the involvement of the Arab *Murahaleen* militias. He was captured and tortured to death in 1992.⁴²

The confrontations between the Fur, Zaghawa and Masaleit on the one hand, and the Janjaweed, the Popular Defense Forces and other Arab dominated militias, supported by the government armed forces, continued throughout the 1990s, with various levels of intensity and mortality.

Large scale atrocities in Darfur occurred more than seven years before the land mark attack of the Darfur rebels on the government military installations and airport in Al Fashir, the capital of North Darfur. A top official in Darfur, implementing Khartoum's policy, decided to divide the Masaleit land into thirteen divisions whereby five chiefdoms were unjustifiably allocated to Arabs. That biased official decision ignited the conflict between Masaleit and Arabs between 1996 and 1998 and led to the huge looting, killing and destruction of Masaleit villages. The conflict drove around 100,000 Masaleit out of their homes and the majority sought refuge in neighboring Chad.⁴³ In 1989 the violence escalated to reach central Darfur. Four villages around Jabal Marra had been attacked by two Arab tribes and the Khartoum government admitted that 3,000 died in the onslaught. Again, thousands of Fur fled their homes to the neighboring cities as a result of the violence.⁴⁴

The *Black Book* was published anonymously in 2000. It was later revealed that the writers had strong ties to the Justice and Equality Movement, one of the major rebel groups in Darfur. The *Black Book* was purported to be the text which dissects and exposes the power asymmetries of the Sudan. It refers to the dominance of the major Northern *Jellaba* tribes; Ja'aliyiin, Shaygiya and Danagla, as the main forces behind the "...underrepresentation of the peripheral regions in

⁴² *Supra* note 12 at 73, 74.

⁴³ *Supra* note 19 at 86.

⁴⁴ *Ibid.*

the Sudan's parliament, cabinets, councils and provincial governorships since independence."⁴⁵ In addition to tracing the roots of the underdevelopment and marginalization of Darfur, the *Black Book* had a significant impact in unifying resistance movements among non-Arabs in Darfur and its publication paved the way for increased recruitment by nascent rebel groups. The main resistance forces, which emerged stronger as a result, were the Sudanese People's Liberation Movement/Army (SPLM/A); the Darfur Liberation Front (DLF), forerunner of the Sudan Liberation Army (SLA); and the National Redemption Front (NRF), run by the Justice and Equality Movement (JEM).

In addition to the strike at Al Fashir airport in 2003, the SLA and JEM also attacked and seized the towns of Mellit and Kutum. The SLA, in particular, launched other successful attacks in various parts of Darfur during the year 2003.⁴⁶ Many observers believe that the creation of the JEM group is the outcome of the 1999 split in the NCP which led to the exclusion of the Party ideologue, Hassan al-Turabi, and subsequently the formation of the Popular Patriotic Congress (PPC), headed by al-Turabi. However, the nature of the JEM's relationship and the degree of alliance with the PPC is highly contested.

In response to the brazen raids of Darfur rebels, the government (GoS) began to reorganize and rearm the militias known as the *Janjaweed*,⁴⁷ to carry on the fighting on the ground, hoping that it would be able to solve the conflict before it could affect the fragile peace process with the South. With the racial hegemony underlined in Chapter 1 of this thesis, the GoS began to focus on civilian targets, under the guise of fighting a counter-insurgency, using bombers and

⁴⁵ *Supra* note 1 at 274.

⁴⁶ I.D.F. and Munzoul Assal "The National Congress Party and the Darfurian Armed Groups" in David R. Black and Paul D. Williams, *The International Politics of Mass Atrocities (eds.): The Case of Darfur* (London and New York: Routledge, 2010) at 37-38.

⁴⁷ Prunier defines *Janjaweed* as "ghostly riders" or "evil horsemen". Name given to the "Arab" militiamen who started to operate in Darfur in the 1980s and whom the government unleashed to commit the 2003-4 genocidal attacks. *Supra* note 19 at xv (Glossary).

helicopters to attack villages from the air, then unleashing the *Janjaweed* with the support of the army. Prunier portrays the egregious violence of the *Janjaweed* as follows:

They would surround the village, and what followed would vary. In the ‘hard’ pattern they would cordon off the place, loot personal belongings, rape the girls and women, steel the cattle and kill the donkeys. Then they would burn the houses and shoot all those who could not run away. Small children being light were often tossed back in the burning houses.⁴⁸

Prunier also observes that the racial slurs such as “Zurqa”, meaning black, and “like slaves” were frequently used by the *Janjaweed* during the attacks.⁴⁹

According to one of the best researched Darfur mortality rates, the number of deaths from violence, malnutrition and disease by April 2006 was 450,000. Of these, a range of 220,000 to 270,000 persons died from violence since the escalation of the conflict in 2003.⁵⁰ Eric Reeves asserts that the GoS interference and obliteration of evidence has made Darfur mortality studies a strenuous undertaking.⁵¹ The United Nations Secretary General estimates that 300,000 Darfurians have died and 4.7 million have fled their homes since the outbreak of the violence in 2003.⁵²

Rape was so rampant and systematic in Darfur that it appears to be an instrument of policy to destroy the fabric of the targeted communities, and perhaps even to create a new generation with ‘Arab’ paternity, a pattern too reminiscent of the use of sexual violence as a weapon of war in Bosnia, Rwanda, and elsewhere.⁵³

⁴⁸ *Supra* note 19 at 100.

⁴⁹ *Ibid* at 100-102.

⁵⁰ “Death in Darfur: Total Mortality from Violence, Malnutrition. And Disease: April/May 2006”, Eric Reeves, in *The world and Darfur: International Response to Crimes Against Humanity in Western Sudan*, Amanda F. Grzyb (ed.), (McGill-Queen’s University Press: 2009) at 176.

⁵¹ Amanda F. Grzyb “Introduction: The International Response to Darfur” in *Ibid* at 18.

⁵² UN News Centre “ Ban launches urgent appeal to Sudan to reverse expulsion of aid groups”, 5 March 2009, online: UN News Centre <<http://www.un.org/apps/news/story.asp?NewsID=30100>>.

⁵³ Amnesty International, “Darfur: Rape as a Weapon of War: Sexual Violence and its Consequences.” London, July 2004, online: <<http://www.cmi.no/sudan/doc/?id=1082>>.

The initial reaction of the international community to the rising conflict in Darfur was rather tardy. Direct criticism was impeded by the desire to avoid endangering the promising peace process for the South. By mid 2004, statements about the situation in Darfur began to flow from the United States and the European Union, with the describing the atrocities as genocide. The US State Department announced that by August 2004, 400 villages in Darfur had been destroyed. In March 2004, Mukesh Kapila, the UN Resident and Humanitarian Coordinator in Sudan called Darfur “the world’s worst humanitarian crisis.”⁵⁴ The UN Secretary-General addressed the crisis in Darfur for the first time in April 2004. He expressed deep concern over the growing violence and referred to the failure of the international community to prevent the genocidal violence in Rwanda in 1994.⁵⁵ In contrast to the United Nations, the African Union (AU) has been directly involved in the conflict since an early stage, albeit with a questionable record of achievements. The impact of the AU involvement in the Darfur crisis will be thoroughly analyzed in chapter 3 of this thesis.

The first Security Council resolution on the Darfur situation was passed on July 30, 2004, stipulating an arms embargo for the warring parties in Darfur. The resolution excluded the Sudanese army from the embargo.⁵⁶ The Security Council’s power politics, as represented in the interests of China and Russia in the Sudan, prevented the exercise of any coherent pressure on the GoS.

Despite the fact that several ceasefire agreements were negotiated and concluded, the fighting has never stopped. The core of the conflict became the targeting of the civilian population of Darfur by the Sudanese army and the *Janjaweed*. Even the acclaimed Abuja Peace Agreement,

⁵⁴Supra note 1 at 291.

⁵⁵ Statement of the Secretary-General to the Commission on Human Rights in Geneva, April 2004, online : <<http://www.un.org/apps/sg/sgstats.asp?nid=862>>.

⁵⁶ Security Council Resolution 1556 (2004), UN Doc. S/RES 1556 (2004).

signed in 2006 between the GoS and the Minni Minawi faction, had been dealt a severe blow when Minawi left Khartoum in December 2010 and announced that the peace arrangement with the GoS is over.⁵⁷

The Security Council established a Commission of Inquiry in September 2004 to examine the violations of international humanitarian law and human rights law in Darfur (Resolution 1564). The commission submitted a report to the Secretary-General in January 2005. The Report presented a detailed accounting of the atrocities committed by the Government of Sudan and the *Janjaweed* militias. The Commission Report found that “Based on thorough analysis of the information gathered in the course of the investigations, the Commission established that the Government of Sudan and the *Janjaweed* are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law.”⁵⁸ The commission, however, declared that “genocidal intent” could not be substantiated.⁵⁹ Despite this conclusion, the Commission seems to have left the door open for different future findings when they stated in the Report that “The Commission does recognize that in some instances individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination that only a competent court can make on a case by case basis.”⁶⁰ The Report of the Commission of Inquiry included a list of 51 individuals who were believed to be perpetrators of horrendous crimes committed in Darfur. The Report, finally, recommended a Security Council referral to the ICC’s Office of the Prosecutor (OTP).⁶¹

⁵⁷“Minawi declares the death of Darfur Peace Agreement, seeks alternatives” *Sudan Tribune*, 13 December 2010, Sudan Tribune, online: <<http://www.sudantribune.com/Minawi-declares-the-death-of,37251>>.

⁵⁸*Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, online: <http://www.un.org/news/dh/sudan/com_inq_darfur.pdf>.

⁵⁹ *Ibid.* Para II.

⁶⁰ *Ibid.*

⁶¹ *Ibid.* Para IV.

A significant breakthrough in the civil war in Southern Sudan took place in the summer of the same year. The SPLM/A and the NCP signed the comprehensive Peace Agreement wherein the parties agreed on a six year transitional period to be followed by a self-determination referendum to determine whether the South would split or remain a part of a united Sudan. The CPA became effective, and a government of national unity was created, making the Southern leader John Garang First Vice-President of the Sudanese government. However, Garang was killed in a helicopter crash on July 30, shortly after taking office.⁶² The desire of the international community to avoid any disruption to the fragile North-South peace process has contributed significantly to the tardy response to the Darfur atrocities.

The Security Council, acting under Chapter VII of the UN Charter, by a vote of 11 in favor to none against, with four abstentions (Algeria, Brazil, China and the United States)⁶³, adopted the Commission's recommendation on March 31, 2005. Resolution 1593 furnished the ICC with the jurisdiction to investigate and try crimes committed in Darfur since July 1, 2002. The Resolution provides that "the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor and ... urges all States and concerned regional and other international organizations to cooperate fully."⁶⁴ This action represents the first UNSC referral of a case to the ICC. The Sudan had previously signed, though not ratified, the Rome Statute establishing the ICC. Later the Sudan "unsigned" the Agreement.

⁶² "Death of Sudan Rebel Leader Imperils Fragile Hope for Peace", *New York Times*, August 2, 2005, online: <<http://www.nytimes.com/2005/08/02/international/africa/02sudan.html>>.

⁶³ The following states are the non-permanent members of the Security Council at the time (2005) : Algeria, Denmark, Philippines, Japan, Argentina, Greece, United Republic of Tanzania, Romania, Benin and Brazil.

⁶⁴ Security Council Resolution 1593 (2005), UN Doc. S/RES 1593 (2005).

There are some doubts that the UNSC has used the Darfur situation referral to avoid handling a situation laden with political controversy and fraught with allegations of genocide. In the case of Darfur, Udombana asserts that the Security Council seemed to consider the ICC referral as a “...halfway measure from the humanitarian military intervention.”⁶⁵

In accordance with the aforementioned recommendation of the Commission, UNSC Resolution 1593 was passed under chapter VII of the UN Charter. According to Article 25 of the UN Charter, the UNSC’s decisions must be accepted and enforced by all UN members.⁶⁶ This binding force of the Resolution prevails over the parties’ obligations under other international agreements.⁶⁷ It is imperative to consider the binding effect of the Resolution on the Sudan, states parties and non-states parties of the Rome Statute.

With regard to the Sudan, the obligation to comply with the cooperation requirement under the statute is beyond doubt. Sudan has been subjected to the strict obligation to “cooperate fully with and provide any necessary assistance to the Court and the Prosecutor.”⁶⁸ Accordingly the Sudan is under a legal obligation to apprehend and transfer Al Bashir to the ICC. The obligation extends to stripping Al Bashir of his head of state immunity, based on Article 27 of the Rome Statute, which remove immunities of officials of States parties.⁶⁹

Under UNSC Resolution 1593, states parties are under obligations to cooperate. The obligation is created by virtue of their membership of the Rome Statute and is subject to the cooperation regime of the Rome Statute. It is the intention of the UNSC as indicated by the recognition of

⁶⁵ Nsongurua J. Udombana, “Pay Back Time in Sudan? Darfur and the International Criminal Court” (2006) 13 Tul. J. Int’l & Comp. L. 1 at 55.

⁶⁶ U.N. Charter art. 25.

⁶⁷ *Ibid*, article 103 “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

⁶⁸ *Ibid* at 49.

⁶⁹ *Ibid*.

the Resolution that non-states parties are under no obligation to cooperate. Since the Rome statute is binding on the states parties, article 27 regarding the irrelevance of the official capacity of the perpetrators applies and the result is that states parties are under a legal obligation to arrest and surrender Omar Al Bashir. This was recently confirmed by a Kenyan High Court which ruled that the arrest warrant issued by the ICC against Al Bashir is binding upon the Kenyan Government.⁷⁰ The ruling created tensions between the Kenyan Executive and Judiciary, and the final impact of the judgment remains to be seen. As discussed in Chapter 4.6 of this thesis, few members of the African Union oppose its decision not to cooperate in the arrest and surrender of Al Bashir.

Non-states parties are identified and addressed in the UNSC Resolution 1593 as a separate category for the purpose of the arrest and surrender of Al- Bashir. The Resolution recognizes that “states not party to the Rome Statute have no obligation under the Statute”.⁷¹ As provided earlier, the Council only “urges” non-states parties to cooperate which fall short of imposing legal obligations on them.

In light of the above, it appears that the UNSC has contributed to the enforcement dilemma by the inadequate wording of the Resolution 1593 and by changing the cooperation regime conferred to the ICTY and the ICTR. When the Security Council created the ad hoc international criminal tribunals it imposed obligations on all UN members to cooperate with those tribunals, thereby applying a single cooperation regime on all states and creating a binding obligation on UN member states to arrest and surrender suspects indicted by such tribunals.⁷² The different

⁷⁰ “Analysis - Bashir row tests Kenya judiciary reforms”, *Reuters*, Dec 9, 2011, online: <<http://uk.reuters.com/article/2011/12/09/uk-kenya-sudan-judiciary-idUKTRE7B80SQ20111209>>.

⁷¹ Security Council Resolution 1593 (2005), UN Doc. S/RES 1593 (2005).

⁷² Security Council Resolution 827 (1993), UN Doc. S/RES 827 (1993); Security Council Resolution 955 (1994), UN Doc. S/RES 955 (1994).

enforcement regime adopted by the UNSC for the Drafur Situation referral to the ICC, could be explained on the basis of the difference in the nature of the international *ad hoc* criminal tribunals as the creation of the UNSC, and the ICC as a treaty created court. However, the author contends that since the serious international crimes prosecuted by the *ad hoc* tribunals and the ICC are similar, and in light of the UNSC powers under the UN Charter to pass binding decisions on all member states, this argument does not hold well. Evidently, substantial political compromises were made to get the Resolution adopted. This subject is further discussed in chapter 4 of this thesis.

2.2. The ICC and the Darfur-related proceedings

The creation of the ICC is a significant milestone in the path of international criminal justice. The quest for a permanent global criminal tribunal started in a serious manner shortly after the Nuremberg and Tokyo tribunals after World War II. The ultimate goal of the ICC is to curb impunity for horrendous international crimes which shock the conscience of humanity. The list of international crimes covers war crimes, crimes against humanity, genocide and aggression. The International Law Commission (ILC) played a prominent role in the adoption of the Statute despite the political differences which threatened to forestall the adoption of the agreement.⁷³ In 1989, the UN General Assembly adopted a resolution prepared in connection with the crime of international drug trafficking and referred it to International Law Commission (ILC).⁷⁴ In 1994, the ILC adopted a draft statute for an international criminal court and submitted the draft to the UN General Assembly.⁷⁵ Following further reviews and modifications by several committees, a

⁷³ See Antonio Cassese, *International Criminal Law* (New York: Oxford University Press Inc., 2003) 329-343.

