The International Criminal Court and the principle of complementarity: A comparison of the situation in the Democratic Republic of the Congo and the situation in Darfur

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DECLARATION

I, **Peace Gifty Sakyibea Ofei**, declare that the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Human Rights and Democratisation in Africa.

Signed…….

Date…….

Supervisor: Dr Raymond Koen

Signature……

Date…….

DEDICATION

This dissertation is dedicated first of all to God Almighty with whom all things are possible. It also dedicated to my parents, my siblings, and Bart. Finally, it is dedicated to all those who gave me a chance to grow academically.

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LIST OF ABBREVIATIONS

DRC	Democratic Republic of the Congo
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
OTP	Office of the Prosecutor

CHAPTER 1

SETTING THE SCENE

1.1 Background to the study

The purpose of the International Criminal Court (ICC) is to investigate, prosecute and punish the most serious crimes of international concern. These crimes are genocide, war crimes, crimes against humanity and the crime of aggression.[1] However, paragraph 10 of the preamble to and article 1 of the Rome Statute of the ICC provide that the jurisdiction of the court shall be complementary to national criminal jurisdictions. This is confirmed by article 17 of the Rome Statute, 'the core provision in relation to complementarity',[2] which states that the ICC is able to investigate and prosecute only situations which states are unwilling or unable to investigate or prosecute themselves.

The situations that have been referred to the ICC in terms of the principle of complementarity are the situations in the Democratic Republic of the Congo (DRC), northern Uganda, Darfur in Sudan and the Central African Republic.[3] This dissertation will focus on the DRC and Darfur. The government of the DRC referred the situation in that country to the ICC on 3 March 2004.[4] Thomas Lubanga Dyilo was arrested and transferred to the ICC on 17 March 2006.[5] On 17 October 2007 a second suspect in the DRC referral, Germain Katanga, was transferred to the ICC.[6] The ICC announced the arrest and transfer to it of a third suspect, Mathieu Ngudjolo Chui, on 7 February 2008.[7] A fourth arrest warrant was issued against Bosco Ntaganda by the ICC on 22 August 2006.[8] The trial of Thomas Lubanga Dyilo is already underway.[9]

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1 Art 5 of the Rome Statute A/CONF.183/9 of 17 July 1998. The ICC will exercise jurisdiction over the crime of aggression once it has been defined.

2 F Razesberger *The International Criminal Court (The Principle of Complementarity)* (2006) 19.

3 International Criminal Court 'Situations and cases' < http://www.icc-cpi.int/cases.html> (accessed 2 July 2008).

4 International Criminal Court 'Prosecutor receives referral of the situation in the Democratic Republic of Congo' < http://www.icc-cpi.int/pressrelease_details&id=19&l=en.html> (accessed 29 July 2008). See also Letter of Joseph Kabila to the Prosecutor dated 3 March 2004 ICC-01/04-01/06-39-US-AnxB1-tENG para 1 <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-39-AnxB1-tENG_English.pdf> (accessed 3 October 2008).

5 ICC Press Release 'ICC judges order release of Thomas Lubanga Dyilo' 2 July 2008 The Hague < http://www.rnw.nl/internationaljustice/icc/DRC/080702-lubanga> (accessed 2 August 2008).

6 O Maillet 'Second DRC Case Spotlights Importance of Cooperation' (2007-2008) 35 *Journal for the Coalition of the International Criminal Court* 1.

7 Coalition for the International Criminal Court 'ICC announces third arrest in DRC situation' <http://www.iccnow.org/documents/CICC_PressRelease_NgudjoloArrest_07feb08_eng1.pdf> (accessed 29 July 2008).

8 *The Prosecutor v Bosco Ntaganda (Warrant of Arrest)* ICC-01-/04-02/06-2-Anx-tENG 22 August 2006 < http://www.icc-cpi.int/library/cases/ICC-01-04-02-06-2-tENG.pdf> (accessed 23 September 2008).

9 The Trial Chamber ordered the release of Thomas Lubanga Dyilo on 2 July 2008. See ICC Press Release (n 5 above). On 21 October 2008, the Appeals Chamber reversed this decision and remanded the matter back to the Trial Chamber for determination. See 'Appeals Chamber confirms the stay of proceedings and reverses decision on the release of Thomas Lubanga Dyilo' <http://www.icc-cpi.int/press/pressreleases/433.html> (accessed 28 October 2008).

The situation in Darfur, however, presents a real challenge to the effectiveness of the ICC because Sudan is not a party to the Rome Statute.[10] Civil war raged in Sudan from 1983 to 9 January 2005.[11] The war spread to Sudan's western region of Darfur in early 2003. Arab tribal militias, also known as *Janjaweed*, clashed with and persecuted the inhabitants of Darfur.[12] Darfur is made up of three states within Sudan. These are North, South and West Darfur. Darfur has a population of about six million people.[13] The *Janjaweed* killed, raped and robbed the inhabitants of Darfur.[14]

The situation in Darfur was referred to the ICC by the United Nations Security Council in terms of Resolution 1593 on 31 March 2005[15] and this referral was hailed as representing the hope of justice for the people of Darfur.[16] The referral was made under article 13(b) of the Rome Statute.[17] The ICC issued warrants of arrest against Ahmad Harun and Ali Kushayb on 27 April 2007, charging them with war crimes and crimes against humanity.[18] To date, however, these warrants have not been executed and the government of Sudan has vowed not to co-operate with the ICC.[19] Enforcement and co-operation issues inevitably arise because Sudan is not a party to the Rome Statute. The Prosecutor of the ICC announced on 14 July 2008 that he had submitted an application for the issue of a warrant of arrest against President Al Bashir of Sudan, for genocide, crimes against humanity and war crimes.[20]

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10 M Du Plessis & C Gevers 'Darfur goes to the International Criminal Court (perhaps)' (2005) 14 *African Security Review* <http://www.iss.co.za/index.php?link_id=24&slink_id=1928&link_type=12&slink_type=12&tmpl_id=3> (accessed 9 March 2008).

11 Du Plessis & Gevers (n 10 above).

12 M Neuner 'The Darfur referral of the Security Council and the scope of the jurisdiction of the International Criminal Court' (2005) 8 *Yearbook of International Humanitarian Law* 321.

13 Neuner (n 12 above) 321.

14 CA Williamson 'Justice empowered or justice hampered: the International Criminal Court in Darfur' (2006) 15 *African Security Review* 22.

15 UN Doc S/RES/1593 (2005).

16 Williamson (n 14 above) 23.

17 Neuner (n 12 above) 328.

18 *The Prosecutor v Ahmad Muhammad Harun 'Ahmad Harun' and Ali Muhammad Ali Abd-Al-Rahman 'Ali Kushayb' (Warrant of Arrest for Ahmad Harun)* ICC-02/05-01/07-2 (27 April 2007) <http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-2_English.pdf> (accessed 4 September 2008); *The Prosecutor v Ahmad Muhammad Harun 'Ahmad Harun' and Ali Muhammad Ali Abd-Al-Rahman 'Ali Kushayb' (Warrant of Arrest for Ali Kushayb)* ICC-02/05-01/07-3 (27 April 2007) <http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-3_English.pdf> (accessed 12 September 2008).

19 Human Rights Watch 'Sudan: hand over war crimes suspects to ICC' <http://www.hrw.org/english/docs/2007/05/02/sudan15822.htm> (accessed 3 August 2008).

20 L Moreno-Ocampo 'Prosecutor's statement on the Prosecutor's application for a warrant of arrest under article 58 against Omar Hassan Ahmad Al Bashir' <http://www.icc-cpi.int/library/organs/otp/ICC-OTP-ST20080714-ENG.pdf> (accessed on 29 July 2008).

The corollary of the principle of complementarity is co-operation.[21] If a state is not willing to prosecute, will it be willing to co-operate fully with the Court on the same matter?[22] The co-operation of states with the ICC is perhaps the most important issue of all, since co-operation concerns the practical realities that the ICC will face.[23] The advantage of a self-referral is that the state involved will co-operate with the ICC.[24]

This dissertation seeks to explore the principle of complementarity, its advantages and its success so far through the DRC self-referral to the ICC. It seeks also to investigate whether there are loopholes in the principle of complementarity, especially with regard to referrals by the Security Council involving states that are not parties to the Rome Statute. In particular the dissertation seeks to explore whether states can use this principle to hamper the efforts of the ICC to bring justice to victims of the most serious crimes of international concern and to end impunity. None of the warrants of arrest issued by the ICC in the Darfur referral has been executed.[25] Three of four of the warrants of arrest issued in the DRC referral have been executed.[26] Since none of the warrants in the Darfur referral has been executed, the author will investigate whether the complementarity principle is better suited to self-referrals than referrals by the Security Council. Sudan is not a party to the Rome Statute and so the dissertation will investigate whether Sudan owes any obligation to co-operate in the investigation and prosecution of those who have been named in the warrants of arrest. The dissertation seeks to explore the relationship between the ICC and a state that is not a party to the Rome Statute.

1.2 Statement of the research problem

The jurisdiction of the ICC is based on the principle of complementarity. The ICC therefore requires the co-operation of states in order to perform its duties of punishing perpetrators of international crimes and bringing justice to victims of these crimes. The study will seek to answer the following questions:

a. What is the principle of complementarity and what is its purpose?

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21 Razesberger (n 2 above) 185.

22 K Miskowiak *The International Criminal Court: Consent, Complementarity and Cooperation* (2000) 51. This was a question asked by Professor Theo van Boven, head of the Dutch delegation at the Rome conference, at a meeting between the Hague municipal authorities and the Dutch Association for International Affairs, 6 November 1998.

23 Miskowiak (n 22 above) 51.

24 International Justice Tribune Series *ICC in 2006: Year One* (2006) 11.

25 Justice for Darfur 'Sudan: open letter to members of the United Nations Security Council' <http://www.amnestyusa.org/pdf/j4d_unscltr.pdf> (accessed 2 August 2008).

26 T Bouwknegt 'ICC arrest warrant against 'Terminator' Bosco Ntaganda' 29 April 2008 <http://www.rnw.nl/internationaljustice/icc/DRC/080429-ICC-Ntaganda> (accessed 2 August 2008).

b. Is the work of the ICC in its bid to bring justice to both the victims and perpetrators of the most serious crimes of international concern in the DRC enhanced because the DRC is a party to the Rome Statute?
c. Is the work of the ICC in its bid to bring justice to perpetrators and victims in Darfur hampered because Sudan is not a party to the Rome Statute?
d. How viable is a Security Council referral to the ICC in terms of investigations, prosecution, and co-operation of the state concerned?
e. Is the principle of complementarity only suitable for situations in which states are parties to the Rome Statute because of problems with co-operation?

