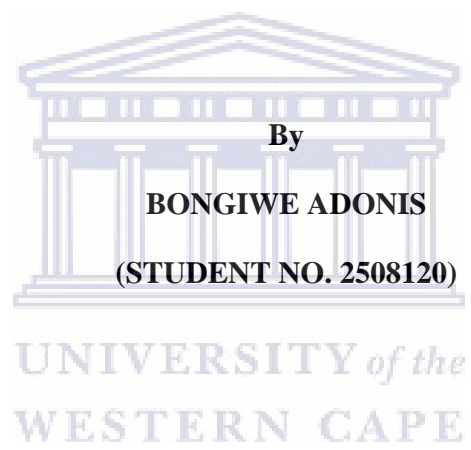


UNIVERSITY OF THE WESTERN CAPE

**A RESEARCH PAPER SUBMITTED TO THE FACULTY OF LAW OF THE
UNIVERSITY OF THE WESTERN CAPE IN PARTIAL FULFILMENT OF THE
REQUIREMENTS FOR THE DEGREE MAGISTER LEGUM – LLM**

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



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

.....

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



TABLE OF CONTENTS

| | |
|--|-------------|
| <i>Title Page</i> | <i>ii</i> |
| <i>Declaration</i> | <i>iii</i> |
| <i>Dedication</i> | <i>iv</i> |
| <i>Acknowledgment</i> | <i>v</i> |
| <i>Abstract</i> | <i>vi</i> |
| <i>Key Words</i> | <i>vii</i> |
| <i>Table of Contents</i> | <i>viii</i> |
| <i>List of Abbreviations</i> | <i>x</i> |
| <i>Map of Sudan</i> | <i>xii</i> |
| | |
| CHAPTER ONE: INTRODUCTION | 1 |
| 1.1 BACKGROUND TO PROBLEM..... | 1 |
| 1.2 OBJECTIVE OF STUDY..... | 3 |
| 1.3 SIGNIFICANCE OF STUDY..... | 3 |
| 1.4 RESERCH METHODOLOGY..... | 4 |
| | |
| CHAPTER TWO: HISTORICAL BACKGROUND OF THE DARFUR CONFLICT | 5 |
| 2.1 THE SUDAN..... | 5 |
| 2.2 THE CONFLICT IN DARFUR..... | 9 |
| | |
| CHAPTER THREE: ISSUES RELATING TO THE SECURITY COUNCIL REFERRAL, JURISDICTION AND ARREST WARRANTS AGAINST AL BASHIR | 16 |
| 3.1 SECURITY COUNCIL REFERRAL OF THE DARFUR SITUATION..... | 16 |
| 3.1.1 Security Council Resolution referring the situation in Darfur..... | 16 |
| 3.1.2 Legal basis..... | 21 |
| 3.1.3 Controversial issues relating to the Security Council’s referral powers..... | 23 |
| 3.2 JURISDICTIONAL ISSUES..... | 25 |
| 3.2.1 The Jurisdiction of the ICC over Nationals of Non-party States..... | 25 |

| | | |
|--|--|----|
| 3.2.2 | Delegation of criminal jurisdiction to international tribunals: principles and precedence..... | 26 |
| | (a) <i>Nuremberg Tribunal</i> | 27 |
| | (b) <i>International Criminal Tribunals for Yugoslavia and Rwanda</i> | 28 |
| | (c) <i>Special Court for Sierra Leone</i> | 29 |
| 3.2.3 | Limitations on ICC’s jurisdiction over nationals of non-party states..... | 30 |
| 3.3 | ARREST WARRANTS AGAINST AL BASHIR..... | 33 |
| 3.3.1 | First arrest warrant issued by Pre-Trial Chamber I..... | 34 |
| | (a) <i>Jurisdiction of the Court</i> | 34 |
| | (b) <i>Admissibility test</i> | 34 |
| | (c) <i>The issuance of arrest warrants</i> | 35 |
| 3.2.1 | Second arrest warrant issued by Pre-Trial Chamber I..... | 36 |
| CHAPTER FOUR: THE IMMUNITY FOR SERVING HEADS OF STATES FROM ICC PROSECUTION | | 39 |
| 4.1 | THE DOCTRINE OF IMMUNITY AND THE SCOPE OF IMMUNITY OF STATE OFFICIALS..... | 39 |
| 4.1.1 | The doctrine of immunity..... | 39 |
| 4.1.2 | Scope of immunity of state officials..... | 40 |
| 4.2 | THE IMMUNITY OF HEADS OF STATES..... | 41 |
| 4.2.1 | Personal immunities and the jurisdiction of international criminal courts.... | 42 |
| 4.2.2 | Immunity before the ICC..... | 44 |
| 4.3 | OBLIGATIONS UPON STATES TO ARREST AND SURRENDER AL BASHIR TO THE ICC..... | 47 |
| 4.3.1 | Article 98(1) of the ICC Statute | 47 |
| 4.3.2 | May the ICC lawfully request for the arrest and surrender of Al Bashir from State Parties? | 49 |
| 4.3.3 | Would a state commit a wrongful act against Sudan by surrendering Al Bashir to the ICC?..... | 50 |
| CHAPTER FIVE: CONCLUDING REMARKS | | 53 |
| LIST OF REFERENCES | | 57 |

LIST OF ABBREVIATIONS

| | |
|--------------|---|
| Doc. | Document |
| DRC | Democratic Republic of Congo |
| ed(s). | editor(s) |
| FRY | Federal Republic of Yugoslavia |
| HAC | Humanitarian Aid Commission |
| <i>Ibid.</i> | <i>Ibidem</i> (same author, same book, same page) |
| ICC | International Criminal Court |
| ICJ | International Court of Justice |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for Yugoslavia |
| JEM | Justice and Equality Movement |
| NIF | National Islamic Party |
| NISS | National Intelligence Security Service |
| No. | Number |
| PDF | Popular Defence Force |
| SAF | Sudanese Armed Forces |
| SC | United Nations Security Council |

| | |
|--------|---|
| 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 |



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 Commission⁴ the SC referred the situation in Darfur to the Prosecutor of the International Criminal Court (ICC),⁵ in terms of Resolution 1593.⁶

¹ Amnesty International Report (2003) ‘Sudan: Empty Promises? Human Rights Violations in Government-Controlled Areas’ African Report No. 54/036/2003 available at <http://www.amnesty.org/en/library/asset/AFR54/036/2003/en/1625d4b3-d6dc-11dd-ab95-a13b602c0642/afr540362003en.pdf> (accessed 24 March 2011); International Crises Group (2003) ‘Sudan: Towards an Incomplete Peace’ African Report No. 73, available at <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/sudan/073-sudan-towards-an-incomplete-peace.aspx> (accessed on 24 March 2011).

² UN Security Council Resolution S/Res/1564 (2004), 18 September 2004.

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”.

⁴ Report of the International Commission of Inquiry on Darfur to the United National Secretary-General, 25 January 2005, available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf (accessed on 23 March 2011).

⁵ See, Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, 12 July 1998, U.N. Doc A/CONF 183/9.

⁶ UN Security Council Resolution S/Res/1593 (2005), 31 March 2005.

In July 2005, the Prosecutor of the ICC, Luis Moreno-Ocampo, decided to open investigations into the situation in Darfur.⁷ 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’⁸ 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.⁹ The Court has issued two arrest warrants against Sudanese President Omar Hassan Ahmad Al Bashir (Al Bashir). The first warrant was issued in 2009¹⁰ and the second warrant in 2010.¹¹

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.¹² The Darfur situation is amongst the seven situations currently before the ICC since the coming into force of the ICC Statute on 1 July 2002.¹³

⁷ See, Press Release, The Prosecutor of the ICC opens investigation in Darfur, ICC-OTP-0606-104, 6 June 2005, available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/press%20releases/otp%20the%20prosecutor%20of%20the%20icc%20opens%20investigation%20in%20darfur> [accessed on 23 March 2011].

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 [accessed on 23 March 2011].

⁹ See, Press Release, Pre-Trial Chamber I receives documents containing list of evidence in the situation in Darfur, ICC-CPI_20070227-207 (2005) available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/press%20releases/pre-trial%20chamber%20i%20receives%20documents%20containing%20list%20of%20evidence%20in%20the%20situation%20of%20darfur> [accessed on 27 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).