⁷⁴ G.A. Res. 44/39, UN GAOR, 44th Sess., supp. No. 9, at 311, U.N. Doc. A/RES/44/39 (1990). The General Assembly formally requested the ILC to draft an ICC statute in 1992. See G.A. Res. 47/33, U.N. GAOR, 47th Sess. 73rd mtg. at 3, U.N. Doc. A/RES/47/33 (1992).

⁷⁵ See "Report of the International Law Commission on the work of its 46th Sess., 2 May-22 July 1994,"

text of a convention for an international criminal court was submitted for final approval by the Rome Conference of Plenipotentiaries.⁷⁶ The Rome Statute was adopted in 1998, and it came into effect in July 2002, 60 days after the ratification of 60 states. The Judges were elected in February 2003 and the Prosecutor was appointed in June 2003.⁷⁷ In December 2011, the total number of the ICC members reached 120.⁷⁸

The success of the ad hoc tribunals for the former Yugoslavia and Rwanda, notwithstanding their limited jurisdiction, provided a much needed stimulus for the creation of the ICC. The jurisprudence and other pertinent literature of the ad hoc tribunals constituted a valuable asset for the formation of the ICC.⁷⁹

The Court possesses the powers to investigate and prosecute cases where there is sufficient evidence to believe that the crimes provided for in article 5 of the Rome Statute have occurred. Although the principle of universal jurisdiction has not been incorporated in the Rome Statute, the ICC is yet “...the International criminal tribunal with the largest territorial competence.”⁸⁰ Complementarity is one of the distinctive features of the ICC. It simply means that the Court’s authority can be triggered only if the state party is unwilling or unable to investigate or prosecute.⁸¹ With regard to the Darfur-related crimes, the Pre-Trial Chamber I of the ICC concluded that the case was admissible in the light of the fact that the crimes have not been

GAOR 49th Sess., supp. No. 10 (A/49/10).

⁷⁶ "Report of the Ad Hoc Committee on the Establishment of an International Criminal Court," GAOR, 5th sess., supp. No. 22 (A/50/22).

⁷⁷ Robert J. Currie, *International and Transnational Criminal Law* (Toronto: Irwin Law Inc., 2010) at 180.

⁷⁸ For a listing of the States Parties, see online: <<http://www.icc-cpi.int/Menu/ASP/states+parties/>>.

⁷⁹ *Supra* note 62.

⁸⁰ Nadia Bernaz and Remy Prouveze “International and Domestic Prosecutions” in M. Cherif Bassiouni (ed.), *The Pursuit of International Criminal Justice: A world Study On Conflicts, Victimization, and Post-Conflict Justice* (Vol. 1), (Antwerp-Oxford-Portland: Intersentia: 2010) at 329.

⁸¹ Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9. Article 17(1).

investigated or prosecuted in the Sudan.⁸² The Court consists of four divisions; the Presidency, the Chambers, the Office of the Prosecutor and the Registry.⁸³ The Court assumes jurisdiction whenever a situation is referred to the Office of the Prosecutor of the Court by a state party or by the UN Security Council or is initiated by the office of the prosecutor itself.⁸⁴ The ICC has a temporal jurisdiction which extends only to international crimes committed after July 2002, the date of the coming into force of the Rome Statute.⁸⁵

The obligations of the States parties to cooperate with the ICC are provided for in Articles 86-102 of the Rome Statute. According to Article 86, the states parties are obligated to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”⁸⁶ The enforcement regime established by the Rome Statute is considered to be a middle ground between the “vertical regime”, which means that cooperation is mandatory and the tribunal can ask states for such cooperation, and the “horizontal regime”, which is based on the will and the convenience of states. The vertical regime is the one adopted by the *ad hoc* international criminal tribunals.⁸⁷ Some provisions of the Rome Statute open the door for states parties to justify their refusal to cooperate with the Court. For example, Article 93(3) stipulates that a requested state may refuse to assist the Court if such assistance is “prohibited in the requested state on the basis of an existing fundamental legal principle of general application.”⁸⁸

The enforcement of the ICC decisions is one of the most contentious issues that would shape the future and the success of the Court.

⁸² Pre-Trial Chamber I, ICC-02/05-01/07, Para II, 27 April 2007, online: <http://www.iclklamberg.com/Caselaw/Sudan/HarunandKushayb/PTCI/ICC-02-05-01-07-1-Corr_English.pdf>.

⁸³ *Supra* note 81, Article 34.

⁸⁴ *Ibid*, Article 13.

⁸⁵ *Ibid*, Article 11(1).

⁸⁶ *Ibid*, Article 86.

⁸⁷ Hans-Peter Kaul and Claus Krieb, "Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises" in Olympia Bekou and Robert Cryer (ed.), *The International Criminal Court* (England: Ashgate Publishing Limited, 2004) at 206.

⁸⁸ Alexander Zahar & Goran Sluiter, *International Criminal Law* (Oxford University Press 2008) 457, at 470.

As of December 2011, the ICC is handling seven situations. Three of them (Uganda, the Democratic Republic of the Congo and the Central African Republic) were initiated by states parties, in addition to the Côte d'Ivoire, Libya, Kenya and Darfur situations.⁸⁹ In the Darfur case, the Court issued two arrest warrants, on 51 counts of war crimes and crimes against humanity in May 2007, for Ahmad Harun, currently Minister of State for Humanitarian Affairs and Ali Kushayb, a leader of the *Janjaweed* militia. Both suspects remain at large.⁹⁰ The ICC also indicted Bahar Idriss Abu Garda, a commander of one of Darfur rebel groups, in May 2009, for three counts of war crimes related to the 2007 attack against African Union Troops. Abu Garda submitted voluntarily to the custody of the Court. However, in February 2010, the Pre-Trial Chamber of the Court declined to confirm the charges for lack of sufficient evidence.⁹¹

Omar Al Bashir, the incumbent President of the Sudan, was indicted by the Court in March 2009. This action raised a lot of controversy and the Sudan took a number of retaliatory actions including the expulsion of several humanitarian agencies providing necessary food, drinking water and medical services to IDPs. As a matter of law there is no question about the appropriateness of the action.⁹² The charges against Al Bashir include seven counts of crimes; two for war crimes and five for crimes against humanity.⁹³ Genocide charges were initially excluded by the Pre-Trial Chamber but in July, 2010, the ICC issued a second arrest warrant for Al

⁸⁹ See international Criminal Court, online: <<http://www.icc-cpi.int/Menus/ICC/>>.

⁹⁰ The Prosecutor v. Ahmad Muhammed Harun (“Ahmad Haroun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”) (Ahmad Haroun and Ali kushayb case), Warrant of Arrest for Ahmed Haroun, ICC-02/05-01/07-2 (Apr. 27, 2007). Warrant of Arrest for Ali Kushayb, ICC-02/05-01/07-3 (Apr. 27, 2007).

⁹¹ The Prosecutor v. Bahar Idriss Abu Garda (The Abu Garda case), ICC-02/05-02/09 (May 17, 2009).

⁹² *Supra* note 19 at 182.

⁹³ The Prosecutor v. Omar Hassan Ahmad Al Bashir (*Al Bashir* Case), Warrant for Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-1 (March 4, 2009).

Bashir, adding genocide to the list of crimes he has allegedly committed in Darfur.⁹⁴ To date, the suspect Omar Al Bashir remains at large.

Omar Al Bashir is the first serving head of state to be indicted by the ICC. The ICC issued arrest warrants against Muammar Kaddafi in June 2011, but the Libyan Leader was captured and killed in October 2011, before appearing before the Court. The ICC terminated proceedings against him in November 2011.⁹⁵

The government of the Sudan refused to cooperate when the ICC issued the two Darfur-related arrest warrants against Harun and Kushaiyb and they maintained the same position when the indictment of Al Bashir was issued. In fact, the Sudan launched a heavy campaign against the ICC with the support of the AU, the Arab League, the Organization of the Islamic Conference, the Group of 77, in addition to China, Russia and other states.⁹⁶

Alarmed and infuriated by the UNSC referral Resolution, Al Bashir government has argued that the ICC prosecutor has no legal right to prosecute Sudanese citizens and that the prerogative belongs exclusively to the Sudanese courts. To bolster its case, the government has argued that it has not ratified the Rome Statute of the ICC nor consented to the obligations binding on State Parties. However, in this case, the Security Council referral to the ICC obliges a non-state party, such as Sudan, to fully cooperate with the Court. By the terms of the UN Charter, a Security Council resolution adopted under Chapter VII of the Charter is binding on Sudan as a UN member state. Sudan has also waged an intensive lobbying campaign to discredit the Court and

⁹⁴ ICC-CPI-20100712-PR557, Press Release: 12.072010 “Pre-Trial Chamber I issues a second warrant of arrest against Omar Al Bashir for counts of genocide, online: <<http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr557?lan=en-GB>>.

⁹⁵ “Pre-Trial Chamber I orders the termination of the case against Muammar Gaddafi” ICC-CPI-20111122-PR745, online: <<http://www.icc-cpi.int/NR/exeres/0F93E236-CDD1-4085-ACB0-80627A038D40.htm>>.

⁹⁶ “Darfur war crimes indictment threatens to split international community”, *The Guardian*, 16 February 2009, online: <<http://www.guardian.co.uk/world/2009/feb/16/sudan-war-crimes-split-international-commulnity>>.

its claims of impartiality. The Sudanese government has also claimed that the ICC has been imposed on Sudan against its will, just as the ICTY was created without Serbia's consent, has been used by Khartoum as evidence that the ICC is a political weapon controlled by the powerful states of the Security Council. Here, the government has accused the ICC of executing "...a political agenda of countries targeting Sudan"⁹⁷ and pursuing a Western-instigated "conspiracy" against the government. The government has sought to portray the ICC as "...a tool for the exercise of the culture of superiority" of Western states to punish weak states in Africa and elsewhere in the developing world. Key to the government's bid for impunity is its argument of "double standards," specifically, that more powerful countries such as the United States are effectively immune from ICC scrutiny for crimes that their military may have committed overseas.⁹⁸

The UNSC is authorized under article 16 of the Rome Statute to defer investigations or prosecutions if such deferral is considered by the UNSC to be in the interest of international peace and security. The proceedings could be stayed for 12 months in accordance with a UNSC Resolution under Chapter VII to this effect. The African Union called for a deferral in the case of the Sudanese President on the basis of the immunity of Al Bashir, the fragile peace process and other reasons. However, the UNSC did not respond, evidently due to the failure of the Sudanese government to take any meaningful action with regard to the situation in Darfur. In response, the

⁹⁷ Victor Peskin, "The International Criminal Court, the Security Council, and the Politics of Impunity in Darfur," *Genocide Studies and Prevention* 4, 3 (December 2009): 304–328. 6 2009 *Genocide Studies and Prevention*. doi:10.3138/gsp.4.3.304/ at 306-307.

⁹⁸ *Ibid.*

African Union declared that "AU Member States shall not cooperate in the arrest and surrender of President Omar Al Bashir of Sudan." ⁹⁹

In his Article *The International Criminal Court*, Prof. William A. Schabas expressed concern over the UNSC referral of the Darfur situation to the ICC.¹⁰⁰ He argued that the referral was "defective in at least two aspects".¹⁰¹ He suggested that the ICC could return the case to the UNSC on the basis of non-compliance with article 13(b) of the Rome Statute due to the absence of any reference to "Prosecution without discrimination" in the referral Resolution. Schabas was criticizing the provision in the Resolution exempting certain persons from prosecution, which was a necessary compromise to secure no US objection to the Resolution. Prof. Schabas believes that such referral puts the ICC at the political mercy of the UNSC.¹⁰² Secondly, he referred to the lack of financial coverage in Resolution 1593 which provides that all the expenses of referral, investigation, prosecution and other activities of the ICC shall be borne by the parties of the Rome Statute.¹⁰³ Notwithstanding the reservations of Prof. Schabas on the relationship of the ICC with the UNSC, the collaboration of the two entities is seemingly indispensable for the pursuit of international criminal justice. As long as the ICC lacks an effective enforcement mechanism, political support from the UNSC will be desperately needed. Even without referrals, the ICC potential for securing compliance of states parties is very doubtful. Since the indictment of President Al Bashir, several states parties (including Chad and Kenya) have welcomed Al Bashir in their territories in total disregard of their treaty obligations.¹⁰⁴ The ICC failed to take

⁹⁹ David Greenberg, "African Union Declaration Against the ICC Not What it Seems" (Washington, DC: Foreign Policy In Focus, (6August, 2009) online:

<http://www.fpif.org/articles/african_union_declaration_against_the_icc_not_what_it_seems>.

¹⁰⁰ William A. Schabas "The International Criminal Court", *supra* note 46 at 134.

¹⁰¹ *Ibid* at 146.

¹⁰² *Ibid* at 147.

¹⁰³ *Ibid*.

¹⁰⁴ "Kenyan ambassadors summoned over Omar Al Bashir's visit", *BBC News Africa*, 1 September 2010, online: <<http://www.bbc.co.uk/news/world-africa-11156184>>.

any action against the two member states in accordance with article 87.7 of the Rome Statute as will be discussed thoroughly in the following Chapter.

One of the shortcomings of the ICC's relationship with the UN is that the power politics of the UNSC's permanent members determine the actual reach of the Court. This is evident in the difficulty of asserting jurisdiction over a permanent member of the UNSC. China, Russia and the United States, out of the five permanent members, have not ratified the Rome Statute. In the presence of the veto powers of the permanent members the possibility of indictment of a non-member would remain largely subject to the political considerations of the permanent members.¹⁰⁵ Moreover, in the Darfur referral, the UNSC obliged the Sudan to cooperate fully with the ICC¹⁰⁶, while it merely "urged" other ICC non-states parties to cooperate. These lacunae are reflected afterwards in the enforcement impasse.

As a permanent Court, the ICC has an advantage over the *ad hoc* tribunals, including the ICTY and the ICTR, with respect to the possibility of being a deterrent element and playing a key role in the domain of *in bello* justice. So far, this role has not been demonstrated. Moreover, more than four years have passed since the issuance of the first arrest Warrants related to the Darfur case¹⁰⁷ and three of four indictees remain at large. So far, the record of the ICC is unimpressive. This conclusion leads to the question about the reasons for such failure, which is the subject of chapter 4.

The ICC has been severely criticized in various respects since its establishment. Enforcement is one of the most common targets of the Court's detractors. In 2003, Goldsmith has argued that:

¹⁰⁵ *Supra* note 75 at 419.

¹⁰⁶ *Supra* note 66.

¹⁰⁷ First Darfur-related Arrest Warrant issued in April 27, 2007. The Prosecutor v. Ahmad Muhammed Harun ("Ahmad Haroun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") (Ahmad Haroun and Ali Kushayb case), Warrant of Arrest for Ahmed Haroun, ICC-02/05-01/07-2 (Apr. 27, 2007). Warrant of Arrest for Ali Kushayb, ICC-02/05-01/07-3 (Apr. 27, 2007).

The ICC is unlikely to punish the Husseins and future Milosevics of the world because it is unlikely to get a grip on them. The ICC has no inherent enforcement powers. It depends completely on member states to arrest and transfer defendants. So the efficacy of ... prosecutions depends on the uncertain resolve of nations to use military or economic force to extricate the oppressive leader from his country.¹⁰⁸

As explained in chapter 4.6, many African states see the ICC as a political instrument of the UNSC which lacks a true autonomy and they believe that the enforcement of international criminal justice by the ICC has been selective. An official communiqué portrays the ICC as “a tool for the exercise of the culture of superiority” of Western states to punish weak states in Africa and elsewhere in the developing world.¹⁰⁹

By all parameters, the performance record of the ICC is not very impressive. Suffice to mention that the ICC has not completed a single case since its establishment. The record of the indictees’ arrest is also not great. However, in the author’s opinion, that does not undermine the importance of the Court or diminish its potential to deliver. In the realm of international criminal justice, the ICC is just one important instrument in a number of complex mechanisms that must be implemented if the world is to see justice, in the broader sense, for all. There is no doubt that this also involves much more concerted action on the part of States. It is clear that progress has been made and the indictment of heads of state is an integral element in the internationalization of justice and the end of the era of impunity. The case of Al Bashir should be considered as a single step in the ongoing evolution of international criminal law. It has become apparent that at this stage, despite the ongoing worldwide efforts to end impunity for tyrants, heads of state immunity

¹⁰⁸Jack Goldsmith, “The Self-Defeating International Criminal Court,” (2003) 70(1) *The University of Chicago Law Review* at 92.

¹⁰⁹Victor Peskin, “The International Criminal Court, the Security Council, and the Politics of Impunity in Darfur,” *Genocide Studies and Prevention* 4, 3 (December 2009) at 306-307 (quoting Sudanese government press release).

remains a major stumble block in enforcing the ICC arrest warrants against heads of state. This is the subject of the following chapter.