1.3 Aims and objectives

This dissertation explores the principle of complementarity with particular reference to the situations in the DRC and Darfur. The purpose of this study is to:

a. Examine the principle of complementarity and its purpose as it relates to the jurisdiction of the ICC.
b. Explore the obligation of states, whether party to the Rome Statute or not, to co-operate with the ICC.
c. Proffer solutions to enhance co-operation of states with the ICC.

1.4 Significance of the study

This dissertation seeks to assess the principle of complementarity as it relates to self-referrals and referrals by the Security Council regarding a situation in a country that is not a party to the Rome Statute. It will be argued that the principle of complementarity is better suited to self-referrals than to referrals by the Security Council. The study will thereby contribute to a broader and deeper understanding of the principle of complementarity.

1.5 Hypothesis

This dissertation takes the preliminary position that the principle of complementarity is more suited to self-referrals than Security Council referrals. The author assumes that the level of co-operation of states with the ICC in a self-referral is higher than in a Security Council referral. It is presumed from the outset that a self-referral is more feasible than a referral by the Security Council.

1.6 Literature review

Cassese,[27] Schabas[28] and Sands[29] have written extensively on international criminal law in general and the International Criminal Court in particular. These books address the principle of complementarity with regard to the jurisdiction of the ICC. There is very little literature, however, that specifically addresses the principle of complementarity in relation to the situation in Darfur, especially pertaining to the ability of a state to use the principle to attempt to hamper the work of the ICC in investigating, prosecuting and punishing international crimes. An article by Williamson[30] touched briefly on the attempt being made by Sudan to impede the work of the ICC using the principle of complementarity. Miskowiak[31] has written on the principle of complementarity and the obligation of states to co-operate with the ICC. Neuner[32] has analysed the uniqueness of the situation in Darfur and the obligation of Sudan to co-operate with the ICC. As far as the author can ascertain, there is no literature comparing self-referrals and Security Council referrals in the light of the situations in the DRC and Darfur.

1.7 Proposed methodology

This dissertation will be based on the existing literature in international criminal law and international criminal justice. The author will draw on primary sources such as the Rome Statute, various international instruments and the case law on the subject. The author will rely also on secondary sources such as books, articles and internet material on international criminal law in general and the ICC in particular. She will do a critical analysis of the primary and secondary sources on the subject in relation to the principle of complementarity and the obligation of states to co-operate with the ICC.

The dissertation makes a comparative study of the situations in the DRC and Darfur. The purpose is to explain the important issues involved with respect to self-referrals and Security Council referrals. The differences between self-referrals and Security Council referrals make a comparative study of the situations in the DRC and Darfur possible.

There will also be a critical analysis of the principle of complementarity and the obligation of states to co-operate with the ICC. There is a link between complementarity and co-operation in the sense that the corollary of complementarity is co-operation.[33] This analysis is therefore aimed at

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27 A Cassese *International Criminal Law* (2003).
28 WA Schabas *An Introduction to the International Criminal Court* (2007).
29 P Sands (ed) *From Nuremberg to The Hague: The Future of International Criminal Justice* (2003).
30 Williamson (n 14 above).
31 Miskowiak (n 22 above).
32 Neuner (n 12 above).
33 Razesberger (n 2 above) 185.

assessing whether there will be different levels of co-operation of states with the ICC depending on whether a case is a self-referral or a referral from the Security Council.

1.8 Limitations of the study

This dissertation is limited to a critical overview of the complementarity principle and the obligation of states to co-operate with the ICC. It compares the referral by the DRC, which is a party to the Rome Statute, and the Darfur referral made by the Security Council to the ICC. It also seeks to discuss the attempt being made by Sudan, which is not a party to the Rome Statute, to hamper the work of the ICC.

1.9 Overview of chapters

This dissertation is divided into four chapters. This chapter introduces the study and its structure. Chapter 2 will discuss the basis of the jurisdiction of two *ad hoc* tribunals,[34] which is primacy.[35] The chapter will also define the principle of complementarity, explain why the jurisdiction of the ICC is based on the principle and discuss the advantages of the principle. Chapter 3 will compare the situation in the DRC with the situation in Darfur, with particular regard to how the work of the ICC has been enhanced or hampered by the different methods of referral and by the relationship of the two countries to the Rome Statute. Since the corollary of the principle of complementarity is co-operation[36] the chapter will discuss the various aspects of co-operation that the Rome Statute requires.[37] Chapter 4 will draw conclusions and make recommendations pertaining to the issues traversed in the previous chapters.

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34 The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

35 Art 9 of the Statute of the International Criminal Tribunal for the Former Yugoslavia UN Doc S/RES/827(1993); Art 8 of the Statute of the International Criminal Tribunal for Rwanda UN Doc S/RES/955 (1994).

36 Razesberger (n 2 above) 185.

37 Miskowiak (n 22 above) 57.

CHAPTER 2

AN ANALYSIS OF THE PRINCIPLE OF COMPLEMENTARITY

2.1 Introduction

This chapter will elucidate the principle of complementarity with the aim of clarifying and delimiting its meaning within the context of the dissertation. In explaining this principle, reference will be made to the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which is based on primacy.[38] The chapter also explains why the jurisdiction of the ICC is based on complementarity and not primacy, and it discusses the advantages of this principle. The various aspects of the principle under Article 17 of the Rome Statute, which is the main provision dealing with the principle, will be discussed. The chapter will also touch on the various types of referrals, but will concentrate on self-referrals and Security Council referrals.

2.2 Primacy of the jurisdiction of the *ad hoc* tribunals

The ICTY and the ICTR were established ostensibly to contribute to the restoration and maintenance of peace in the Former Yugoslavia[39] and Rwanda.[40] These tribunals were given primacy over the national courts in order to achieve these purposes.[41] Article 9(2) of the Statute of the ICTY and article 8(2) of the Statute of the ICTR provide that these tribunals have primacy over national courts, which means that even where national courts are investigating or prosecuting a case, the tribunals can order the transfer of the case to them. The tribunals may therefore assert their jurisdiction at any point in the proceedings simply because the crimes being investigated and prosecuted by the national courts fall within the jurisdiction of the tribunals.[42] There is, therefore, no need to determine the availability or competence of national authorities to prosecute the alleged perpetrators of crimes.[43]

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38 See n 35 above.

39 Security Council Resolution 827 UN Doc S/RES/827 (1993). See also *Decision on the Defence Motion for Interlocutory Appeal (Prosecutor v Tadic)*, Case No. IT-94-1-AR72 (Appeals Chamber, 2 October 1995) para 32.

40 Security Council Resolution 955 UN Doc S/RES/955 (1994). See also *Prosecutor v Kanyabashi* ICTR-96-15-T (Trial Chamber, 18 June 1997), para 20.

41 MM El Zeidy 'The principle of complementarity: a new machinery to implement international criminal law' (2002) 23 *Michigan Journal of International Law* 883.

42 Schabas (n 28 above) 175.

43 F Lattanzi 'The complementarity character of the jurisdiction of the court with respect to national jurisdiction' in F Lattanzi (ed) *The International Criminal Court: Comments on the Draft Statute* (1998) 3 cited in El Zeidy (n 41 above) 892.

In *Prosecutor v Tadic*, the accused argued that the ICTY did not have primacy over the jurisdiction of national courts. The Appeals Chamber upheld the primacy of the jurisdiction of the ICTY and found that there was a need to strengthen the jurisdiction of the ICTY through the principle of primacy in order to avoid the recurrent danger of international crimes being characterised as ordinary crimes, or proceedings being designed to shield the accused, or cases not being diligently prosecuted.[44] It held, further, that the principle of primacy would prevent the use of any of these ploys to defeat the core purpose of the ICTY,[45] to the benefit of the very people whom the tribunal was established to prosecute.[46] The decision in *Tadic* applies equally to the ICTR. However, in *In the Matter of Surrender of Elizapan Ntakirutimana,*[47] the court of first instance did not enforce the principle of primacy and refused to order the transfer and surrender of the accused to the ICTR. On appeal the decision of the court was reversed and an order was made for the transfer and surrender. The challenges faced in obtaining the order in the *Ntakirutimana* case point to some of the difficulties in enforcing primacy. The case brought to the fore the weakness of the *ad hoc* tribunals in respect of implementing primacy.[48]

2.3 Meaning of the principle of complementarity

Unlike the ICTY and the ICTR, the jurisdiction of the ICC is based on the principle of complementarity.[49] It must be noted that the issue of complementarity only arises with reference to the crimes that are within the jurisdiction of the ICC.[50] The Rome Statute does not provide any definition of the principle of complementarity. However, Philippe has defined it as 'a functional principle aimed at granting jurisdiction to a subsidiary body when the main body fails to exercise its primary jurisdiction'.[51]

More importantly, the meaning of the complementarity principle can be gleaned from various provisions in the Rome Statute, namely, paragraph 10 of the Preamble and articles 1 and 17. As already noted in Chapter 1,[52] paragraph 10 and article 1 provide that the jurisdiction of the ICC shall be complementary to national criminal jurisdictions. According to article 17, which is the main provision on complementarity, the ICC will exercise its jurisdiction in a case only where a state is unable or

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44 *Decision on the Defence Motion for Interlocutory Appeal, (Prosecutor v Tadic)* (n 39 above) para 58. See also article 10(2)(a)&(b) of the Statute of the ICTY.

45 The purpose of the ICTY is to restore and maintain peace.

46 *Decision on the Defence Motion for Interlocutory Appeal, (Prosecutor v Tadic)* (n 39 above) para 58.

47 1997 US Dist LEXIS 20714 *6-20 cited in El Zeidy (n 41 above) 888.

48 See n 47 above.

49 Cassese (n 27 above) 351.

50 X Philippe 'The principles of universal jurisdiction and complementarity: how do the two principles intermesh?' (2006) 88 *International Review of the Red Cross* 382.