¹² See, Situation in Darfur, Sudan, ICC-02/05, available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/> [accessed on 28 July 2011].

¹³ See, All Situations, available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/> [accessed on 25 October 2011].

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 *servant* 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.

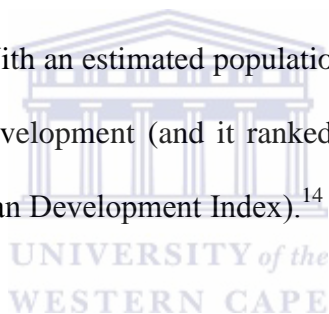


CHAPTER TWO:

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).¹⁴



After thirty-nine years of foreign control, under British-Egyptian rule, Sudan became independent on 1 January 1965.¹⁵ Its colonial legacy entrenched the state apparatus in Northern Sudan.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.¹⁷

¹⁴ UNDP Human Development Index 2010 – 20th Anniversary Edition 'The Real Wealth of Nations Pathways to Human Development', available at http://hdr.undp.org/en/media/HDR_2010_EN_Complete_reprint.pdf [accessed on 5 June 2011].

¹⁵ Niblock T (1987) *Class and Power in Sudan: The Dynamics of Sudanese Politics, 1898-1985* 11; Johnson D H (2003) *The Root Causes of Sudan's Civil Wars* 21; Kabalo S A (1988) 'Economic Crisis and The Civilian, Military Interchange in The Sudan' in Mahmoud F B (ed) *Calamity in Sudan: Civilian Versus Military Rule* 21.

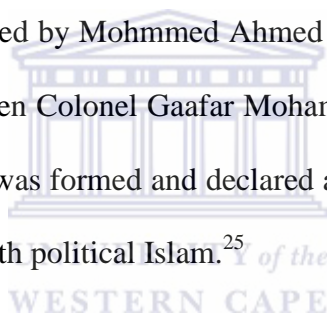
¹⁶ Field S 'The Civil War in Sudan: The Role of the Oil Industry' (200) Institute for Global Dialogue Occasional Paper No. 23, 3.

¹⁷ *Ibid*; Niblock T (1987) *Class and Power in Sudan: The Dynamics of Sudanese Politics, 1898-1985* 153 and 154; Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 175.

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.¹⁸ In the remaining periods, the country has been ruled by military regimes.¹⁹

In November 1958 General Ibrahim Abboud came to power through a coup.²⁰ The military government continued a policy of Arabization and Islamization.²¹ The continued repression by government throughout the country led to unrest and the emergence of armed rebellion in the South.²² 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.²³

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.²⁴ The Sudanese Socialist Union (SSU) was formed and declared as the sole legitimate party, and its socialist ideology later infused with political Islam.²⁵



¹⁸ Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 172-173.

¹⁹ Ali T & Matthews R (1999) 'Civil War and Efforts in Sudan' in Ali T & Matthews R *Civil Wars in Africa* (1999) 193.

²⁰ Deng F M (1995) *War of Visions: Conflict of Identities in the Sudan* 57-58; Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 179-180.

²¹ *Ibid.*

²² Deng F M (1995) *War of Visions: Conflict of Identities in the Sudan* 57-58.

²³ Mansour K (1990) *The Government They Deserve: The Role of the Elite in Sudan's Political Evolution* 199. Beshir M O (1975) *The Southern Sudan: From Conflict to Peace* 49-53; Kabalo S A (1988) 'Economic Crisis and The Civilian, Military Interchange in The Sudan' in Mahmoud F B (ed) *Calamity in Sudan: Civilian Versus Military Rule* 26-28; Ali T & Matthews R (1999) 'Civil War and Efforts in Sudan' in Ali T & Matthews R *Civil Wars in Africa* 205-206; Johnson D H (2003) *The Root Causes of Sudan's Civil Wars* 30-31; Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 180.

²⁴ Woodward P (2003) *The Horn of Africa: Political and International Relations* 38-42.

²⁵ Gresh A (1989) 'The Officers and the Comrades: The Sudanese Communist Party and Nimeiri Face-to-Face, 1969-1971' 21 *International Journal of Middle East Studies* 393-394; Burr J M & Collins R O (2008) *Darfur: The Long Road to Disaster* (2ed.) 71; Beshir M O (1975) *The Southern Sudan: From Conflict to Peace* 72; Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 190.

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.²⁶ 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 1919.²⁷ 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.²⁸ The attempt to redraw the borders between the North and South, in order to remove the oilfields from Southern jurisdiction failed, and resulted in the creation of a new province.²⁹ This was a breach of the Addis Ababa agreement.³⁰ Furthermore, in September 1983 Nimeiri introduced Islamic *Sharia* Law (the so-called September laws) by injecting religion into government policies.³¹ 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.³² 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.³³

²⁶ Global Security Website 'Sudan: First Civil War', available at <http://www.globalsecurity.org/military/world/war/sudan-civil-war1.htm> [accessed on 5 June 2011]; Dagne T 'Sudan: The Crisis in Darfur and Status of the North-South Peace Agreement' (2010) 18, available at <http://fpc.state.gov/documents/organization/142668.pdf> [accessed on 5 June 2011]; Woodward P (2003) *The Horn of Africa: Political and International Relations* 42-43.

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

²⁸ *Ibid.*

²⁹ Ali T & Matthews R (1999) 'Civil War and Efforts in Sudan' in Ali T & Matthews R *Civil Wars in Africa* 208-209; Field S 'The Civil War in Sudan: The Role of the Oil Industry' Institute for Global Dialogue Occasional Paper No. 23 (2000) 3; Johnson D H (2003) *The Root Causes of Sudan's Civil Wars* 45-47; Sharif H (1994) 'Re-Cycling the Past in the Sudan: An Overview of Political Decay' in Sharif H & Terje T (eds.) *Short-Cut to Decay: The Case of the Sudan* 12; Rone J (2003) *Sudan, Oil, and Human Rights* 129.

³⁰ Field S 'The Civil War in Sudan: The Role of the Oil Industry' (2000) Institute for Global Dialogue Occasional Paper No. 23, 3.

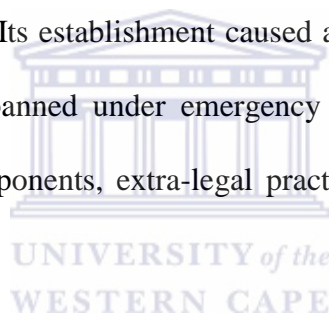
³¹ Johnson D H (1991) 'North-South Issues' in Woodward P (ed.) *Sudan after Nimeiri* 131-137; Ali T & Matthews R (1999) 'Civil War and Efforts in Sudan' in Ali T & Matthews R *Civil Wars in Africa* 209; Johnson D H (2003) *The Root Causes of Sudan's Civil Wars* 71; Rona J (2003) *Sudan, Oil, and Human Rights* 130-132.

³² El-Battahani A 'A Complex Web: Politics and Conflict in Sudan' (2006) available at <http://www.c-r.org/our-work/accord/sudan/politics-conflict.php> [accessed on 5 June 2011].

³³ Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 192-193.

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.³⁴ The elections in 1986 led to the victory of UP leader, Sadiq Al-Mahdi, who became Prime Minister.³⁵ 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.³⁶

In June 1989 the current President of Sudan, General Omar Hassan Al-Bashir, came to power through a military coup.³⁷ 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).³⁸ Its establishment caused another round of conflict. Political parties and trade unions were banned under emergency laws.³⁹ Hallmarks of the regime consisted of the detention of opponents, extra-legal practices and general abuse of human rights.⁴⁰



³⁴ Sidahmed A S & Sidahmed A (2005) *Sudan: The Contemporary Middle East* 33-34; Sharif H (1994) 'Re-Cycling the Past in the Sudan: An Overview of Political Decay' in Sharif H & Terje T (eds.) *Short-Cut to Decay: The Case of the Sudan* 13; Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 193.

³⁵ Sidahmed A S & Sidahmed A (2005) *Sudan: The Contemporary Middle East* 33-34.

³⁶ Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 231.

