Transnational Criminal Justice and Crime Prevention - An International and African Perspective

By

BONGIWE ADONIS
(STUDENT NO. 2508120)

Prepared under the Supervision of

Prof. Dr. Gerhard Werle 31

October 2011
Immunity for Serving Heads of States for Crimes under International Criminal Law:
An Analysis of the ICC-Indictment against Omar Al Bashir
DECLARATION

I, BONGIWE ADOINS declare that “Immunity for Serving Heads of States for Crimes under International Criminal Law: An Analysis of the ICC-Indictment against Omar Al Bashir” is my work and that it has not been submitted for any degree or examination in any other university or institution. All sources used, referred to or quoted have been duly acknowledged.

Bongiwe Adonis

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31 October 2011
DEDICATION

To my parents, Lindiwe and Tom Adonis.
ACKNOWLEDGMENT

I would like to express my gratitude to my supervisor Prof Dr GERHARD WERLE for his supervision of this research paper, particularly in assisting and guiding me with in the formulation of the topic. I owe a special vote of thanks to Dr MORITZ VORMBAUM, for intellectually inspiring and challenging me throughout the process of this paper. It is thanks his detailed of his criticism and constructive comments that I was able to improve my work and bring about a solid end product of this academic piece. To, SOSTENESS MATERU and WINDELL NORTJIE, thank you so much for always availing yourselves to give advice, and a shoulder to lean on, and for being patient with me during process.

Most importantly, I extend my deepest gratitude to my parents, LINDIWE and TOM, for believing in me from the day one, ndiyabulela kakulu. To my beloved siblings: ESRA, GUGU, and KHAYA, this one is for you, for sacrificing so much for me as your baby sister. I need to express a special thanks to the families of ADONIS, MDLULWA, BUNDWINI and NOBULA for their support and contribution to my success.

A heart-felt gratitude to my loving friend, RAYMOND EYIOMEN YOSIMBOM, for being there for me, and for being a pillar of encouragement and support until the last day. To my classmates and friends, in the LLM programme, thank you for being true comrades in this academic struggle. To all my friends, who would mention if space allowed, thank you for your friendship, prayers and support as peers.

Finally, I am sincerely grateful to DAAD for providing me with financial support, without which I would not have been able to embark upon these further studies. The scholarship marked a great point in my life. The LLM programme not only exposed me to broader international cultures and languages, it also allowed me to interact with renowned researchers in the various fields of international law.
Immunity for Serving Heads of States for Crimes under International Criminal Law:

An Analysis of the ICC-Indictment against Omar Al Bashir

ABSTRACT

This paper analyses head of state immunity, a traditional rule of international law, in relation to the indictments by the International Criminal Court (ICC) in 2009 against the current Sudanese President Omar Hassan Ahmad Al Bashir. It can be agreed that the doctrine of immunity in international law attempts to overcome the tension between the protection of human rights and the demands of state sovereignty. The statutes and decisions of international criminal courts make it clear that no immunity for international crimes shall be attached to heads of states or to senior government officials. However, the case against the Sudanese President, where the jurisdiction of the ICC was triggered by the UN Security Council’s referral of the situation in Darfur to the Court, represents the first case where a serving head of state has, in fact, been indicted before the ICC. From this case, a number of legal issues have arisen; such as the questions where the ICC’s jurisdiction over an incumbent head of state, not party to the ICC Statute, is justified, and the obligations upon ICC state parties to surrender such a head of state to the requesting international criminal court. This paper gives an analysis of these questions.
KEY WORDS

Al Bashir
Crimes against humanity
Genocide
Immunity
Internal conflict
International Criminal Court
International Obligations
State Sovereignty
United Nations Security Council
War crimes
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<tr>
<td>Doc.</td>
<td>Document</td>
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<tr>
<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<td>ed(s).</td>
<td>editor(s)</td>
</tr>
<tr>
<td>FRY</td>
<td>Federal Republic of Yugoslavia</td>
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<tr>
<td>HAC</td>
<td>Humanitarian Aid Commission</td>
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<tr>
<td>Ibid.</td>
<td>Ibidem (same author, same book, same page)</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for Yugoslavia</td>
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<td>JEM</td>
<td>Justice and Equality Movement</td>
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<td>NIF</td>
<td>National Islamic Party</td>
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<td>NISS</td>
<td>National Intelligence Security Service</td>
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<td>No.</td>
<td>Number</td>
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<td>PDF</td>
<td>Popular Defence Force</td>
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<tr>
<td>SAF</td>
<td>Sudanese Armed Forces</td>
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<td>SC</td>
<td>United Nations Security Council</td>
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</table>
SCSL  Special Court for Sierra Leone

SLM/A  Sudan Liberation Movement/Army

SPLM/A  Sudan People’s Liberation Movement/Army

SSLM   Southern Sudan Liberation Movement

U.S.   United States of America

UN   United Nations

UP   Umma Party

v  versus

Vol.   Volume
MAP OF SUDAN

CHAPTER ONE:
INTRODUCTION

1.1 BACKGROUND TO PROBLEM

World alert on the conflict and atrocities in Darfur, Sudan, may be greatly attributed to the increased widespread media coverage and reports by non-governmental organisations, during 2003.\(^1\) In September 2004, the UN Security Council (SC) adopted Resolution 1564,\(^2\) acting under Chapter VII of the UN Charter. This resolution requested, *inter alia*, for the establishment of an International Commission of Inquiry on Darfur (the Commission) by the United Nations Secretary-General.

In October 2004, the Secretary-General appointed a five member body of the Commission.\(^3\) The Commission was assembled in Geneva and began its work on 25 October 2004, and submitted its report within three months of its appointment. Based upon the report of the Commission\(^4\) the SC referred the situation in Darfur to the Prosecutor of the International Criminal Court (ICC),\(^5\) in terms of Resolution 1593.\(^6\)

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\(^3\) The tasks for the Commission were set out in Article 12 of Resolution 1564 (2004), “to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties”; “to determine also whether or not acts of genocide have occurred”; and “to identify the perpetrators of such violations with a view of ensuring that those responsible are held accountable”.


In July 2005, the Prosecutor of the ICC, Luis Moreno-Ocampo, decided to open investigations into the situation in Darfur. Mr Ocampo stated, in his periodic report to the SC, that the available evidence showed a ‘widespread pattern of serious crimes, including murder, rape, the displacement of civilians, and the looting and burning of civilian property’ had occurred in the Darfur region. This was followed by a list of evidence, deposited by the Office of the Prosecutor, to the Pre-Trial Chamber I requesting summons to appear be issued in respect of two suspects. The Court has issued two arrest warrants against Sudanese President Omar Hassan Ahmad Al Bashir (Al Bashir). The first warrant was issued in 2009 and the second warrant in 2010.

The situation in Darfur has resulted in six cases before the ICC. Three suspects (including Al Bashir) have been issued with arrest warrants, two suspects have been summoned, and the case against one suspect has been closed. The Darfur situation is amongst the seven situations currently before the ICC since the coming into force of the ICC Statute on 1 July 2002.

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8 Detailed summaries of the crimes on which the prosecutor has gathered information and evidence can be found on the ICC’s website, available at [http://www.icc-cpi.int/cases/Darfur/s0205/s0205_un.html](http://www.icc-cpi.int/cases/Darfur/s0205/s0205_un.html) [accessed on 23 March 2011].


10 The Prosecutor v Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-1, ‘Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’ (4 March 2009); The Prosecutor v Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-95, ‘Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’ (12 July 2010).

11 The Prosecutor v Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-73, ‘Judgement on the Appeal of the Prosecutor against the Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’ (3 February 2010).


1.2 OBJECTIVE OF STUDY

The first objective of this study is to conduct an analysis of the legal issues following the arrest warrants issued against Al Bashir by the Pre-Trial Chamber I. This will be done by taking cognisance of the factual and legal background of the case against Al Bashir before the ICC. The focus of this study will be on the attacks and counter attacks which took place within the Darfur region, and the prominent peace negotiations which gave rise to the referral of the Darfur situation to the ICC. The second objective of this study is to identify the rules of international law on immunities enjoyed by state officials. In particular, the extent to which such immunities are applicable before international fora, such as the ICC, where it issues arrest warrants against an incumbent head of state not party to the ICC Statute.

1.3 SIGNIFICANCE OF STUDY

The sovereignty of a state is not unfettered, it is in fact limited by many international rules such as customary law and treaty law. The doctrine of immunity, although well founded in the jurisprudence of international law, presents challenges where serious human rights violations have occurred in conflict situations, with the threat that the victim communities’ interests are compromised through the award of immunity to such perpetrators. We have seen indictments against heads of state, such as those brought against Slobodan Milosević, by the International Criminal Tribunal for the former Yugoslavia (ICTY), and against Charles Taylor, by the Special Court for Sierra Leona (SCSL). However, in both cases these accused appeared before the respective tribunals as former heads of states. During the regime of the ICC, the indictments against Omar Al Bashir are the first of their kind, as he is a serving head of state.
The fact that the situation in Darfur is based on a resolution of the SC is paramount in respect of issues such as; the removal of immunity. Another problem relates the obligations upon states parties to the ICC Statute, under Article 98(1), to surrender Al Bashir to the ICC. Therefore, the question arises whether there is an obligation upon states parties to co-operate with the ICC or whether the request to surrender Al Bashir amounts to an *ultra vires* act by the ICC. The fact that the situation in Darfur is still pending before the ICC, and that Al Bashir is still at large (although he has made visits to several states since the issuance of arrest warrants against him) makes this study worth researching. Finally, this study is also topical for the purpose of exploring the application of the ICC Statute for the first time against an incumbent head of state, in respect to the ICC’s mandate to end impunity and to prevent future crimes.