51 Philippe (n 50 above) 380.

52 Chapter one, section 1.1.

unwilling to exercise its national criminal jurisdiction. The conclusion, therefore, is that articles 1 and 17 are an exception to the rule that national courts have prior jurisdiction over international crimes.[53]

Complementarity is the opposite of primacy. The ICC can assert its jurisdiction only when it becomes obvious that a state is unwilling or unable to investigate and prosecute perpetrators of crimes that are within the jurisdiction of the court. In effect, the ICC does not have the first bite at the cherry. Primacy, however, does not require unwillingness or inability. The *ad hoc* tribunals may assert their jurisdiction simply because the crimes being investigated and prosecuted by the national courts fall within the jurisdiction of the tribunals.[54] In support of the principle of complementarity the Prosecutor of the ICC has stated:

> The effectiveness of the International Criminal Court should not be measured only by the number of cases that reach the Court. On the contrary, the absence of trials by the ICC, as a consequence of the effective functioning of national systems would be a major success.[55]

The statement of the Prosecutor recognises the fact that national courts have priority over the jurisdiction of the ICC and, therefore, where states live up to their responsibility of investigating and prosecuting alleged perpetrators of international crimes, the court will not be able to assert its jurisdiction. The conduct of investigations and prosecutions by national courts will mean, therefore, that fewer cases will come before the ICC.

2.3.1 Meaning of inability

The jurisdiction of the ICC may be triggered by a state's inability to pursue a matter. In order to determine inability in a particular case, the ICC has to consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.[56] The determination of inability by the court therefore takes into account instances such as a lack of a central government,[57] a state of anarchy which arises out of a conflict or a crisis, or public disorder that leads to the collapse of national systems, and these must prevent the state from fulfilling its duty of investigating and prosecuting international crimes.[58]

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53 'Paper on some policy issues before the Office of the Prosecutor' 4 <http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf> (accessed 14 August 2008).

54 Schabas (n 28 above) 175.

55 See n 53 above.

56 Art 17(3) of the Rome Statute.

57 An example of such a state would be Somalia in the 1990s.

58 See n 53 above.

The most relevant factor on which to decide whether or not a state is unable to prosecute alleged perpetrators of the crimes over which the ICC has jurisdiction is the total or substantial collapse or unavailability of a state's judicial system.[59] A state that is engaged in war or has been plunged into anarchy would be found by the ICC to be unable to carry out its prosecutorial obligations. Another example would be where a state does not have adequate control over its police force.[60] Also, a state may be willing to investigate and prosecute a case but unable to do so because of the collapse of state institutions, for example, the national judicial system, or because of widespread lawlessness.[61]

Note must be taken of the fact that inability is not founded only on a total or substantial collapse or unavailability of a national judicial system.[62] The formulation 'or otherwise unable to carry out its proceedings' was included in article 17(3) of the Rome Statute to cater for situations where the failure of a state to obtain the accused or necessary evidence or testimony might be attributed to reasons other than a total or substantial collapse or unavailability of a national judicial system.

A national judicial system, although functioning perfectly, will be described as unavailable due to obstacles which may be legal or factual.[63] For example, the absence of the necessary legislation to enable a state to investigate and prosecute the relevant crimes will make a national judicial system unavailable.[64]

2.3.2 Meaning of unwillingness

The ICC may also pursue a matter if a state is unwilling to do so. Article 17(2) of the Rome Statute contains the grounds for the determination of the unwillingness of a state to investigate a case or to carry out prosecutions, and these grounds are separate, not cumulative. In order to establish the unwillingness of a state to investigate and prosecute, the ICC must determine whether the national decision has been made or proceedings are or were being undertaken to shield the person concerned from criminal responsibility with respect to genocide, crimes against humanity and war crimes.[65] Therefore, where states conduct sham trials in order to shield a person from criminal responsibility under article 20(1) of the Rome Statute, they would be deemed to be unwilling.[66] Where states also begin trials without any

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59 See n 56 above.
60 Miskowiak (n 22 above) 48.
61 EL Zeidy (n 41 above) 869.
62 See n 56 above.
63 Meissner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* 86 cited in Razesberger (n 2 above) 49.
64 Razesberger (n 2 above) 49.
65 Art 17(2)(a) of the Rome Statute.
66 The essence of article 20(1) is that a person who has been tried for a crime over which the ICC has jurisdiction and for which he or she has already been convicted or acquitted cannot be tried by the court. See also Schabas (n 28 above) 184.

intention of completing them, they will be deemed to be unwilling.[67] The grant of amnesties can be an indication also of the unwillingness of a state to prosecute because amnesties imply that judicial action cannot be taken against those who benefit from these amnesties, and where proceedings have already been commenced they are stopped.[68]

A state will be deemed unwilling also where there has been an unjustified delay which is inconsistent with an intent to bring the person concerned to justice,[69] or the proceedings are not or were not being conducted independently or impartially.[70] An unjustified delay exists if proceedings have taken longer than cases with similar facts usually take.[71]

Where proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice, a state will be deemed unwilling.

2.4 Rationale of the principle of complementarity

There are three fundamental reasons which constitute the rationale of the principle. Firstly, for practical reasons it is inappropriate that the ICC be flooded with cases from all over the world because of the limited number of judges and the limited financial resources available to the court. It was considered prudent, therefore, to allow national courts to exercise their jurisdiction over international crimes based on territorial link or universality. National courts will also be more able than the ICC to collect evidence and arrest the accused.[72]

Secondly, making the jurisdiction of the ICC complementary to that of national jurisdictions was designed to respect sovereignty, which is very important to states.[73] Complementarity is an expression of the will of states to establish an institution which has power to exercise jurisdiction over all persons but also recognises that it is the responsibility of states first and foremost to exercise criminal jurisdiction.[74] States want to maintain and preserve the jurisdiction they have over crimes.[75] States, generally, supported the idea of an international criminal court that would exercise jurisdiction over international

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67 Schabas (n 28 above) 184.
68 Philippe (n 50 above) 383.
69 Art 17(2)(b) of the Rome Statute.
70 Art17(2)(c) of the Rome Statute. See also (n 53 above) 4.
71 J Pichon 'The principle of complementarity in the cases of the Sudanese nationals Ahmad Harun and Ali Kushayb before the International Criminal Court' (2008) 8 *International Criminal Law Review* 195.
72 Cassese (n 27 above) 351.
73 Cassese (n 27 above) 351.
74 See n 53 above.
75 RS Lee 'Introduction: The Rome conference and its contributions to international law' in RS Lee (ed) *The International Criminal Court: The Making of the Rome Statute* (1999) 27.

crimes. These states were not, however, in support of the creation of a body that could encroach on their sovereignty.[76] The need to balance state sovereignty and the exercise of the jurisdiction of the ICC led to the adoption of the principle because it recognises the fact that it is the primary duty of every state to exercise criminal jurisdiction over those responsible for international crimes.[77] This is supported by Lee who submits that:

> One of the most difficult legal problems in creating an international court was therefore to find a way whereby such a Court would not impair but rather supplement the exercise of national jurisdiction. The principle of complementarity as embodied in the Rome Statute provided the key.[78]

Note must be taken also of the fact that, although the *ad hoc* tribunals have primacy over national jurisdictions, there were problems with its implementation and so it was decided that the ICC should not have primacy over national courts.[79] The *Tadic* decision confirmed the primacy of the *ad hoc* tribunals. However, the tribunals do not always have the power to enforce this mechanism, as shown by the *Ntakirutimana* case.[80] As a result the ICTY has been described as 'a giant without arms' which can function only if states co-operate with it.[81] Another explanation is that states sometimes regard the primacy that the tribunals have over national jurisdictions as a threat to their sovereignty and so sometimes refuse to co-operate with them.[82] It was considered prudent, therefore, to make the jurisdiction of the ICC complementary to the jurisdiction of national courts.[83]

Thirdly, the *ad hoc* tribunals were established because of the atrocities that had occurred in the 1990s in the Former Yugoslavia and Rwanda.[84] The ICC is a permanent court[85] and therefore a general balance had to be struck between the conventional duty of states to exercise jurisdiction over crimes and the importance of ensuring that grave violations of international humanitarian law will be punished. As already stated, insistence on the primacy of the jurisdiction of the ICC would have made the creation of

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76 JT Holmes 'The principle of complementarity' in RS Lee (ed) *The International Criminal Court: The Making of the Rome Statute* (1999) 41.

77 Paragraph 6 of the Preamble to the Rome Statute.

78 Lee (n 75 above) 27.

79 BS Brown 'Primacy or complementarity: reconciling the jurisdiction of national courts and international criminal tribunals' (198) 23 *Yale Journal of International Law* 426 cited in El Zeidy (n 41 above) 888.

80 1997 US Dist LEXIS 20714 *6-20 cited in El Zeidy (n 41 above) 888. Notwithstanding the existence of the two agreements on surrender of persons between the government of the United States and the ICTR, the United States District Court for the Southern District of Texas, Laredo Division denied the request of the ICTR to surrender the accused on the grounds that the agreement with the ICTR was unconstitutional and therefore unenforceable. However, this decision was reversed on 5 August 1998.

81 Lattanzi (n 43 above) 3 cited in El Zeidy (n 41 above) 888.

82 El Zeidy (n 41 above) 889.

83 Paragraph 10 of the Preamble to the Rome Statute.

84 Art 1 of the Statute of the ICTY and art 1 of the Statute of the ICTR.

85 Art 1 of the Rome Statute.

the court impossible.[86] In effect, the principle of complementarity was regarded as way of ensuring that the ICC has the final word when states fail to fulfil their obligation of punishing the perpetrators of international crimes.[87] The principle is aimed at ensuring that international crimes do not go unpunished.[88] A further aim is to ensure that the court receives a high level of co-operation from states.

Notwithstanding the desire for state co-operation, the Security Council can refer a situation concerning a state to the ICC in terms of Chapter VII of the United Nations Charter.[89] The state need not, therefore, be a party to the Rome Statute. The state need be only a member of the United Nations.[90] The competence of the Security Council to make referrals to the court seeks to ensure that a state that is not a party to the statute does not promote impunity, by not investigating or prosecuting cases.[91] Referrals by the Security Council, however, raise issues of co-operation which will be the subject of the next chapter.

2.5 Application of the principle of complementarity

The ICC may exercise its jurisdiction in respect of the crime of genocide, crimes against humanity and war crimes in three ways. Firstly, a state party may refer a situation in which one or more of such crimes have been committed to the Prosecutor in accordance with articles 13(a) and 14(1) of the Rome Statute.[92] Secondly, the Security Council may refer a situation in which one or more crimes appear to have been committed to the ICC under article 13(b) of the Rome Statute.[93] The Security Council, in referring such a situation to the Prosecutor, must act under Chapter VII of the Charter of the United Nations.[94] The decision by the Security Council to refer a situation to the ICC will be the result of a vote to that effect, and that decision will bind all the members of the United Nations.[95] Thirdly, the

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86 El Zeidy (n 41 above) 889.