Chapter 3. Does the Head of State Immunity Shield Al Bashir from the Jurisdiction of the ICC?

This chapter examines whether Al Bashir can rely upon the head of State immunity to shield himself from the proceedings before the ICC. At the outset, it is necessary to explore the doctrine of head of state immunity under customary international law. Thereafter, due consideration will be given to the question whether there are any factors that impact the applicability of the doctrine with regard to the ICC arrest warrants against Al Bashir.

The head of state immunity doctrine had been raised by the Sudan, African Union, Arab League and other opponents of the ICC indictment of Omar Al Bashir as the international law doctrine that precludes the execution of the ICC arrest warrants against the Sudanese President. The AU passed a resolution prohibiting cooperation of AU members in the arrest and surrender of Al Bashir with a specific reference to Article 98 of the Rome Statute as the authority for such position.¹¹⁰

Even before that, the doctrine has been discussed several times by international criminal tribunals. The ICTY, for example issued arrest warrants against Milosevic and Milutinovic in 1999, when they were still presidents of Yugoslavia and Serbia, respectively.¹¹¹

The concept of head of state immunity is derived from state sovereignty and sovereign equality principles upon which the UN Charter is founded. The principle of non-interference in the domestic jurisdiction of another state has flowed from the sovereign equality principle. Unlike diplomatic immunity, which is codified in the Vienna Convention on Diplomatic Relations, there is no international agreement describing the nature and extent of head of state immunity.

¹¹⁰ *Infra* notes 178 and 184.

¹¹¹ Indictment of Milosevic and Others , ICTY, IT-99-37, 24 May 1999.

Since immunity only comes into play after jurisdiction has been established, it is important to note that immunity does not function to limit a Court's jurisdiction, but it acts as a procedural bar to the exercise of the jurisdiction that is already established. In this sense, jurisdiction should not be considered when discussing immunities.

Article 27 of the Rome Statute waived the head of state immunity and according to that Article, the official capacity of the perpetrators of the crimes identified in the Rome Statute is no longer relevant.¹¹²

3.1 The relevance of the head of state immunity

There are three theories related to head of state immunity. In the following paragraphs these theories will be described and analyzed after a consideration of the types of such immunities.

3.1.1 Functional and personal immunity

State officials' immunity falls broadly into two categories: *ratione personae*, which means personal immunity and *ratione materiae*, meaning functional immunity. The rationale for the functional immunity is that the officials are considered to be executing official functions. The basic function of the immunities is to guard against prosecution by foreign national courts.¹¹³

State officials enjoy functional immunity for actions undertaken in their official capacity. According to the immunity doctrine, they are deemed to be acting on behalf of the State. However, State officials can be indicted if they acted beyond their official mandates. Such indictments include serious international crimes.¹¹⁴

¹¹² *Supra* note 81 Article 27.

¹¹³ Rosanne van Alebeek, *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law* (Oxford: Oxford University press, 2008) at 158.

¹¹⁴ Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (London: Routledge, 1997) at 188-189.

Personal immunity applies to senior officials such as head of state, ministers of foreign affairs and diplomats. This type of immunity is broader in its scope and it covers all acts committed while in office. It expires at end of the official's service. It is also intended to protect senior officials from criminal prosecutions during their term of service. The head of state immunity falls within this category.¹¹⁵

3.1.2 Theories related to head of state immunity

First, Absolute theory:

Historically, absolute immunity of the head of state is rooted in the recognition of the sovereignty of the state.¹¹⁶ It means that heads of state could not be prosecuted in other states due to lack of jurisdiction. This absence of jurisdiction is based on two underlying principles. First, the head of state is identified as a sovereign. Second, international law was applicable to states and not the government leaders, so any act by the head of state was considered as made by the state itself. There was no room for individual responsibility and the head of state could not be prosecuted in a foreign court. Hence, he/she enjoys absolute immunity based on the principle of sovereign equality.¹¹⁷

Second, Restricted theory;

This theory developed when states began to distinguish between the state and the head of state as a result of increasing involvement of states in commerce and trade.¹¹⁸ It is also the outcome of the distinction made between *jure imperii*, which means sovereign acts subject to state immunity,

¹¹⁵Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007) at 423.

¹¹⁶ *Ibid.*

¹¹⁷ Gerhard Werle, *Principles of International Criminal Law* (Den Haag: TMC Asser Press, 2005) at 173.

¹¹⁸ Lee M. Caplan, "State Immunity, Human Rights, and Jus cogens: A Critique of the Normative Hierarchy Theory" (2003) 97 *American journal of International Law* at 748.

and *jure gestionis*, meaning state act of a private or commercial character not subject to state immunity.¹¹⁹

Third, Normative hierarchy theory:

This is a recent theory developed by modern international human rights law and international criminal law with the aim of holding heads of state personally responsible for serious violations of international law. The essence of this theory is that jurisdictional immunity is no longer applicable when a state breaches fundamental norms of international law,¹²⁰ known as *jus cogens*.¹²¹ The rationale behind this theory is that international law norms which are *jus cogens* rank higher in hierarchy than state immunity and they prevail over other norm of international law. It also relates to the vital and fundamental world community interests that need to be protected or enhanced.

The deficiency of the absolute and restricted theories surfaces when victims of human rights violations seek prosecution of a Head of State. On the other hand, the implementation of the normative hierarchy immunity might prove difficult in many jurisdictions. The central defect of the absolute theory is that it regards the head of state as the manifestation of the state and thereby virtually enjoys all the state rights such as sovereignty and inviolability. This is basically reserved to the state.

¹¹⁹ Jodi Horowitz, "Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet: Universal Jurisdiction and Sovereign Immunity for Jus cogens Violations" (1999) 23 Fordham International Law Journal at 504.

¹²⁰ *Supra* note 113 at 758.

¹²¹ "Jus cogens is a norm thought to be so fundamental that it even invalidates rules drawn from treaty or custom. Usually, a jus cogens norm presupposes an international public order sufficiently potent to control States that might otherwise establish contrary rules on a consensual basis." Mark W. Janis, *An Introduction to International Law* (New York: Aspen Publishers, 2003) at 62-63.

As to the restrictive immunity, it is not always easy to draw the line between the public and private state actions.¹²² However, since it has been widely accepted as customary international law to exclude commercial acts from immunity, there should be no problem in removing serious human rights violations from the scope of immunity.¹²³

The Normative Hierarchy theory restricts the scope of immunity and guarantees accountability for heads of State when they break *jus cogens* norms. The main difficulty with this theory is the enforcement of the court orders related to proceedings against heads of State.

The Genocide Convention has come into force in 1952. It marks a stark deviation from the historic concept of immunity. In Article 4 of the Convention, the official capacity of the suspects, as a bar to prosecution for genocide crimes, is removed. In the Arrest Warrant case, the ICJ stated that the official capacity was irrelevant for prosecution of persons by certain international tribunals and the ICC in cases where they assume jurisdiction through their mandate¹²⁴ such as the ICTY and SCSL.¹²⁵

The Rome Statute also rendered Head of State immunity inapplicable with respect to grave international crimes identified in the Rome Statute. Article 27 states that:

27.1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal

¹²² Lee M. Caplan, "State Immunity, Human Rights, and Jus cogens: A Critique of the Normative Hierarchy Theory" (2003) 97 *American Journal of International Law* at 758.

¹²³ Michael P. Davis, "*Accountability and world Leadership: Impugning Sovereign Immunity*" 1999 *University of Illinois Law Review* at 1364.

¹²⁴ Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), International Court of Justice (ICJ), I.C.J. Reports 2001, p. 3, 14 February 2002, par. 61.

¹²⁵ Article 7(2) Statute of the International Criminal Tribunal for the Former Yugoslavia, Annex to the Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808, UN Doc. S/25704, 3 May 1993; Article 6(2) Statute of the Special Court for Sierra Leone, annex to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, pursuant to Security Council resolution 1315, UN Doc. S/RES/1315 (2000), 16 January 2002.

responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

27.2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.¹²⁶

3.2 Analysis and evaluation of Al Bashir situation

The immunity of heads of state has been thoroughly discussed by international criminal tribunals. The ICTY, for example, issued arrest warrants against Milosevic and Milutinovic in 1999, when they were still Presidents of Yugoslavia and Serbia, respectively.¹²⁷ The SCSL also indicted Charles Taylor when he was still the incumbent President of Liberia.¹²⁸

In light of the above developments, it seems that the removal of immunity for heads of state in connection with serious international crimes as defined in the Rome Statute has become an emerging norm of customary international law. The reality is that the doctrine of absolute immunity for heads of state has strongly eroded.

Paola Gaeta asserts that, “the rules of customary international law on personal immunities of incumbent heads of state do not apply in the case of the exercise of criminal jurisdiction by an international criminal court; therefore, they do not bar the exercise of the jurisdiction of the ICC with respect to an incumbent head of state.”¹²⁹ On the other hand, Akande seems to be in favor of further qualifications. He argues that before an international court has the authority to disregard an individual’s immunities, the tribunal’s founding instruments must provide for the removal of immunities, and the individual’s state must be bound by those instruments.¹³⁰

¹²⁶ *Supra* note 81 Article 27.

¹²⁷ Indictment of Milosevic and Others , ICTY, IT-99-37, 24 May 1999.

¹²⁸ Prosecutor v. Charles Taylor, SCSL, SCSL-03-01-7, 3 May 2003.

¹²⁹ Paola Gaeta, “Does President Al Bashir Enjoy Immunity from Arrest?” (2009) 7 J. Int'l Crim. Just at 315.

¹³⁰ Dapo Akande, International Law Immunities and the International Criminal Court, 98 AM. J. Int'l L. 407, 419 (2004) at 418.

It is important to draw the line between, immunity from prosecution, on the one hand, and immunity from arrest, on the other hand. Apparently, the arrest and surrender of Al Bashir lie with national authorities and thus possibly impinge on inter-state relations. The issue of immunity from arrest is addressed in article 98 (1) of the Statute, which states the following:

“The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”¹³¹

Article 98 of the Rome Statute is irrelevant to the ICC charges against Al Bashir. The waiver of immunity provided in that article is unnecessary since the Sudan is bound to the Rome Statute by the effect of UNSC Resolution 1593, for the purposes of the Darfur-related indictments. Through this binding obligation, article 27 of the Rome Statute strips the Sudanese President of any immunity claims.

The wording of UNSC Resolution 1593 is somewhat problematic and it led to heated debate on the interpretation of its provisions. However, for the purposes of the entitlement of Al Bashir to the Head of State immunity, the above conclusion is still valid. The debate on the interpretation of the Resolution is mostly about the struggle between the proponents of the different schools of immunity.

The arguments limiting the scope and effect of article 27(2) of the Rome Statute are predicated on the premise that the rule in article 27(2) is treaty-based theory; therefore, it cannot bind non-parties. The counter argument reinforces the nature of the article as codifying an already existing

¹³¹ Supra note 81 Article 98(1).

rule of customary international law. This rule is supported by the ICJ judgment in the *Arrest Warrant* case, as provided earlier. In that case the Court ruled that the exception to the rule of personal immunity can arise “before certain international criminal courts, where they have jurisdiction.”¹³² The Court referred specifically to the ICTY, the ICTR and the ICC, in addition to the text of Article 27 (2) of the Rome Statute.¹³³ The judgment in the *Arrest Warrant* case could invoke a need to identify the difference between the national and the international courts. However, in the case of Al Bashir, the explicit reference to the ICC renders this exercise unnecessary. For the sake of clarity, it suffices to state that international criminal courts and tribunals do not represent the specific national interests of their states parties.

The powers of the Court to prosecute all individuals regardless of their official capacity, signifies that immunity would be irrelevant. The ICC, in this sense, falls within the definition of the “international court” adopted by the ICJ in the *Arrest Warrants* case. That also reinforces the ICC’s power to strip Al Bashir of the head of state immunity. On the other hand, it is the tension between article 27 (2) and 98(1) of the Rome Statute that creates this confusion and ambiguity.

Nonetheless, it has been recommended that the UNSC issues a further resolution providing for obligation on all UN member states to extend cooperation to the ICC and to enforce the arrest warrants against Al Bashir.¹³⁴ The author considers that this recommendation is undesirable. In addition to the earlier argument that article 27 of the Rome Statute has already embodied a rule of customary international law, which is sufficient to secure the removal of the heads of state immunity, the extra UNSC resolution may shed some doubts on the authoritativeness of this

¹³²Case Concerning the Arrest Warrant of 11.4.2000 (Democratic Republic of Congo v. Belgium), ICJ Reports 2002, par 61 (hereafter “Arrest Warrant case”).

¹³³ *Ibid.*

¹³⁴ Von Michiel Blommestijn and Dr. Cedric Ryngaert, “Exploring the Obligations for States to Act upon the ICC’s Arrest Warrant for Omar Al Bashir” Working Paper No. 48, Global Governance Studies, Leuven Centre (2010) at 438.

article and it could create more controversy and uncertainty as to the interpretation and the limits of article 27 of the Statute.

As discussed in Chapter 5, the combination of Resolution 1593 and the Genocide Convention creates an obligation on the ICC's states parties and non-states parties to cooperate on the arrest and surrender of Al Bashir, as regards the genocide charges. Al Bashir enjoys no immunities whatsoever and the ICC mandated by the UNSC 1593 to pursue his prosecution.

Blommestijn and Ryngaert criticize the reasoning of the Pre-Trial Chamber (PTC) of the ICC in its decision to issue the arrest warrants. They analyze the reasoning of the PTC's decision which is predicated, in their analysis, on four grounds: First, the argument that the reference to the preambular provision of the Statute, which sets out the objective of removing criminal impunity. The authors argue that this does not provide a legal basis for the ICC to strip states which are not parties to the Rome Statute of their right without their direct consent.¹³⁵

In the second point, the PTC addresses the relevant legal norms as set out in articles 27(1) and (2) of the Rome Statute, and stresses their primacy over other sources of international law. The authors, again, assert that the reasoning does not constitute a persuasive argument for a treaty provision to prevail over customary international law.¹³⁶

The third point relates to the PTC's decision that the other sources of the law referred to in paragraphs 1(b) and 1(c) of article 27 of the Statute can only be triggered when there is a *lacuna* in the elements of crimes and the rules contained in the Statute. Moreover, such *lacuna* cannot be filled by the application of the criteria of interpretation.¹³⁷ The authors reiterate the same

¹³⁵ *Ibid* at 434.

¹³⁶ *Ibid*.

¹³⁷ Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber I, 4.3.2009 (hereafter "Al Bashir Decision"). Par 41.

argument in the second point, explaining that article 27, as a treaty provision, cannot supersede customary international law rules of immunity. In the opinion of the authors, if article 27 of the Rome Statute derives its validity from the consent of the states parties, why should it be considered binding on non-states parties?¹³⁸

The fourth PTC argument is predicated on the assertion that UNSC Resolution 1593 authorized investigating and prosecuting the Darfur Situation in accordance with the statutory framework of the ICC.¹³⁹ The authors admit that this is the most persuasive argument of all four provided by the PTC.¹⁴⁰ Few scholars have challenged the authority of the UNSC's referral Resolution as the appropriate legal basis for the prosecution of Al Bashir.

Despite the different nature and source of authority, Akande suggests that "When the Security Council chooses to do so, at least with respect to the immunities of nationals of the state (or states) in question, the Security Council puts the ICC on equal footing with the ad hoc tribunals."¹⁴¹ Akande explains that this situation is based on three legal underpinnings apart from the Rome Statute: the mandatory nature of the U.N. Charter, the ICJ's decision in the *Arrest Warrant Case*, and the SCSL's decision regarding immunities in the *Prosecutor v. Charles Taylor*.¹⁴²

The erosion of the head of State immunity began as early as the end of World War II. Following the end of the War, the Charter of the Nuremberg Tribunal explicitly revoked Head of State

¹³⁸ *Supra* note 127.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ Dapo Akande, "The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?" 3 (Oxford Transnational Justice Research, Working Paper No. 6, 2008), online: < <http://www.csls.ox.ac.uk/documents/> >.

¹⁴² *Ibid.*

immunity for Nazi war criminal suspects under its jurisdiction.¹⁴³ Such efforts worked to separate the individual ruler of a state from that state's inherent sovereignty, a notion that increasingly became identified with the will of a state's citizens rather than personified by its leader.

The ICC should take action against the states violating their international law obligations based on the Genocide Convention, the UNSC Resolution 1593 and the Rome Statute. Several actions are available for non-compliance depending on the instrument in question, as explained at length in the succeeding chapters.

It transpires from the above that the defense of the head of state immunity cannot provide a shield for Al Bashir to avoid the ICC's prosecution on the international crimes committed in Darfur. The question whether and when the arrest and surrender of Al Bashir will take place remains to be seen.