1.4 RESEARCH METHODOLOGY

This research is library-based. Primary sources will include relevant statutory documents, UN Reports on the situation in Darfur; Press Releases, resolutions and reports to the SC and those of the ICC, and cases. Secondary sources will consist of academic publications including, books, journal articles, legal scholar’s commentary, as well as newspaper reports specifically in relation to the situation in Darfur and those addressing the issue of head of state immunity.
CHAPTER TWO:
HISTORICAL BACKGROUND OF THE DARFUR CONFLICT

2.1 THE SUDAN

In order to understand the situation in Darfur, it is important to place it within its broader context. This normally entails a broad assessment of the situation into three phases of development, namely; pre-colonial, colonial, and post-colonial Sudan. However, an examination of the first two phases will not be conducted in the present study. The Sudan is situated in northeastern Africa. With an estimated population of 43 million inhabitants, Sudan is considered at Low Human Development (and it ranked 154 in the 2010 United Nations Development Programme’s Human Development Index).\(^\text{14}\)

After thirty-nine years of foreign control, under British-Egyptian rule, Sudan became independent on 1 January 1965.\(^\text{15}\) Its colonial legacy entrenched the state apparatus in Northern Sudan.\(^\text{16}\) Throughout the country development was uneven and the South was treated as a closed district, with Southerners having little voice in the running of the country.\(^\text{17}\)


Sudan has had ten years of democracy during the periods of 1956-1958, 1965-1969, and 1985-1989, during its forty-six years under national rule. In the remaining periods, the country has been ruled by military regimes.

In November 1958 General Ibrahim Abboud came to power through a coup. The military government continued a policy of Arabization and Islamization. The continued repression by government throughout the country led to unrest and the emergence of armed rebellion in the South. In 1964 student protests and unions strikes in Khartoum forced the military regime out of office, this period is said to mark the beginning of Sudan’s first civil war.

The 1965 coalition government, led by Mohammed Ahmed Mahjub of the Umma Party (UP), was overthrown in May 1969 when Colonel Gaafar Mohamed Al-Nimeiri took power. The Sudanese Socialist Union (SSU) was formed and declared as the sole legitimate party, and its socialist ideology later infused with political Islam.

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21 Ibid.
On 27 February 1972 the so-called Addis Ababa agreement was signed between Nimeiri and the Southern Sudan Liberation Movement (SSLM), which granted the South a degree of autonomy and democracy. African scholars have described the agreement as a landmark in the history of Sudan and as important as the Treaty of Versailles was in Europe in 1919. After oil was discovered in the South in 1979, Nimeiri took several measures to incorporate the oil-rich areas of the South into the North, because of the nation’s deepening economic crisis. The attempt to redraw the boarders between the North and South, in order to remove the oilfields from Southern jurisdiction failed, and resulted in the creation of a new province. This was a breach of the Addis Ababa agreement. Furthermore, in September 1983 Nimeiri introduced Islamic Sharia Law (the so-called September laws) by injecting religion into government policies. The South reacted with further resistance against these steps, and eventually civil war re-launched in 1983 by the Sudan People’s Liberation Movement (SPLM), displacing four million people and killing almost two million people. After sixteen years of oppressive rule Nimeiri’s regime came to an end amidst protests, over food shortage and price increases, led by the Professionals’ Front.


27 Beshir M O (1975) The Southern Sudan: From Conflict to Peace 107 and 122-123.

28 Ibid.


In April 1985 a Transitional Military Council, led by General Abed Rahman Siwar Al-Dahab, was put in place to oversee Sudan into a multi-party democratic era. The elections in 1986 led to the victory of UP leader, Sadiq Al-Mahdi, who became Prime Minster. The elected government was soon overthrown by the leaders of the Islamist coup who cited the elected government’s political ineptness and failure to stop the fighting in Darfur among the reasons for its actions.

In June 1989 the current President of Sudan, General Omar Hassan Al-Bashir, came to power through a military coup. The Islamist regime was led by the National Islamic Front (NIF) and established a paramilitary organ, alongside the Sudanese Armed Forces (SAF), called the Popular Defence Force (PDF). Its establishment caused another round of conflict. Political parties and trade unions were banned under emergency laws. Hallmarks of the regime consisted of the detention of opponents, extra-legal practices and general abuse of human rights.

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Successive regimes have been criticised for being manipulative administrations, using ideologies to gain support, and elites who have mastered the colonial era’s divide-and-rule tactics. This resulted in under-development, exclusion, and violent conflict in Sudan. The failure of parliamentary systems resulted in military coups and the emergence of regional movements. However, the political parties who ran these systems have been complimented for running reasonably fair elections which earned them more respect from the press, judiciary and trade unions. Today the Sudan, once the largest country in Africa, has been divided into two states. The 2005 Comprehensive Peace Agreement (CPA) brought an end to the North-South Sudan, David and Goliath style, civil war. The January 2011 Referendum, in order to determine the status of the Southern Sudan, received a majority of 98.83 per cent of participants voting for independence led to the subsequent birth of the Republic of South Sudan on 9 July 2011.

2.2 THE CONFLICT IN DARFUR

Darfur is located in the western province of Sudan and boarders with Libya, Chad, and the Central African Republic. Administratively it was divided into North (El Fasher), South (Nyala) and West (El Geneina) Darfur.

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42 Ibid.
43 Salih M A M ‘Understanding the Conflict in Darfur’ (2005); Ibrahim F ‘Ideas on the Background of the Present Conflict in Darfur’ (2004), available at http://www.afrikafreundeskreis.de/docs/darfur_prof_ibrahim_5_04.pdf [accessed on 10 July 2011].
46 See, United Nations Mission in the Sudan ‘Independence of South Sudan’ available at http://www.un.org/en/peacekeeping/missions/unnis/referendum.shtml [accessed on 5 August 2011]. “The referendum was initiated in 2005 through the CPA between the Government of Sudan and the SPLM, which ended a war of over twenty years. Sudanese authorities were responsible for the process, led by President Al Bashir of Sudan and President Salva Kiir Mayardit of the Southern Sudan, under the leadership of the [SC]”.
48 Salih M A M ‘Understanding the Conflict in Darfur’ (2005); Ibrahim F ‘Ideas on the Background of the Present Conflict in Darfur’ (2004).
It is habited by tribal groups (predominantly agriculturalist and sedentary) whose distinctions are not clear-cut, and “are more a product of war than the cause of it.”49 Islam is a sheared religion amongst all tribes, and although some tribes have their own languages, Arabic is commonly spoken.50

Mohamed M A Salih contends that Sudan’s independence gave rise to at least three sets of relationships with respect Darfur: “(i) the development of new alliances because of the ethnic background of political parties; (ii) the fight for resources intensified because of human and livestock population; drought; competition over land, water points and grazing resources; and (iii) the UP’s control of western Sudanese votes were increasingly challenged by Darfur-based movements.”51

The main rebel groups in Darfur, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), started organising themselves during 2001 and 2002.52 Their members were drawn from local village defence groups, and essentially derived from three tribes: the Fur, the Massalit and the Zaghawa.53 The SLM/A, which was formally known as the Darfur Liberation Front, focused its agenda on the people of Darfur and it later covered all of Sudan.54 The agenda of the JEM was based on a type of manifesto called the Black Book of 2001 – which documents the dominance of northern tribes in Sudan’s

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51 Salih M A M ‘Understanding the Conflict in Darfur’ (2005); Ibrahim F ‘Ideas on the Background of the Present Conflict in Darfur’ (2004).
53 Ibid.
government – and sought to prove the disparities in the distribution of power and wealth.\textsuperscript{55} Both rebel groups cited socio-economic and political marginalisation of Darfur and its people as reason for their opposition to the Khartoum government.\textsuperscript{56} The Darfur conflict began as a civil war (1987-1989) between local militia, each with ethnic identity.\textsuperscript{57} It is suggested that the government only became involved after 1989, following its failed initiatives to address the basic causes of the conflict.\textsuperscript{58} In March 2003 the insurgents attacked government installations in Kutum, Tine and El Fashir, by destroying military aircraft, killing soldiers and police, and looting government weaponry in order to strengthen their position.\textsuperscript{59}

As a result of military deficit in Darfur the government of Sudan called upon local tribes to assist, alongside the PDF, in the fight against the rebels.\textsuperscript{60} Mostly Arab (from the Misseriya and Rizeigat) nomadic tribes responded to the government’s call.\textsuperscript{61} Reports indicated that foreigners, primarily from Chad and Libya, also responded to this call and that the government of Sudan was prepared to recruit them.\textsuperscript{62} These new recruits became known by the civilian population as the “\textit{Janjaweed}”.


\textsuperscript{56} Ibrahim F ‘Ideas on the Background of the Present Conflict in Darfur’ (2004).

\textsuperscript{57} Mamdani M (2009) \textit{Saviours and Survivors: Darfur, Politics, and the War on Terror} 232 and 259.

\textsuperscript{58} Ibid.


\textsuperscript{60} Salih M A M ‘Understanding the Conflict in Darfur’ (2005); Burr J M & Collins R O (2008) \textit{Darfur: The Long Road to Disaster} (2ed.) 285; Mamdani M (2009) \textit{Saviours and Survivors: Darfur, Politics, and the War on Terror} 258. “By 1999 there were reportedly 80,000 regular troops in the Sudanese armed forces, 3,500 NIF commissioned army officers, and 150,000 in the PDF.”

\textsuperscript{61} Mamdani M (2009) \textit{Saviours and Survivors: Darfur, Politics, and the War on Terror} 254-255.

\textsuperscript{62} Ibrahim F ‘Ideas on the Background of the Present Conflict in Darfur’ (2004).
The term *janjaweed* is defined as:

“[A] generic term to describe Arab militias acting, under the authority, with the support, complicity or tolerance of the Sudanese State authorities, and who benefit from impunity for their actions”.

As already been pointed out, that the *janjaweed* were enlisted by the Sudanese government as a counterinsurgency force due to a lack of its own military resources.