87 Philippe (n 50 above) 381.

88 El Zeidy (n 41 above) 870.

89 Art 13(b) of the Rome Statute.

90 Neuner (n 12 above) 324 & 328.

91 Statement to the United Nations Security Council pursuant to UNSCR 1593 (2005) 5 June 2008 1 <http://www.icc-cpi.int/library/organs/otp/ICC-OTP-ST20080605-ENG.pdf> (accessed 17 October 2008).

92 Article 13(a) provides that: 'The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14'.
Article 14(1) provides that: 'A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court may appear to have been committed requesting the Prosecutor to investigate the situation to determine whether one or more specific persons should be charged with the commission of such crimes'.

93 Article 13(b) provides that: 'The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations'.

94 Chapter VII of the United Nations Charter allows the Security Council to determine the existence of any threat to the peace, breach of the peace, or act of aggression and to take non-military or military action to restore international peace and security.

95 El Zeidy (n 41 above) 957.

Prosecutor can initiate his or her own investigation in respect of such a crime in accordance with article 15(1) of the Rome Statute.[96] This study will confine itself to referrals by states and by the Security Council.

2.5.1 The DRC referral

On 19 April 2004 the Prosecutor announced the receipt of a letter signed by the President of the DRC referring to him the situation of crimes within the jurisdiction of the Court allegedly committed anywhere within the territory of the DRC since the entry into force of the Rome Statute on 1 July 2002. The DRC requested the Prosecutor to investigate in order to determine if one or more persons should be charged with such crimes. [97] The referral was done under article 13(a) and 14 of the Rome Statute.[98] The letter from the government of the DRC stated that:

> *En raison de la situation particulière que connaît mon pays, les autorités compétents ne sont malheureusement pas en mesure de mener des enquêtes sur les crimes mentionnés ci-dessus ni d'engager les poursuites nécessaires sans la participation de la Cour Pénale Internationale*. [99]

The DRC referred the situation in the country to the ICC because it was unable to conduct or investigate cases.[100] It must be noted that before the DRC made the referral to the court, the Prosecutor had already decided to investigate the situation in that country.[101] He had, however, indicated publicly that he would welcome a self-referral because it would ensure a higher level of co-operation from the DRC.[102] However, Gaeta has warned that:

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96 Article 15(1) provides that: 'The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court'.

97 International Criminal Court (n 4 above). See also Letter of Joseph Kabila to the Prosecutor dated 3 March 2004 (n 4 above).

98 Letter of Joseph Kabila to the Prosecutor dated 3 March 2004 (n 4 above).

99 Letter of Joseph Kabila to the Prosecutor dated 3 March 2004 ICC-01/04-01/06-39-US-AnxB1_French para 2 <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-39-AnxB1_French.pdf> (accessed 3 October 2008)
The English translation which can be found in Letter of Joseph Kabila to the Prosecutor dated 3 March 2004 (n 4 above) para 2 is 'Due to the specific circumstances in which my country finds itself, the relevant authorities are unable to carry out investigations into the above-mentioned crimes or to conduct the necessary prosecutions without the participation of the International Criminal Court.'

100 *The Prosecutor v Thomas Lubanga Dyilo (Decision on the Prosecutor's Application for a warrant of arrest, Article 58)* ICC-01/04/01/06-8-Corr (10 February 2006) para 35 <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-8-US-Corr_English.pdf> (accessed 23 September 2008).

101 WA Schabas 'Complementarity in practice: Some uncomplimentary thoughts' (2008) 19 *Criminal Law Forum* 11.

102 L Moreno-Ocampo 'Lessons from the first cases' *The Future of the International Criminal Court – Salzburg Retreat, 25-27 May 2006(2006)* 9 <http://www.sbg.ac.at/salzburglawschool/Retreat.pdf> (accessed 18 September 2008).

> [T]he government authorities may be prepared to cooperate where the crimes investigated have been allegedly committed by the opposing side; in contrast it is unlikely that they will be fully co-operative in the investigation of crimes perpetrated by state agents.[103]

The Prosecutor of the ICC decided to initiate an investigation into the situation in the DRC on 16 June 2004.[104] The practice of self-referral was supported by Pre-Trial Chamber I when it indicated that a self-referral is consistent with the principle of complementarity.[105] Pre-Trial Chamber I has issued four warrants of arrest in the DRC referral. These warrants are for Thomas Lubanga Dyilo, Bosco Ntaganda, Germain Katanga and Mathieu Ngudjolo Chui.[106]

2.5.2 The Darfur referral

Sudan signed the Rome Statute on 8 September 2000, but has not yet deposited its ratification. It is, therefore, not a party to the statute. However, the ICC may exercise jurisdiction over crimes committed in the territory of states which are not party to the statute and over nationals of states not party to the statute where the Security Council makes a referral to the court.[107] In response to a request by the former United States Secretary of State, Collin Powell,[108] Security Council Resolution 1564 established an International Commission of Inquiry to investigate the reports of the violations of international humanitarian law and human rights law in Darfur. The Commission was to investigate all parties to the Darfur conflict, establish whether acts of genocide had occurred in the region, and also identify the perpetrators of these acts.

The Commission found that crimes against humanity, but not genocide, had been committed in Darfur and called for the referral of the case by the Security Council to the ICC.[109] In requesting the Security Council to refer the Darfur case to the ICC, the Commission stated in its report that:

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103 P Gaeta 'Is the practice of "self-referrals" a sound start for the ICC?' 2 *Journal of International Criminal Justice* 952 cited in Schabas (n 28 above) 149.

104 *The Prosecutor v Thomas Lubanga Dyilo (Decision on the Prosecutor's Application for a warrant of arrest, article 58)* ICC-01/04/01/06-8-Corr (10 February 2006) para 22 http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-8-US-Corr_English.pdf (accessed 23 September 2008).

105 Schabas (n 28 above) 148.

106 *The Prosecutor v Thomas Lubanga Dyilo (Warrant of Arrest)* ICC-01/04-01/06-2-tEN, 10 February 2006 <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2_tEnglish.pdf > (accessed 5 September 2008); *The Prosecutor v Bosco Ntaganda (Warrant of Arrest)* (n 8 above); *The Prosecutor v Germain Katanga (Warrant of Arrest)* ICC-01/04-01/07-1-tENG, 2 July 2007 <http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-1_tEnglish.pdf> (accessed 22 September 2008); *The Prosecutor v Mathieu Ngudjolo Chui (Warrant of Arrest)* ICC-01/04-02/07-1-tENG, 6 July 2007 <http://www.icc-cpi.int/library/cases/ICC-01-04-02-07-1-tENG.pdf> (accessed 22 September 2008).

107 *Decision on the Prosecution Application under Article 58(7) of the Statute*, ICC-02/05-01/07-1, 27 April 2007 para 16 <http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-1_English.pdf> (accessed 6 September 2008).

108 Secretary Collin L. Powell, Testimony before the Senate Foreign Relations Committee, Washington DC, 9 September 2004 cited in Schabas (n 28 above) 42.

109 Schabas (n 28 above) 47.

> The Sudanese justice system is unable and unwilling to address the situation in Darfur. This system has been significantly weakened during the last decade. Restrictive laws that grant broad power to the executive particularly undermined the effectiveness of the judiciary. In fact, many of the laws in force in Sudan today contravene basic human rights standards. The Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity such as those carried out in Darfur and the Criminal Procedure Code contains provisions that prevent effective prosecution of these acts. In addition many victims informed the Commission that they had little confidence in the impartiality of the Sudanese justice system and its ability to bring to justice the perpetrators of the serious crimes committed in Darfur. In any event many feared reprisals if they resorted to the national justice system.[110]

It is submitted that a Security Council referral would ensure that justice is done to perpetrators and victims because the ICC would be able to investigate and prosecute persons that have control over the state apparatus. The ICC, backed by the Security Council, may force Sudanese government officials and other personalities to submit to investigation and possibly criminal proceedings.[111] Security Council referrals will help, therefore, to bring an end to impunity. On 31 March 2005, in response to the Commission's report, the Security Council referred to the ICC the situation in Darfur since 2002.[112]

The Prosecutor decided to open investigations into the situation in Darfur on 1 June 2005.[113] The Sudanese government established various courts and mechanisms ostensibly to investigate and prosecute the crimes that had taken place in Darfur, but the Prosecutor has not found a trace of any such investigations or prosecutions.[114] Pre-Trial Chamber I has issued its first warrants of arrest in the Darfur referral.[115] In the application for a summons or a warrant of arrest, the Prosecutor has to establish that national proceedings did not encompass the persons or the conduct which were the subject of the case before the court. In its decision to issue the warrants of arrest, the chamber stated that the case against Ahmad Harun and Ali Kushayb was admissible because national proceedings did not encompass these two accused. Their conduct was also not the subject of any national court proceedings. Hence the case fell within the jurisdiction of the ICC and was admissible.[116]

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110 Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, Geneva, 25 January 2005 para 586 <http://www.un.org/News/dh/sudan/com_inq_darfur.pdf> (accessed 18 August 2008).

111 See n 110 above para 572.

112 See n 15 above para 1. See also Schabas (n 28 above) 48.

113 *Decision to initiate an investigation* (ICC-02/05-2) 1 June 2005 <http://www.icc-cpi.int/library/cases/ICC-02-05-2_English.pdf> (accessed 23 September 2008).

114 See n 91 above 2.

115 *The Prosecutor v Ahmad Muhammad Harun 'Ahmad Harun' and Ali Muhammad Ali Abd-Al-Rahman 'Ali Kushayb' (Warrant of Arrest for Ahmad Harun)* (n 18 above); *The Prosecutor v Ahmad Muhammad Harun 'Ahmad Harun' and Ali Muhammad Ali Abd-Al-Rahman 'Ali Kushayb' (Warrant of Arrest for Ali Kushayb)* (n 18 above).

116 *Decision on the Prosecution Application under Article 58(7) of the Statute* (n 107 above) paras 24-25.

2.6 Conclusion

The principle of complementarity gives national courts primary jurisdiction over international crimes, thereby making the jurisdiction of the ICC a secondary form. The jurisdiction of the court is based on complementarity because states are unwilling to surrender a part of their sovereignty and because the creation of the ICC was made possible by the adoption of the principle of complementarity. More importantly, complementarity exists to ensure that an end is brought to impunity.