The Security Council should, therefore, use its powers under Chapter VII by resolving that the failure of the GoS to cooperate with the ICC represents a threat to peace and security. This would be the next logical step, which would then be the basis for further collective measures. The mere threat of collective diplomatic sanctions or of divestments from Sudan could have positive effects.¹⁴⁴

This chapter concludes that the head of state immunity is not a valid defense against the arrest and surrender of Al Bashir to the ICC. However, it is still used by several states and organizations to justify non-compliance with international law obligations. In the following chapter, this thesis will investigate the confluence of reasons and circumstances that kept Al Bashir at large for almost 3 years after the issuance of the arrest warrants.

¹⁴³See Charter of the International Military Tribunal art. 7, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280 ("The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.")

¹⁴⁴Dan Sarooshi, "The Peace and Justice Paradox: The International Criminal Court and the UN Security Council" in Dominic McGoldrick, *et al.*, eds., *The Permanent International Criminal Court, Legal and Policy Issues* (Portland: Hart, 2004) 95 at 103.

Chapter 4. The reasons behind the failure to enforce

Several reasons and factors, with various levels of significance and weight, contributed to the stalemate condition as regards the execution of the arrest warrants against the Sudanese president. These factors will be described and analyzed to reflect their impact on the enforcement process and the chances of surmounting them.

4.1. The lack of an effective enforcement mechanism in the ICC's regime

The International Criminal Court (ICC) has no direct power to compel states to arrest perpetrators of international crimes and hand them over for trial. State cooperation is vital for international criminal tribunals while it is resisted by governments complicit in mass atrocities. Paradoxically, without states' power to enforce, the ICC would seem to lack any leverage whatsoever to bring recalcitrant states into compliance.

The difficulty of enforcing the decisions of the ICC is also a major hurdle undermining the impact of the Court on ongoing conflicts. The nature of the enforcement system created by the Rome Statute generally resembles the structure of inter-state cooperation, rather than that of the *ad hoc* tribunals.¹⁴⁵ Although article 86 of the Rome Statute stipulates that “States Parties shall ... cooperate fully with the Court in its investigations and prosecutions of crimes within the jurisdiction of the Court,”¹⁴⁶ the ICC has no coercive powers to implement its decisions. However, the Rome Statute enables the ICC to make a finding that a state has failed to comply with its cooperation obligation and can refer the matter to the ICC Assembly of States Parties or the Security Council where the referral of the matter is made by the Security Council.¹⁴⁷ Even

¹⁴⁵ Bert Swart, “General Problems” in Antonio Cassese, Paola Gaeta & John R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) at 1595.

¹⁴⁶ Article 86 of the Rome Statute, *Supra* note 81.

¹⁴⁷ Article 87(7) of the Rome Statute, *Supra* note 81.

this power has not been exercised effectively by the ICC.¹⁴⁸ To be able to fulfill its mandate, it is imperative for the Court to develop an effective and operative enforcement mechanism with the support of the states parties and the international community.

The current legal regime under the Rome Statute deals insufficiently with non-compliance. Non-States Parties to the Rome Statute are generally not obliged to cooperate with the Court and even non-compliant states parties can hardly be punished.¹⁴⁹ The shortcomings of the ICC's enforcement regime have been discussed in Chapter two of this thesis.

4.2 Inconsistencies in the Rome Statute

One of the issues that fueled the arguments of the opponents of the Al Bashir prosecution is immunity from arrest, which is addressed in article 98 (1) of the Statute. This article states the following: “The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity”¹⁵⁰

Articles 27 and 98 (1), which are both dealing with immunity, seem to contradict one another. While article 27 rules out the pertinence of any kind of immunity before the Court, article 98 (1) seems to require the Court to respect immunity when requesting State cooperation.¹⁵¹ In fact, The AU objected to the arrest Warrants against Al Bashir and subsequently requested the Security Council to defer the arrest warrants, *inter alia*, on the basis of article 98 (1).¹⁵²

¹⁴⁸ *Ibid.*

¹⁴⁹ Annalisa Ciampi, “The Obligation to Cooperate” in Antonio Cassese, *et al.*, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 1607 at 1635.

¹⁵⁰ Article 98(1) of the Rome Statute, *Supra* note 81.

¹⁵¹ Gaeta, in Cassese *et al.* (eds.), *Supra* note 145 at 992.

¹⁵² *Infra* note 183 at 11.

The Rome Statute was enacted with the dual objectives of eliminating impunity for the perpetrators of serious international crimes while guaranteeing respect for the internal affairs of states. These goals led to the creation of competing mandates of holding accountable those individuals most culpable of international crimes, while ensuring that doing so does not infringe upon the rights of states.

As far as states parties are concerned, it would be incongruous to draft a provision such as article 27, which nullifies international immunities before the Court, if as a result of article 98 (1), immunity would prevent a suspect from being surrendered to the Court. It seems most reasonable to conclude that although “third party” in article 98(1) is a reference to any state other than the requested state, whether it is a state party or a non-state party, it is self-evident that for states parties, no waiver of immunity is necessary. Assuredly, the result of the UNSC referral, has placed the Sudan *mutatis mutandis* in the position of a state party with regard to the Court’s proceedings in the Darfur situation; therefore, as is the case for states parties, the Sudan cannot rely on article 98 (1). By requiring Sudan to “cooperate fully with and provide any necessary assistance to the Court”¹⁵³, the UNSC has implicitly obliged Sudan to waive the immunity that is held by all its nationals under international and national law vis-à-vis the Court. Akande asserts that “In the sense of article 98 (1), Sudan would have to be regarded as both the “requested State”, as well as the “third State”. Seeing how a state cannot be considered as holding international obligations of immunity towards itself, article 98 (1) is not applicable for the PTC’s request to Sudan and does not have a bearing on its obligations of cooperation vis-à-vis the Court.”¹⁵⁴

¹⁵³ *Supra* note 134.

¹⁵⁴ *Ibid.*

Notwithstanding the above conclusion, this inconsistency remains one of the weaknesses of the Court and a strong tool for recalcitrant states and opponents of the ICC to oppose its decisions. From a procedural viewpoint, states invoking article 98.1 are not allowed to decide unilaterally on the question of a possible conflict with its obligations under international law. As per article 119 of the Rome Statute “Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.”¹⁵⁵ Hence, it is only for the ICC to decide whether or not the alleged conflict justifies the refusal of cooperation. If the Court decided in the affirmative, a waiver of immunity would be required from the notifying state, before the ICC can proceed with the case. Despite the above conclusion, in the case of Al Bashir, the scope of article 98.1 appears to be irrelevant. The normative hierarchy theory embodied in article 27 of the Rome Statute, strips away Al Bashir’s immunity as head of state and reinforce the new norm of curbing impunity regardless of the official status of the perpetrators when international core crimes are committed.

The interpretation given by the ICC to article 98(1) of the Rome Statute is that this provision does not apply to the instant case. An ICC request with respect to the arrest warrants against Omar Al Bashir would not require any state “...to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person”¹⁵⁶ In a recent decision, the Pre-Trial Chamber I confirmed the validity of article 27 in the Al Bashir case, and found that it is not inconsistent with article 98(1).¹⁵⁷

¹⁵⁵ Article 119 of the Rome Statute, *Supra* note 81.

¹⁵⁶ Article 27 of the Rome Statute, *Supra* note 81.

¹⁵⁷ “Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir”, ICC-02/05-01/09-139, 12 December 2011, para. 18. online: <<http://www.icc-cpi.int/iccdocs/doc/doc1287184.pdf>>.

The ICC's interpretation of article 27, read with article 98(1) of the Rome Statute, has not persuaded the critics of the ambiguity created by the two Articles. The dilemma created by such articles remains one of the contributing factors to the failure to enforce the arrest warrants against Al Bashir. The lessons learned from the Court's position in Al Bashir case is that the theory of absolute immunity is persistently undermined.

The author recommends that article 98 of the Rome Statute be amended to remove any inconsistencies with other provisions of the Rome Statute, particularly article 27, and to ensure that when the ICC'S jurisdiction is triggered by a Security Council referral, all UN member states are obligated to enforce ICC arrest warrants.

4.3 The limited scope of states cooperation under UNSC Resolution 1593

In the Darfur case, the UNSC is largely responsible for the enforcement impasse. The cooperation regime created by Resolution 1593, which referred the Darfur situation to the ICC, is quite limited in its scope of application. While the UNSC resolutions establishing the ICTY and ICTR extend the legal obligation to cooperate to all UN member states, the Resolution conferring jurisdiction on the ICC to prosecute Darfur crimes exempted non-states parties to the Rome Statute from the strict obligation to cooperate, though it "urged" them to extend the necessary assistance the ICC.

Non-State Parties to the Rome Statute are under no obligation to cooperate with the Court. For states parties, non-cooperation is a violation of international law. However, the UNSC has the power and the mandate to obligate non-states parties to cooperate in the arrest and surrender of Al Bashir. The ICC, when exercising its jurisdiction through referrals by the Security Council, needs to have the same autonomous authority of the ad hoc international criminal tribunals in order for its ultimate target of ending impunity to be realized.

There are several logical and legal paradoxes in the UNSC Resolution 1593, which referred the Darfur situation to the ICC. The referral was based on Chapter VII of the UN Charter, indicating that the UNSC considers the situation in Darfur as a threat to international peace and security. In light of that, there would be no reasonable legal or political justification for the selectivity exercised by the UNSC in deciding which states are obligated to cooperate in the execution of the arrest warrants. The UNSC choice to impose a legal obligation on a group of UN member states based on their ratification of the Rome Statute, and to exempt another group of UN member states, who decided not to be members of the treaty creating the ICC, is unwarranted.

The underlying question here is whether the UNSC choice of the ICC for the investigation and prosecution of the Darfur-related international crimes is essentially for its regime, rules, mandate and structure as a competent international Court, or because of its member states. If the correct answer is the former, then there would be little grounds for the exemption of the other group of states from the enforcement obligation. This argument should be viewed in light of the UNSC power and authority to impose such enforcement obligations on all UN member states under chapter VII of the Charter.

The ICC states parties have a good argument against such selective approach. They may assert that, as far as Darfur situation is concerned, the Sudan is a third party vis-à-vis the ICC treaty, and in the absence of the referral Resolution, the Darfur situation will not create any legal obligations on the states parties. In other words, the Sudan is a “third party” vis-à-vis both states parties and non-states parties. Hence, there are no good grounds for a resolution that creates contrasting levels of compliance for the UN member states. The UNSC referral of the Darfur situation triggered the jurisdiction of the ICC, including a “partial” cooperation regime, in the sense of excluding non-states parties from the legal obligation to cooperate.

The above contention may be counter-argued by referring to the nature of the Rome Statute as a negotiated treaty, which is binding *in toto* upon its parties. The referral is provided for in article 13(b) of the Rome Statute, and the relationship between the United Nations and the ICC is governed by article 2 of the Statute. The foregoing argument is true but it does not impugn on the rights of states parties to question the selective approach of a referral based on Chapter VII , in view of the Sudan status as a non-state party.

The author is of the opinion that, apart from the Darfur case, all referrals under Chapter VII of the UN Charter should be made binding upon all UN member states, failing which, the enforcement impasse experienced in the aftermath of the Darfur situation referral will keep recurring. The situation is most puzzling in view of the UNSC previous decisions to extend the obligation to cooperate to all UN member states in the case of the *ad hoc* tribunals.

The UNSC missed a good opportunity to avoid the shortcomings of the Darfur situation referral when the Libyan situation was referred to the ICC through Resolution 1970, in February 2011. Regrettably, the UNSC maintained the same regime of cooperation adopted in UNSC Resolution 1593, regarding the Darfur situation. The Council directed the Libyan authorities to cooperate fully with the ICC in its investigations of the situation in Libya while “urging” non-states parties and other organizations to cooperate fully with the Court.¹⁵⁸

4.4 Absence of the UN willingness and decisiveness

The pursuit and protection of national interests have played a direct role in the lack of political willingness by the UN and individual states to apply political and economic pressure and even sanctions on the government of the Sudan and protect those affected by the violence inflicted by Khartoum and the *Janjaweed*.

¹⁵⁸ Para. 5, Security Council Resolution 1970 (2011), UN Doc. S/RES/1970 (2011).

This lack of decisiveness and political unwillingness by the UN is based on its own political agenda of successfully finalizing the Naivasha Peace Accords that would end the protracted civil war between the North and the South. The US also has its own political agenda in the region and does not want to seem aggressive toward the GoS for fear that it will stop providing reliable intelligence for the war on terror. Moreover, with its unpleasant experiences in Iraq and Afghanistan, the US does not seem to be interested in launching another unpopular war in Sudan.

China and Russia played and are still playing a significant role in the political inaction towards the Sudan. China, consistently opposes sanctions on the GoS because of its high investment into the oil reserves throughout Sudan. China's growing domestic economy forced it to actively pursue investments in many developing countries of marginal stability and democracy.¹⁵⁹ China is also the second largest consumer of oil worldwide and it must secure foreign energy resources to keep up with the demand of its economy.

Russia opposed sanctions against the Sudan for reasons related to its economic and national interests. Although Russia does not maintain oil interests in the Sudan, its primary relationship with Khartoum is the transfer of arms to supply the paramilitaries, known as the Popular Defence Force (PDF) and the Janjaweed in their ongoing efforts to eradicate the African people of Darfur. Russia has been supplying Khartoum since 2004 with MI-24 attack helicopter gunships, T-55 tanks and MIG-29 aircraft while China has been supplying Fantan A5 strike helicopters and TK-8 training aircraft.¹⁶⁰

The Security Council failed to use its powers under Chapter VII to stipulate that the failure of the GoS to cooperate with the ICC represents a threat to peace and security, which could be the basis for

¹⁵⁹ "Sudan, Oil and Human Rights" Human Rights Watch, New York (November 24, 2003) at 456, online: <<http://www.hrw.org/en/reports/2003/11/24/sudan-oil-and-human-rights>>.

¹⁶⁰ Maggie Farley, "China, Russia faulted for Sudan arms sales" *Los Angeles Times*, May 09, 2007.

further collective measures. The mere threat of collective diplomatic sanctions or of divestments from Sudan is not expected to have any positive effects on the Sudan's intransigent attitude.

4.5 Sudan's political manipulation and prevarication

A confluence of several political factors impacted the failure of the ICC to apprehend and prosecute Al Bashir and the other two Sudanese suspects. Well before Moreno-Ocampo sought arrest Warrants for Al Bashir in mid-2008, Sudan attempted to sideline the ICC and discourage international pressure to cooperate with the Court. In its campaign against the ICC, the government has followed a number of strategies used by other states, such as Serbia and Rwanda, whose nationals have been investigated and targeted for prosecution by the ICTY and ICTR. First, the Al Bashir government argued that the ICC prosecutor had no legal right to prosecute Sudanese citizens and that the prerogative belonged exclusively to the Sudanese courts. In response to the arrest warrant request, the Sudanese government initiated threats of violence.¹⁶¹ Despite these threats, and after months of deliberation, the ICC formally ordered the arrest of President Al Bashir on March 4, 2009.¹⁶² The President was charged with war crimes and crimes against humanity for his role in the atrocities in Darfur.¹⁶³ In retaliation for the issuance of the arrest Warrants, Sudanese officials expelled many Western aid groups that provided food, water and essential health services to the people of Darfur and which accounted for more than 50 per cent of the total humanitarian aid in Darfur.¹⁶⁴

The government of Sudan's threats was voiced by several officials. Sudanese Presidential Advisor Bona Malwal said on 25 July: "We are telling the world that with the indictment of our

¹⁶¹ See Andrew Heavens, "Sudan Says Indicting President Would Risk Bloodshed", *Reuters*, Jan. 5, 2009, online: <<http://www.reuters.com/articie/africaCrisis/idUSL5223746>>.

¹⁶² *Supra* note 93.

¹⁶³ *Ibid.*

¹⁶⁴ Human Rights Watch, "Sudan: Expelling Aid Agencies Harms Victims" *Hum. Rts. Watch News*, Mar. 5, 2009.

president Al Bashir we cannot be responsible for the well-being of foreign forces in Darfur"; Adam Hamid Musa, recent governor of South Darfur, threatened that there will be "more genocide like it has been not seen before by anyone", if President Al Bashir is indicted; and President Al Bashir himself said that "we are not looking for problems, but if they come to us then we will teach them a lesson they won't forget."¹⁶⁵ The GoS also threatened to derail the fragile North-South Agreement (Comprehensive Peace Agreement). Despite all the threats and blustering, in the cases of the two other heads of state indicted by international criminal tribunals (Liberia's Charles Taylor and Yugoslavia's Slobodan Milosevic), fears that prosecuting these leaders would dismantle peace efforts proved unfounded.¹⁶⁶

The following lines provide a stark example of the nature and mentality of the security cabals who govern the Sudan. Roza Pati states that:

Additionally, the Warrant of Arrest issued by the Pre-Trial Chambers has already had a devastating impact on Darfur. The subsequent retaliation of the Sudan by expelling non-governmental organizations has paralyzed the United Nations humanitarian efforts in Sudan to ensure food, shelter and protection needs of 4.7 million people who rely on foreign assistance. There has been an escalating increase of insecurity through the kidnappings of aid workers in Sudan. Threats of radical groups to conduct bombing campaigns across Europe and the United States, the call of Al-Qaeda to undertake *jihad* against "the crusade" of the West against Sudan, a stalled peace process, and the 2009 elections far behind schedule, added to an increasingly ominous situation reigning in Sudan.¹⁶⁷

The Sudan also played the justice-against-peace card. The allies of the Sudanese government including states and organizations resorted to this claim to justify their position against the prosecution of the Sudanese President and other sanctions against the Sudan.