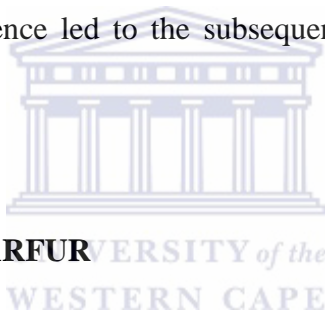
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³⁸ Salih M A M 'Understanding the Conflict in Darfur' (2005) University of Copenhagen Centre for African Studies Occasional Paper, available at http://www.teol.ku.dk/cas/research/publications/occ_papers/muhamed_salihsamletpaper.pdf [accessed on 10 July 2011].

³⁹ Sharif H (1994) 'Re-Cycling the Past in the Sudan: An Overview of Political Decay' in Sharif H & Terje T (eds.) *Short-Cut to Decay: The Case of the Sudan* 17.

⁴⁰ *Ibid*, 18.

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.⁴¹ This resulted in under-development, exclusion, and violent conflict in Sudan.⁴² The failure of parliamentary systems resulted in military coups and the emergence of regional movements.⁴³ 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.⁴⁴ Today the Sudan, once the largest country in Africa,⁴⁵ 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 2011.⁴⁶



2.2 THE CONFLICT IN DARFUR

Darfur is located in the western province of Sudan and borders with Libya, Chad, and the Central African Republic.⁴⁷ Administratively it was divided into North (El Fasher), South (Nyala) and West (El Geneina) Darfur.⁴⁸

⁴¹ El-Battahani A 'A Complex Web: Politics and Conflict in Sudan' (2006).

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].

⁴⁴ Sidahmed A S & Sidahmed A (2005) *Sudan: The Contemporary Middle East* 35.

⁴⁵ Collins R D (2008) *A History of Modern Sudan* 1; Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 8.

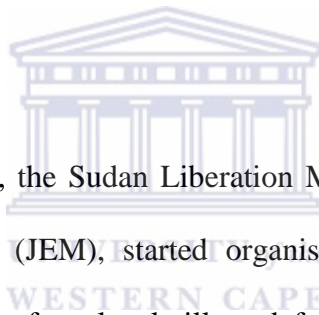
⁴⁶ See, United Nations Mission in the Sudan 'Independence of South Sudan' available at <http://www.un.org/en/peacekeeping/missions/unmis/referendum.shtml> [accessed on 5 August 2011]. "The referendum was initiated in 2005 through the CPA between the Government of Sudan and the SPLM, which ended a war 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]"

⁴⁷ Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 8.

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

⁴⁹ Suliman M ‘Ethnicity from Perception to Cause of Violent Conflicts: The Case of the Fur and Nuba Conflicts in Western Sudan’ (1997), available at http://www.ifaanet.org/ethnicity_inversion.htm [accessed on 10 July 2011].

⁵⁰ Sharif H (1994) ‘Re-Cycling the Past in the Sudan: An Overview of Political Decay’ in Sharif H & Terje T (eds.) *Short-Cut to Decay: The Case of the Sudan* 18; Ibrahim F ‘Ideas on the Background of the Present Conflict in Darfur’ (2004).

⁵¹ Salih M A M ‘Understanding the Conflict in Darfur’ (2005); Ibrahim F ‘Ideas on the Background of the Present Conflict in Darfur’ (2004).

⁵² Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 254.

⁵³ *Ibid.*

⁵⁴ See, Press Release, Commentary by SLM/A, 14 March 2003, available at <http://www.sudan.net/news/press/postedr/214.shtml> [accessed on 11 July 2011].

government – and sought to prove the disparities in the distribution of power and wealth.⁵⁵ Both rebel groups cited socio-economic and political marginalisation of Darfur and its people as reason for their opposition to the Khartoum government.⁵⁶ The Darfur conflict began as a civil war (1987-1989) between local militia, each with ethnic identity.⁵⁷ It is suggested that the government only became involved after 1989, following its failed initiatives to address the basic causes of the conflict.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.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.⁶⁰ Mostly Arab (from the Misseriya and Rizeigat) nomadic tribes responded to the government's call.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.⁶² These new recruits became known by the civilian population as the “Janjaweed”.

⁵⁵ Wallis W ‘Black Book History’ *Sudan Tribune: The Financial Times*, 21 August 2004, available at <http://www.sudantribune.com/The-Black-Book-history-or-Darfur-s,4868> [accessed on 11 July 2011].

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

⁵⁷ Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 232 and 259.

⁵⁸ *Ibid.*

⁵⁹ International Crisis Group ‘Sudan’s Other Wars’ 25 June 2003, available at http://www.thenubian.net/ICG_Nubian_5062003.pdf [accessed 13 July 2011]; International Crisis Group ‘Darfur Rising: Sudan’s New Crisis’, ICG African Report No. 76, 25 March 2004, available at <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/sudan/Darfur%20Rising%20Sudans%20New%20Crisis.pdf> [accessed on 13 July 2011]; Burr J M & Collins R O (2008) *Darfur: The Long Road to Disaster* (2ed.) 285; Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 255.

⁶⁰ Salih M A M ‘Understanding the Conflict in Darfur’ (2005); Burr J M & Collins R O (2008) *Darfur: The Long Road to Disaster* (2ed.) 285; Mamdani M (2009) *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.”

⁶¹ Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 254-255.

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”.⁶³

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.⁶⁴ 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.⁶⁵ Villages were often burned down to prevent return.⁶⁶

World alert to the conflict in Darfur may be greatly attributed to the increased widespread media coverage and reports by non-governmental organisations during 2003.⁶⁷ Political response gained momentum in 2004 when US Secretary of States Colin Powell declared the violence in Darfur as genocide for the first time.⁶⁸

⁶³ Salih M A M ‘Understanding the Conflict in Darfur’ (2005).

⁶⁴ Ekengard A ‘The African Union Mission in Sudan (AMIS): Experiences and Lessons Learned’ FOI Swedish Defence Research Agency Report (2008), available at <http://www.foi.se/upload/projects/Africa/foir2559.pdf> [accessed on 14 July 2011].

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ See, Sudanese Human Rights Organisation (2004) ‘Report on the situation of Human Rights in Sudan, 1 October 2003 – 31 January 2004’, available at <http://www.shro-cairo.org/reports.htm> [accessed on 11 July 2011]; Amnesty International Report ‘Sudan: Empty Promises? Human Rights Violations in Government-Controlled Areas’ (2003); Smith J and Walker B (2004) ‘Darfur: Management of a Genocidal Crisis’ AEGIS Report 201/04, available at http://www.wagingpeace.info/documents/Darfur_Summary_Report.pdf [accessed on 11 July 2011]; International Crises Group (2003) ‘Sudan: Towards an Incomplete Peace’ Africa Report No. 73; Human Rights Watch (2004) ‘Sudan, Darfur in Flames: Atrocities in western Sudan’ Vol. 16, No. 5 (a), available at <http://www.hrw.org/sites/default/files/reports/sudan0404.pdf> [accessed on 11 July 2011]; Human Rights Watch (2004) ‘Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan’ Vol 16, No. 6 (a), available at <http://www.hrw.org/sites/default/files/reports/sudan0504full.pdf> [accessed on 11 July 2011].

⁶⁸ See, Genocide Watch ‘Genocide Emergency: Darfur, Sudan’ (2004), available at <http://www.genocidewatch.org/aboutgenocide/12waystodenygenocide.html> [accessed on 1 August 2011].

The SC condemned the attacks in the Darfur region⁶⁹ 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

⁶⁹ UN Security Council Resolution S/RES/1556 (2004), 30 July 2004.

⁷⁰ See, Save Darfur Coalition, available at www.savedarfur.org/faith [accessed on 13 July 2011]; Save Darfur Coalition 'Unity Statement', available at www.savedarfur.org/pages/unity_statement [accessed on 13 July 2011]; National Council of Churches 'The 2004 Unity Statement and Call to Action', available at www.nccusa.org/news/04savedarfur-coalition.html [accessed on 13 July 2011].

⁷¹ See, World Health Organisation 'Retrospective Mortality Survey: Among the Internally Displaced Population, Greater Darfur Sudan' (2005), available at http://www.emro.who.int/sudan/pdf/CMS%20Darfur%202005%20final%20report_11%2010%2005.pdf [accessed on 11 July 2011].

⁷² See, Deteriorating Security Threats to Plunge Darfur into 'Chaos', under UN Secretary-General (OCHA) available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1088217> [accessed on 11 July 2011].

⁷³ See, United Nations High Commission for Refugees 'The Darfur Crisis and Chad Mediation', available at <http://www.unhcr.ch/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=MEDIA&401159eca&page=publ> [accessed on 13 July 2011].