Complementarity allows situations to be referred to the ICC in three ways: by a state party, by the Security Council and the Prosecutor can exercise *proprio motu* jurisdiction. Self-referrals and referrals by the Security Council constitute the subject of this study, with specific reference to the manner in which the situations in the DRC and Darfur were referred to the ICC. The situation in the DRC is a self-referral whilst that in Darfur is a Security Council referral. The next chapter will discuss the effect of the principle of complementarity on co-operation and surrender, in the context of the DRC and Darfur referrals.

CHAPTER 3

COMPARING THE DRC AND DARFUR

3.1 Introduction

This chapter undertakes a comparative analysis of the situations in the DRC and Darfur. It will be recalled that the situation in the DRC is a self-referral and the situation in Darfur is a Security Council referral. More importantly, Sudan is not a party to the Rome Statute. The chapter will compare how the work of the ICC, given its purpose, has been enhanced or hampered by the two types of referrals in question, with a view to assessing which one is the better.

Since the corollary of the principle of complementarity is co-operation,[117] the chapter will discuss also the various aspects of co-operation that the Rome Statute requires. The comparison between the situations in the DRC and Darfur will be based on the general principle of co-operation with the ICC. This general principle will be divided into the obligation of the DRC and Sudan to co-operate with the ICC, co-operation with the court in the area of investigations, and the execution of warrants of arrest. Note must be taken of the fact that the co-operation of states with the ICC is vital if the court is to fulfil its mandate of investigating and prosecuting perpetrators of international crimes. There will be an explanation of the importance of state co-operation to the work of the ICC, the co-operation regime of the court, and the political nature of that co-operation regime.

3.2 The importance of co-operation for the work of the ICC

For any international tribunal to execute its mandate effectively there is the need for the co-operation of states. An international tribunal cannot enforce decisions, orders or requests without such co-operation.[118] National courts have an advantage over these tribunals because they form part of the legal system of states. State institutions are available to these national courts and these institutions enable them to conduct their own investigations and also enforce any order or decision that they issue.[119] International tribunals, however, need the co-operation of states if they are to fulfil their mandate of investigating and prosecuting international crimes. International tribunals have no enforcement agencies

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117 Razesberger (n 2 above) 185.

118 Cassese (n 27 above) 355.

119 B Swart & G Sluiter 'The International Criminal Court and International Criminal Co-operation' in HAM von Hebel *et al* (eds) *Reflections on the International Criminal Court* (1998) 91.

and therefore need state authorities in order to seize evidentiary material, compel witnesses to give testimony, search the scenes where crimes have allegedly been committed, or execute arrest warrants.[120]

The co-operation of states is vital for international criminal courts because the activities of these courts affect the subjects, territory, and sovereignty of states. The need for justice to be done without delay to both the perpetrator and the victim requires the expeditious collection of evidence and the ability to summon witnesses to testify at short notice in order to ensure a speedy trial.[121] The co-operation of states with the ICC is important because without such co-operation it would be difficult to prosecute perpetrators at the international level.[122]

The principle of complementarity itself constitutes a further reason why the ICC requires the co-operation of states and international organisations.[123] Where a state refers a situation to the ICC there is an automatic expectation of co-operation.[124] However, where the ICC proceeds to investigate and prosecute international crimes because a state is unwilling, that state cannot be expected to render any assistance needed by the ICC to bring justice to both perpetrators and victims of international crimes.[125] According to Rastan:

> [W]here a state has been deemed 'unwilling' under Article 17, the Court could be placed in a paradoxical position of having to depend on the same institutional and procedural weaknesses that were deemed incapable of supporting domestic investigations and prosecutions.[126]

The Prosecutor has to conduct investigations in states, and the success of these investigations depends on co-operation. Co-operation is unlikely to be forthcoming in the case of states that are not parties to the statute or states that find themselves threatened by such an investigation. Both of these are rather probable scenarios.[127]

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120 Swart & Sluiter (n 119 above) 91.
121 Cassese (n 27 above) 355.
122 MK Marler 'The International Criminal Court: Assessing the jurisdictional loopholes in the Rome Statute' (1999) 43(2) *Duke Law Journal* 830.
123 Swart & Sluiter (n 119 above) 92.
124 Moreno-Ocampo (n 102 above) 9.
125 Swart & Sluiter (n 119 above) 92
126 R Rastan 'Testing co-operation: The International Criminal Court and national authorities' (2008) 21 *Leiden Journal of International Law* 455.
127 Schabas (n 28 above) 248.

3.3 The co-operation regime of the ICC

Where the relationship between states is 'horizontal', co-operation is not mandatory and, therefore, except where a state is a party to a treaty, there is no obligation to co-operate.[128] Under the 'horizontal' model an international tribunal cannot compel states to lend their co-operation to it. Also, the tribunal cannot exercise coercive powers within the territory of states.[129] The model of co-operation between the ICTY and the ICTR and states is the 'vertical' or 'supranational' model. Because of the 'vertical' relationship with the states, these tribunals can issue binding orders to states regarding their co-operation with them.[130] Thus, the ICTY has authority to direct mandatory orders to states.[131] It can also issue binding orders to states and compel an individual to produce documents required for an investigation or a trial.[132] The ICTY can issue binding orders to state officials. [133]

The model of co-operation with the ICC found in Part 9 of the Rome Statute contains the important components of the 'horizontal' and the 'vertical' models.[134] Examples of the 'horizontal' model of co-operation can be found in articles 93(1)(e) and (f), 89(1) and 91(3) of the Rome Statute. Pursuant to article 93(1)(e) and (f), witnesses may be transferred to the ICC with the consent of states. Under articles 89(1) and 91(3) requests for co-operation shall be complied with according to the applicable procedure under national law.[135] An element of the 'vertical model' is the requirement that state parties ensure that national procedures are available for all the forms of co-operation under article 88 of the Rome Statute. The model of co-operation under the statute was based on a compromise between national sovereignty and international solidarity.[136]

3.4 The political nature of the co-operation regime of the ICC

The ICC is treaty-based and therefore its establishment was founded on the consent of parties to the Rome Statute.[137] However, the fact that the ICC was created by consent can reduce its efficacy

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128 Swart & Sluiter (n 119 above) 96.
129 Cassese (n 27 above) 356.
130 Swart & Sluiter (n 119 above) 96-97.
131 *Prosecutor v Tihomir Blaskic (Decision on the objection of the Republic of Croatia to the issuance of subpoena duces tecum*) 18 July 1997 para 42<http://www.un.org/icty/blaskic/trialc1/decisions-e/70718SP2.htm> (accessed 18 October 2008).
132 *Prosecutor v Tihomir Blaskic* (n 131 above) para 66.
133 *Prosecutor v Tihomir Blaskic* (n 131 above) para 65.
134 Swart & Sluiter (n 119 above) 96-97.
135 Swart & Sluiter (n 119 above) 99.
136 Swart & Sluiter (n 119 above) 100.
137 LA Barria & SD Roper 'Evaluating the influence of the International Criminal Court on the apprehension of indictees' 2 <http://www.allacademic.com//meta/p_mla_apa_research_citation/1/5/2/7/9/pages152795/p152795-1.php> (accessed 23 August 2008).

significantly.[138] The ability of the court to fulfil its mandate will be contingent upon political co-operation and diplomacy. The importance of political co-operation becomes even more obvious from the fact that the Security Council can refer to the ICC cases relating to states that are not party to the Rome Statute, as it has done in the Darfur referral.[139] The ability of the court to ensure that Sudan respects its orders is limited and therefore any co-operation that Sudan gives to the ICC will be based purely on political will and diplomacy.[140]

3.5 The obligation to co-operate with the ICC

3.5.1 The DRC referral

The DRC ratified the Rome Statute on 11 April 2002.[141] Pursuant to article 86 of the statute, state parties are required to co-operate fully with the ICC in its investigation and prosecution of crimes within the jurisdiction of the court. This obligation is important because investigations and prosecutions are channels via which the ICC is expected to fulfil its mandate. In order to enable the court to investigate and prosecute crimes, state parties are required to facilitate the questioning of persons being investigated or prosecuted and also to provide assistance to the court through the service of documents. States are also required to produce evidence, preserve evidence, and protect witnesses and victims.[142] The court can also request a state party to arrest and surrender a person for whose arrest a warrant has been issued.[143] Article 59(1) of the Rome Statute requires a state party which has received a request for arrest and surrender to take steps immediately to arrest the person mentioned in the warrant, in accordance with its laws and the provisions in Part 9 of the statute.

The advantage of the DRC referral is that the country will facilitate the activities of the ICC in respect of the referral. It is the duty of the DRC to co-operate with the Prosecutor since it has involved the ICC directly in its situation.[144] The duty of a referring state to co-operate with the court is stressed by the Office of the Prosecutor (OTP), which has stated that:

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138 LN Sadat & SR Carden 'The new International Criminal Court: An uneasy revolution' (2000) 88 *Georgetown Law Journal* 415 cited in Barria & Roper (n 137 above) 2.

139 Barria & Roper (n 137 above) 2.

140 Holmes (n 76 above) 77.

141 Democratic Republic of the Congo (African States) <http://www.icc-cpi.int/asp/statesparties/country&id=5.html> (accessed 14 September 2008).

142 Art 93 of the Rome Statute.

143 Art 89 of the Rome Statute.

144 H-P Kaul 'Construction site for more justice: the International Criminal Court after two years' (2005) 99(2) *The American Journal of International Law* 375.

> Where the Prosecutor receives a referral from the State in which a crime has been committed, the Prosecutor has the advantage of knowing that the State has the political will to provide his Office with all the co-operation within the country that it is required to give under the Statute. Because the State, of its own volition, has requested the exercise of the Court's jurisdiction, the Prosecutor can be confident that the national authorities will assist the investigation, will accord the privileges and immunities necessary for the investigation, and will be anxious to provide if possible and appropriate the necessary level of protection to investigators and witnesses.[145]

It is, therefore, the duty of the DRC to provide assistance to the court in its investigations. It also has a duty to co-operate with the court during prosecutions. The DRC is required to produce evidence, preserve evidence and also ensure that witnesses to and victims of the crimes within the jurisdiction of the court are provided with adequate protection. The duty of the DRC to co-operate with the ICC also means that the OTP will enjoy the privileges and immunities that such investigations require and, more importantly, investigators and witnesses are assured of the protection of the state. The referring state will also execute warrants that are issued by the court. The DRC has an obligation to co-operate with the court in its investigations and execution of warrants. The obligation of the referring state to co-operate with the ICC has enhanced the work of the court in respect of the situation in the DRC.