Towards the end of 2003, the *janjaweed* shifted the focus of their campaign away from the rebels and targeted civilians. A typical assault on a village was initiated by helicopter bombings, this was followed by the *janjaweed* entering the villages on foot or camels and horses or pickups to loot, rape, and kill civilians. Villages were often burned down to prevent return.

World alert to the conflict in Darfur may be greatly attributed to the increased widespread media coverage and reports by non-governmental organisations during 2003. Political response gained momentum in 2004 when US Secretary of States Colin Powell declared the violence in Darfur as genocide for the first time.

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63 Salih M A M ‘Understanding the Conflict in Darfur’ (2005).
65 Ibid.
66 Ibid.
The SC condemned the attacks in the Darfur region\(^69\) together with the call to save Darfur.\(^70\) The World Health Organisation estimated 118,142 dead between September 2003 and January 2005.\(^71\) Another estimate was that of John Holmes, under Secretary-General for Humanitarian Affairs, it suggested 200,000 people dead as a result of the combined effect of the conflict.\(^72\) In November 2004 the Office of the United Nations High Commission for Refugees (UNHCR) reported 203,051 internally displaced persons from Darfur in 11 camps along the border of Sudan and others living as refugees in eastern Chad.\(^73\) In contrast, the Commissioner-General of the Government Humanitarian Aid Commission indicated that there were 1, 65 million internally displaced persons in 81 camps and safe area during the beginning of the same month.\(^74\)

It is worthy to note that, as early as August 2003, efforts were made to find a political solution to end the conflict. On 3 September 2003, in Abéché, with the backing of President Idriss Déby of Chad, the government representatives and the SLM/A signed a Ceasefire Agreement which envisaged cessation of hostilities for a renewable 45-day period.\(^75\) Subsequent rounds of talks took place and on the 8 April 2004 the government of Sudan and

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the SLM/A and the JEM signed a Humanitarian Ceasefire Agreement. On the 28 May 2004 the parties signed an agreement on ceasefire modalities.

The African Union (AU) became actively involved in mediating peace talks which took place in Addis Ababa, Ethiopia and in Abuja, Nigeria. The mission in Darfur was the AU’s second and largest and most complex initiative. On the 9 November 2004, the government representatives, the SLM/A and the JEM signed two Protocols, one on the Improvement of the Humanitarian Situation and the other on the Enhancement of the Security Situation in Darfur.

Apart from the political negotiations, the AU played a key role through the African Mission in Sudan. However, the scope of its mandate was limited to monitoring the ceasefire through the establishment of the AU Ceasefire Commission in Darfur, including the deployment of monitors. The African Mission in Sudan faced several operational challenges which led to

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77 Ibid.
82 A list of challenges faced by peacekeeping forces is draw by, O’Neill G W and Cassis V ‘Protecting Two Million Internally Displaced: The Successes and Shortcomings of the African Union in Darfur’ (2005).
its close liaison with the United Nations Mission in Sudan in terms of the SC Resolution 1564.\textsuperscript{83}

Despite the efforts of political negotiations and the adaptation of\textsuperscript{83} protocols, violations in the Darfur region continued between the rebels and the government forces and its militia, leading up to intervention by the SC in 2005. The alarming death toll in the Sudan conflict is and the number of its victims are said to exceed those of the Balkans, Rwanda, Somalia, Sierra Leona, and Chechnya conflicts combined.\textsuperscript{84} Overall, the assumption is that all the deaths, whether ‘direct’ or ‘indirect’, are a result of violence from a single source: the government of Sudan.\textsuperscript{85}

\footnotesize
\begin{itemize}
\item Mamdani M (2009) Saviours and Survivors: Darfur, Politics, and the War on Terror 272.
\end{itemize}
CHAPTER THREE:
ISSUES RELATING TO SECURITY COUNCIL
REFERRAL, JURISDICTION AND ARREST
WARRANTS AGAINST AL BASHIR

3.1 SECURITY COUNCIL REFERRAL OF THE DARFUR SITUATION

Not surprisingly, the powers of the SC to refer a situation to the ICC has been heavily
criticised by both ICC states parties and academics. This section of the chapter deals with
these issues by discussing: (i) the factual background against which the Darfur situation was
referred to the ICC, (ii) the legal basis upon which the SC may exercise these powers, and
(iii) the legal consequences which arise when the ICC exercises jurisdiction over a situation,
owing to the referral by the SC.

3.1.1 Security Council Resolution referring the situation in Darfur

It is important to note that the SC, in its resolution 1556, emphasized the need to bring to
justice the leaders and their associates who incited and carried out human rights and
international humanitarian law violations in Darfur.86 The parties to the conflict also insisted
on the principle of accountability, in that they “[stressed] the need to restore and uphold the
rule of law, including investigating all cases of human rights violations and bringing to
justice those responsible, in line with the AU’s expressed commitment to fight impunity.”87

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87 See, Preamble 7 of the Protocol on the Improvement of the Humanitarian Situation in Darfur.
In September 2004 the SC, pursuant to Resolution 1564, requested the UN Secretary-General to establish the International Commission of Inquiry on Darfur (the Commission).  

A month later the Secretary-General appointed a five member body of the Commission. The tasks of the Commission were:

“to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties”; “to determine also whether or not acts of genocide have occurred”; and “to identify the perpetrators of such violations with a view of ensuring that those responsible are held accountable”.  

In February 2005, three months after completing its mandate, the Commission submitted its report to the SC. In its report the Commission found that the attacks by government forces and the janjaweed on civilians (mostly belonging to the Fur, Masaalit and Zaghawa tribes) amounted to “large-scale war crimes,” and that the mass killing of civilians by government forces and the janjaweed were piloted in “both a widespread and systematic manner,” therefore, likely to amount to a crime against humanity. The Commission established that “rape and other forms of sexual violence committed by the janjaweed and Government soldiers in Darfur was widespread and systematic and may thus well amount to a crime against humanity”, and that this applied to the crime of sexual slavery. More importantly, the Commission noted that while the rebel groups were responsible for attacks on civilians, which amounted to war crimes, it found no evidence suggesting that these attacks were widespread or systematic.

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89 The members of the Commission were Mr Antonio Cassese as Chairman, from Italy; Mr Mohammed Fayek, from Egypt; Ms Hina Jilano, from Pakistan; Mr Dumisani Ntsebeza, from South Africa; and Ms Theresa Striggner-Scott, from Ghana, see Press Release, Secretary-General Establishes International Commission of Inquiry for Darfur SG/A/890 (2004), available at http://www.un.org/News/Press/docs/2004/sga890.doc.htm [accessed on 20 July 2011].
92 Ibid, paras. 267 and 293.
93 Ibid, para. 360.
94 Ibid, para. 268.
Of great significance is the Commission's finding with regard to mechanisms for ensuring accountability for the crimes committed in Darfur. The Commission was of the opinion that the “Sudanese courts are unable and unwilling to prosecute and try the alleged offenders [and that] [o]ther mechanisms are needed to do justice.” Max Du Plessis correctly stated that this is no small finding, because it denies the Sudanese government the opportunity to rely upon the complementarity principle contained in the ICC Statute to avert that it is willing to prosecute the offenders.

The Commission finally recommended for the referral of the Darfur situation to the ICC by the SC in order “to protect the civilians of Darfur and end the rampant impunity...prevailing there.” In addition to this, it endorsed the ICC as the “only credible way of bringing alleged perpetrators to justice.” Indeed this evaluation holds true today, owing to Sudan’s failure to prosecute the offenders itself.

One of the practical limitations faced by the Commission may be discerned from the language of its founding instrument, namely Resolution 1564. First, its mandate was only in regard to the situation in Darfur, thereby excluding the conflict in the south and other regions of Sudan. Secondly, the time-frame of its investigations were only in respect of events from the beginning of 2003 up to the completion of its mandate. This proposition was impractical, taking into cognisance that the conflict in the Darfur was intrinsically intertwined with conflicts throughout the country, therefore, could not be viewed in isolation.

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95 Ibid, para. 568.
98 Ibid, para. 573.
Two months after receiving the Commission’s report, the SC, acting under Chapter VII of the UN Charter, referred the Darfur situation since the 1 July 2002 to the ICC and urged all states to co-operate with the Court. The resolution invited the ICC and AU to discuss the practicalities of proceedings relating to the conflict, while also emphasising the importance of healing and reconciliation, for example, through the creation of truth and/or reconciliation commissions.

The resolution was adopted by eleven votes to none against and four abstentions by Algeria, Brazil, China and the United States. The Algerian representative preferred an AU solution to this delicate problem, because it could provide peace and satisfy the need for justice. The Chinese representative disagreed with the referral to the ICC without the consent of Sudan and preferred that the perpetrators to be tried in Sudan. The United States (U.S.) representative express her delegations long-standing objections and concerns regarding the ICC’s jurisdiction over national of non-party states, however, it believed that a hybrid tribunal in Africa would have been a better mechanism in order to end the climate of impunity in Darfur. Brazil agreed with the resolution but objected to paragraph 6, which recognised the ICC’s exclusive jurisdiction.

One of the issues concerning the SC’s referral power is that it can enhance the ICC’s jurisdictional reach to situations involving non-party states.

100 Ibid, paras. 3 and 4.
101 Ibid, para. 5.
103 Ibid.
104 Ibid.
105 Ibid.
106 Ibid.
107 See paragraph 3.1.3 below.
U.S Ambassador Anne W Patterson, during her explanation of the U.S. vote, remarked on paragraph 6 of the resolution, which reads as follows:

“Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State[.]”