⁷⁴ See, Darfur Humanitarian Profile, No 8 (2004), available at <http://unsudanig.org> [accessed on 13 July 2011].

⁷⁵ African Union Peace and Security Council Fifth Session (2004) 'Report of the Chairperson of the Commission on the Situation in the Sudan', available at <http://www.africanunion.org/Reports/13%20April%20Report%20Chairperson%20-%20%20Sudan.pdf> [accessed on 20 July 2011].

the SLM/A and the JEM signed a Humanitarian Ceasefire Agreement.⁷⁶ On the 28 May 2004 the parties signed an agreement on ceasefire modalities.⁷⁷

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.⁷⁸ On the 9 November 2004, the government representatives, the SLM/A and the JEM signed two Protocols, one on the Improvement of the Humanitarian Situation⁷⁹ and the other on the Enhancement of the Security Situation⁸⁰ 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.⁸¹ The African Mission in Sudan faced several operational challenges⁸² which led to

⁷⁶ International Crisis Group (2004) 'Sudan: Now or Never in Darfur', ICG African Report No. 80, available at <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/sudan/Sudan%20Now%20or%20Never%20in%20Darfur.pdf> [accessed on 13 July 2011].

⁷⁷ *Ibid.*

⁷⁸ O'Neill G W and Cassis V 'Protecting Two Million Internally Displaced: The Successes and Shortcomings of the African Union in Darfur' (2005) University of Bern Project on Internal Displacement Occasional Paper, available at [http://ocha-gwapps1.unog.ch/rw/RWFiles2005.nsf/fb9a3459e0c5a152c1257205004f1c3e/c1257243004e0cf2c1257344004f376b/\\$FILE/bi-sdn-11nov.pdf](http://ocha-gwapps1.unog.ch/rw/RWFiles2005.nsf/fb9a3459e0c5a152c1257205004f1c3e/c1257243004e0cf2c1257344004f376b/$FILE/bi-sdn-11nov.pdf) [accessed on 16 July 2011].

⁷⁹ Protocol between the Government of Sudan, the Sudan Liberation Movement/Army and the Justice and Equality Movement on the Improvement of the Humanitarian Situation in Darfur, Abuja, 9 November 2004.

⁸⁰ Protocol between the Government of Sudan, the Sudan Liberation Movement/Army and the Justice and Equality Movement on the Enhancement of the Security Situation in Darfur in accordance with the N'djamena Agreement, Abuja, 9 November 2004.

⁸¹ O'Neill G W and Cassis V 'Protecting Two Million Internally Displaced: The Successes and Shortcomings of the African Union in Darfur' (2005).

⁸² A list of challenges faced by peacekeeping forces is drawn 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 1564.⁸³

Despite the efforts of political negotiations and the adaptation of 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.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.⁸⁵



⁸³ See, UN Security Council Resolution S/RES/1564 (2004).

⁸⁴ Melville D ‘Restoring Peace and Democracy in Sudan: Limited Choices for African Leadership’ (2002) Institute for Global Dialogue Occasional Paper No. 34.

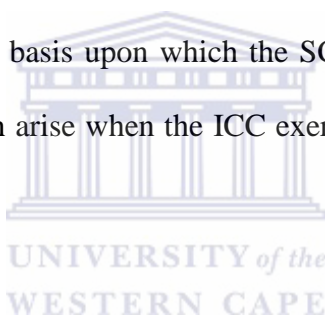
⁸⁵ Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 272.

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

⁸⁶ See, S/RES/1556 (2004), para. 6.

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).⁸⁸ A month later the Secretary-General appointed a five member body of the Commission.⁸⁹ 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”.⁹⁰

In February 2005, three months after completing its mandate, the Commission submitted its report to the SC.⁹¹ 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.⁹² 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.⁹³ 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.⁹⁴

⁸⁸ See, S/RES/1564 (2004), para. 12.

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].

⁹⁰ See, S/RES/1564 (2004), para. 12.

⁹¹ Report of the International Commission of Inquiry on Darfur, para. 9.

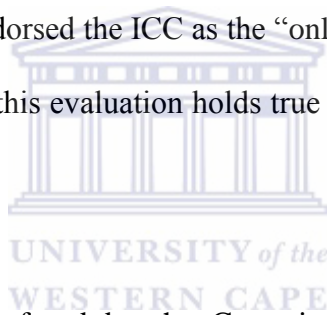
⁹² *Ibid*, paras. 267 and 293.

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."⁹⁵ 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.⁹⁶

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."⁹⁷ In addition to this, it endorsed the ICC as the "only credible way of bringing alleged perpetrators to justice."⁹⁸ 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.

⁹⁵ *Ibid*, para. 568.

⁹⁶ Du Plessis M 'The International Court that Africa Wants' (2010) 56.

⁹⁷ Report of the International Commission of Inquiry on Darfur, para. 569.

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.⁹⁹ The resolution invited the ICC and AU to discuss the practicalities of proceedings relating to the conflict,¹⁰⁰ while also emphasising the importance of healing and reconciliation, for example, through the creation of truth and/or reconciliation commissions.¹⁰¹

The resolution was adopted by eleven votes to none against and four abstentions by Algeria, Brazil, China and the United States.¹⁰² The Algerian representative preferred an AU solution to this delicate problem, because it could provide peace and satisfy the need for justice.¹⁰³ 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.¹⁰⁴ 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.¹⁰⁵ Brazil agreed with the resolution but objected to paragraph 6, which recognised the ICC's exclusive jurisdiction.¹⁰⁶

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.¹⁰⁷

⁹⁹ See, S/RES/1593 (2005).

¹⁰⁰ *Ibid.*, paras. 3 and 4.

¹⁰¹ *Ibid.*, para. 5.

¹⁰² See, Press Release, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court SC/8351 (2005), available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> [accessed 18 September 2011].

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.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.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.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

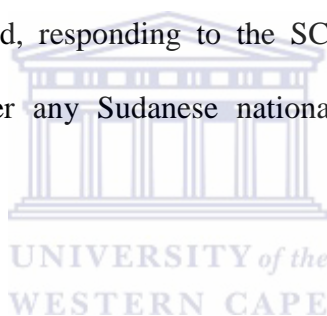
¹⁰⁸ See, U.S. Mission to the United Nations Press Release No. 061(05) ‘Explanation of Vote by Ambassador Anne W. Patterson, Acting U.S. Representative to the United Nations, on the Sudan Accountability Resolution, in the Security Council’ (2005), available at http://www.archive.usun.state.gov/press_releases/20050331_055.html [accessed 18 September 2011].

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.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.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.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).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.¹¹⁵



3.1.2 Legal basis

The ICC established under the ICC Statute¹¹⁶ is the first 'permanent' international court with the power to try *individuals* [my emphasis] accused of serious crimes of international concern.¹¹⁷ Proceedings before the ICC may be invoked by one of the three so-called trigger

¹¹¹ Crook J R (2005) 'U.S. Proposes New Regional Court to Hear Charges Involving Darfur, Others Urge ICC' Vol. 99 No. 2 *The American Journal of International Law* 501.

¹¹² *Ibid.*

¹¹³ *Ibid.*, 502.

¹¹⁴ See, Hoge W 'U.S. Lobbies U.N on Darfur and International Court' *New York Times*, 29 January 2005 at A5, available at <http://query.nytimes.com/gst/fullpage.html?res=9C06E6D9143BF93AA15752C0A9639C8B63> [accessed on 18 September 2011]; Lynch C 'U.S., Europe Debate Venue for Darfur Trials, E.U. Wants ICC to Try War Crimes Cases' *Washington Post*, 21 January 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A24673-2005Jan20.html> [accessed 18 September 2011].

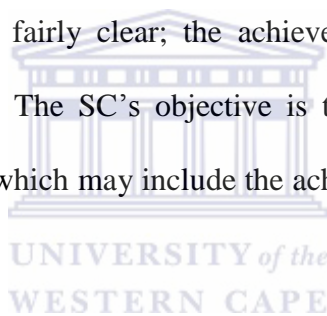
¹¹⁵ See, Reuters 'Sudanese President Vows to Defy U.N. Vote' *Washington Post*, 3 April 2005, at A30, available at <http://www.washingtonpost.com/wp-dyn/articles/A22014-2005Apr2.html> [accessed on 18 September 2011].