3.5.2 The Darfur referral

Unlike the DRC, Sudan is not a party to the statute. Sudan signed the Rome Statute in September 2000, before the eruption of the conflict in Darfur. However, it has not acceded to the statute. It has also not made a declaration under article 12(3).[146] Nevertheless, Sudan, as a signatory to the Rome Statute, is under an obligation not to undermine the statute in any way.[147] Resolution 1593 requires the Government of Sudan and all other parties to the conflict in Darfur to co-operate fully with and provide any necessary assistance to the court and the Prosecutor.[148] This resolution is binding on Sudan because it is a member of the United Nations and decisions of the United Nations Security Council bind all members.[149]

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145 'Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications' <http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf> (accessed 6 September 2008).

146 Neuner (n 12 above) 324. Article 12(3) of the Rome Statute states that 'a state which is not a party to the Rome Statute may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the court with respect to a crime committed in the territory of the state or by a national of that state. The accepting state shall co-operate with the court in accordance with Part 9 of the Rome Statute'.

147 D Clancy 'The Darfur Investigation – Stalemate and Statecraft' 10 *Journal for the Coalition of the International Criminal Court* Issue No. 35 November 2007 – April 2008.

148 para 2.

149 Art 25 of the United Nations Charter.

Sudanese authorities have been persistent in their rejection of Resolution 1593. Immediately after its adoption Sudan stressed that it is not a party to the Rome Statute and therefore the implementation of the resolution will be problematic,[150] thus bringing to the fore the practical difficulties which the OTP was going to face regarding this referral. The statement of the Sudanese authorities was a foretaste of such difficulties in respect of the investigative activities of the OTP and the execution of the warrants of arrest. Sudan's president Al Bashir also criticised the resolution.[151] On 19 February 2006 the President submitted that it is the national judicial system that has jurisdiction over cases in Darfur.[152] However, on 5 June 2008 the Prosecutor, in his bi-annual report to the UN Security Council, stated that the OTP had found no evidence of Sudanese proceedings in relation to international crimes in Darfur during the last three years.[153] The Prosecutor also informed the Security Council in the report that the Sudanese government is not co-operating with the court and is not complying with Resolution 1593.[154]

3.5.3 Summing up the obligation to co-operate

The obligation of the DRC to co-operate with the court arises from the Rome Statute and the DRC is further required to co-operate because it made the referral to the ICC of its own volition. Co-operation is therefore expected to be forthcoming naturally. The ICC thus will be able to fulfil more easily its mandate of investigating and prosecuting those alleged to have committed crimes that are within the jurisdiction of the court and therefore help bring an end to impunity.

Sudan is not a party to the ICC and the situation in Darfur was referred to the court by the Security Council in Resolution 1593. The obligation of Darfur to co-operate with the court arises from Resolution 1593, which is binding on the government of Sudan only because it is a member of the United Nations. Although Sudan has been directed to comply with all requests of the court, it will be unwilling to do so since the matter was referred to the ICC by another body and not the state itself. A possible loophole in the principle of complementarity, namely, the limitation of the ability of the court to enforce orders directed at states that are not party to the statute, rears its head.[155]

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150 UN Doc. S/PV. 5158 12 <http://www.iccnow.org/documents/PVs_1593_DarfurReferral_31March05.pdf> (accessed 23 August 2008)

151 Peace Negotiations Watch 'Sudan Rejects UN Resolution on Darfur' 11 April 2005 <http://www.publicinternationallaw.org/docs/PNW4/PNW.11Apr_05.html> (accessed 23 August 2008).

152 Xinhuan et 'Sudan vows not to extradite suspects of Darfur war crimes' 19 February 2008 cited in Neuner (n 12 above) 326.

153 Update Report No. 4 Sudan/Darfur 11 June 2008 <http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.4198079/> (accessed 23 August 2008).

154 See n 153 above.

155 Holmes (n 76 above) 78.

From the very beginning, the nature of the two referrals point to the likelihood that the work of the ICC will be enhanced in the DRC, whiles its activities will be hampered in Darfur, thereby raising questions about the feasibility of a Security Council referral.

3.6 Investigations

The ability to conduct investigations is crucial to the ICC if it is to fulfil effectively the purpose for which it was created.[156] When a situation is referred to the ICC, the Prosecutor must conduct investigations to establish whether crimes that fall within the jurisdiction of the court have been committed.[157] The investigation conducted by the Prosecutor must cover all facts and evidence that are relevant to an assessment of whether there is criminal responsibility under the Rome Statute. The Prosecutor may collect evidence, question persons who are being investigated, and also question victims and witnesses. The Prosecutor is required to investigate inculpatory and exculpatory circumstances equally.[158] The investigations conducted by the Prosecutor are meant to determine which persons should be charged with having committed crimes.

The ICC requires the co-operation of the state on whose territory it is to conduct investigations because states are sovereign.[159] It is a general rule that states can exercise judicial authority only in their own territories. Thus, if the judicial officers of one state need to conduct on-site investigations in another state, then they require the permission of that state. They also require the permission of the state in order to gather evidence.[160] Under the Rome Statute, as a general rule, the Prosecutor requires the consent of a state before he can conduct investigations on its territory. Where the Prosecutor is unable to obtain such consent, the Pre-Trial Chamber may authorise the Prosecutor to proceed. However, an on-site investigation conducted without the authority of a state may occur only if the state concerned is a party to the statute.[161]

Investigations, however, need not be conducted only on the territory of a state. Where the victims are outside the state, information can be acquired from them. Investigations also include reports on the referral from organisations which the Prosecutor finds reliable.[162]

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156 Z Wenqi 'On co-operation by states not party to the International Criminal Court' (2006) 88(861) *International Review of the Red Cross* 100.

157 Art 54(1) of the Rome Statute.

158 See n 157 above.

159 Wenqi (n 156 above) 100.

160 Wenqi (n 156 above) 100.

161 F Guariglia 'Investigation and Prosecution' in RS. Lee (ed) *The International Criminal Court: The Making of the Rome Statute* (1999) 232-233.

162 ICC Prosecutor Ready with Evidence Against Darfur War Criminals' New York 14 December 2006 <http://www.icc-cpi.int/pressrelease_details&id=217&l=en.html> (accessed 23 September 2008).

3.6.1 The DRC referral

The Prosecutor has had unhindered access to witnesses and evidence in the DRC referral. Members of the OTP have been in the Ituri region of the DRC since July 2004, approximately four months after the referral to the ICC.[163] Given the dynamics of international co-operation, it is submitted that this period indicates the willingness of the DRC authorities to co-operate with the ICC, and rightly so, since it was a self-referral. The members of the OTP have conducted more than 70 missions, both inside and outside of the DRC. A judicial co-operation agreement was concluded between the OTP and the DRC in October 2004. The country has also supported the OTP in the creation of witness protection mechanisms. There are even immediate response systems available in Bunia and Kinshasa.[164] The Prosecutor, based on his investigations into the matter, has been able to apply successfully for four warrants of arrest thus far.

3.6.2 The Darfur referral

Investigations by the Prosecutor in the Darfur referral have been plagued, however, by many difficulties. Essentially investigations have been hampered because of the low level of co-operation obtained from the Sudanese authorities.

The Prosecutor has not been able to open a field office in Darfur.[165] The OTP has not been able to conduct interviews with victims and witnesses in Darfur. It has, therefore, been unable to conduct on-site investigations.[166] The request of the OTP to the government of Sudan for an interview with Ahmad Harun was not granted.[167] This is not to say, however, that no form of co-operation has been forthcoming from the government of Sudan. Officials of the OTP have been allowed to interview senior state officials and were given documents collected by the National Commission of Inquiry.[168] The Prosecutor stated in an application before Pre-Trial Chamber I that:

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163 Moreno-Ocampo (n 102 above).

164 Moreno-Ocampo (n 102 above).

165 'Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)' 9 <http://www.icc-cpi.int/library/cases/OTP_ReportUNSC_3-Darfur_English.pdf> (accessed 15 September 2008).

166 See n 165 above 9.

167 This request was made prior to the issue of the warrant for the arrest of Harun. This will be discussed in the next section.

168 'Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)' <http://www.icc-cpi.int/library/organs/otp/UNSC_2008_En.pdf> (accessed 15 September 2008).

> [T]he Government of the Sudan … thus far has in practice provided a degree of co-operation in response to the Prosecution's requests. … Obviously, there remain a number of outstanding requests, in particular a request to interview Harun that was formulated by the OTP on 16 November 2005 and was never granted and recently, an unwillingness to allow such investigative steps as interviews of witnesses under Article 55(2). A degree of co-operation has nonetheless been forthcoming. It included providing information required by the Prosecution in respect of particular documents from the National Commission of Inquiry, facilitating four missions to Khartoum during 2005 and 2006, facilitating interviews including that of a senior official under the procedures set forth in Article 55(2), and organising a fifth mission to Khartoum in January 2007.[169]

However, the co-operation that has been forthcoming from the government of Sudan does not satisfy the level of co-operation required by Resolution 1593. What is more, all co-operation ceased after the ICC issued the warrants of arrest,[170] despite the fact that investigations do not come to an end after the issue of warrants but are required also for trial purposes.

The level of co-operation offered by the government of Sudan is a natural consequence of the nature of the Darfur referral. The situation in Darfur was referred to the ICC because there was a determination made by the International Commission of Inquiry on Darfur that the government of Sudan was unwilling to investigate and prosecute cases.[171] However, the Prosecutor is required to rely on the same institutions that were deemed unwilling to support national investigations and prosecutions and this has placed him in a contradictory position.[172] The Prosecutor is expected to rely on Sudanese authorities in order to be able to conduct investigations into the events in Darfur. He requires the consent of the government in order to enter Sudanese territory. The Security Council did not give the Prosecutor the power to enter the territory of Sudan without the permission of Sudan. In fact, the Security Council did not explicitly offer the prospect of future political support to the OTP.[173] The ICC cannot compel the government of Sudan to allow it into Darfur and the court cannot impose penalties for non-compliance with any requests it makes to the government of Sudan.[174]

In spite of the challenges faced by the OTP, it has been able to collect evidence through the more than seventy missions it conducted to seventeen countries.[175] It has been able to collect evidence from

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169 *Prosecutor's Application under Article 58(7) ICC-02/05-56*, 27 February 2007 para 274 <http://www.icc-cpi.int/library/cases/ICC-02-05-56_English.pdf> (accessed 6 September 2008).