¹⁶⁵ See Luis Moreno-Ocampo, International Criminal Court, Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, Pursuant to UNSCR 1593 (2005), at 3 (2008).

¹⁶⁶ "Braced for the Aftershock", *Economist*, Mar. 5, 2009, at 66.

¹⁶⁷ Roza Pati, "The ICC and The Case of Sudan's Omar Al Bashir: Is Plea Bargaining a valid option?" (2008-2009) 15 U. C. Davis J. Int'l L. & Pol'y 256 at 325.

Payam Akhavan has critiqued the peace v. justice argument succinctly. He identifies three areas of concern in the debate. First, he notes that “power reality” is an ever-changing concept and that it is often used to justify the failure of the international community to respond to egregious international crimes, or even to provide a shield for the perpetrators of such crimes.¹⁶⁸ Secondly, he asserts that “one cannot assume that if prosecutions are a potential disincentive to peace, then impunity will necessarily be an incentive. Not only is such an approach far from realistic, it is also often oblivious to the psychology of political violence and the presumed need to negotiate from a position of strength in order to end atrocities.”¹⁶⁹ He cites the example of Foday Sankoh, the leader of the RUF in Sierra Leone, who requested amnesty to help end the civil war in his country but ended up attempting to overthrow the government and assume power. And finally, the third misconception relates to measuring the impact of tribunals in accordance with the “cause and effect” formula. Akhavan argues that it is more realistic to measure the effect of the tribunals in the context of other extant factors. He argues that “...absent victor’s justice, tribunals must remain hostage to power realities.”¹⁷⁰

In principle, it should be emphasized that peace and justice are not irreconcilable concepts. Justice is not a threat to peace. As explained in chapter 4.6, a number of states and organizations, particularly the AU and the Arab League have used this argument to shield the Sudan from the reach of international justice.¹⁷¹

Deploing the African leaders’ outcry, former UN Secretary General Kofi Annan states that “One must begin by asking why African leaders shouldn’t celebrate this focus on African victims. Do

¹⁶⁸ See Payam Akhavan, "Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism." (2009) 31.3 Human Rights Quarterly at 624-654.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Infra* notes 188, 192.

these leaders really want to side with the alleged perpetrators of mass atrocities rather than their victims? Is the court's failure to date to answer the calls of victims outside of Africa really a reason to leave the calls of African victims unheeded?"¹⁷²

Through political jockeying and prevarication, among other things, Al Bashir succeeded to a large extent in obstructing international criminal justice. As Akhavan put it

‘The romanticization of genocidal violence in the name of political realism overlooks the potential impact of tribunals on the behavior of political leaders. So long as a demagogical head of state or warlord is firmly in power, an indictment by a tribunal may merely imply the inconvenience of not being able to travel abroad and—as demonstrated by the travels of Sudan’s President Al Bashir to certain sympathetic countries despite the ICC arrest Warrants against him— even that restriction may be partially circumvented.’¹⁷³

Peskin has addressed the question why the powerful pro-ICC states allowed the Sudan to get away with its defiance and open campaign to undermine the ICC. He contends that the Sudan confidence that it will not be punished for its non-compliance and other rouge activities, is grounded on the knowledge that its consent is needed for the deployment of the UNAMID hybrid (UN/AU) forces in Darfur. Furthermore, Peskin explains that the Sudan retained the right to approve the delivery of the humanitarian relief to the vulnerable civilians in Darfur. This kind of dependence has caused strong ICC supporters such as the European Union to avoid applying pressure on Sudan to cooperate with the ICC. Peskin concludes that the UNAMID forces and its predecessor, AMIS, proved to be ineffective and failed in their basic mission of protecting

¹⁷² Kofi Annan, “Africa and the International Court”, *New York Times*, June 29, 2009.

¹⁷³ *Supra* note 168.

civilians.¹⁷⁴ The following paragraphs tackle the impact of the AU's involvement in the enforcement process.

4.6 The Negative Role of the African Union

The AU role in the Darfur crisis, particularly the enforcement of the arrest warrants against Al Bashir, is very significant. The AU has been engaged in the Darfur crisis from the early stages of the conflict and it was the only foreign force in Darfur ground until the deployment of the UN/AU hybrid forces in Darfur in October 2007.¹⁷⁵

The Constitutive Act of the AU empowers states to intervene where countries fail to protect their citizens from the scourges of internal conflicts. Article 4 (h) of the Act confirms the right of the Union to intervene in a member State pursuant to decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.¹⁷⁶

In the absence of intervention from the Security Council or the Western powers, the AU was the only foreign force in Darfur. The attention of the international community was fixed on the peace talks in Naivasha, Kenya, when the violence in Darfur broke out. Gerard Prunier asserts that the GoS had a free hand in Darfur because “as long as it showed good faith in Naivasha it could do what it wanted in Darfur.”¹⁷⁷ In the circumstances, the African Union took the decision to intervene under the mantra “African solutions to African problems”. So far, the engagements of

¹⁷⁴Victor Peskin, “The International Criminal Court, the Security Council, and the Politics of Impunity in Darfur” (December 2009) 6 2009 *Genocide Studies and Prevention* 4, 3 (December 2009) at 321.

¹⁷⁵The African Union (AU) is an intergovernmental organization with 53 member states which has been established in July, 2002. The AU was created as a successor to the Organization of African Unity (OAU). The idea of the African Union emerged in response to various concerns and threats affecting the Continent, particularly the failure of the OAU to be an effective peace broker and to address the protracted conflicts which raged the African Continent. It was formally announced at the Sirte Summit (Libya) in September 1999 and the actual establishment took place in July 2002. For further information about the structure of the AU, see generally: Samuel M. Makinda and F. Wafula Okumu, *The African Union: Challenges of Globalization, Security and Governance* (New York: Routledge, 2008).

¹⁷⁶African Union 2000. Constitutive Act of the African Union, 11 July 2000: art 4 (h).

¹⁷⁷ Gerard Prunier, *Darfur, The Ambiguous Genocide* (Ithaca, N. Y.: Cornell University Press, 2005) at 56.

the AU in the Darfur conflict have taken three basic forms, the African Union Mission in Sudan (AMIS), the African Union/ United Nations Mission in Darfur (UNAMID) and the African Union Panel on Darfur (AUDP).

When the ICC pre-trial chamber started considering Prosecutor Moreno-Ocampo's request for an arrest Warrant against the Sudanese President, the African Union called on the UN Security Council for an Article 16 suspension of the case against Al Bashir. However, that request was not heeded¹⁷⁸. In March 2009, the International Criminal Court (ICC) issued warrants for the arrest of Omar Al Bashir, the Sudanese President, for war crimes and crimes against humanity. Three months later, the African Union declared that the "AU Member States shall not cooperate in the arrest and surrender of President Omar al Bashir of Sudan."¹⁷⁹ Jean Ping, the Chairman of the Commission of the African Union, claimed that the declaration was in response to the Security Council's decision not to defer Al Bashir's indictment, as was requested by the AU. Ping stated that "if you don't want to listen to the continent, as usual, we also are going to act unilaterally."¹⁸⁰ The legal basis of the AU decision not to cooperate with the ICC in relation to the Al Bashir case was predicated on article 98 of the Rome Statute. Under that provision, the ICC may not request the surrender of a person in a manner that would require a state to act inconsistently with its obligations under international law in respect of the immunity of that person.¹⁸¹

¹⁷⁸ Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc Assembly/AU/13 (XIII), Addis Ababa, 1–3 July 2009, 8; Communiqué of the 207th Meeting of the Peace and Security Council at the Level of the Heads of State and Government, Doc PSC/AHG/COMM.1(CCVII), 29 October 2009, 5.

¹⁷⁹ *Ibid.*

¹⁸⁰ David Greenberg, "African Union Declaration Against the ICC Not What it Seems" Washington, DC: Foreign Policy In Focus, (6 August, 2009) online:

<http://www.fpif.org/articles/african_union_declaration_against_the_icc_not_what_it_seems>.

¹⁸¹ Security Council Resolution 1769, UN Doc S/RES/1769, 31 July 2007.

On the 3rd of July 2009, the African Union (AU) summit of Heads of State in Libya resolved to “...denounce the International Criminal Court (ICC) and refuse to take action on the Court’s order that should Sudan’s President Omar Al Bashir land in their territories, he should be arrested, and extradited for prosecution by the ICC, for crimes against humanity, allegedly committed in the Darfur region of southern Sudan.”¹⁸²

The Sudanese Government and the AU trumpeted the claim that the ICC is an anti-African court because it has so far only opened formal investigations on the African continent. This claim ignores the significant ways in which African states have engaged the ICC and sought international prosecutions. The reality is that three of the ICC’s six situations (Uganda, Democratic Republic of Congo, and the Central African Republic) were initiated by African state referrals to the Court. In other words, three African states willfully submitted to the jurisdiction of the ICC. The Darfur case was referred to the Court by the UN Security Council. Moreover, the ICC is bound by the Rome Statute to accept the UNSC referral and at least investigate the case in order to reach a conclusion as to whether there are sufficient grounds for prosecution.¹⁸³ Nonetheless, the resolution adopted at the end of the 13th African Union Summit of Heads of States says the AU “deeply regrets” that the United Nations ignored its previous demand to defer the arrest Warrants against President Al Bashir under Article 16 of the Rome Statute.¹⁸⁴

According to Katherine Iliopoulos, under public international law, the legal force of the AU’s Resolution regarding the non-cooperation with the ICC is questionable. An international treaty ratified by a state is binding on that state unless it decides to withdraw from it altogether. The legality of the AU’s resolution would depend on the interpretation of the Court itself of the scope

¹⁸² Andrew Heavens, “AU Ruling Means Bashir Can Travel in Africa: Sudan” *Reuters*, 4 July 2009.

¹⁸³ Articles 14 and 15 of the Rome Statute, *Supra* note 81.

¹⁸⁴ Katherine Iliopoulos “The African Union and the ICC” (10 July, 2009) Crimes of War Project, online: <<http://www.crimesofwar.org/onnews/news-darfur10.html>>.

of article 98 of the Rome Statute which on its face allows the international law obligations of States parties (such as the respect for head of state immunity) to prevail over a request for surrender by the Court.¹⁸⁵

Iliopoulos argues that the most reasonable interpretation of the Court's Statute is that Article 98 of the Rome Statute must be understood in conjunction with article 27, which specifies that no one can claim immunity before the ICC based on their official capacity. The failure of states parties to arrest the Sudanese suspects constitutes a violation of their obligation to cooperate under the Rome Statute. The Sudan is subject to Rome Statute by means of the UNSC referral. Hence, the obligation cannot be avoided. All AU states parties to the Rome Statute are under obligation to arrest and surrender the Sudanese President, Omar Al Bashir, to the ICC.¹⁸⁶

In the days following the AU's summit, Botswana appeared to be the only African state to publicly condemn the AU statement. Botswana's vice president, Mompoti Merafhe, criticized Libya for not allowing adequate debate on the matter and called on African leaders not to "try to undermine the work of the ICC simply because one head of state has been indicted by the Court."¹⁸⁷

In the South African Institute for Security Studies Position Paper on the AU and article 16 of the Rome Statute, the authors contend that for the AU's argument for deferral of Al Bashir prosecution under article 16 to be cogent, a number of points must be demonstrated. These points include whether the Sudan has made any progress in the direction of domestic prosecution of Darfur crimes perpetrators to warrant the deferral. Second, due to the abhorrent nature of the crimes committed in Darfur, the burden on the AU is very heavy to prove that the deferral serves

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ "Botswana Condemns AU Resolution on Sudan's Bashir," Reuters, 7 July 2009.

the interests of justice and peace better than proceeding with the prosecution. That includes whether there is a peace process in the Sudan and how credible it is. Third, since combating impunity is the driving force behind the creation of the ICC, a firm and reliable undertaking from the Sudan regarding this end is absolutely necessary. Again, the test here is more than lip service and dishonored commitments.¹⁸⁸ Apparently, the Sudan is far from meeting all the above criteria and it turned out that the AU approached the UNSC with meager political grounds to support its call for deferral.

The AU claims that the ICC involvement in the Darfur crisis would have an adverse impact on the alleged peace process. However, since the issuance of the AU's Resolution to prevent cooperation with the Court, the political and humanitarian situations have hardly improved. In fact, the flawed Abuja peace Agreement of 2006, which failed to persuade the two major rebel groups in Darfur to join, has totally collapsed after the sole Darfurian signatory, Arko Minni Minnawi, abandoned the peace arrangement and declared that his movement has already started fighting with the Sudanese armed forces.¹⁸⁹

In February 2009, when it became clear the ICC would issue arrest warrants for President Al Bashir, a high-level African Union panel was formed to tackle the task of developing a peace and justice formula. The decision of the Peace and Security Council to establish the Panel was confirmed by the Assembly of the Union.¹⁹⁰ The Panel was required to examine the situation in Darfur and to make recommendations on how best the issues of accountability and combating

¹⁸⁸ Akande, Dapo, Du Plessis, Max and Jalloh, Charles C., "An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court" (October 27, 2010). Institute of Security Studies Position Paper, Pretoria, South Africa, October 2010; Oxford Legal Studies Research Paper No. 6/2011, online: <SSRN: <http://ssrn.com/abstract=1698839>>.

¹⁸⁹ "Minnawi announces withdrawal from Abuja Agreement", *Radio Dabanga* (February 4, 2011) online: <<http://www.radiodabanga.org/node/9223>> .

¹⁹⁰ Assembly of The African Union, Twelfth Ordinary Session, 1-3 February 2009, Addis Ababa, Ethiopia, Assembly/AU/1(XII) Rev.3, online: <<http://www.iss.co.za/uploads/ASSEMBLYAGENDA/JAN09.PDF>>.

impunity, on the one hand, and reconciliation and healing, on the other, could be addressed effectively and comprehensively, within the context of the peaceful resolution of the conflict in Darfur.¹⁹¹ The eight-member African Union High Level Panel on Darfur (AUPD), led by former South African President Thabo Mbeki, began its work in March 2009 and submitted its recommendations in early October 2009, on a possible breakthrough in the Darfur crisis. The ICC indictments against the Sudanese President were handed down in March 2009.¹⁹²

The timing of the AUPD's formation raised suspicion that the Mbeki-led panel was nothing more than a cover-up attempt. Mbeki denied this accusation, but Ahmed Maher El Sayed, a former Egyptian Foreign Minister and one of the AUPD members, made remarks in early November 2009 to the contrary. He indicated in an interview with an Egypt-based newspaper that the AUPD will not allow the prosecution of the Sudanese President. He also provided that the goal of the Panel was to find a way out of the ICC dilemma.¹⁹³

On the 8th of October 2009, the AUPD submitted its final report and the AU Peace and Security Council (PSC) endorsed the report the same month and established the High Level Implementation Panel (AUHIP) to execute its findings, comprising Mbeki and two other African ex-presidents.¹⁹⁴ In its recommendations, the AUPD called for a hybrid court with participation of foreign judges to try war crimes suspects, as well as changes to Sudanese laws. The Sudanese government rejected the proposal and emphasized the need to preserve the independence of the Sudanese judiciary and to conform to the constitution on the matter. To date, the AUPD recommendations have not been adopted by the government of the Sudan and they were also not

¹⁹¹ African Union High-Level Panel on Darfur (AUPD), online: < <http://www.darfurpanel.org/>>.

¹⁹² "Analysis: Sudan awaiting Mbeki's panel report on Darfur" *Sudan Tribune* (17 September 2009), online : < <http://www.sudantribune.com>>.

¹⁹³ "Mbeki 'outraged' over his panelist remark on Darfur mission" *Sudan Tribune* (10 November 2009), online: < <http://www.sudantribune.com/spip.php?article33074>>.