She opined that the language of these paragraphs provides protection to the U.S and other states and as such is precedent-setting by acknowledging the concerns of states not party to the ICC Statute and recognising that persons from these states should not be susceptible to investigation or prosecution by the ICC.\(^\text{108}\) Therefore, according to Patterson, in the future where there is no consent by the state involved, any investigation or prosecution by the ICC over nationals of non-party states may “only” be envisaged where there is a decision by the SC.\(^\text{109}\) Another important remark was that the U.S was satisfied that the resolution recognized that the UN will not bear any of the expenses incurred in connection with the referral.\(^\text{110}\) This position is not surprising as it is conceivable that a state not party to the ICC Statute would not desire to make financial contributions with respect to investigations and prosecutions before a Court which it does not endorse.

John Crook observes that the President Bush’s administration had long pressed for strong international response to the brutal attacks on civilians in Darfur and western Sudan, it was


\(^{109}\) Ibid.

\(^{110}\) Ibid, S/RES/1593 (2005) para. 7 states the following: “Recognizes that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily[.]”
the first country to publicly characterise the events as genocide, and it was instrumental in the creation of the Commission of Inquiry to investigate the events in Darfur.\textsuperscript{111}

However, the U.S. vigorously opposed the ICC contending that the Court could bring unwarranted and politically motivated charges against U.S. troops and officials.\textsuperscript{112} Crook suggests that this is why in late January 2005, before the submission of the Commission’s report to the SC, the U.S proposed creating a new court at the headquarters of the existing ICTR in Arusha, Tanzania, to be jointly administered by the UN and AU.\textsuperscript{113} According to newspaper reports, the U.S. proposal was met with strong resistance from SC members, most of which supported the Council’s referral to the ICC (Britain, France, and Denmark).\textsuperscript{114} In addition to this, Al Bashir stated, responding to the SC referral, in a broadcast that his government would not surrender any Sudanese nationals to be tried in courts outside Sudan.\textsuperscript{115}

3.1.2 Legal basis

The ICC established under the ICC Statue\textsuperscript{116} is the first ‘permanent’ international court with the power to try individuals [my emphasis] accused of serious crimes of international concern.\textsuperscript{117} Proceedings before the ICC may be invoked by one of the three so-called trigger


\textsuperscript{112} Ibid.

\textsuperscript{113} Ibid, 502.


\textsuperscript{116} The court is established under Article 1 of the ICC Statute.

\textsuperscript{117} ICC Statute, Article 1.
mechanisms.\textsuperscript{118} Article 13(b) of the ICC Statute grants the SC express power to refer cases to the Prosecutor of the ICC in a “situation in which one or many of such crimes within the jurisdiction of the Court appears to have been committed.” However, as Berman suggests, the effectiveness of the ICC will to a large extent depend upon its relationship with the SC.\textsuperscript{119}

Two sources of law govern this relationship. First is the UN-ICC Relationship Agreement,\textsuperscript{120} and the second is the constituent treaties of the UN and the ICC, namely; the UN Charter and the ICC Statute respectively.\textsuperscript{121} However, the ICC is not a UN organ.\textsuperscript{122} This relationship is complicated because the Court’s decisions may involve issues of high political sensitivity.\textsuperscript{123} Further tension may develop due to differing mandates which the two institutions seek to achieve.\textsuperscript{124} The ICC mandate is fairly clear; the achievement of justice by means of an international criminal process.\textsuperscript{125} The SC’s objective is the maintenance or restoration of international peace and security, which may include the achievement of justice in a particular case.\textsuperscript{126}

\textsuperscript{123} Ibid, 95.
\textsuperscript{124} Ibid.
\textsuperscript{125} Ibid, 96.
\textsuperscript{126} Ibid.
However, as pointed out by Max du Plessis with respect to the mandate of the ICC, “there is no irrebuttable presumption in favour of prosecutions” under the ICC Statute.¹²⁷

### 3.1.3 Controversial issues relating to the Security Council’s referral powers

Some observations may be made in respect to the legal issues that flow from this controversial exercise of jurisdiction by the ICC.

First, a referral by the SC must be within the context of a Chapter VII resolution.¹²⁸ An adoption of a Chapter VII resolution requires the SC to make an Article 39 determination that a situation constitutes a “threat to, or breach of, the peace or an act of aggression.”¹²⁹ Put differently, the SC must determine that in a particular situation it is necessary to take measures which would restore or maintain international peace and security.¹³⁰ This links the SC’s mandate of peace and security to the ICC’s justice mandate.¹³¹

Secondly, it seems that this mechanism grants the ICC jurisdiction regardless of the perpetrators nationality and location of the crime, therefore, it particularly caters for crimes committed on the territory of UN non-member states.¹³² Therefore, the SC’s referral power can enhance the jurisdictional reach of the ICC to situations involving non-party states, a jurisdiction that would not exist had it not been for such a referral.¹³³

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Thirdly, the jurisdiction exercised by the ICC in terms of Article 13(1) is its own and not some jurisdiction which has been transferred to the Court by the SC. This observation is accurate because the SC does not possess any criminal jurisdiction of its own which it could pass to the ICC.

Finally, the SC’s referral competence is limited in respect of a ‘situation’ only and not an individual case. Whereas the trigger mechanism by the Prosecutor of the ICC is more narrower in terms of a ‘specific crime’ hence its referral may not be the result of an investigation of a general ‘situation’. This position may be seen as reflecting the general concern by the ICC states parties to not give the Prosecutor wide powers, while also to not allow the SC to refer an individual case of criminal activity. However, the SC is not prohibited from deciding, under the UN Charter, to refer a particular case of criminal activity to the ICC in order to maintain peace.

In the final analysis, it should be highlighted that the ICC Statute accords no special treatment to a SC referral as opposed to the other two ways in which a case may be brought before the Court. Therefore, a referral by the SC does not necessarily mean that there will be actual prosecution of a case by the Prosecutor, due to the independence and impartiality enjoyed by ICC organs. In this regard, the Prosecutor has discretion when deciding whether to proceed

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137 Ibid.
138 Ibid.
139 Ibid., 98.
140 ICC Statute, Article 42.
with an investigation or prosecution in a particular case.\footnote{ICC Statute, Article 53(1) and (2).} This competence applies even in respect of a referral by the SC.\footnote{Sarooshi D in McGoldrick D, Rowe P, Donnelly E (eds.) \textit{The Permanent International Criminal Court} (2004) 99}

While the SC may want to ensure the effectiveness of its determination, for example, by creating \textit{ad hoc} tribunals, such a practice would undermine the establishment of the ICC.\footnote{Sarooshi D (1996) ‘The Legal Framework Governing United Nations Subsidiary Organs’ Vol. 67 No. 1 \textit{British Yearbook of International Law} 418-478.} Moreover, a referral to the ICC could be financially feasible and more appropriate in other situations. This argument was raised by the Commission when it considered in favour for a referral of the Darfur situation to the ICC.\footnote{See, Report of the Commission of Inquiry on Darfur, para. 574-582.}

\section*{3.2 JURISDICTIONAL ISSUES}

\subsection*{3.2.1 The jurisdiction of the ICC over nationals of non-party states}

The ICC Statute provides for three circumstances in terms of which the Court may exercise jurisdiction over nationals of non-party states. First, the ICC may found jurisdiction over such individuals in situations referred to the ICC Prosecutor by the SC.\footnote{ICC Statute, Article 13.} Secondly, where such individuals have committed a crime on the territory of a state which is party to the ICC Statute or has otherwise accepted the jurisdiction of the Court in respect to that crime.\footnote{ICC Statute, Article 12(2)(a) and (3).} Thirdly, where the non-party state has given consent to the ICC’s jurisdiction in a particular case.\footnote{\textit{Ibid.}}
Notably, in the first two circumstances the consent of the state of nationality is a requirement in the exercise of jurisdiction by the ICC.\textsuperscript{148}

The U.S. has vigorously argued that the exercise of jurisdiction over nationals of non-parties without the consent of the non-party state would be contrary to international law.\textsuperscript{149} This argument is described as the “principal American legal objection” to the ICC.\textsuperscript{150} David J Scheffer suggests a basis for the U.S. position is that it is “untenable to expose the largest deployed military force in the world…to the jurisdiction of a criminal court that the U.S. government has not yet joined and whose authority over American citizens the U.S. does not yet recognise.”

The long standing views of the China and the U.S. against the jurisdiction of the ICC are well known. Be this as it may, both states failed to practically manifest their views by exercising their veto power, as UN permanent member states, against the referral of the Darfur situation to the ICC.\textsuperscript{151}

\textit{3.2.2 Delegations of criminal jurisdiction to international courts: principles and precedents}

The question that arises here: is whether states may lawfully delegate criminal jurisdiction to international fora such as the ICC?


\textsuperscript{150} Ibid.