¹¹⁶ The court is established under Article 1 of the ICC Statute.

¹¹⁷ ICC Statute, Article 1.

mechanisms.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.¹¹⁹

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



¹¹⁸ Cassese A (2008) *International Criminal Law* (2ed.) 344 and 396; Werle G (2009) *Principles of International Criminal Law* (2ed.) 91.

¹¹⁹ Quoted in Sarooshi D ‘The Peace and Justice Paradox: The International Criminal Court and the UN Security Council’ in McGoldrick D, Rowe P, Donnelly E (eds.) *The Permanent International Criminal Court* (2004) 95.

¹²⁰ ICC Statute, Article 2; See, Report of the Preparatory Commission for the International Criminal Court (continued) Preparatory Commission for the International Criminal Court PCNICC/2001/1/Add1, 8 January 2002; See, Press Release, Agreement between the International Criminal Court and the United Nations, ICC-CPI-20041004-78, available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/agreement%20between%20the%20international%20criminal%20court%20and%20the%20united%20nations?lan=en-GB> [accessed on 1 September 2011].

¹²¹ Sarooshi D in McGoldrick D, Rowe P, Donnelly E (eds.) *The Permanent International Criminal Court* (2004) 96.

¹²² McGoldrick D ‘Criminal Trials before International Tribunals: Legality and Legitimacy’ in McGoldrick D, Rowe P, Donnelly E (eds.) *The Permanent International Criminal Court* (2004) 97.

¹²³ *Ibid.*, 95.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, 96.

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

¹²⁷ Du Plessis M ‘The International Criminal Court that Africa Wants’ (2010) 55.

¹²⁸ White N and Cryer R ‘The ICC and the Security Council: An Uncomfortable Relationship’ in Doria J, Gasser H P, Bassiouni C (eds.) *The Legal Regime of the International Criminal Court* (2009) 461.

¹²⁹ The Charter of the United Nations, 26 June 1945.

¹³⁰ White N and Cryer R ‘The ICC and the Security Council: An Uncomfortable Relationship’ in Doria J, Gasser H P, Bassiouni C (eds.) *The Legal Regime of the International Criminal Court* (2009) 461.

¹³¹ Simma B (2002) *The Charter of the United Nations: A Commentary* (2ed.) 726-727.

¹³² Werle G (2009) *Principles of International Criminal Law* (2ed.) 84-85.

¹³³ Sarooshi D in McGoldrick D, Rowe P, Donnelly E (eds.) *The Permanent International Criminal Court* (2004) 98.

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.¹³⁴ This observation is accurate because the SC does not possess any criminal jurisdiction of its own which it could pass to the ICC.¹³⁵

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'.¹³⁶ 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.¹³⁷ 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.¹³⁸

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.¹³⁹ 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.¹⁴⁰ In this regard, the Prosecutor has discretion when deciding whether to proceed

¹³⁴ White N and Cryer R 'The ICC and the Security Council: An Uncomfortable Relationship' in Doria J, Gasser H P, Bassiouni C (eds.) *The Legal Regime of the International Criminal Court* (2009) 461.

¹³⁵ Cryer R (1998) 'Commentary on the Rome Statute for an International Criminal Court: A Cadenza for the Song of the Who Died in Vain?' Vol. 3 No. 2 *Journal of Conflict and Security Law* 278-279.

¹³⁶ Sarooshi D in McGoldrick D, Rowe, Donnelly (eds.) *The Permanent International Criminal Court* (2004) 97.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*, 98.

¹⁴⁰ ICC Statute, Article 42.

with an investigation or prosecution in a particular case.¹⁴¹ This competence applies even in respect of a referral by the SC.¹⁴²

While the SC may want to ensure the effectiveness of its determination, for example, by creating *ad hoc* tribunals, such a practice would undermine the establishment of the ICC.¹⁴³ 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.¹⁴⁴

3.2 JURISDICTIONAL ISSUES

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.¹⁴⁵ 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.¹⁴⁶ Thirdly, where the non-party state has given consent to the ICC's jurisdiction in a particular case.¹⁴⁷

¹⁴¹ ICC Statute, Article 53(1) and (2).

¹⁴² Sarooshi D in McGoldrick D, Rowe P, Donnelly E (eds.) *The Permanent International Criminal Court* (2004) 99

¹⁴³ Sarooshi D (1996) 'The Legal Framework Governing United Nations Subsidiary Organs' Vol. 67 No. 1 *British Yearbook of International Law* 418-478.

¹⁴⁴ See, Report of the Commission of Inquiry on Darfur, para. 574-582.

¹⁴⁵ ICC Statute, Article 13.

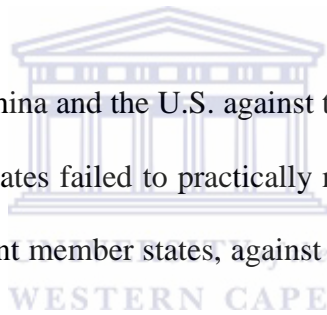
¹⁴⁶ ICC Statute, Article 12(2)(a) and (3).

¹⁴⁷ *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.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.¹⁴⁹ This argument is described as the “principal American legal objection” to the ICC.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.¹⁵¹



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?

¹⁴⁸ Akande D (2003) ‘The Jurisdiction of the International Criminal Court over Nations of Non-Parties: Legal Basis and Limitations’ Vol. 1 Issue 3 *Journal of International Criminal Justice* 619.

¹⁴⁹ See United States’ State Department Fact Sheet on the International Criminal Court, available at <http://www.state.gov/s/wci/rls/fs/2002/9978.htm> [accessed on 18 September 2011].

¹⁵⁰ *Ibid.*

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.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 they have no legal competence to act.¹⁵³

(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.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.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.¹⁵⁶

¹⁵² Morris M (2001) 'High Crimes and Misconceptions: The ICC and Non-Party States' Vol. 64 No. 1 *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'."

¹⁵³ Akande D (2003) 'The Jurisdiction of the International Criminal Court over Nations of Non-Parties: Legal Basis and Limitations' 625.

¹⁵⁴ Scharf M (2001) 'The ICC's Jurisdiction over Nationals of Non-Party States: A Critiques of the U.S. Position' 64 *Law & Contemporary Problems* 103-106.

¹⁵⁵ Morris M (2001) 'High Crimes and Misconceptions: The ICC and Non-Party States' 37-42.

¹⁵⁶ Akande D (2003) 'The Jurisdiction of the International Criminal Court over Nations of Non-Parties: Legal Basis and Limitations' 628.

(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.¹⁵⁷ When the SC acts in terms of Chapter VII of the UN Charter, it exercises powers delegated to it by member states collectively.¹⁵⁸ Therefore, the ICTY and the ICTR are examples of delegation of criminal jurisdiction by states to international tribunals.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.¹⁶⁰ In *Prosecutor v Milutinović, Ojdanić, Sainović* an ICTY Trial Chamber held that despite the decisions of the UN organs, the FRY was at all material times a UN member.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.¹⁶²

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.

¹⁵⁸ Sarooshi D (2000) *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* 25-32.

¹⁵⁹ Scharf M (2001) 'The ICC's Jurisdiction over Nationals of Non-Party States: A Critiques of the U.S. Position' 108.

¹⁶⁰ *Prosecutor v Milosević, Milutinović, Sainović, Ojdanić & Stojiljkovi*, 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.

¹⁶¹ *Prosecutor v Milutinović, Ojdanić, Sainović*, Case No. IT-99-37-PT, 6 May 2003.

¹⁶² Akande D (2003) 'The Jurisdiction of the International Criminal Court over Nations of Non-Parties: Legal Basis and Limitations' 629.

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 2000.¹⁶³ 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.”¹⁶⁴ Thirdly, many states, including the U.S., that supported the ICTY’s jurisdiction over FRY nationals,¹⁶⁵ did not regard the FRY as a UN member.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.¹⁶⁷ Therefore, similar to the position of the ICC, as long as there is territorial jurisdiction, the question of nationality is irrelevant.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.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.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

¹⁶³ *Prosecutor v Milutinović, Ojdanić, Sainović*, para 38 and 71.

¹⁶⁴ *Ibid.*

¹⁶⁵ Akande D (2003) ‘The Jurisdiction of the International Criminal Court over Nations of Non-Parties: Legal Basis and Limitations’ 630.