¹⁹⁴ African Union, Report of the African Union: High Level Panel on Darfur (AUPD), 29 October 2009, PSC/AHG/2(CCVII), online:<<http://www.unhcr.org/refworld/docid/4ccfde402.html>>.

welcome by Darfur rebel groups.¹⁹⁵ The hybrid court proposed by the AUPD deserves deeper analysis; however, it is beyond the scope of this thesis.

Subsequently, Mbeki showed little enthusiasm for implementing the recommendations of his panel. According to the Sudan Tribune, Mbeki stated in a press conference that “We should remember that these proposals, endorsed by the AU, are matters that are still going to be negotiated by the Sudanese themselves, so when in the negotiating process, all of the parties negotiating peace in Darfur must consider these proposals.”¹⁹⁶

As explained earlier, the AU’s decision not to cooperate with the ICC in the arrest and surrender of Al Bashir is based, *inter alia*, on the immunity of Al Bashir as a Head of State and secondly on essential state interests. In other words, the AU worries that a prosecution of the incumbent Sudanese president could impede the prospects for peace. The question of the head of state immunity is dealt with in chapter 3 of this thesis. In the following lines the AU argument justifying its position on the Al Bashir arrest warrants will be examined and analyzed.

One of the controversial questions which have a bearing on the case of Al Bashir, is the applicability of the obligation to cooperate with the international criminal tribunals on international organizations. The difficulty is that some member states of international organizations are not parties to the Statute of the ICC and, therefore, are technically not bound to cooperate with it. This argument is embodied in article 86.6 of the Statute which provides that “...the Court may ask any intergovernmental organization to provide information or documents” and “...may also ask for other forms of cooperation and assistance which may be agreed upon

¹⁹⁵ *Ibid.*

¹⁹⁶ “Mbeki softens stance on Darfur hybrid court proposal” *Sudan Tribune* (17 December 2009) online: <<http://www.sudantribune.com/spip.php?article33484>>.

with such an organization in accordance with its competence and mandate."¹⁹⁷ The relevant cooperation provisions of the Statutes of both the ICTY and the ICTR do not mention any subject of international law other than states.¹⁹⁸

In the *Simic* case, the ICTY extended the scope of article 29 of its Statute to include international organizations by holding that it had jurisdiction to issue a binding order to disclose information to NATO's Stabilization Force (SFOR).¹⁹⁹ Bearing in mind that the ICTY is created by the UN and the nature of the cooperation requested in the *Simic* case, it is safe to conclude that the ICC has no legal grounds to demand cooperation from international organizations.

Akande observes that the AU decision to no longer cooperate with the ICC in arresting Al Bashir was directed to all the AU member states, despite the fact that more than thirty African states are Rome Statute states parties.²⁰⁰ That raises a question about the legality of the AU decision and its binding effect on states which are members of both the AU and the ICC. Akande contends that the AU realized the legal dilemma created by the decision and he suggests that the AU Assembly's July 2010, Kampala decision requested its member states to "...balance where applicable, their obligations to the AU with their obligations to the ICC."²⁰¹ It is important to note that the AU member states are also bound by the UNSC Resolution 1593 which conferred jurisdiction on the ICC with respect to the Darfur situation.

Sluiter questioned the essence of the AU justification for their decision to halt cooperation with the ICC. He maintained that "Leaving aside the merits of such claims [that the arrest of Al Bashir

¹⁹⁷ Article 86(6) of the Rome Statute, *Supra* note 81.

¹⁹⁸ Alexander Zahar & Goran Sluiter, *International Criminal Law* (Oxford: Oxford University Press, 2008) at 470.

¹⁹⁹ Decision on Motion for Judicial Assistance to be Provided by SFOR and Others, *Prosecution v. Simic et al*, Case No. IT-95-9-T, ICTY, T. Ch. III, 18 October 2000.

²⁰⁰ *Supra* note 141.

²⁰¹ *Ibid.*

will hamper the peace process in the Sudan], it will be examined whether the risks of destabilization, jeopardizing peace or other perceived essential interests could justify refusal to arrest Al Bashir. Secondly, a decision by the AU, obliging its members not to arrest Al Bashir, could be a lawful ground to refuse compliance with the arrest Warrants.”²⁰² Sluiter asserts that the Rome Statute does not recognize any of the aforementioned AU justifications as acceptable grounds for refusal to cooperate.

With full awareness of the implications of losing his office as head of state, Al Bashir mobilized all the government apparatus to secure his triumph in the rigged elections of 2010. Apart from the secession of the southern Sudan, which took place after Al Bashir's doubtful win, the bloody *Jihad* war waged by the Al Bashir regime since 1989, the ongoing war and egregious crimes committed in Darfur, Southern Kordofan and Southern Blue Nile provinces in the Sudan, are indications of how Al Bashir is a serious threat to the peace and security.

This chapter demonstrates that the AU's engagement in the Darfur conflict is not only ineffective, but also counter-productive to the enforcement of the arrest warrants against Al Bashir. The issuance of the AU's resolution to prevent cooperation with the Court is one of the major contributors to the failure to apprehend the indicted Sudanese President. Several states parties defended their failure to arrest Al Bashir, when he visited them, on the basis of this AU resolution. The list includes Chad, Kenya and Malawi. The AU's decision is indeed a serious obstruction to the enforcement of international criminal justice.

Desmond Tutu, former Archbishop of the Anglican Church in South Africa, published an impassioned article entitled *Will Africa Let Sudan Off the Hook?* Desmond Tutu stressed that

²⁰² Goran Sluiter, “What Should the ICC Do About the Darfur Situation” (Topic for January 2011-May 2011), Darfur Debate, Human Rights International Law Online Forum, UCLA Sanela Diana Jenkins Human Rights Project, online: <<http://uclalawforum.com/darfur#Sluiter>>.

“African leaders should be the staunchest supporters of efforts to see perpetrators brought to account. Yet rather than stand by those who have suffered in Darfur, African leaders have so far rallied behind the man responsible for turning that corner of Africa into a graveyard.”²⁰³ He undermined the imperialist conspiracy theory and argued that “To imply that the prosecution is a plot by the West is demeaning to Africans and understates the commitment to justice we have seen across the continent. It's worth remembering that more than 20 African countries were among the founders of the International Criminal Court, and of the 108 nations that joined the court, 30 are in Africa.”²⁰⁴

This Chapter has discussed the various factors that impacted the failure to enforce the arrest warrants against Al Bashir. The following chapter examines whether Al Bashir will end up in the dock. Furthermore, it explores the elements, instruments and mechanisms that could assist in making this possible.

203 Desmond Tutu, “Will Africa Let Sudan Off The Hook?” New York Times, March 2, 2009.

204 *Ibid.*

Chapter 5. The Prospects of Enforcement

5.1. Do the *ad hoc* international criminal tribunals offer a learning experience to the ICC in respect of the enforcement of the arrest warrants?

International criminal justice has made great strides since the international military tribunals set up in Nuremberg and Tokyo after World War II. The International Criminal Tribunal for the former Yugoslavia (ICTY) was created in accordance with Chapter VII of the UN Charter to prosecute the international crimes committed during the war in the former Yugoslavia. Security Council Resolution 827 was passed in 1993 for that purpose.²⁰⁵

When the United Nations acknowledged that genocide and other international crimes were committed in Rwanda in 1994, the UNSC created the International Criminal Tribunal for Rwanda (ICTR) in accordance with Resolution 955.²⁰⁶

One of the major differences between the *ad hoc* tribunals and the ICC is the cooperation scheme which is described as vertical in the *ad hoc* regime. The situation of a recalcitrant state refusing to cooperate with an international criminal tribunal undermines the significance of the distinction between horizontal and vertical systems. Goran concludes that in dealing with intractable states that are unwilling to cooperate “the challenge to the authority of the Tribunal in these instances clearly was not one that could be resolved internally by appealing to normative hierarchies, but had to be referred to external authorities.”²⁰⁷ That leads us to the point of the need for the supportive political power for the proper functioning of international criminal courts and tribunals. Such political support could be lent by the Security Council, powerful states, regional

²⁰⁵ Security Council Resolution 827 (1993), UN Doc. S/RES 827 (1993).

²⁰⁶ Security Council Resolution 955 (1994), UN Doc. S/RES 955 (1994).

²⁰⁷ Dr. Goran Sluiter, *The Surrender of War Criminals to the International Criminal Court*, (2003) 25 I Loy. L.A. Int'l & Comp. L. Rev. 605 at 166.

organizations or other political institutions that have the leverage and influence to call for and support an effective enforcement regime as will be discussed hereunder.

Despite the relatively good record of suspects' apprehension achieved by the *ad hoc* international tribunals, they encountered, as well, severe resistance to the enforcement of their decisions. As indicated by Victor Peskin, the nature and level of cooperation with the tribunals was determined by several socio-political parameters in the state where enforcement was sought.²⁰⁸ This cooperation deficiency has been highlighted by Peskin in his note that:

While the ICTY and ICTR have often been stymied by non-cooperation, the states of the former Yugoslavia and Rwanda have frequently sought to portray themselves as cooperative in order to avoid international condemnation. When these states have been accused of non-cooperation, they have often advanced good faith reasons for their behavior, such as a lack of state capacity to locate and arrest fugitives.²⁰⁹

Tracey Gurd suggests that the ICC might learn from the scenarios which led to the arrest of what she calls "the three big fish", meaning the three leaders indicted by *ad hoc* international criminal tribunals, namely: Slobodan Milosevic (former president of Yugoslavia), the Bosnian Serb leader Radovan Karadzic, and Charles Taylor (former Liberian President). She maintains that the apprehension of Milosevic was the direct result of the political influence of the United States. The consistent financial pressure applied by the US, she argues, forced Serbia to transfer Milosevic to The Hague. Mention was also made of the impact of the journalists and the civil society in the former Yugoslavia and other states.²¹⁰

²⁰⁸ Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (United States: Cambridge University Press, 2008) at 9.

²⁰⁹ Victor Peskin. "The International Criminal Court, the Security Council, and the Politics of Impunity in Darfur" (2009) 43 *Genocide Studies and Prevention* at 304-328. online at: <http://muse.jhu.edu/journals/genocide_studies_and_prevention/v004/4.3.peskin.pdf>.

²¹⁰ Tracey Gurd, *Arresting the "Big Fish": Lessons On States Cooperation for the International Criminal Court*, Aegis Trust 2009, online : <[http://www.reliefweb.int/rw/lib.nsf/db900sid/ASAZ-8BKEDX/\\$file/Aegis_Jan2009.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/ASAZ-8BKEDX/$file/Aegis_Jan2009.pdf?openelement)>.

In May 1999, the former President of Yugoslavia became the first sitting head of state to be indicted by an international criminal court (the ICTY). He was indicted on four counts of crimes against humanity and war crimes for atrocities committed in Kosovo in 1999. His arrest and surrender took place despite the repeated Serbian refusal to cooperate with the ICTY and the worries of the ICTY's Prosecutor about the lack of necessary mechanisms to arrest Milosevic. The confluence of factors which led to the arrest includes the defeat of Milosevic in the elections against Kostunica and the subsequent popular protests against the former president. It also includes the effort of the congressional staffers who worked for US senators which played a pivotal role in the adoption of the McConnell-Leahy Law, which introduced new conditions for Serbia to qualify for US Aid and support for obtaining help from international financial institutions. One of the essential conditions imposed upon Serbia was the obligation to take necessary and significant steps to arrest and surrender the ICTY's indicted suspects. The cooperation required by the conditions included access for investigators and provision of documents. A deadline was fixed for meeting the conditions. One day after the deadline Milosevic was arrested in Belgrade, though no transfer to the Hague was made. The political pressure from the US continued and the US State Department threatened to boycott the international donors' conference for Serbia, scheduled for June 29, 2001, unless Milosevic was transferred to The Hague. The transfer was made on June 28, 2001. The US attended the Serbia donation conference and the amounts pledged were paid.²¹¹

The second leader discussed by Gurd is Radovan Karadzic. The arrest of the Bosnian leader took place in July 2008 as a result of the political pressure of the European Union. Karadzic was indicted by the ICTY in 1995. He was considered one of the most wanted suspects for 13 years

²¹¹ *Ibid.*

before his arrest. One of the factors that contributed to the enforcement of the arrest warrant was the election of a new pro-western government in Serbia. However, the most important element which facilitated the arrest was the EU's condition that the arrest and transfer of Karadzic was a pre-requisite for Serbia's accession to the European Union. The use of conditionality by the EU was a significant tool to sway the state which was reluctant to cooperate. Karadzic has been charged with 11 counts of genocide, crimes against humanity and war crimes, including his alleged role in the Srebrenica massacres which took place in 1995. Karadzic was arrested in a suburb of Belgrade and was transferred to the ICTY in The Hague two days later.²¹²

The arrest of Charles Taylor, the former president of Liberia, is the last example provided by Tracey Gurd. Taylor was indicted by the Special Court for Sierra Leone (SCFSL) in 2003. When the indictment was announced, Taylor was in Ghana attending peace talks about the Liberian conflict. He left Ghana immediately, fearing his arrest, and back to Liberia. Later, Nigeria agreed to host him. It was widely understood that the Nigerian offer came as a result of a brokered deal including the US, UN, AU and ECOWAS (the Economic Community of West African States). Taylor settled for sometime in Nigeria but the call to bring him to justice was kept alive by NGOs, US Congressmen and the European Parliament.²¹³

Nigerian businessmen affected by the conflict in Liberia also questioned Taylor's asylum in Nigeria and requested his transfer to the Special Court for Sierra Leone.²¹⁴ A boost was given to the extradition demand when Ellen Johnson-Sirleaf was elected President of Sierra Leone. The fear of Taylor's return to Sierra Leone to destabilize the newly elected government prompted the

²¹² *Ibid* .

²¹³ "Pressure to bring Charles Taylor to trial", 19 September 2005, *Amnesty International Deutschland*, online: <http://webcache.googleusercontent.com/search?q=cache:VERDEqLYk_sJ:www.amnesty-liberia.de/news/340032005.php+Charles+Taylor+Pressures+from+Congressmen+and+the+European+Parliament+helped+justice&cd=1&hl=en&ct=clnk&gl=ca&source=www.google.ca>.

²¹⁴ "Bringing Justice: The Special Court for Sierra Leone", September 7, 2004, *Human Rights Watch*, online: <<http://www.hrw.org/en/node/11983/section/10>>.

US to adopt a conditionality standard similar to the one applied in the Milosevic situation. Nigeria was put under severe pressure to arrest and surrender Charles Taylor to appear before the SCSL. Obasanjo, the then Nigerian President, was scheduled to hold a meeting with US President George W. Bush early March, 2006. The transfer of Charles Taylor was added to the agenda and the Nigerian President answered that he would extradite Taylor only if a request was received from an elected government. The Request was made by the Liberian elected President and 20 days later the Nigerian President accepted the request. By that time Taylor went missing from his villa in Nigeria. He was caught by the Nigerian authorities on March 29, 2006, while he was trying to cross the Cameroon border in a car full of US dollars and Euros. He was taken to Monrovia without delay. The UNMIL forces secured his arrest in accordance with UNSC Resolution 1638 passed in November, 2005. The Resolution empowered UNMIL to “apprehend and detain former President Charles Taylor in the event of his return to Liberia and to transfer him to or facilitate his transfer to Sierra Leone for prosecution before the Special Court for Sierra Leone.”²¹⁵

A helicopter took Taylor to Freetown where he was surrendered to the Special Court for Sierra Leone. Furthermore, there was a serious concern that political unrest might result if Taylor was tried in Sierra Leone. Accordingly, the Liberian President requested that Taylor be tried in the Hague. The Dutch government asked for a UNSC resolution authorizing the transfer and in response to the request, UNSC Resolution 1688 was passed in June, 2006, accordingly.²¹⁶ Gurd concludes that “it is possible to achieve cooperation even in seemingly hopeless cases when an

²¹⁵ Security Council Resolution 1638 (2005), U.N. Doc S/RES/1638(2005).

²¹⁶ Security Council Resolution 1688 (2006), U.N. Doc S/RES/1688(2006).

effective strategy, adaptive to changing political and economic circumstances, is implemented by the tribunal and a powerful and diverse set of allies.”²¹⁷

Although the aforementioned scenarios occurred in different contexts and circumstances; nevertheless, they inform the case of Darfur. Unfortunately, this pattern of political pressure has not been exercised in the case of Darfur. The arrest of the abovementioned three leaders was only secured after they had been removed from office or stepped down from power. In other words, the trials commenced when they were former heads of state. However, there are several lessons to be learned from them. First, they prove that it is actually possible to arrest indicted heads of state, no matter how they hid or resisted arrest. Second, they succeeded in surmounting the impasse of the head of state immunity. It is true, as indicated above, that the arrests took place after the leaders were stripped of power, however, the successful arrests contributed significantly to the erosion of the heads of State immunity under customary international law. Third, the arrests reinforce the importance of the political support and pressure on the arrest of indicted heads of state. They demonstrate that new norms of international law are emerging, and tools, such as political and diplomatic pressure, sanctions and use of military force, are indispensable for this transition to ending impunity. It is noteworthy that the role of NGOs and international civil society has been enormously favorable²¹⁸. The use of economic sanctions to facilitate cooperation for the enforcement international criminal justice may be successful to break a state's resistance especially where such state is economically fragile and incapable of self-sustenance and where there is absence of support from a regional body.