\textsuperscript{151} See, paragraph 3.1.1 above.
Madeline Morris argues that a delegation to an international criminal tribunal would be impermissible because the consequences are fundamentally different when carried out by an international court as opposed to a national court.\textsuperscript{152} Dapo Akande expands on this point by stating that the prestige of international courts and the embarrassment from their adverse decision are reasons why states may not wish to have cases involving their nationals or interests heard by international courts, however, this does not of itself mean that the they have no legal competence to act.\textsuperscript{153}

\textit{(a) The Nuremberg Tribunal}

Michael Scharf opines that the Nuremberg Tribunal, established to prosecute the Nazi leaders after World War II, was a collective exercise of universal jurisdiction by a treaty-based international court and as such constitutes a precedent for the ICC.\textsuperscript{154} However, Morris argues that while the Tribunal is an example of a delegation of criminal jurisdiction by states to an international tribunal, the Allied States were exercising sovereign powers in Germany at the time and, therefore, the Tribunal was founded upon the consent of the state of nationality.\textsuperscript{155} These arguments reflect a lack of consensus as to whether the Nuremberg Tribunal may be relied upon as precedent-setting for a delegation of criminal jurisdiction to an international tribunal without the state of nationality’s consent.\textsuperscript{156}

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\textsuperscript{152}Morris M (2001) ‘High Crimes and Misconceptions: The ICC and Non-Party States’ Vol. 64 No. 1 \textit{Law and Contemporary Problems} 29-47, at 30 she says that “[s]tates would have reason to be more concerned about the political impact of adjudications before an international court than before an individual State’s courts’.”
(b) The International Criminal Tribunals for the Former Yugoslavia and for Rwanda

The International Criminal Tribunal for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) were created by SC resolutions under Article 25 of the UN Charter.\textsuperscript{157} When the SC acts in terms of Chapter VII of the UN Charter, it exercises powers delegated to it by member states collectively.\textsuperscript{158} Therefore, the ICTY and the ICTR are examples of delegation of criminal jurisdiction by states to international tribunals.\textsuperscript{159}

The question of the Tribunals authority over nationals of non-members was raised in 1999, when the ICTY issued indictments for the then Presidents of the Former Republic of Yugoslavia (FRY), Slobodan Milosević and four other senior officials in relation to the crimes committed in Kosovo.\textsuperscript{160} In \textit{Prosecutor v Milutinović, Ojdamić, Sainović} an ICTY Trial Chamber held that despite the decisions of the UN organs, the FRY was at all material times a UN member.\textsuperscript{161} There are three reasons why the exercise of jurisdiction by the ICTY over FRY nationals provides precedence for the exercise of jurisdiction by an international tribunal that is treaty-based over nationals of a state that was not party to that treaty and without the consent of that state.\textsuperscript{162}

\begin{itemize}
  \item \textsuperscript{157} UN Security Council Resolution S/RES/827 (1993), and UN Security Council Resolution S/RES/955 (1994), respectively establish the ICTY and the ICTR.
  \item \textsuperscript{160} \textit{Prosecutor v Milosević, Milutinović, Sainović, Ojdanić & Stojiliković}, Case No. IT-99-37-I, 29 June 2001. This was the time during which the SC (SC Res. 777 (1992) and UN General Assembly (GA Res. 47/1 (1992) decided that the FRY could not automatically assume the membership of the Socialist Federal Republic of Yugoslavia (SFRY) in the UN and needed to apply for new membership.
  \item \textsuperscript{161} \textit{Prosecutor v Milutinović, Ojdanić, Sainović}, Case No. IT-99-37-PT, 6 May 2003.
\end{itemize}
First, the FRY was not a member of the UN after the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), therefore, the FRY was not a UN member between 1992 and 2000.\textsuperscript{163} Secondly, in its decision the Chamber stated that “a crime committed by any person, whatever his nationality, in a country that is part of the SFRY, is triable by the Tribunal.”\textsuperscript{164} Thirdly, many states, including the U.S., that supported the ICTY’s jurisdiction over FRY nationals,\textsuperscript{165} did not regard the FRY as a UN member.\textsuperscript{166} These arguments seem to support the SC’s competence to provide for jurisdiction over nationals who commit crimes on the territory of a state that was a UN member.\textsuperscript{167} Therefore, similar to the position of the ICC, as long as there is territorial jurisdiction, the question of nationality is irrelevant.\textsuperscript{168}

(c) The Special Court for Sierra Leone

The Special Court for Sierra Leone (SCSL) was created under a treaty between the UN and Sierra Leone for the prosecution of individuals who committed serious international crimes in Sierra Leone.\textsuperscript{169} The jurisdiction of the Court is not limited to nationals of Sierra Leone. In fact the Court indicted a non-national: the former head of state of Liberia, Charles Taylor, for his participation in armed conflict in Sierra Leone.\textsuperscript{170} Although Liberia has instituted proceedings before the International Court of Justice (ICJ), arguing that the indictment and arrest warrants do not respect the immunity enjoyed by heads of states, it has not argues that

\textsuperscript{163} Prosecutor v Milutinović, Ojdanić, Sainović, para 38 and 71.
\textsuperscript{164} Ibid.
\textsuperscript{166} Ibid.
\textsuperscript{167} ibid.
\textsuperscript{168} ibid.
\textsuperscript{170} Prosecutor v Charles Ghanbay Taylor, Case No. SCSL-03-01-I-001, 7 March 2003.
the Sierra Leone is not able to delegate its criminal jurisdiction to an international court. On the contrary the Court has received strong support the U.S. and the international community and is a significant example of what the US contends that parties to the ICC cannot lawfully do.

These cases provide historical precedent on the practice of states delegating their criminal jurisdiction over non-nationals to international tribunals, in circumstances where the state of nationality’s consent was not sought. This principle finds equal application to the ICC. Where states have acted collectively, by lawfully delegating their criminal jurisdiction to the Court, in order to protect the interests of the international community.

### 3.2.3 Limitations on ICC jurisdiction over nationals of non-party states

It has already been established that the ICC has jurisdiction over nationals of non-party state, despite this fact, the ICC Statute limits the Court’s jurisdiction in specific circumstances.

First, state officials may not rely on international law immunities in order to escape the jurisdiction of the ICC in terms of Article 27 of the ICC Statute. This provision is limited by Article 98(1), in that states parties to the ICC Statute are prevented from arresting and surrendering officials of non-party states to the ICC. This limitation is discussed in more detail in paragraphs 4.2.2 and 4.3.1.

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171 Ibid.
Secondly, certain treaties may prevent the surrender of a non-party national, who is present on the territory of an ICC state party, to the ICC. Article 98(2) allows states parties, on whose territory a person wanted by the ICC is present, to fulfil their obligations under international agreements preventing the transfer of such person to the ICC.

Thirdly, the Prosecutor of the ICC may not commence or proceed with an investigation or prosecution where the SC has requested a deferral of a situation. This provision was inserted as a means of providing limited political control over the work of the Prosecutor, as it was acknowledged that there may be circumstances where the exercise of jurisdiction by the ICC would interfere with on-going conflict resolution by the SC.

Fourthly, the complementarity provisions of the ICC Statute serve to limit its jurisdiction, in that, the ICC may not exercise its jurisdiction in cases where a state is willing to, or has genuinely and in good faith, investigated or prosecuted a person in respect of the same crime before the Court. Therefore, the jurisdiction of the ICC is supplementary to that of national courts and it may not be exercised where such national courts function properly. How does this principle apply to cases involving non-party states such as Sudan? Article 17 of the ICC Statute makes reference to a “State which has jurisdiction over” the case, this would include non-party states because they may have jurisdiction according to the traditional principles of jurisdiction; nationality or territoriality. On this basis it becomes clear that Sudan missed

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175 ICC Statute, Article 16.
177 ICC Statute, Article 17 and 20.
the opportunity of frustrating the exercise of jurisdiction by the ICC by asserting both willingness and ability to prosecute its nationals under its domestic judicial system.

Finally, the ICC’s competence to exercise jurisdiction over nationals of non-party states arises in cases of extradition obligations. States parties to the ICC Statute have an obligation to arrest and surrender persons on their territory to ICC when such a request is made by the Court. Where there are competing requests for extradition between a non-party state (in respect of its national) and the ICC, the state party with custody is only obliged to give priority to the ICC surrender request if there is no extradite treaty with the non-party state. If there is no extradition treaty requiring the surrender of the accused to the non-party state, then the state party has the right to choose whether to surrender the national to the ICC or to the non-party state.

While the exercise of jurisdiction by the ICC over nationals of non-party states may be considered as politically unacceptable by non-party states (like Sudan), it is a desirable way of ending the culture of impunity where there has been violations of international human rights and international humanitarian law, as we have seen unfold in the Darfur region.

180 ICC Statute, Article 89.
181 ICC Statute, Article 90(4).
182 ICC Statute, Article 90(6).
3.3 ARREST WARRANTS AGAINST AL BASHIR

Based upon the report of the Commission the SC referred the situation in Darfur to the ICC Prosecutor, in terms of resolution 1593, which was subsequently welcomed by the Secretary-General, Kofi Annan. Prior to opening investigations the Prosecutor considered multiple sources of information in his analysis, including the report of the Commission. After a thorough analysis of this information, the Prosecutor concluded that the statutory requirements for initiating an investigation were satisfied, and thereafter opened investigations into the situation in Darfur on 1 June 2005.

On 14 July 2008, the Prosecutor filed an ex parte application under Article 58 of the ICC Statute (the Prosecution Application), to Pre-Trial Chamber I, requesting the issuance of an arrest warrant against Al Bashir. The Prosecution Application were for Al Bashir’s “alleged criminal responsibility in the commission of genocide, crimes against humanity and war crimes against members of the Fur, Masalit and Zaghawa groups in Darfur from 31 March 2003 to 14 July 2008.” In his application, the Prosecutor also submitted that issuing a summons to appear could have been a viable alternative had Al Bashir shown a willingness to appear before the Court.

183 See, S/Res/1593, para. 1.
186 Ibid.
188 The Prosecution Application, para. 413.
189 The Prosecution Application, para. 414.
3.3.1 First arrest warrant issued by Pre-Trial Chamber I

(a) Jurisdiction of the Court

The Pre-Trial Chamber I maintained that it has jurisdiction *ratione materiae* insofar as the conduct “gives rise to genocide, crimes against humanity and war crimes.”\(^{190}\) In relation to the jurisdiction *ratione personae*, the Chamber considered that the case fell within its jurisdiction, insofar as the Darfur situation was referred to it by the SC acting pursuant to Article 13(b) of the ICC Statute.\(^{191}\) This was despite of the fact that the case “refer[ed] to criminal liability of a State that is not party to the Statute, for crimes which were allegedly committed in the territory of a State not party to the Statute.”\(^{192}\)

(b) Admissibility Test

The Chamber noted that the Prosecution Application did not raise any issues of admissibility, except to highlight that there were no investigations or prosecutions being conducted against Al Bashir for any of the crimes at national level.\(^{193}\) The Chamber declined to use its discretionary *pro proprio motu* power to determine the admissibility of the case against Al Bashir because: (i) the application was confidential; and (ii) there was no manifest factor which provoked it to exercise its discretion under Article 19(1) of the ICC Statute.\(^{194}\)

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\(^{190}\) *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-3, ‘Decision on the Prosecutor’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir’ (4 March 2009). In particular, those provided for in Articles 6(a), (b) and (c), 7(1)(a), (b), (d), (f) and (g) and 8(2)(e)(i) and (v) of the Rome Statute; The Prosecution Application, paras. 9, 240 and 355.