¹⁶⁶ *Ibid.*

¹⁶⁷ *ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ See, The Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone of 16 January 2002, available at <http://www.sierra-leone.org/specialcourt-statute.html> [accessed on 18 September 2011]. The Statute of the Special Court is annexed to this agreement.

¹⁷⁰ *Prosecutor v Charles Ghankay 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.¹⁷¹ On the contrary the Court has received strong support the U.S. and the international community¹⁷² and is a significant example of what the US contends that parties to the ICC cannot lawfully do.¹⁷³

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.

¹⁷¹ *Ibid.*

¹⁷² See, UN Security Council Resolution S/RES/1315, 14 August 2000; U.S. State Department 'Press Statement' (2002), available at <http://www.state.gov/r/pa/prs/ps/2002/7348.htm> [accessed 19 September 2011].

¹⁷³ Akande D (2003) 'The Jurisdiction of the International Criminal Court over Nations of Non-Parties: Legal Basis and Limitations' 632.

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.¹⁷⁴ 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.¹⁷⁵ 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.¹⁷⁶

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.¹⁷⁷ 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.¹⁷⁸ 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.¹⁷⁹ On this basis it becomes clear that Sudan missed

¹⁷⁴ Akande D (2003) ‘The Jurisdiction of the International Criminal Court over Nations of Non-Parties: Legal Basis and Limitations’ 642.

¹⁷⁵ ICC Statute, Article 16.

¹⁷⁶ Arsanjani M (1999) ‘The Rome Statute of the International Criminal Court’ 93 *American Journal of International Law* 26-27.

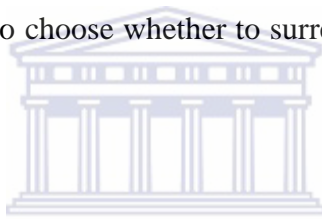
¹⁷⁷ ICC Statute, Article 17 and 20.

¹⁷⁸ ICC Statute, Preamble para. 10 and Article 1; Werle G (2009) *Principles of International Criminal Law* (2ed.) 83; Holmes J T ‘Complementarity: National Courts versus the ICC’ in Cassese A, Gaete P, Jones J R W (eds.) *The Rome Statute of the International Criminal Court Vol. 1* (2001) 667.

¹⁷⁹ Du Plessis M ‘The International Criminal Court that Africa Wants’ (2010) 59.

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.¹⁸⁰ 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.¹⁸¹ 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.¹⁸²



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 1593,¹⁸³ which was subsequently welcomed by the Secretary-General, Kofi Annan.¹⁸⁴ Prior to opening investigations the Prosecutor considered multiple sources of information in his analysis, including the report of the Commission.¹⁸⁵ 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 2005.¹⁸⁶

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.¹⁸⁷ 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."¹⁸⁸ 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.¹⁸⁹

¹⁸³ See, S/Res/1593, para. 1.

¹⁸⁴ See, Press Release, Secretary-General Welcomes Adoption of Security Council Resolution Referring Situation in Darfur, Sudan, To International Criminal Court Prosecutor, SG/SM/9797AFR/1123 (2005), available at <http://www.un.org/NEWS/Press/docs/2005/sgsm9797.doc.htm> [accessed on 25 March 2011].

¹⁸⁵ See, Press Release, The Prosecutor of the ICC opens investigation in Darfur, ICC-OTP-0606-104, 1 June (2005).

¹⁸⁶ *Ibid.*

¹⁸⁷ Public redacted version of the Prosecutor's Application under Article 58, ICC-02/05-157-AnxA, 14 July 2008.

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 *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

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.

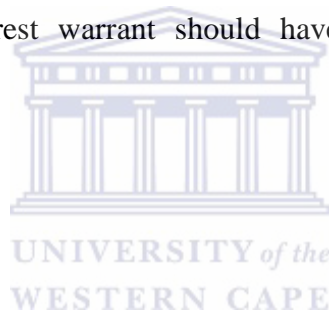
¹⁹² *Ibid.*

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,¹⁹⁵ or as an indirect co-perpetrator¹⁹⁶ for war crimes¹⁹⁷ and crimes against humanity.¹⁹⁸ 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.¹⁹⁹ Judge Anita Uăcka, 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.²⁰⁰ Upon assessing the Prosecutor's evidence, she found there were reasonable grounds to believe that there was existence of genocidal intent,²⁰¹ and therefore, the arrest warrant should have been issued for the crime of genocide.²⁰²



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-tEN (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 *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), two counts for war crimes: internationally directly attacks against a civilian population as such or against individual civilians not taking part in hostilities, Article 8(2)(e)(i); and pillaging, Article 8(2)(v).

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 *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-3.

²⁰⁰ *Ibid.*, paras. 32 and 34.

²⁰¹ *Ibid.*, para. 86.

²⁰² *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 decision²⁰⁷

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 ICTY²⁰⁸ 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); *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).

²⁰⁴ *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-73, Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir" (3 February 2010).

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).

²¹⁰ Van der Vyver J D (2010) 'Prosecutor v Omar Hassan Ahmed Al Bashir' Vol. 104 No. 3 *American Journal of International Law* 462.

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.²¹² 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.²¹³ 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."²¹⁴

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.'²¹⁵ 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.²¹⁶ 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.²¹⁷

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.

²¹⁵ Gosnell C (2008) 'The Request for an Arrest Warrant in Al Bashir: Idealistic Posturing of Calculated Plan?' 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



²¹⁸ Oette L (2010) 'Peace and Justice, or Neither? The Repercussions of the al-Bashir Case for International Criminal Justice in Africa and Beyond' Vol. 8 No. 2 *Journal of International Criminal Justice* 345-364.

²¹⁹ See, African Union, Peace and Security Council (2008) Communiqué of the 142nd Meeting, PSC/MIN/Comm(CXLII), para. 2; African Union, Peace and Security Council (2008) Communiqué of the 151st Meeting, PSC/MIN/Comm.1(CLI), para. 7 and 8.

²²⁰ See, Report of the African Union High-Level Panel on Darfur (2009) 'Darfur: The Quest for Peace, Justice and Reconciliation' PSC/AHG/2 (CCVII).

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

²²¹ Cassese A (2008) *International Criminal Law* (2ed.) 302.

²²² *Ibid.*

²²³ English-Word Information, available at <http://wordinfo.info/unit/4072/ip:9/il:M> [accessed on 29 September 2011].

²²⁴ Aiyar P R (2005) *Concise Law Dictionary: With legal maxims, Latin terms and words and phrases* (3ed.) 549-550.

²²⁵ Murungu C ‘Immunity of State Officials and the Prosecution of International Crimes’ in Murungu C & Biegon J (eds.) *Prosecution International Crimes in Africa* (2011) 35.

²²⁶ Schabas W A (2007) *An Introduction to International Criminal Law* 231.

It, therefore, constitutes a defence to international criminal responsibility in favour of individuals accused of international crimes.²²⁷ Immunity may be invoked at any time during the trial but before judgement is delivered.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'.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.²³⁰ Functional immunity, commonly referred to as immunity *ratione materiae*, applies on the strength of the so-called Act of State doctrine to the official acts of senior state officials.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.²³² This type of immunity may be relied upon both by serving and former state officials for official acts while they were in office.²³³

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

²²⁷ Murungu C in Murungu C & Biegon J (eds.) *Prosecution International Crimes in Africa* (2011) 35.

²²⁸ *Ibid.*

²²⁹ *Ibid.*; See, Dissenting Opinion of Judge Jean Yves De Cara in the *Case Concerning Certain Criminal Proceedings in France (Republic of Congo v France)* Provisional Measures Order of 17 June 2003, ICJ Report (2003) 102, 122.

²³⁰ Cassese A (2008) *International Criminal Law* (2ed.) 302

²³¹ Murungu C in Murungu C & Biegon J (eds.) *Prosecution International Crimes in Africa* (2011) 43; Cassese A (2008). *International Criminal Law* (2ed.) 302.

²³² Cassese A (2008) *International Criminal Law* (2ed.) 302.