170 See n 168 above para 30.

171 See n 110 above para 586.

172 Rastan (n 126 above) 455.

173 MC Bassiouni 'The ICC—Quo Vadis' (2006) 4(3) *Journal of International Criminal Justice* <http://jicj.oxfordjournals.org/cgi/content/full/4/3/421> (accessed 21 September 2008).

174 Rastan (n 126 above) 455.

175 See n 162 above.

reports of the Security Council, states and organisations. The OTP has been able to screen hundreds of potential witnesses and has taken in excess of a hundred formal statements from people, most of whom are victims.[176] The evidence available to the OTP is mainly based on accounts by victims and witnesses and organisations. The low level of co-operation offered by the government of Sudan did not prevent the Prosecutor from gathering enough evidence and from applying for the issue of summons for the appearance of persons who are allegedly criminally responsible for the events in Darfur.[177] The Prosecutor recently applied for a warrant of arrest to be issued against President Al-Bashir of Sudan.[178] The ability of the Prosecutor to bring the application points to the fact that it is still possible to set the wheels of justice in motion even in a Security Council referral, although investigations are hampered.

3.6.3 Summing up investigations

In relation to the conduct of investigations, the study reveals that the DRC has co-operated with the OTP as required by the Rome Statute. This is the degree of co-operation desired by the Prosecutor and that is why he solicited a self-referral by the DRC. The Darfur referral, however, points to what will be every prosecutor's nightmare – a low level of co-operation. The level of co-operation required from Sudan under Resolution 1593 has not been forthcoming. Nevertheless, the Prosecutor has been able to conduct investigations and has been able to apply for summons based on the investigations he conducted. However, he faced more challenges than in the DRC referral, suggesting that a self-referral is better than a Security Council referral in respect of the level of co-operation that a state would provide. Self-referrals, however, will not always be possible because not all states are parties to the Rome Statute. Moreover, states may not always exercise jurisdiction over international crimes and this is what makes the ability of the Security Council to make referrals important. It will help bring an end to impunity.[179] The next question is the ability of the ICC to ensure that suspects are brought before the court after the issue of warrants.

3.7 Execution of warrants of arrest

According to article 58(1) of the Rome Statute, at any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest for a person if it is

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176 See n 162 above.

177 *Prosecutor's Application under Article 58(7)* (n 169 above) paras 273-275. However, Pre-Trial Chamber I issued warrants instead because the suspects could not be expected to appear voluntarily before the court. See *Decision on the Prosecution application under Article 58(7) of the Statute* (n 107 above) para 134.

178 *Summary of the case, Prosecutor's Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad Al Bashir* <http://www.icc-cpi.int/library/organs/otp/ICC-OTP-Summary-20081704-ENG.pdf> (accessed 24 September 2008).

179 See n 91 above 1.

satisfied that the person has committed a crime within the jurisdiction of the court. The warrant will be issued if the chamber finds that a warrant is necessary to ensure the appearance of the person before the ICC for trial. It will also be issued to ensure that the person does not obstruct or endanger the investigation or the court proceedings, or to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the court and which arises out of the same circumstances.

Warrants are important because they are the channels through which alleged perpetrators can be brought before the ICC for trial.[180] Although a trial may not necessarily result in a verdict of guilty, the wheels of justice really start to turn during a trial. The execution of a warrant stifles the ability of the arrested person to interfere in the case and this provides a degree of protection for witnesses and victims. The execution of a warrant enables the court to prosecute and ultimately punish perpetrators of international crimes. Prosecution will serve as deterrence to like-minded persons and justice will be done to the victims. Victims will also get a chance to tell their story.[181] If an accused is found guilty, there is an acknowledgement by the court of the liability of the perpetrator, and victims may receive compensation from the Trust Fund.[182] The receipt of compensation by victims is, however, secondary to the desires of victims to see justice done through prosecutions, because compensation is primarily symbolic.

The delay in the execution of warrants or inability to execute warrants will affect negatively the credibility of the court, especially in the eyes of victims and perpetrators, because for victims referrals represent the hope of justice, and for perpetrators the issue of warrants of arrest represents threats of prosecution. Barria & Roper consider that:

> The inability to apprehend indictees not only undermines the credibility of any justice system as well as in this case the commitment of states to the principles of international law, but more fundamentally the failure to arrest suspects thwarts the prosecution of cases and ultimately denies the possibility of justice to individuals … .[183]

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180 Art 58(1)(b)(i) of the Rome Statute. Under article 61 of the Rome Statute, the Pre-Trial Chamber holds a hearing to confirm the charges on which the Prosecutor intends to go to trial. If the charges are not confirmed, no trial will be held. This decision can be appealed.

181 Art 68 of the Rome Statute.

182 Art 79(1) of the Rome Statute. Article 79(1) provides that 'a Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and the families of such victims'.

183 Barria & Roper (n 137 above) 2.

However, the ICC has no police force and it is ultimately the duty of the state to execute a warrant of arrest, that is, arrest and surrender the alleged perpetrator to the ICC, and that is why formal requests are made to the state to execute a warrant.[184]

3.7.1 The DRC referral

Thomas Lubanga Dyilo (Lubanga) was the first person to be surrendered to the court in the DRC referral.[185] He was surrendered to the ICC on 17 March 2006.[186] Lubanga is charged with the war crime of enlisting, conscripting and using children under the age of 15 years to participate actively in hostilities.[187] He is described as the alleged founder of the *Unions Patriotes Congolais*.[188]

Germain Katanga is alleged to be the leader of the *Force de Résistance Patriotique en Ituri*. He was surrendered by the government of the DRC to the ICC on 17 October 2007, and is the second person to have been transferred to the ICC. [189] The warrant of arrest for Katanga was issued on 2 July 2007.[190] Katanga is charged with war crimes and crimes against humanity.[191]

Mathieu Ngudjolo Chui is alleged to be one of the leaders of the allied *Front des Nationalistes et Intégrationnistes –Front de Résistance d'Ituri*.[192] A warrant of arrest was issued against him by Pre-Trial Chamber I on 6 July 2007. He was arrested and transferred to the ICC on 7 February 2008.[193] He is charged with war crimes and crimes against humanity.[194]

The Pre-Trial Chamber decided on 10 March 2008 that the cases of *The Prosecutor v Germain Katanga* and *The Prosecutor v Mathieu Ngudjolo Chui* be joined.[195]

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184 See n 168 above paras 4 & 9. The ICC transmitted the warrants to the government of Sudan on 16 June 2007.

185 'First arrest for the International Criminal Court' The Hague, 17 March 2006 <http://www.icc-cpi.int/press/pressreleases/132.html> (accessed 24 August 2008).

186 See n 185 above. See also ICC Newsletter 'Chronology of the Thomas Lubanga Dyilo case' November 2006 <http://www.icc-cpi.int/library/about/newsletter/10/en_01.html> (accessed 22 September 2008).

187 *The Prosecutor v Thomas Lubanga Dyilo (Warrant of Arrest)* (n 106 above). See also *The Prosecutor v Thomas Lubanga Dyilo (Document Containing the Charges)* ICC-01/04-01/06-356-Anx2, 28 August 2006 paras 25-33.

188 *The Prosecutor v Thomas Lubanga Dyilo (Warrant of Arrest)* (n 106 above).

189 Maillet (n 6 above) 1.

190 *The Prosecutor v Germain Katanga (Warrant of Arrest)* (n 106 above) 6.

191 *The Prosecutor v Germain Katanga (Warrant of Arrest)* (n 106 above) 6.

192 Combined Factsheet: Situation in the Democratic Republic of Congo <http://www.icc-cpi.int/library/press/pressreleases/Combined_factsheet_on_DRC2_Final_pt_update_2.pdf> (accessed 5 September 2008).

193 Case Information Sheet: The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui <http://www.icc-cpi.int/library/press/pressreleases/ICC-01-04-01-07-InfoSheet-ENG.pdf> (accessed 8 September 2008).

194 *The Prosecutor v Mathieu Ngudjolo Chui (Warrant of Arrest)* (n 106 above).

195 *Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07-257 10 March 2008 <http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-257-ENG.pdf> (accessed 5 September 2008).

A warrant for the arrest of Bosco Ntaganda has been issued but is yet to be executed.[196] He is charged with the war crime of enlisting, conscripting and using children under the age of 15 years to participate actively in hostilities.[197]

The DRC has co-operated with the court and executed three warrants of arrest. However, it can be argued that the execution of the warrants for Lubanga and Katanga were relatively easy because the two were already in the custody of DRC authorities. Lubanga had been in custody before the referral was made.[198] Katanga had been in prison in the DRC since 2005.[199] The authorities have been praised for executing the warrants.[200] Certainly, the co-operation of the authorities is indeed laudable because it will enable the ICC to execute its mandate effectively. However, it has been argued that the DRC has been so co-operative in the execution of the warrants because of the status of the arrestees.[201] So far the individuals for whom the warrants have been issued have been rebels.[202] These people pose a political risk to the government. It has been advantageous for the government to execute the warrants since it has been able to get rid of rebels through the international justice system.[203] Co-operation may therefore not be as forthcoming if warrants are issued for the arrest of state officials.[204]

Lubanga, Katanga and Chui have been charged with having committed serious crimes.[205] The ultimate aim of this study is to establish whether the level of co-operation of a state is higher during a self-referral than during a Security Council referral. It appears from the three warrants executed in the DRC situation thus far that a self-referral ensures a high level of co-operation. It confirms the reason why the Prosecutor solicited the referral from the DRC. However, the status of those mentioned in the warrants may affect the level of co-operation and indicate that self-referrals, after all, do not always ensure a high level of co-operation. A case in point is the stalemate that occurred between the government of Rwanda and the ICTR. When the former Prosecutor of the ICTR indicated that members of the Rwandan Patriotic Front would be investigated for atrocities they committed during the genocide,

196 Warrant of arrest against Bosco Ntaganda unsealed, The Hague, 29 April 2008 <http://www.icc-cpi.int/pressrelease_details&id=362&l=en.html> (accessed 24 September 2008).

197 *The Prosecutor v Bosco Ntaganda (Warrant of Arrest)* (n 8 above).