\(^{191}\) *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-3, 14.

\(^{192}\) Ibid.

\(^{193}\) Ibid, 18; The Prosecution Application, para. 3.

\(^{194}\) *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-3, 18.
(c) The issuance of a warrant of arrest

In March 2009, the majority of the Chamber issued an arrest warrant against Al Bashir on the basis of his individual criminal responsibility under Article 25(3)(a) of the ICC Statute as an indirect perpetrator, or as an indirect co-perpetrator for war crimes and crimes against humanity. In a majority of two to one decision, the Chamber declined to include the crime of genocide because it found that it could not reasonably conclude that there was an existence of genocidal intent. Judge Anïta Uâëka, dissented from this by arguing that the at the arrest warrant stage, the mens rea required, was that the evidence should give reasonable grounds to believe that there was genocidal intent. Upon assessing the Prosecutor’s evidence, she found there were reasonable grounds to believe that there was existence of genocidal intent, and therefore, the arrest warrant should have been issued for the crime of genocide.

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195 Ibid, para. 211. The Chamber highlighted the decision on the confirmation of charges in *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07-717 (30 September 2008), para. 514, that “[t]he leader must use his control over the apparatus to execute crimes, which means that the leader…mobilises his authority and power within the organisation to secure compliance with his orders”.

196 The Prosecutor v Omar Hassan Ahmad Al Bashir, Case No, ICC-02/05-01/09-3, para. 212. The Chamber highlighted the decisions in *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-803-EN (29 January 2007), para. 342 and *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* at para. 521, cases that “[t]he concept of co-perpetration based on joint control over the crime is rooted in the principle of division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner. Hence, although none of the participants has control over the offence because they all depend on one another for its commission, they share control because each of them could frustrate the commission of the crime by not carrying out his or her task.”

197 Ibid. Five counts of crimes against humanity: murder, Article 7(1)(a); extermination, Article 7(1)(b); forcible transfer, Article 7(1)(d); torture, Article 7(1)(f); and rape, Article 7(1)(g).

198 Ibid. Five counts of crimes against humanity: murder, Article 7(1)(a); extermination, Article 7(1)(b); forcible transfer, Article 7(1)(d); torture, Article 7(1)(f); and rape, Article 7(1)(g).

199 Ibid, para. 86.

200 Ibid, para. 105.
3.3.2 Second arrest warrant issued by Pre-Trial Chamber I

The Pre-Trial Chamber's decision excluding the crime of genocide was appealed by the Prosecutor.\(^{203}\) His appeal was upheld by the Appeals Chamber where it asserted that “the question was not whether a person acted with genocidal intent is the only reasonable conclusion that can be drawn from the evidence, but whether or not there are reasonable grounds to believe, based on the facts, that the person committed the alleged acts with genocidal intent.”\(^{204}\) Moreover, the Chamber held that “only reasonable conclusion” criterion is applicable at the conviction stage and not for the purposes of issuing a warrant of arrest.\(^{205}\)

The Appeals Chamber held that because the Pre-Trial Chamber had erroneously applied the standard of proof required for issuing an arrest warrant,\(^{206}\) this procedural error had a material affect on the outcome of the proceedings; therefore, it reversed that facet of the decision.\(^{207}\)

In this regard Johan D van der Vyver observes that the ICC Statute test of “reasonable grounds” differs from that one contained in the Statutes of the ICTY\(^{208}\) and ICTR,\(^{209}\) which require a “prima facie case.”\(^{210}\) Therefore, it is uncertain whether the ICC test requires a lesser degree in comparison to the Statutes of these international tribunals.\(^{211}\)

\(^{203}\) *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-12, Prosecution's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" (10 March 2009);

\(^{204}\) *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-21, Decision on the Prosecutor's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" (24 June 2009).

\(^{205}\) Ibid, para. 33-39.

\(^{206}\) Ibid, para. 33-39.

\(^{207}\) Ibid, para. 41.

\(^{208}\) ICTY Statute, Article 19(1).

\(^{209}\) ICTR Statute, Article 18(1).


\(^{211}\) Ibid.
On 12 July 2010 the Pre-Trial Chamber I issued a second arrest warrant against Al Bashir in
terms Article 25(3)(a) of the ICC Statute, for the crime of genocide. The Chamber found
that there were reasonable grounds to believe that Al Bashir acted with specific intent, as one
of the reasonable conclusions that may be drawn from the Prosecutor’s evidence. Satisfied
with the standard of proof recognized by the Appeals Chamber, the Pre-Trial Chamber I held
that “there were reasonable grounds to believe that Al Bashir acted with dolus
specialis/specific intention to destroy in part the Fur, Masalit and Zaghawa ethnic groups.”

The issuance of arrest warrants against Al Bashir, by the ICC, has been quite topical in
political, professional and academic arenas. Christopher Gosnell heavily criticises, from a
legal practitioners view, the arrest warrant request by the ICC Prosecutor as ‘a calculated
strategy, using short-term expediency.’According to him, a sealed arrest warrant (as
opposed to a public one) could have increased the chances of arresting Al Bashir during his
numerous visits to other countries, as in case of Jean-Pierre Bemba when he was taken by
surprise in Belgium. Alternatively, the Prosecutor could have delayed requesting a public
warrant against Al Bashir until he had secured custody and commenced a trial of at least one
perpetrator by using a sealed warrant.

212 The Prosecutor v Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-95, Second Warrant of Arrest
for Omar Hassan Ahmad Al Bashir (12 July 2010). Three counts of genocide: genocide by killing, Article 6-a;
genocide by causing serious bodily or mental harm, Article 6-b; and genocide by deliberately inflicting on each
target group conditions of life calculated to bring about the group’s physical destruction, Article 6-c.
213 The Prosecutor v Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-94, Second Decision on the
Prosecution’s Application for a Warrant of Arrest (12 July 2010), para. 4.
214 Ibid, para. 5.
Vol. 6 Journal of International Criminal Justice 841.
216 Ibid, 841-843.
217 Ibid, 848.
The *Al Bashir case* has not only also exasperated the international debate about the close involvement of the SC and to the ICC, it has also given rise to strong opposition to the prosecution of African leaders for crimes under international law.\(^{218}\) Notably, the AU has taken a lead in its decision of non-cooperation with the ICC and its call for the SC to defer the proceedings in terms of Article 16 of the ICC Statute,\(^ {219}\) for a regional solution under the auspices of the African Union High-Level Panel on Darfur (AUPD).\(^ {220}\)

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CHAPTER FOUR:

THE IMMUNITY FOR SERVING HEADS OF STATES FROM ICC PROSECUTION

4.1 THE DOCTRINE OF IMMUNITY AND THE SCOPE OF IMMUNITY OF STATE OFFICIALS

4.1.1 The Doctrine of Immunity

One of the obstacles in prosecuting international crimes are the rules intended to protect the accused person by granting him or her immunity from prosecution.\(^{221}\) Two categories of immunities may come into play, namely, those under international law and those provided for in national legislation.\(^ {222}\) However, this section of the paper will focus on the former category of immunities. As a starting point, the etymology of the word immunity comes from the Latin word *immunitas*, meaning ‘exempt from public service or charge’.\(^ {223}\) According to the Concise Law Dictionary:

"An immunity is a right peculiar to some individual or body; an exemption from some general duty or burden; a personal benefit or favour granted by the law contrary to the general rule".\(^ {224}\)

Thus, immunity from prosecution means an exception to prosecution for crimes.\(^ {225}\) According to William Schabas, immunity is ‘a defence’ under international criminal law.\(^ {226}\)


\(^{222}\) Ibid.


It, therefore, constitutes a defence to international criminal responsibility in favour of individuals accused of international crimes.\textsuperscript{227} Immunity may be invoked at any time during the trial but before judgement is delivered.\textsuperscript{228} As a ground that excludes an individual’s criminal responsibility, immunity ‘has the effect of rendering inadmissible any action brought against the person who invokes it’.\textsuperscript{229} The issue then is whether or not the defence of immunity is enforceable under international law?

4.1.2 Scope of immunity of state officials

International law considers two aspects to state officials’ immunity: functional immunity and personal immunity.\textsuperscript{230} Functional immunity, commonly referred to as immunity \textit{ratione materiae}, applies on the strength of the so-called Act of State doctrine to the official acts of senior state officials.\textsuperscript{231} In principle the state is held responsible for any violations of international law that a state agent may have committed while acting in an official capacity.\textsuperscript{232} This type of immunity may be relied upon both by serving and former state officials for official acts while they were in office.\textsuperscript{233}

Personal immunity, commonly referred to as immunity \textit{ratione personae}, is granted by international customary to a certain category of individuals and applies only for the term of

\textsuperscript{227} Murungu C in Murungu C & Biegon J (eds.) \textit{Prosecution International Crimes in Africa} (2011) 35.

\textsuperscript{228} Ibid.


\textsuperscript{230} Cassese A (2008) \textit{International Criminal Law} (2ed.) 302


\textsuperscript{233} Ibid.
office of the individual. Moreover, it also applies to international crimes, as held by domestic courts in the cases involving Muammar Qaddafi and Robert Mugabe. There seems to be consensus in judicial opinion and state practice that a state official possessing immunity *ratione personae* may not be subject to the jurisdiction of domestic courts in foreign states for allegedly committing international crimes.