²³³ *Ibid.*

office of the individual.²³⁴ Moreover, it also applies to international crimes, as held by domestic courts in the cases involving Muammar Qaddafi²³⁵ and Robert Mugabe.²³⁶ 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.²³⁷

However, nowadays this position is no longer accepted under international law.²³⁸ John Dugard argues that “some human rights norms enjoy such a high status that their violations, even by state officials, constitute an international crime.”²³⁹ Therefore, according to Dugard the doctrine of immunity cannot be at odds with these developments.²⁴⁰



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.²⁴¹ 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

²³⁴ Akande D (2004) ‘International Law Immunities and the International Criminal Court’ Vol. 98 No. 3 *American Journal of International Law* 409; Cassese A (2008) *International Criminal Law* (2ed.) 302. Such individuals include: heads of state, prime ministers or foreign ministers, diplomatic agents, and high-ranking agents of international organisations.

²³⁵ French *Cour de Cassation* 13 March 2001 Judgement 1414 (2001) 105 *Revue Generale de Droit International Public* 437.

²³⁶ *Tachiona v Mugabe* 169 F Supp 2d 259, 309 (SNDY 2001), the U.S. courts dealt with torture and civil action against the Mugabe regime for having tortured Tachiona’s family in Zimbabwe. Following the precedent of the *Arrest Warrants* case, the U.S. courts held that a sitting head of state has immunity from criminal and civil proceedings abroad.

²³⁷ Akande D (2004) ‘International Law Immunities and the International Criminal Court’ 411.

²³⁸ Murungu C in Murungu C & Biegion J (eds.) *Prosecution International Crimes in Africa* (2011) 43.

²³⁹ Dugard J (2005) *International Law: A South African Perspective* (3ed.) 50.

²⁴⁰ *Ibid.*

²⁴¹ Oola S ‘Bashir and the ICC: The Aura or Audition of the International Justice in Africa?’ (2008) Oxford Transitional Justice Research Collected Essays, 2008-2010, 63.

was not truly an international criminal tribunal, and therefore, the personal immunities of head of state apply before it.²⁴² 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.²⁴³ 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.²⁴⁴ 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.²⁴⁵

²⁴² Gaeta P (2009) 'Does President Al Bashir Enjoy Immunity from Arrest' Vol. 7 *Journal of International Criminal Justice* 317.

²⁴³ *Prosecutor v Charles Ghankay Taylor*, Case No. SCSL-2003-01-I, Appeals Chamber Decision on Immunity from Jurisdiction, Taylor (31 May 2004), para. 52.

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.²⁴⁶ The Court held that the Minister’s immunity applies before national courts for international crimes.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.²⁴⁸

This decision has been strongly criticized ‘as a setback for the movement against impunity for the commission of international crimes.’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.’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.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.²⁵²

²⁴⁶ *Ibid*, para. 71.

²⁴⁷ *Ibid*, para. 56-58.

²⁴⁸ *Ibid*, para. 61

²⁴⁹ Dugard J (2005) *International Law: A South African Perspective* (3ed.) 53.

²⁵⁰ Akande D ‘The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?’ (2008) Oxford Transitional Justice Research Collected Essays, 2008-2010, 88.

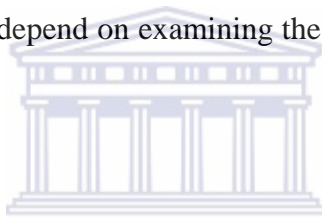
²⁵¹ *Prosecutor v Blaškić*, Case No. IT-95-14-AR 108 *bis*, Objection to Issue of Subpoena *duces tecum*, (29 October 1997), 110 ILR 609, 707, para. 38-43.

²⁵² Akande D ‘The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?’ (2008) 88.

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 mention 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

²⁵³ Gaeta P ‘Official Capacities and Immunity’ in Cassese A, Gaeta P & Jones J R W D (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 991; Akande D ‘The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?’ (2008) 88; Akande D (2004) ‘International Law Immunities and the International Criminal Court’ 416.

²⁵⁴ Akande D ‘The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?’ (2008) 88; Akande D (2004) ‘International Law Immunities and the International Criminal Court’ 417.

punishment.²⁵⁵ The reference to “equally”, in paragraph 1, clearly refers to a “distinction based on official capacity” only.²⁵⁶ Secondly, the expression “official capacity”, in paragraph 1, is used to describe a broad concept by using non-exhaustive examples.²⁵⁷ 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.²⁵⁸ 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.²⁵⁹ Therefore, even if the accused held a position or purported to act in an official capacity it would not exempt criminal responsibility.²⁶⁰ 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.²⁶¹ 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.²⁶²

Eric David observes that the ICC Statute dismisses two radically different defences.²⁶³ 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.²⁶⁴

²⁵⁵ Triffterer O ‘Article 27’ in Triffterer O (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2008) 786.

²⁵⁶ *Ibid.*, 787.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*, 788.

²⁵⁹ *Ibid.*, 789.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*, 790.

²⁶² *Ibid.*

²⁶³ David E ‘Official Capacity and Immunity of an Accused before the International Criminal Court’ in Doria J, Gasser H P & Bassiouni M C (eds.) *The Legal Regime of the International Criminal Court* (2009) 743.

²⁶⁴ *Ibid.*

Similar provisions of Article 27(1) are reflected in the agreements of the Nuremberg²⁶⁵ and Tokyo²⁶⁶ Tribunals, the Nuremberg Principles,²⁶⁷ and the statutes of the ICTY²⁶⁸ and ICTR.²⁶⁹ The main effect of these provisions is that it eliminates the substantive defence that may be raised by state officials.²⁷⁰ On the other hand, the provision of Article 27(2) has no counterpart in the founding instruments of international tribunals.²⁷¹ 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.²⁷²

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...”²⁷³ 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.

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.

²⁶⁶ See, The Charter of the International Military Tribunal for the Far East (Tokyo Charter), a directive from the commander-in-chief of the Allied forces, Douglas MacArthur issued on 19 January 1946, Article 6.

²⁶⁷ See, Principle III.

²⁶⁸ See, Article 7(2).

²⁶⁹ See, Article 6(2).

²⁷⁰ Akande D (2004) ‘International Law Immunities and the International Criminal Court’ 419.

²⁷¹ *Ibid.*, 420.

²⁷² *Ibid.*

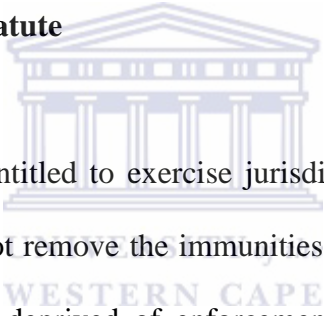
²⁷³ *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-3, para. 41.

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.”²⁷⁴

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.²⁷⁵ 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.”

²⁷⁴ Gaeta P (2009) ‘Does President Al Bashir Enjoy Immunity from Arrest’ 325.

²⁷⁵ Gaeta P (2009) ‘Does President Al Bashir Enjoy Immunity from Arrest’ 325; Bamu P ‘Head of State Immunity and the ICC: Can Bashir be Prosecuted?’ (2008) Oxford Transitional Justice Research Collected Essays, 2008-2010, 86.

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 concerned²⁷⁶ Consequently, the ICC must first seek the co-operation and waiver of immunity from the third state before issuing its request to states.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.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.²⁷⁹ Kreß and Prost are in favour of this interpretation.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".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 scholars²⁸² and by some ICC states parties.²⁸³ Reliance upon

²⁷⁶ Prost K and Schlunck A 'Article 98' in Triffterer O (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999) 1131.

²⁷⁷ Gaeta P (2009) 'Does President Al Bashir Enjoy Immunity from Arrest' 328.

²⁷⁸ *Ibid.*, 328.

²⁷⁹ Kreß C and Prost K 'Article 98' in Triffterer O (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 2ed. (2008) 1606.

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

²⁸² Broomhall B *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003) 145; Gaeta P 'Official Capacities and Immunity' in Cassese A, Gaeta P & Jones J R W D (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 993-996; Gaeta P (2009) 'Does President Al Bashir Enjoy Immunity from Arrest' 328; Akande D (2004) 'International Law Immunities and the International Criminal Court' 422.

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.²⁸⁴ 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.²⁸⁵

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.²⁸⁶

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."

²⁸⁴ Gaeta P (2009) 'Does President Al Bashir Enjoy Immunity from Arrest' 328.