²¹⁷ *Supra* note 210.

²¹⁸ Amnesty International, International Crisis Group, Human Rights Watch, Save Darfur and many other international, regional and domestic organizations contributed tremendously to unveiling the enormity of the humanitarian crisis of Darfur. Several Humanitarian agencies have provided and are still providing essential services to the IDPs and other darfurian refugees in Sudan and Chad.

The reasons for the failure to arrest Al Bashir have been considered in chapter 4 of this thesis. However, the above survey reveals that one of the most significant factors in the enforcement process is the power politics of the UN Security Council and other regional bodies. The author asserts that since the eruption of the violence in Darfur, no serious political pressures have been exerted on the government of the Sudan.

5.2. The implications of invoking the Genocide Convention on the execution of the arrest warrants

The Sudanese president, Omar Al Bashir, was first indicted by the ICC in March 2009. The charges against Al Bashir at that time included seven counts of war crimes and five counts for crimes against humanity. In July, 2010, the ICC issued a second arrest warrants against Al Bashir, adding genocide to the list of charges.²¹⁹

The perpetration of genocide crimes in Darfur was first brought to the attention of the UN in September 2004. The United States Secretary of State Colin Powell urged the UN Security Council to initiate a full investigation into the Darfur conflict. He asserted that genocide has occurred and may still be occurring in Darfur. The creation of the International Commission of Inquiry on Darfur followed shortly.²²⁰

The term “intent” in the definition of genocide was subject to different interpretations but it has been widely accepted that it amounts to *dolus specialis*.²²¹ The UN International Commission of Inquiry on Darfur excluded genocide from the list of the crimes committed in Darfur based on

²¹⁹ ICC-CPI-20100712-PR557, Press Release: 12.07.2010 “Pre-Trial Chamber I issues a second warrant of arrest against Omar Al Bashir for counts of genocide, online: < <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr557?lan=en-GB>>.

²²⁰ Secretary of State Colin L Powell, Text of Colin Powell Testimony to Senate Foreign Relations Committee, Washington DC, 9 September 2004. online: <www.voanews.com/english/archive/2004-09/a-2004-09-09-8-Text.cfm>.

²²¹ The ICTR defines *dolus specialis* as “... this specific intent that distinguishes the crime of genocide from the ordinary crime of murder.” *Kayishema* (ICTR-95-1-T), Trial Chamber II, 21 May 1999. Para 91.

the lack of adequate evidence of “intent”.²²² Likewise, the Pre-trial Chamber of the ICC struck out genocide from the initial list of the Prosecutor’s charges for the same reason. However, subsequently, the Appeals Chamber reversed the decision and the charge was allowed. It was held that the Pre-Trial Chamber's standard was higher and more demanding than what is required under the Rome Statute, and secondly, that the Pre-Trial Chamber's interpretation of "reasonable grounds" standard of article 58(1)(a) of the Rome Statute would impose on the Prosecutor a requirement of proof "beyond reasonable doubt".²²³ This article holds that the Pre-Trial Chamber "shall, on the application of the Prosecutor, issue a warrant of arrest of a person if there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court."²²⁴ To date, the genocide charge has not facilitated the enforcement of the arrest warrants against Al Bashir, and the Sudanese President is still at large. This chapter examines the impact of the genocide charge and the consequent invocation of the Genocide Convention on the prospects of the arrest and surrender of Al Bashir.

In the *Akayesu* case, the ICTR held that:

“The scale of the atrocities committed, their general nature, in which region or country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.”²²⁵

²²² Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004 (25 January 2004) Para’s 489-489, UN Doc S/2005/60. online: <www.un.org/News/dh/sudan/com_inq_darfur.pdf>.

²²³ ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (n 12) para 204(v), 39, 33.

²²⁴ Article 58 (1)(a) of Rome Statute, *supra* note 81.

²²⁵ Prosecutor v. Akayesu, Judgment, ICTR-96-4-T (2 September 1998), para. 477.

Goran Sluiter has examined the impact of invoking the Genocide Convention on the prospects of the arrest and surrender of Al Bashir.²²⁶ Citing the ICJ judgment on the application of the Genocide Convention between Bosnia and Serbia,²²⁷ Sluiter contends that the ICC can be identified as an “international penal tribunal” within the meaning of Article VI of the Genocide Convention. In the above judgment, the ICJ decided that “Serbia had violated its obligation to punish under the Convention by having failed to transfer Ratko Mladic for trial to the ICTY, and thus having failed to cooperate fully with the Tribunal.”²²⁸

Article VI of the Genocide Convention provides:

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.²²⁹

Article VI is the result of political compromise to accommodate divergent views on the role and scope of international justice in the post World War II era. The result is the non-compulsory international tribunal embedded in article VI of the Convention.²³⁰

Sluiter argues that, if the ICC qualifies for the role of “international penal tribunal” as stipulated in the Genocide Convention :

The ICC could directly hold accountable contracting parties to the Genocide Convention for violation of Article VI. The practical effect would not be that important, because the ICC could not make use of relevant mechanisms under the Genocide Convention, such as Article IX, in case a contracting party violated its obligations under Article VI; rather the ICC is confined to its own mechanisms

²²⁶ Goran Sluiter, “Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case, *J Int Criminal Justice*” (2010) 8 (2): 365-382. online: <<http://jicj.oxfordjournals.org/content/8/2/365.full.pdf+html>>.

²²⁷ ICJ, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), judgment of 26 February 2007, I.C.J. Reports 2007.

²²⁸ *Ibid* at 369.

²²⁹ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277 (entered into force 12 January 1951), Article VI.

²³⁰ William Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), at 368.

under the ICC Statute, which aim at ensuring compliance with the duty to cooperate.²³¹

Sluiter framed his conception that the genocide charge against President Al Bashir enhances and widens the cooperation system under the Rome Statute in four points. First, he claims that the ICC, with the invocation of article VI of the Genocide Convention, is well suited to assume the duty of combating impunity for genocide and thus acquire new jurisdiction over the state parties of the Convention including Sudan. Second, he explains that the cooperation regime of the Genocide Convention, though very simple compared to the ICC's system, can expand the scope of cooperation to include states which are not members of the ICC but are parties to the Genocide Convention. That serves, he provides, to tighten the net around Al Bashir. Third, he observes that since the Sudan is a party to the Genocide Convention, the level of cooperation required from its government is very high. Therefore, chances for challenging the authority of the ICC will be less with the emphasis on its duties under the Genocide Convention. Fourth, for the purposes of the Genocide Convention, the official capacity of the genocide suspects, including heads of state, does not confer immunity upon them. According to Sluiter's opinion above, the arrest and surrender of Al Bashir to the ICC in compliance with article VI does not contradict any rule of international law.²³²

In the following lines the obligations imposed by the Genocide Convention on the Sudan, the ICC states parties and the ICC non-states parties who are members of the Genocide Convention, as regards the enforcement of arrest warrants against Al Bashir, will be discussed and analyzed.

Since the Sudan is a member of the United Nations, it is bound by UNSC Resolution 1593, referring the Darfur situation to the ICC. As discussed earlier, this Resolution recognizes the ICC

²³¹ *Supra* note 226.

²³² *Ibid.*

as the “international penal tribunal” within the meaning of Article VI of the Genocide Convention. Accordingly, the Sudan’s acceptance of the ICC’s jurisdiction is based on its obligations as a UN member²³³ and its ratification of the Genocide Convention. As regards the Sudan, this conclusion may not be productive, since the Sudanese government is not expected to change its position and turn over Al Bashir to the ICC based on its obligations under the Genocide Convention. However, the invocation of the Genocide Convention constitutes an extra obligation on the Sudan and could be critical for future UNSC measures and possible forceful action against the Sudanese government.

The ICC states parties are under obligation as per article I of the Genocide Convention to punish acts of genocide.²³⁴ This obligation is also brought about by customary international law and it arises when the genocide suspect is present at the territory of the member state. The Genocide Convention provides that the appropriate tribunal for the trial of genocide perpetrators is either the parties’ own domestic courts or the “international penal tribunal”, which is embodied by the ICC at the moment by the effect of the UNSC Resolution 1593. It appears from the above that the ICC members who are also parties to the Genocide Convention are under a legal obligation to arrest and surrender genocide suspects to the ICC, failing the suspect’s prosecution in the courts of the state where the genocide crimes were committed. Such obligation is triggered by the UNSC Resolution 1593 which referred the Darfur situation to the ICC.

ICC non-states parties who are members of the Genocide Convention are deemed to have accepted the jurisdiction of the ICC as the “international penal tribunal” contemplated by the Genocide Convention. This is based on the decision of the ICJ on the application of the

²³³ According to Article 25 of the UN Charter UNSC’s decisions must be accepted by all UN members.

²³⁴ Article I of the Genocide Convention, *Supra* note 229.

Genocide Convention between Bosnia and Serbia,²³⁵ and the UNSC Resolution 1593. The Resolution is deemed to have been accepted by ICC non-states parties at least for the purposes of the competence of the Court to prosecute Darfur international crimes including genocide. Sluiter²³⁶ and Akande²³⁷ argue that the duty of the non-state parties to cooperate in connection with Al Bashir genocide charge originates from the cooperative regime enshrined in the Genocide Convention. They concur on the opinion that no further international law rules or authority is required to establish their obligation to cooperate²³⁸. Heads of state immunity, which is the most invoked justification for refusing to cooperate in the arrest and surrender of Al Bashir, is totally irrelevant when it comes to the implementation of the Genocide Convention.

Article IV of the Genocide Convention provides that “Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”²³⁹ The Convention is applicable to all persons charged with genocide and there is no exception based on the official capacity of the suspect. The activation of the Genocide Convention in the case of the ICC genocide charge against Al Bashir provides a fresh ground for the enforcement of the ICC arrest warrants against Al Bashir.

If the invocation of the Genocide Convention led to breaking the impasse of Al Bashir prosecution, the impact of this development on the image and efficacy of the ICC can be quite enormous. Moreover, such invocation could bring into play powerful states such as US and China, since both states have ratified the Genocide Convention. With this kind of development

²³⁵ *Supra* note 221.

²³⁶ Göran Sluiter, “Darfur Question,” *Supra* note 202.

²³⁷ Dapo Akande, “Darfur Question,” *Supra* note 202.

²³⁸ *Ibid.*

²³⁹ Article IV of the Genocide Convention, *Supra* note 229.

the ICC will circumvent the cooperation deficit created by Resolution 1593 exclusion of non-states parties from the obligation to arrest and surrender the Sudanese president.

William Schabas adopts a different opinion on the impact of the genocide charge against Al Bashir. He believes that the Genocide Convention does not entail any duty on the part of the ICC non-states parties to cooperate with respect to genocide charges against Al Bashir. In one of his arguments, Schabas states that “In any event, no obligation to prosecute under the Genocide Convention arises if genocide has not in fact been established. The insistence of the Prosecutor and the holding by Pre-Trial Chamber 1 that there are ‘reasonable grounds to believe’ genocide has been committed must be weighed against much authority to the contrary.”²⁴⁰ It’s important to examine this argument which challenges the legality of using the Genocide Convention to secure the arrest and trial of Al Bashir. Schabas maintains that what triggers the Genocide Convention is the establishment of genocide, rather than a charge of genocide. In his words “It cannot be said that a state has violated its obligations to punish the crime of genocide if in fact genocide has not been committed. Only if and when this is established can there be a breach of the Convention.”²⁴¹ At the outset, the Genocide Convention is not only about genocide punishment. It provides, *inter alia*, for genocide prevention. Second, The Genocide Convention is not about the crime of genocide only. It covers genocide and “any other acts”, as stipulated in article III of the Convention. Such acts include:

1. Conspiracy to commit genocide;
2. Direct and public incitement to commit genocide;
3. Attempt to commit genocide;

²⁴⁰ William Schabas, “Darfur Question,” *Supra* note 202.

²⁴¹ *Ibid.*

4. Complicity in genocide.²⁴²

Therefore, as a matter of law, there can be a breach of the Genocide Convention without the establishment of genocide; otherwise, how can the member states “prevent” an “established” or “committed” genocide? Moreover, the crime of “attempt to commit genocide”, under Article 3 of the Convention, does not require the “establishment” of genocide. However, discussing such aspects of the Genocide Convention in detail is beyond the scope of this thesis.²⁴³

It is imperative to demonstrate the inaccuracy of the statement that the obligations under the Genocide Convention cannot be effective unless genocide is “established” or “committed”. Two credible authorities support this view; first, article VI of the Genocide Convention, which provides that “Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”²⁴⁴ This article refers explicitly to “charged persons” without qualifying this by any specific level of establishment of genocide. Consequently, the obligation of member states is triggered as soon as charges are issued. It goes without saying that a competent international tribunal may decide whether genocide has taken place or not at any time during the trial. However, until that happens and as long as genocide charges have been framed, there are little grounds to deny the authority of the ICC to invoke the provisions of the Genocide Convention in the case of Al Bashir, on the basis that some persons are skeptical of the occurrence of genocide.

²⁴² Article III of the Genocide Convention, *Supra* note 229.

²⁴³ *Ibid.*

²⁴⁴ Article VI of the Genocide Convention, *Supra* note 229.

The second authority is the ruling of the ICJ in the *Bosnia v. Serbia* case, where the Court held that Serbia had violated its obligations under the Genocide Convention by failing to transfer Ratko Mladić to the ICTY, where he was charged with genocide.²⁴⁵ The ICJ did not consider the issue of the occurrence of genocide separately, and then use its finding to decide whether an obligation under the Genocide Convention has been violated.²⁴⁶

Schabas does not support the application of the Genocide Convention in Al Bashir case until genocide has been “established” or “committed”. He rejects the genocide charges laid by the ICC which he recognizes as a competent international tribunal within the meaning of Article VI of the Genocide Convention.²⁴⁷ While he rejects genocide charges pressed by a competent international court, Schabas, evidently, accepts without questioning the finding of the UN Darfur inquiry commission, and use it as an evidence to support his argument that genocide has not been established.²⁴⁸ On this point, Schabas comments that “...it is worth recalling that the Commission of Inquiry established pursuant to a request from the Security Council did not conclude, in its January 2005 report, that genocide had been committed.”²⁴⁹ Juxtaposing Schabas’s contrasting conclusions drawn from the Commission’s recommendations and the ICC’s charges, reveals that, at best, Schabas does not subject his sources to an equal level of scrutiny. The question which arises in this respect is that: what makes the ICC, at least from a procedural point of view, less authoritative than the investigation commission?

The “attempt to commit genocide” is a punishable act under the Genocide Convention²⁵⁰ and the “direct and public incitement to commit genocide”²⁵¹ is a crime under the Genocide Convention,

²⁴⁵ *Supra* note 225.

²⁴⁶ *Ibid.*

²⁴⁷ William Schabas, “Darfur Question,” *Supra* note 202.

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ Article III (d) of the Genocide Convention, *Supra* note 229.

as well. These crimes cannot be reconciled with Schabas argument that no violation of the Genocide Convention can take place until genocide is committed or established. Apparently, “attempt” can take place without actual perpetration of genocide. It is noteworthy that Schabas avoids addressing the question how genocide could be established or committed. The answer to this question would ultimately lead to the role of the competent tribunal in deciding whether genocide has been committed at all or not. Evidently, this role is not the exclusive domain of the UNSC. As the referral of the Darfur situation to the ICC reveals, the UNSC has not resolved that the atrocities committed in Darfur amounts to genocide. However, the ICC, which assumed jurisdiction by referral from the UNSC, investigated the allegations of genocide and reached a conclusion which led to the genocide charge against Al Bashir.

It is no secret that political interests and motivations were behind the failure to recognize The Rwandan genocide. The same applies to Darfur genocide, where the United Nations, the international community, the African Union, the Arab League and the Commission of Inquiry on Darfur (ICID) shied away from using the term genocide. The United States called it genocide but remained unwilling to take action. Genocide is “A preemptory norm (*jus cogens*), giving rise to an *erga omnes* obligation (obligation flowing to all)”²⁵². However the response of the world community to such an “odious scourge” is rather ambivalent. Unless foreign national interests of major international powers are being threatened, genocide and other heinous international crimes will remain “humanitarian” issues and will not provoke serious response.