However, nowadays this position is no longer accepted under international law. John Dugard argues that “some human rights norms enjoy such a high status that their violations, even by state officials, constitute an international crime.” Therefore, according to Dugard the doctrine of immunity cannot be at odds with these developments.

### 4.2 THE IMMUNITY OF HEADS OF STATES

The indictment of Al Bashir by the ICC is not an unprecedented move as he is the third head of state to be indicted by an international criminal court. Precedent includes the indictment issued by the ICTY against Slobodan Milosević while he was the President of the FRY, and those issued by the SCSL against Charles Taylor while he was President of Liberia. In the *Taylor* case the defence challenged the validity of the indictment by arguing that the SCSL...
was not truly an international criminal tribunal, and therefore, the personal immunities of head of state apply before it. In this regard, the SCSL settled the case by affirming that it is an international tribunal, and as such, it argued that these immunities do not apply before international criminal courts. However, in both these cases the custody of the accused was only secured after they had either been removed or had stepped down from power, therefore, at the time of their trials both Presidents were former heads of states.

4.2.1 Personal immunities versus the Jurisdiction of international criminal courts

Two questions arise in the Al Bashir case concerning the personal immunities of heads of states: (i) whether the ICC has violated Al Bashir’s personal immunities of Al Bashir as a serving heads of state? and (ii) whether ICC states parties are obliged to carry out the request for the arrest and surrender of Al Bashir?

It has already been mentioned that customary international law accepts that state officials are not subject to the jurisdiction of foreign states concerning all crimes, including international crimes. This holds true for head of states because they fall under the protective shield of immunity ratione personae. Authoritatively for this position is found in the decision by the International Court of Justice (ICJ) in the Arrest Warrant case. The ICJ held that when the Belgian court issued [emphasis] the arrest warrant against the Minister of the Democratic Republic of Congo on charges of international crimes committed in the DRC, it violated the personal immunities enjoyed by the Minister.

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244 Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) 2002 ICJ Report 3; 41 ILM 536.
245 Ibid, para. 70.
Interestingly, the ICJ held that Belgium had breached the international rules by merely “circulating internationally” the arrest warrants.\textsuperscript{246} The Court held that the Minister’s immunity applies before national courts for international crimes.\textsuperscript{247} It acknowledged that this immunity would not apply: (i) once the Minister was no longer in office, (ii) to acts committed in the Minister’s private capacity, and (iii) before international tribunals such as the ICC, ICTY and the ICTR.\textsuperscript{248}

This decision has been strongly criticized ‘as a setback for the movement against impunity for the commission of international crimes.’\textsuperscript{249} Akande suggests that one should not read too much into the decision of the ICJ, as its argument that ‘international law immunities only apply before national courts and not before international tribunals is unpersuasive.’\textsuperscript{250} In this regard the Appeals Chamber of the ICTY addressed the issue in the Blaškić case, by recognising that in certain circumstance, international law immunities may be pleaded before an international tribunal.\textsuperscript{251} Although the Chamber was referring to the immunity of state officials from producing documents, it nevertheless, accepted that state officials can be immune from the jurisdiction of international tribunals.\textsuperscript{252}

\textsuperscript{246} Ibid, para. 71.
\textsuperscript{247} Ibid, para. 56-58.
\textsuperscript{248} Ibid, para. 61
\textsuperscript{251} \textit{Prosecutor v Blaškić}, Case No. IT-95-14-AR 108 bis, Objection to Issue of Subpoena \textit{duces tecum}, (29 October 1997), 110 ILR 609, 707, para. 38-43.
Commentators agree that the merely accepting the view that international law immunities do not apply before international courts and tribunals oversimplifies the matter.\(^ {253}\) The reliance upon international law immunities before international criminal tribunals should rather depend upon: (i) whether the instruments conferring jurisdiction on the tribunal expressly or implicitly remove the immunity of state officials, and (ii) whether the state concerned is bound by the instrument which removes the immunity.\(^ {254}\)

### 4.2.2 Immunity before the ICC

As already mentioned above that the question of whether or not international law immunities are available before the ICC will depend on examining the text of the ICC Statute. Article 27 states the following:

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

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 person.”

At least four elements may be considered in analysing and interpreting Article 27(1). First, the expression of equal application “to all persons” manifests that all [emphasis] individuals who commit crimes within the jurisdiction of the Court will be responsible and liable for


punishment. The reference to “equally”, in paragraph 1, clearly refers to a “distinction based on official capacity” only. Secondly, the expression “official capacity”, in paragraph 1, is used to describe a broad concept by using non-exhaustive examples. These are the most typical examples of individuals with political and administrative power who might be tempted to claim immunity from criminal responsibility and hide behind positions in their endeavours to attain impunity. Thirdly, the very strict wording of the formula “shall in no case exempt…” have the procedural consequence that the Court does not have to make a finding on the facts concerning the position held by the accused at the time when he or she committed the crime. Therefore, even if the accused held a position or purported to act in an official capacity it would not exempt criminal responsibility. Finally, the wording of the formula “in and of itself [is not a] “ground for reduction of sentence” clearly indicates that no mitigation is permitted just because the accused acted or believed that he/she was acting in their official capacity. However, the possibility for a reduction of sentence, according to Article 78(1), is equally available to accused who commit crimes while acting in an official capacity as to all other perpetrators.

Eric David observes that the ICC Statute dismisses two radically different defences. The first objection is based on the merits, Article 27(1), while the second objection is based on procedural grounds, Article 27(2), and it expressly bars both.

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256 Ibid, 787.
257 Ibid.
258 Ibid, 788.
259 Ibid, 789.
260 Ibid.
261 Ibid, 790.
262 Ibid.
263 Ibid.
265 Ibid.
Similar provisions of Article 27(1) are reflected in the agreements of the Nuremberg and Tokyo Tribunals, the Nuremberg Principles, and the statutes of the ICTY and ICTR. The main effect of these provisions is that it eliminates the substantive defence that may be raised by state officials. On the other hand, the provision of Article 27(2) has no counterpart in the founding instruments of international tribunals. The provision establishes that state officials are subject to prosecution by the ICC thereby constituting a waiver by states parties of any immunity that their officials would ordinarily possess before the ICC.

In summary, the provisions of Article 27 merely reiterate the prevailing principle of customary international law, namely; that the personal immunities are irrelevant before international criminal courts. One could agree that in the Al Bashir case the Pre-Trial Chamber I recognised this fact by stating “that the current position Omar of Al Bashir as Head of State which is not party to the [ICC] Statute has no effect on the Court’s jurisdiction…” However, this amputation of immunity by Article 27 does not bring closure to the problem because the ICC relies upon states to arrest and surrender wanted persons.

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265 See, The Charter of the International Military Tribunal (Nuremberg Charter), agreed upon in pursuance to the London Agreement on 8 August 1945, Article 7.
267 See, Principle III.
268 See, Article 7(2).
269 See, Article 6(2).
271 Ibid, 420.
272 Ibid.
273 The Prosecutor v Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-3, para. 41.
4.3 OBLIGATIONS UPON STATES TO ARREST AND SURRENDER AL BASHIR

An issue of more practical difficulty is whether states may lawfully ignore Al Bashir’s personal immunities in order to comply with the request of the ICC? Paola Gaeta address this issue by stating that:

“[T]o assert that an international criminal court can “lawfully” issue and circulate an arrest warrant against individuals entitled to personal immunity before national courts, is not tantamount to saying that states can “lawfully” arrest those individuals and surrender them to the requesting international court.”

4.3.1 Article 98(1) of the ICC Statute

We now know that the ICC is entitled to exercise jurisdiction over nationals of non-party states yet the ICC Statute does not remove the immunities ordinarily enjoyed by officials of non-parties. Because the ICC is deprived of enforcement powers it relies upon states to enforce and implement its warrants of arrest. In general, states parties are obliged to cooperate with a request from the ICC for the arrest and surrender of a person on their territory, in terms of Article 86 of the ICC Statute. The subsequent provisions Part IX of the ICC Statute set out this obligation in more detail. However, the Court’s request for co-operation is limited by Article 98(1), 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.”

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Commentators note that in essence this limitation obliges the Court to not put [the requested] state in a position of violating its international obligations where immunities are concerned\(^\text{276}\). Consequently, the ICC must first seek the co-operation and waiver of immunity from the third state before issuing its request to states\(^\text{277}\).

At face value there seems to be tension between Article 27, which renders international immunities irrelevant for ICC’s exercise of jurisdiction, and Article 98, which bars the Court from proceeding with a request for surrender in respect of persons entitled to international immunities\(^\text{278}\). The tension between these two provisions depends upon the interpretation of the words “third states” in Article 98(1). A grammatical interpretation of the words “third states” may mean a state other than the requested state\(^\text{279}\). Kreß and Prost are in favour of this interpretation\(^\text{280}\). Their argument is that if the drafters of the ICC Statute intended for the words in Article 98(1) to refer to a “non-party state” they would have done so, as they did in other provisions of Part IX (in particular Article 87(5)) which explicitly speak of “a State not party to the Statute”\(^\text{281}\).

A narrow interpretation of the words “third states” may mean a non-party state of the ICC Statute as taken by a number of scholars\(^\text{282}\) and by some ICC states parties\(^\text{283}\). Reliance upon


\(^{278}\) Ibid, 328.


\(^{280}\) Ibid.

\(^{281}\) Ibid.


\(^{283}\) Quoted in Akande D (2004) ‘International Law Immunities and the International Criminal Court’ at 422, during the July-August 1999 Session of the ICC Preparatory Commission, delegates from Canada and the
this interpretation would mean that a waiver of immunity would be a precondition in order to execute a request for surrender. In contrast, such a waiver is not necessary between a requested state party and other states parties because Article 27(2) removes the hurdle of international immunities from preventing the ICC in exercising jurisdiction or issuing arrest warrants.