²⁸⁵ *Ibid.*

²⁸⁶ *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* [emphasis] states to fully co-operate with the ICC.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.²⁸⁸ Such a state could claim that it does not incur responsibility against Sudan for deciding to carry out a recommendation by the SC.²⁸⁹

One may agree with Gaeta's two-fold argument against this legal construction.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.²⁹¹ Secondly, the SC did not urge states to ignore international immunities when co-operating with the ICC.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.²⁹³

Since the issuance of arrest warrants by the ICC, Al Bashir has been invited to visit several

²⁸⁷ See, S/RES/1593 (2005).

²⁸⁸ Gaeta P (2009) 'Does President Al Bashir Enjoy Immunity from Arrest' 331.

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.* 331.

²⁹¹ *Ibid.*

²⁹² *Ibid.*, 332.

²⁹³ See, Public Document ICC-02/05-01/09-7, Request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir, 6 March 2009, available at <http://www.icc-cpi.int/iccdocs/doc/doc642283.pdf> [accessed on 7 October 2011]; Public Document ICC-02/05-01/09-96, Supplementary request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir, 21 July 2011, available at <http://www.icc-cpi.int/iccdocs/doc/doc910850.pdf> [accessed on 7 October 2011].

countries, including Uganda,²⁹⁴ Nigeria,²⁹⁵ Turkey,²⁹⁶ Denmark²⁹⁷ and South Africa.²⁹⁸ 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.²⁹⁹ More interestingly, President Al Bashir has visited Egypt,³⁰⁰ Kenya,³⁰¹ Djibouti³⁰² and has made two visits to Chad.³⁰³

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”.

²⁹⁵ See, Amnesty International, Nigerian government must arrest Sudanese President during visit, 23 October 2009, available at <http://www.amnesty.org/en/news-and-updates/news/nigerian-government-must-arrest-sudanese-president-during-visit-20091023> [accessed on 7 October 2011]. President Al Bashir was invited to attend another meeting of the AU Peace and Security Council in Abuja Nigeria, which was scheduled to begin on 29 October 2009. The then, Nigerian President Umaru Yar’Adua apparently gave assurance that President Al Bashir would not be arrested during his visit in Nigeria.

²⁹⁶ See, Amnesty International, Turkey: No to safe haven for fugitive from international justice, 6 November 2009, available at <http://www.amnesty.org/en/news-and-updates/news/turkey-no-safe-haven-fugitive-international-justice-20091106> [accessed on 7 October 2011]. Amnesty International condemned an invitation extended by Turkey to President Al Bashir to attend a meeting of the Organisation of the Islamic Conference which took place from 5 to 9 November 2009.

²⁹⁷ See, Amnesty International, Danish government must arrest Sudanese President if he attends climate conference, 20 November 2009, available at <http://www.amnesty.org/en/news-and-updates/news/danish-government-must-arrest-sudanese-president-if-he-attends-climate-conferenc> [accessed on 7 October 2011]. The Danish government invited President Al Bashir to attend a meeting in Copenhagen on climate change which was to be convened in December 2009.

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.

²⁹⁹ Du Plessis M ‘The International Criminal Court that Africa Wants’ (2010) 17.

³⁰⁰ See, Amnesty International, Al-Bashir visit to Egypt is a missed opportunity to enforce justice, 25 March 2009, available at <http://www.amnesty.org/en/news-and-updates/news/al-bashir-visit-egypt-missed-opportunity-enforce-justice-20090325> [accessed on 7 October 2011]. Amnesty International condemned Egypt’s failure to arrest President Al Bashir during his visit in the country.

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.

³⁰² See, Public Document ICC-02/05-01/09-129, Decision informing the United Nations Security Council and the Assembly of the States parties to the Rome Statute about Omar Al-Bashir’s recent visit to Djibouti, 12 May 2011, available at <http://www.icc-cpi.int/iccdocs/doc/doc1057120.pdf> [accessed on 7 October 2011]. President Al Bashir visited Chad to attend the inauguration ceremony of President Ismael Omar Guelleh’s third term on 8 May 2011.

³⁰³ See, Amnesty International, Chad must arrest Sudanese President Omar al-Bashir during visit, 21 July 2010, available at <http://www.amnesty.org/en/news-and-updates/chad-must-arrest-sudanese-president-omar-al-bashir-during-visit-2010-07-21> [accessed on 7 October 2011]. Amnesty International called on Chadian authorities to arrest and surrender President Al Bashir to the ICC, during his visit in the country while attending a meeting of leaders and heads of states of the Community of Sahel-Saharan States. Also see, Public Document ICC-02/05-01/09-132, Decision requesting observation about Omar Al-Bashir’s recent visit to the Republic of Chad, 18 August 2011, available at <http://www.icc-cpi.int/iccdocs/doc/doc1206768.pdf> [accessed on 7 October 2011]. The Registrar of the ICC informed the Pre-Trial Chamber I of President Al Bashir’s second visit to Chad to attend the inauguration ceremony of President Idriss Deby Itno on 7 and 8 August 2011.

Although three of the countries (excluding Egypt) which Al Bashir has visited are states parties to the ICC Statute,³⁰⁴ none of them has co-operated with the ICC in arresting and surrendering the incumbent head of state of Sudan to the Court.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.³⁰⁶



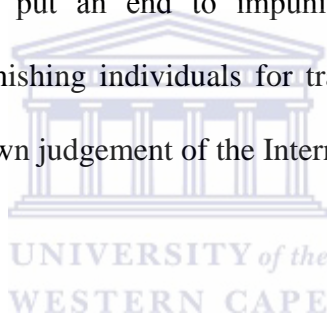
³⁰⁴ See, The States Parties to the Rome Statute, available at <http://www.icc-cpi.int/Menus/ASP/states+parties/> [accessed on 7 October 2011].

³⁰⁶ Gaeta P (2009) 'Does President Al Bashir Enjoy Immunity from Arrest' 332.

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.³⁰⁷ 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”³⁰⁸ and “to put an end to impunity for the perpetrators of these crimes...”³⁰⁹ 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.”³¹⁰

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.³¹¹

³⁰⁷ Akande D (2004) ‘International Law Immunities and the International Criminal Court’ 407.

³⁰⁸ ICC Statute Preamble, para. 4.

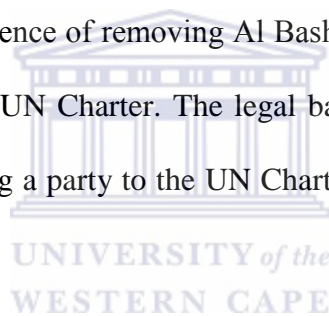
³⁰⁹ ICC Statute Preamble, para. 5.

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

³¹¹ Akande D (2004) ‘International Law Immunities and the International Criminal Court’ 432.

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.³¹²



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.³¹³ 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.³¹⁴ It is against this back-drop that the immunity enjoyed Al Bashir is lifted by Article 27.³¹⁵

³¹² Akande D 'The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?' (2008) 89.

³¹³ *Ibid.*, 90.

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*

Finally, where a charge of genocide is brought, against an accused, before the ICC (as Al Bashir is), the Genocide Convention of 1948³¹⁶ lifts immunities.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*³¹⁸ that the ICTY fell within the scope of Article 6 because of the obligations accepted under the UN Charter.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.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.³²¹ These issues will perhaps be addressed before the ICC in the appeals proceedings concerning the decision to issue arrests 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.³²²

One cannot conceive that Al Bashir would voluntarily surrender himself to the ICC nor that the Sudanese government will waive 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

³¹⁶ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.

³¹⁷ Akande D. 'The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?' (2008) 90.

³¹⁸ Case Concerning the Application of the Genocide Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v Serbia-Montenegro*), 26 February 2007.

³¹⁹ Ibid.

³²⁰ Akande D 'The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?' (2008) 90.

³²¹ Du Plessis M 'The International Criminal Court that Africa Wants' (2010) 79.

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.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"³²⁴ At the time of writing, the ICC has launched its investigations against six African countries, two of which concern serving heads of states.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.



WORD COUNT: 17 981 (excluding contents page and list of references).

³²³ Gaeta P (2009) 'Does President Al Bashir Enjoy Immunity from Arrest' 332.

³²⁴ See, Mahmood Mamdani quoted in Du Plessis M 'The International Criminal Court that Africa Wants' (2010) 20.

³²⁵ See, ICC Situations and Cases, available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> [accessed on 7 October 2011].

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