Sexual violence in Darfur has been established by various credible investigations. One of the reports provides that “Rape was so ubiquitous and systematic in Darfur that it appears to be an

²⁵¹ Article III (c) of the Genocide Convention,*Supra* note 229.

²⁵²Nsongurua Udombana, “Escape from Reason: Genocide and the International Commission of Inquiry in Darfur,” (2006) 40 *International Law* at 48.

instrument of policy to destroy the fabric of the targeted communities, and perhaps even to create a new generation with ‘Arab’ paternity, a pattern too reminiscent of the use of sexual violence as a weapon of war in Bosnia, Rwanda, and elsewhere.”²⁵³

Based on the above analysis, it is submitted that the combination of the Genocide Convention and the UNSC Resolution 1593 furnishes the necessary authority for the enforcement of the ICC’s arrest warrants against the Sudanese President. As provided earlier, one of the advantages is that the obligation to cooperate extends to the ICC’s non-states parties that have ratified the Genocide Convention. Moreover, this interpretation surmounts the immunity impasse through adopting the official-capacity irrelevance principle enshrined in the Genocide Convention. The path to taking action on the basis of this conclusion is still unpaved. Political interests of major international players will certainly impact the speed and steadiness of its implementation. However through further UNSC action and the support of the international community, the prosecution of Omar Al Bashir could be realized, accountability for the worst international crimes can be revitalized and curbing impunity can be achieved. As Sluiter put it:

Bearing in mind that the Genocide Convention intends punishment of all perpetrators of genocide, no individual is exempt from the scope of application of Article VI. As a result, a State-party to the Genocide Convention arresting Al Bashir and surrendering him to the ICC, in compliance with Article VI, violates no rule of international law in relation to Sudan. On the contrary, that State complies with its obligations under the Genocide Convention.²⁵⁴

It has been contended that the contribution of the Genocide Convention to the prevention and punishment of genocide is not impressive. Nick Donovan claims that the Convention has several weaknesses and flaws, which are mainly the result of its historical context and the lack of

²⁵³ “Darfur: Rape as a Weapon of War: Sexual Violence and its Consequences.” *Amnesty International*, London, July 2004, online: < <http://www.cmi.no/sudan/doc/?id=1082>>.

²⁵⁴ *Supra* note 202.

updating.²⁵⁵ Donovan argues that the shortcomings of the Genocide Convention include: First, linking mass killings to the concept of a few protected identity groups. He maintains that this linking has led to protracted and unproductive discussion. As an example, he mentions the question whether the Hutus and Tutsis were well defined as racial or ethnic groups to warrant the protection under the Convention. Second, Donovan argues that the Genocide Convention overstressed the “intent” condition, resulting in extensive debates on issues like the difference between “intent” and “motive”. He asserts that such debates were counter-productive and they diverted attention from the more important issues, such as how to prevent the atrocities and prosecute the perpetrators.²⁵⁶

Leila Sadat supports Donovan’s assertions and argues that the Genocide Convention should be expanded to comprise social and political groupings, and to reverse the exclusion of ethnic cleansing and similar concepts from the scope of the Convention. She hopes for introducing changes to broaden the narrow interpretation of the Convention.²⁵⁷ She also remarks that the lack of consensus on whether atrocities amount to genocide, led to denying the label of “genocide” to groups such as the Bosnians, Cambodians and Armenians.

Sadat has observed that, “...of the 100 million civilians killed in the past seventy years, only six to eight million have been within the reach of the convention, as applied by international courts and tribunals. The adoption of the Genocide Convention was a considerable achievement in 1948... but it gives little solace to the victims of modern-day atrocities.”²⁵⁸

Donovan suggests that the shortcomings of the Genocide Convention could have been mitigated if states were prepared to enforce the laws targeting crimes against humanity, including rape,

²⁵⁵ Nick Donovan, *Enforcement of International Criminal Law*, *Supra* note 145 at 4.

²⁵⁶ *Ibid.*

²⁵⁷ Leila Sadat, *The crimes Against Humanity Initiative*, *Supra* note 145, at 21.

²⁵⁸ *Ibid.*

murder and torture. He stresses the need for creating "... a legal framework in which mass murderers and rapists can be fairly tried, where prosecutors and defense lawyers can rely upon arguments related to culpability for the acts, rather than inferences about the alleged intent of the suspect, or legal contortions related to definitions of protected groups."²⁵⁹

The above critique of the Genocide convention is timely and thoughtful. Yet, for the purposes of enforcing the arrest warrants against Al Bashir, resort to the Genocide Convention adds huge value. Even before the recommended reforms and modifications, the Convention contributes immensely to the prospects of prosecuting Al Bashir.

5.3. Other scenarios that could assist in the enforcement of the arrest warrants

The situations where the trial of Al Bashir before the ICC could be realized include the following. First, Al Bashir willfully submits to the jurisdiction of the ICC. This is a very unlikely scenario since there is no identifiable motive for this move. It would also be inconsistent with Al Bashir's persistent rejection of the Court's jurisdiction. Second, the Sudan government executes the arrest warrants and surrenders Al Bashir to the Court. This is an improbable scenario since Al Bashir has been the head of the Sudanese State for almost 22 years. Currently, there is no imminent threat to his political dominance, although some analysts suggest that the wave of the political upheaval sweeping the Middle East and North Africa since the Tunisian popular uprising in December, 2010, may have an impact on the Sudan. If a regime change followed a popular revolt against Al Bashir's autocracy, the surrender of the President would be a probable result. The Al Bashir regime has antagonized almost all the political forces in the Sudan with its ruthless repression, persecution of political opponents in addition to its long term disruption of the country's social and political fabrics.

²⁵⁹ *Supra* note 255.

Third, The Al Bashir arrest warrants could be enforced in a third country either as a treaty obligation or as an expression of ardent commitment to the cause of international criminal justice. The examples of the attitude of states, so far, are not very encouraging and even some ICC states parties have declined to apprehend Al Bashir when he visited them.²⁶⁰ Nonetheless, this scenario has actually materialized in the case of Charles Taylor where Taylor was arrested in a third country and handed over to the competent tribunal, as explained earlier in this Chapter.

Fourth, the arrest of Al Bashir may be carried out by the UNAMID or other UN peacekeeping force. There is a reasonable likelihood that the arrest of Al Bashir could be executed in this manner. In the former Yugoslavia, NATO forces played an active role in chasing high-profile suspects such as Radovan Karadzic. Proceeding through UN peacekeeping forces also involves technical and logistical support to enable the peacekeeping forces to perform the operation. However, in the case of Al Bashir that requires changing the mandate of these forces in accordance with Article 3 of the Relationship Agreement between the United Nations and the International Criminal Court, which provides:

Obligation of cooperation and coordination

The United Nations and the Court agree that, with a view to facilitating the effective discharge of their respective responsibilities, they shall cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest pursuant to the provisions of the present Agreement and in conformity with the respective provisions of the Charter and the Statute.²⁶¹

The NATO led force (IFOR/SFOR) in Bosnia-Herzegovina had not been conferred with the power to arrest and surrender war crimes suspects. However it was mandated by the UNSC to ensure the implementation of the Dayton Peace Accord, including the clause that obligates the parties to cooperate with the ICTY. The NATO also specified that

²⁶⁰ Chad, Kenya and Malawi.

²⁶¹ ICC-ASP/3/Res.1, Relationship Agreement between the United Nations and the International Criminal Court, Article 3.

“IFOR should detain any persons indicted by the International Criminal Tribunal who come into contact with IFOR in its execution of assigned tasks, in order to assure the transfer of these persons to the International Criminal Tribunal.”²⁶² Accordingly, multinational forces were mandated to execute arrest warrants issued by ICTY. A number of suspects were actually arrested by SFOR and transferred to the ICTY.

The mission in Liberia is a good example of peace keeping forces can play an important role in the apprehension and transfer of the suspects to an international criminal tribunal. The UNSC adopted Resolution 1638, expanding the mandate of the UNMIL to” apprehend and detain former President Charles Taylor in the event of a return to Liberia and to transfer him or facilitate his transfer to Sierra Leone for prosecution before the Special Court for Sierra Leone.”²⁶³ Charles Taylor was arrested in Nigeria when he attempted to flee Nigeria in March 2006. Following Taylor’s repatriation to Liberia, UNMIL transferred him to Freetown.²⁶⁴

To sum up, the fact that peacekeeping forces in Liberia and Bosnia played a substantial role in arresting war criminals is an important development towards the enforcement of international criminal law. Unfortunately this was not followed in the Sudan. In the case of Darfur, it has been argued that the GoS had been opposed to a peacekeeping force in Darfur long before the referral to the ICC, since it is “determined to wipe out the rebel groups in

²⁶² To facilitate the arrest of indictees by the peacekeeping force, the ICTY amended its Rules of Procedure and Evidence in 1996 by adopting Rule 59*bis*, allowing the ICTY to transmit a warrant of arrest to an “appropriate authority or international body”; see ICTY, *Rules of Procedure and Evidence* (adopted 11 February 1994, as amended on 25 June and 5 July 1996), UN Doc. IT/32/Rev.9 (1996).

²⁶³S/RES 1638 (2005). For more information, see Micaela Frulli, “A Turning Point in International Efforts to Apprehend War Criminals, The UN Mandates Taylor’s Arrest in Liberia” (2006) 4 *Journal of International Criminal Justice* at 352.

²⁶⁴ *Ibid* at 351.

Darfur, at almost any cost.”²⁶⁵ It is also evident that, similar to UNMIS, the mandate of a peacekeeping mission would be limited to a clearly defined region and would not include the arrest of government officials.²⁶⁶ However, as the case of Liberia has shown, mandates can be extended once a force is on the ground; a general tendency towards implementing international law, including international criminal law, seems to be emerging. Even if executing ICC arrest warrants would not be one of the primary tasks of a peacekeeping force in Darfur, international forces, as evident in the cases of Liberia and Bosnia, are increasingly sought to cooperate with international criminal tribunals.

The mandate of the UN/AU force in Darfur (UNAMID) is currently limited to protecting civilians and supporting the implementation of the Darfur Peace Agreement.²⁶⁷

The mandate of the former African Mission in Sudan (AMIS) was to monitor, observe and to protect civilians whom it encounters under imminent threat and in the immediate vicinity, within resources and capability, ironically, according to AMIS mandate, the protection of the civilian population is the responsibility of the GoS.²⁶⁸

Prominent NGOs, such as Human Rights Watch and the International Crisis Group, have openly pressured the Security Council to explicitly mandate a UN peacekeeping mission to support the work of the ICC in Darfur: “The mission should also be specifically empowered to provide appropriate assistance to the International Criminal Court’s investigations in Darfur including the arrest of individuals indicted for crimes against humanity and war

²⁶⁵ Nick Grono & David Mozersky, “Sudan and the ICC: A Question of Accountability” *International Crisis Group* (31 January 2007) online: <<http://www.crisisgroup.org/en/key-issues/crisis-in-darfur.aspx>>.

²⁶⁶ *Ibid.*

²⁶⁷ See S.C. Res. 1769, U.N. Doc. S/RES/1769 (July 31, 2007) (declaring further that UNAMID must fulfill its mandate “without prejudice” to the responsibilities of the Sudanese government).

²⁶⁸ Security Council Resolution 1564 (2004), U.N. Doc S/RES/1564(2004).

crimes.”²⁶⁹ Khartoum vehemently opposed a UN mission in Darfur with a broad mandate which might be expanded to arrest future suspects.

²⁶⁹ Human Rights Watch & International Crisis Group, “Security Council Must Take Action to Protect Civilians in Darfur, Joint Human Rights Watch and International Crisis Group Letter to the Members of the U.N. Security Council Regarding Darfur” (31 January 2006) online: *Human Rights Watch* <<http://hrw.org/english/docs/2006/01/31/sudan12577.htm>>.

Conclusion

Enforcement is the Achilles' heel of the International Criminal Court. Unlike domestic courts, enforcement is beyond the control of the ICC. That is a structural weakness which cannot be surmounted without establishing the ICC's own police force and enforcement regime, which is not expected to take place in the foreseeable future.

The Court will remain dependent on the states' cooperation, the UN Security Council and other members of the international community, to enforce its decisions. Hence, states' cooperation is imperative for the proper functioning of the ICC.

As demonstrated in chapters 1 and 2 of this thesis, the brutality and ruthlessness of Al Bashir's regime, as witnessed in the heinous atrocities inflicted in Darfur against the civil population, is representative of the fear of the Arab minority to lose control over the political, cultural and economic dominance. A prominent Sudanese lawyer described the National Islamic Front (NIF), the former name of Al Bashir's political party, which climbed to power by a military coup against the elected government in 1989, as follows:

“The NIF is one of the forces of hegemony in the Sudan, hegemony that is purported to be legitimated by and is obscured by invocation of Islam. In this sense, The NIF's ideology of Islamic absolutism is also an obscurantist ideology which not only justifies but also conceals the racist, predatory and exploitive reality of the *Jellaba* rule in the Sudan.”²⁷⁰

The gruesome ethnic and racial background of the Darfur conflict is often overlooked and mostly downplayed. This thesis reveals that there is a strong link between the root causes of the conflict and the targeting of the civilian population of the major three African tribes in Darfur, viz., Fur, Zaghawa

²⁷⁰ *Supra* note 7 at 214.

and Masalié. Most important, this link uncovers the frequently questioned “intent” and “motive” of the Darfur genocide.

The thesis also contributes to the answer of the fundamental question concerning the lawfulness of the ICC’s arrest warrants against Al Bashir. This issue raised substantial controversy and it has been used by the Sudan and other states and organizations to protect Al Bashir from the ICC’s jurisdiction. The examination of the various theoretical approaches to the doctrine of the head of state immunity shows that the normative hierarchy theory, which reflects the recent developments in the law and jurisprudence of international criminal justice and international human rights, is gaining wide recognition and approval. In the Al Bashir case, the doctrine seems to pose little legal significance. The conclusion of this study is that, immunity for serving heads of state cannot be invoked successfully in situations before international criminal courts and tribunals, where serious violations of international criminal law were committed. The list of international crimes includes genocide, crimes against humanity and war crimes.

The cooperation impasse in the arrest and surrender of the Sudanese president created worries and frustration amongst the victims of the Darfur conflict and the proponents of the ICC. The enforcement dilemma also impacts the image and credibility of the ICC. This thesis argues that the endorsement of the genocide charge against Al Bashir changed the dynamics of the cooperation regime forever. The author contends that invoking the Genocide Convention adds a renewed impetus to the enforcement efforts. The interplay of the Genocide Convention and UNSC Resolution 1593 trumps immunity subterfuge and widens the base of the cooperating states to include all the states parties to the Convention. As a norm of customary international law the obligation to cooperate in the punishment and prevention of genocide extends beyond the parties to the Convention. One of the major advantages is that all Security Council permanent members are parties to the Genocide Convention.

Commenting on the impact of the Genocide Convention on the possible arrest of the Sudanese President, Guran succinctly states that “If the ICC cannot count on the effects of article VI under these circumstances, it probably never will, and that provision can remain a dead letter.”²⁷¹ The momentum created by the relevance of the Genocide Convention to the Darfur international crimes should be seized without delay and it is recommended that the ICC gets engaged with UNSC so as to agree on the best way to give effect to the Convention for the purpose of enforcing the ICC’s arrest warrants against Al Bashir.

The thesis discusses the position of the African Union in response to the ICC’s indictment of Al Bashir. The nature of AU’s engagement in the Darfur crisis in general, reveals that the Pan-African organization has not learned much from the tragic Rwandan genocide of 1994. It might be too early to predict the outcome of the “Arab Spring” but if that could lead to a better respect for human rights and protection of citizens, rather than leaders, a spill-over into many other African states would be very much desired. Three Arab states that witnessed uprisings and regimes change are also member states to the African Union, namely; Tunisia, Egypt and Libya.

Combating Impunity is far from realization. The response of the international community to the catastrophic abuse of power by the Sudanese government, which resulted in one of the worst humanitarian crisis in modern history, has been rather slow and extremely disappointing. The conflict is ongoing and the Sudanese government is showing no signs of compromise. Political support from and robust action by the UNSC, is essential for the enforcement of international criminal tribunals and courts. The engagement of the ICC and the UNSC, long with the interplay of the Rome Statute, the Genocide Convention and the UNSC Resolution 1593, is capable of securing cooperation and accomplishing the enforcement of the ICC arrest warrants against Al Bashir. Political will, determination and robust action will make it happen.

²⁷¹ *Supra* note 226.

Adding the Genocide Convention to the enforcement instruments of the arrest warrants against Al Bashir, provides a good opportunity to bring justice to the victims of Darfur atrocities, and to assist the ICC in fulfilling its mandate to combat impunity. The UNSC and the world community should not meet this opportunity with tardiness and ambivalence.

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