4.3.2 May the ICC lawfully request for the arrest and surrender of Al Bashir from State Parties?

The legal issue is whether the ICC’s request for surrender amounts to an ultra vires act? If one accepts the above narrow construction then indeed the Court’s request is ultra vires, in that it is in conflict with Article 98(1). As the President of Sudan, Al Bashir’s immunity ratione personae, applies in relation to all states. The basis for contending that the ICC request is ultra vires is that the Court has not fulfilled the precondition required by its Statute, namely; that of obtaining a waiver of immunity from the Sudanese government before it goes ahead in issuing a request for surrender from its states parties. It is against this backdrop that states parties may lawfully elect not to comply with the ICC’s request.

United Kingdom circulated a paper (based upon discussions among the ‘like-minded’ group of countries on the relationship between Article 27 and 98) in which they stated:

“The interpretation which should be given to Article 98 is as follows. Having regard to the terms of the Statute, the Court shall not be required to obtain a waiver of immunity with respect to the surrender by one State Party of a head of State or government, or diplomat, of another State Party.”


Ibid.

Ibid, 329.
4.3.3 Would a state commit a wrongful act against Sudan surrendering Al Bashir to the ICC?

States parties may choose to carry out the ICC’s request although they are not obliged to do so, against the above contention. One may recall that SC’s resolution, referring the situation in Darfur, only urged states to fully co-operate with the ICC.\textsuperscript{287} In this regard, one view is that a state could execute the Court’s request based on being a member of the UN, and as such it would be performing an action urged by the SC.\textsuperscript{288} Such a state could claim that it does not incur responsibility against Sudan for deciding to carry out a recommendation by the SC.\textsuperscript{289}

One may agree with Gaeta’s two-fold argument against this legal construction.\textsuperscript{290} First, the co-operation by states with the ICC is limited in that it must comply with the ICC Statute, put differently, the SC resolution has not given the ICC a blank cheque: in that did not authorise the ICC to issue requests to non-party states.\textsuperscript{291} Secondly, the SC did not urge states to ignore international immunities when co-operating with the ICC.\textsuperscript{292}

The Registrar of the ICC, at the request of the Pre-Trial Chamber I, has issued two requests seeking co-operation from all states parties of the ICC to arrest and surrender Al Bashir.\textsuperscript{293} Since the issuance of arrest warrants by the ICC, Al Bashir has been invited to visit several

\textsuperscript{287} See, S/RES/1593 (2005).
\textsuperscript{289} Ibid.
\textsuperscript{290} Ibid. 331.
\textsuperscript{291} Ibid.
\textsuperscript{292} Ibid, 332.
countries, including Uganda, Nigeria, Turkey, Denmark and South Africa. Max du Plessis opines that Al Bashir avoided travelling to these states for fear of arrest or perhaps so that these states could avoid diplomatic embarrassment. More interestingly, President Al Bashir has visited Egypt, Kenya, Djibouti and has made two visits to Chad.

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294 See, Sapa ‘Uganda cautions al-Bashir over Kampala trip’ Mail and Guardian, 16 July 2009, available at http://mg.co.za/article/2009-07-16-uganda-cautions-albashir-over-kampala-trip [accessed on 7 October 2011]. President Al Bashir was invited to Uganda to attend a meeting of the AU, but he did not attend after being warned that his visit could cause a “diplomatic incident”.


298 See, Bell G ‘South Africa may arrest Bashir if attends World Cup’ Reuters, 28 May 2010, available at http://www.reuters.com/article/2010/05/28/us-soccer-world-bashir-idUSTRE64R3KH20100528 [accessed on 7 October 2011]. Amidst reports that President Al Bashir was invited to attend the 2010 Soccer World Cup hosted by South African, President Jacob Zuma, confirmed that he would face arrest if indeed he arrived in South Africa.


301 See, Menya W ‘Bashir surprise guest in Kenya’ Daily Nation, 27 August 2010, available at http://www.nation.co.ke/News/Bashir%20surprise%20guest%20in%20Kenya/-/1056/998008/-/w03i5sz/-/index.html [accessed on 7 October 2011]. President Al Bashir visited Kenya to attend the promulgation of Kenya’s new constitution; however, the Kenya government said it would not arrest him and surrender him to the ICC.


Although three of the countries (excluding Egypt) which Al Bashir has visited are states parties to the ICC Statute,\(^\text{304}\) none of them has co-operated with the ICC in arresting and surrendering the incumbent head of state of Sudan to the Court.\(^\text{305}\)

In conclusion, although the SC has requested all states to co-operate with the ICC, its request cannot be construed to imply that states are legalised in breaching the rules of customary international law on personal immunities of a head of state, such as Al Bashir, without incurring any international responsibility for such a breach.\(^\text{306}\)


CHAPTER FIVE: CONCLUDING REMARKS

The purpose of this research has been to address the question of whether state officials, particularly a serving head of state, may be held responsibly before an international forum for international crimes committed while in office? This question is reflected in the long standing debate regarding the tension between the protection of human rights and the demands for state sovereignty. However, the drafters of the ICC Statute have made clear that their aims were “that the most serious crimes of concern to the international community as a whole must not go unpunished” and “to put an end to impunity for the perpetrators of these crimes…” The concept of punishing individuals for transgressing international criminal law can be traced to the well-known judgement of the International Military Tribunal where it stated that:

“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

In criminal cases when it is alleged that international crimes have been committed, the rules of international law regarding immunity strike a balance between the need to avoid undue interference with the functioning of foreign states and the need to punish perpetrators for international crimes.

308 ICC Statute Preamble, para. 4.
309 ICC Statute Preamble, para. 5.
310 International Military Tribunal judgement of 1 October 1946, in The Trial of German Major Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, Part 2 (1950), 447
Evidently, the ICC Statute has gone beyond the developments of customary international law. As discussed earlier in chapter three, the ICC is in line with the precedence of the other international criminal tribunals in asserting that nationals of non-party states may be subject to its jurisdiction, subject to relevant limitations.

With regard to the immunity of a serving head of state from prosecution by the ICC for committing international crimes, one would agree with the author that issuance of arrest warrants against Al Bashir is a hallmark event in the Courts dispensation. One of the concerns about the case against Al Bashir is that it arises out of a SC referral regardless of the fact that Sudan is not a party to the ICC Statute. However, this issue can be dispensed of it by accepting that SC has the competence of removing Al Bashir’s immunity when exercising its power under Chapter VII of the UN Charter. The legal basis for removing his immunity is anchored on the Sudan state being a party to the UN Charter, and therefore, having accepted the binding power of the SC.\footnote{312 Akande D ‘The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?’ (2008) 89.}

Has the ICC ousted the immunity enjoyed by Al Bashir under international law as an incumbent head of state? There is strong academic support which responds in the affirmative to this question. First, whenever the SC refers a situation to the ICC, the ICC Statute is binding upon the state concerned as if it were a party to Statute.\footnote{313 Ibid, 90.} Secondly, SC resolution 1593 (paragraph 2) implicitly binding upon Sudan in that it must co-operate with the ICC, hence, this puts Sudan in an parallel position to an ICC state party to accept the provisions of the Statute.\footnote{314 Ibid.} It is against this back-drop that the immunity enjoyed Al Bashir is lifted by Article 27.\footnote{315 Ibid.}
Finally, where a charge of genocide is brought, against an accused, before the ICC (as Al Bashir is), the Genocide Convention of 1948 \(^\text{316}\) lifts immunities. \(^\text{317}\) Important provisions of the Genocide Convention are: Article 4 which provides for the punishment of persons who commit genocide even if they are constitutionally responsible rulers, and Article 6 which provides the prosecution of such persons either before the national courts where the genocide took place or before an international criminal tribunal in respect to which the state has accepted jurisdiction. The ICJ held, in the *Genocide Convention case* \(^\text{318}\) that the ICTY fell within the scope of Article 6 because of the obligations accepted under the UN Charter. \(^\text{319}\) This argument could also be applied in support of the ICC in cases concerning a referral of a situation by the SC to the Court. \(^\text{320}\)

While these academic arguments suggest that the ICC Statute has removed Al Bashir’s immunity, the ICC has not yet made a pronouncement on the relationship concerning Articles 27 and 98 and their effects for non-party states. \(^\text{321}\) These issues will perhaps be addressed before the ICC in the appeals proceedings concerning the decision to issue arrest warrants against Al Bashir by the Sudanese President himself, other African states, and the AU in terms of Article 82(1) of the ICC Statute. \(^\text{322}\)

One cannot conceive that Al Bashir would voluntarily surrender himself to the ICC nor that the Sudanese government will waiver the President’s immunity so as to allow the ICC to exercise its jurisdiction over him. To this end, ICC state parties may choose to arrest and

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\(^{319}\) Ibid.


\(^{322}\) Ibid.
surrender Al Bashir to the ICC at the cost of breaching their obligations under international law. However, the ICC’s jurisdiction will not be affected by the illegality of the arrest because the Court is not bound to respect any head of state’s immunities.\textsuperscript{323} This situation is highly unimaginable because before travelling to other states Al Bashir will definitely establish some guarantees that that state will not surrender him to the ICC, as illustrated in chapter four. The lack of efforts to bring Al Bashir to justice before the ICC cannot be isolated from the political debate that “the ICC is rapidly turning into a Western court to try African…governments”\textsuperscript{324} At the time of writing, the ICC has launched its investigations against six African countries, two of which concern serving heads of states.\textsuperscript{325} In sum, one can only be optimistic that in the future the ICC will undertake prosecutions of international crimes committed not only by nationals of non-party states but also nationals of powerful state, including their head of states who enjoy immunities under international law.

\textbf{WORD COUNT: 17 981} (excluding contents page and list of references).


\textsuperscript{325} See, ICC Situations and Cases, available at \textcolor{blue}{http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/} [accessed on 7 October 2011].
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**National Courts**


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