198 Barria & Roper (n 137 above) 27.

199 Maillet (n 6 above) 1.

200 Maillet (n 6 above) 1.

201 See generally A Cassese 'Is the ICC still having teething problems?' (2006) 4 *Journal of International Criminal Justice* 431; WA Schabas 'Complementarity in practice: Some uncomplimentary thoughts' (2008) 19 *Criminal Law Forum* 5.

202 Cassese (n 201 above) 435.

203 WW Burke 'Complementarity in practice: The International Criminal Court as part of a system of multi-level global governance in the Democratic Republic of Congo' (2005) 18 *Leiden Journal of International Law* 565.

204 P Gaeta 'Is the practice of "self-referrals" a sound start for the ICC?' (2004) 2 *Journal of International Criminal Justice* 952 cited in Schabas (n 28 above) 149.

205 It has been argued, however, that the charges brought against Lubanga are not serious enough and that the court should have focused its attention on graver crimes.

the government of Rwanda stopped co-operating with the ICTR.[206] Although investigations and prosecutions before the *ad hoc* tribunals are not based on referrals, the stalemate gives a fair indication of what can happen if and when warrants of arrest are issued against government officials or persons connected to the government during self-referrals. In any case, it is highly unlikely that a government will refer a matter to the ICC if there is a high possibility that state officials might be implicated.

3.7.2 The Darfur referral

Unlike the DRC referral, the government of Sudan has not executed any of the warrants issued by the Pre-Trial Chamber on 27 April 2007. The ICC has issued warrants of arrest for Ahmad Harun and Ali Kushayb.[207] Since it is the state that executes warrants,[208] a formal request has been made to the government of Sudan to arrest and surrender Harun and Kushayb to the ICC.[209] According to Schabas, the ICC 'has welcomed the Security Council Resolution like the Trojans with the Greeks bearing gifts'.[210] This statement refers to the challenges he suspected the ICC would face when the referral was made. It is one thing to issue warrants and it is an entirely different thing to ensure that such warrants are enforced.

The Prosecutor correctly acknowledged in his application under article 58(7) of the statute that without the co-operation of the government of Sudan it will not be possible to bring Harun and Kushayb before the ICC. The Prosecutor applied for a summons under article 58(7) instead of a warrant of arrest under article 58(1) of the Rome Statute,[211] perhaps because he acknowledged the challenges the court would face in having warrants executed.[212] The Prosecutor stated in the application that a summons is less intrusive.[213] However, Pre-Trial Chamber I issued warrants, instead of summonses, because the crimes with which Harun and Kushayb had been charged were serious and therefore they were not expected to appear voluntarily before the ICC.[214]

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206 LS Graybill 'Punishment, pardon and amnesia: Three African post-conflict methods' (2004) 25(6) *Third World Quarterly* 1121.

207 *The Prosecutor v Ahmad Muhammad Harun 'Ahmad Harun' and Ali Muhammad Ali Abd-Al-Rahman 'Ali Kushayb' (Warrant of Arrest for Ahmad Harun)* (n 18 above); *The Prosecutor v Ahmad Muhammad Harun 'Ahmad Harun' and Ali Muhammad Ali Abd-Al-Rahman 'Ali Kushayb' (Warrant of Arrest for Ali Kushayb)* (n 18 above).

208 See also Barria & Roper (n 137 above) 17.

209 Art 59 of the Rome Statute. See also Alex de Waal 'Darfur, the Court and Khartoum: The politics of cooperation' 14 http://www.globalpolicy.org/intljustice/icc/2008/030/courting.pdf (accessed 14 September 2008).

210 Schabas (n 28 above) 51.

211 *Prosecutor's Application under Article 58(7)* (n 169 above) para 274.

212 *Prosecutor's Application under Article 58(7)* (n 169 above) para 271.

213 *Prosecutor's Application under Article 58(7)* (n 169 above) para 273.

214 *Decision on the Prosecution Application under Article 58(7) of the Statute* (n 107 above) para 134.

Harun is charged with war crimes and crimes against humanity.[215] He is part of the inner circle of power and holds the actual reins of power and control over government assets.[216] He was the Minister of State for the Interior[217] before the issue of the warrant for his arrest, but is presently the Sudanese Minister for Humanitarian Affairs and is in charge of providing assistance and protection to the displaced population in Darfur. This in effect means he has direct control over people who are victims of the crimes for which the warrant against him was issued.[218]

Harun is also a former member of the Popular Defence Forces (PDF) whose members were granted immunity under article 8 of the People's Armed Forces Act. Article 8 grants to all members of internal security forces immunity when charged with acts they committed in the process of providing security within Sudan during the civil war.[219] Members of the PDF enjoy this immunity because the Sudanese army and the Minister of Defence have controlled the PDF since 1989.[220] In addition, Harun has immunity under the Privileges and Immunities Appropriation and Constitutional Office Holders, Executive and Legislative Act 2001 (Privileges and Immunities Act), because of his position as the Minister of State for Humanitarian Affairs. The immunity enjoyed by Harun as a minister under this Act can be lifted by the president.[221] Article 21 of the Privileges and Immunities Act states that ministers can be criminally prosecuted only with the permission of the president. Immunity under the Act does not exclude immunity for the commission of crimes under the Rome Statute.[222] However, there is no sign that the president is going to lift this immunity. Clearly, the Sudanese authorities are unwilling to prosecute Harun.[223]

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215 *The Prosecutor v Ahmad Muhammad Harun 'Ahmad Harun' and Ali Muhammad Ali Abd-Al-Rahman 'Ali Kushayb' (Warrant of Arrest for Ahmad Harun)* (n 18 above) paras 6-15.
216 *Decision on the Prosecution Application under Article 58(7) of the Statute* (n 107 above) para 127.
217 *Prosecutor's Application under Article 58(7)* (n 169 above) paras 61 & 118.
218 Clancy (n 147 above).
219 Pichon (n 71 above) 219.
220 Pichon (n 71 above) 205.
221 Pichon (n 71 above) 221.
222 Pichon (n 71 above) 205.
223 Pichon (n 71 above) 221.

It has been stated by the Sudanese Ministry of Justice that Harun has been questioned by the authorities of Sudan in connection with certain incidents which occurred during the conflict in Darfur. These incidents include crimes against humanity and war crimes, especially murder, rape, torture, complete destruction of a village and forcible displacement of a civilian population. However, Harun was released after questioning because the authorities could not find any evidence implicating him.[224] It can also be concluded that Sudan is unwilling to prosecute Harun in the light of the statement made by President Al Bashir that Harun will not be surrendered to the ICC.[225] On 5 December 2007, Sudan's ambassador to the United Nations reiterated the position of the government, by stating that Sudan will not surrender Harun and Kushayb to the ICC.[226]

Kushayb, too, is charged with war crimes and crimes against humanity.[227] He is a tribal leader in West Darfur and by mid-2003 had an important position in the PDF. [228] Kushayb is a commander in the *Janjaweed,*[229] a militia group on which the Sudanese government has relied to conduct military operations in Darfur.[230] The *Janjaweed* has been reported to have launched attacks against villages in Darfur either together with government of Sudan forces or on its own.[231] Kushayb was reportedly under investigation[232] and had been in detention from November 2006 for the sole purpose of prosecuting him.[233] He was in detention because of incidents concerning certain areas in South and West Darfur, among them Arawala.[234] He was, however, freed in autumn 2007[235] because, according to the authorities, there was no evidence implicating him in the charges for which he had been detained.[236] He had been in detention for nearly a year prior to his release.[237] It must be noted that Kushayb was in custody at the time the warrants of arrest were issued. The government of Sudan would not prosecute Harun and Kushayb and yet it would not surrender them to the ICC.

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224 Pichon (n 71 above) 219.

225 *Summary of the case, Prosecutor's Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad Al Bashir* <http://www.icc-cpi.int/library/organs/otp/ICC-OTP-Summary-20081704-ENG.pdf> (accessed 24 September 2008).

226 See n 168 above para 25.

227 *Prosecutor v Ahmad Muhammad Harun 'Ahmad Harun' and Ali Muhammad Ali Abd-Al-Rahman 'Ali Kushayb' (Warrant of Arrest for Ali Kushayb)* (n 18 above) paras 6-16. <http://www.icc-cpi.int/library/cases/ICC- 02-05-01-07-3_English.pdf > (accessed 12 September 2008).

228 *Prosecutor's Application under Article 58(7)* (n 169 above) paras 37 & 79.

229 *The Prosecutor v Ahmad Muhammad Harun 'Ahmad Harun' and Ali Muhammad Ali Abd-Al-Rahman 'Ali Kushayb' (Warrant of Arrest for Ali Kushayb)* (n 18 above).

230 *Prosecutor's Application under Article 58(7)* (n 169 above) para 97-100.

231 See n 110 above paras 240, 272, 274 & 632.

232 *Prosecutor's Application under Article 58(7)* (n 169 above) para 264.

233 'Sudan Rejects ICC jurisdictions Says One Suspect Held, Sudan Tribune, Tuesday, 27 February 2007 <http://www.sudantribunecom/spip.php?page=imprimable&id_article=20473> cited in Pichon (n 71 above) 224.

234 *Prosecutor's Application under Article 58(7)* (n 169 above) para 257.

235 Pichon (n 71 above) 226.

236 W Ali, 'Sudan Releases Darfur War Crime Suspect Wanted by ICC' Sudan Tribune, 2 October 2007 <http://www.sudantribune.com/spip.php?article24036> (accessed 18 October 2008).

237 Pichon (n 71 above) 226.

There is a real possibility of the work of the ICC being hampered even in the case of a Security Council referral involving a state party. The situation is further complicated by the fact that Sudan is not a party to the Rome Statute. The ICC would have to rely on institutions of an unwilling state for purposes of investigations and prosecution of cases and for the execution of warrants of arrest.[238]

The ability of a state to hamper the work of the ICC is highlighted in the Darfur referral. The disadvantage of a Security Council referral becomes obvious here. There was euphoria after the Darfur referral.[239] Some analysts, however, questioned the ability of the ICC to perform effectively its mandate in respect of the Darfur referral.[240] Although the Prosecutor was able to conduct investigations even with the low level of co-operation he received from the government of Sudan, the execution of the warrants of arrest requires the full co-operation of the government of Sudan. Harun and Kushayb can be arrested only by the government of Sudan or by Interpol and other states if they travel.[241] Needless to say, these persons will not travel.

The Prosecutor is invited to inform the Security Council of progress or lack of progress in the Darfur referral every six months.[242] One would assume that such reporting is to enable the Security Council to compel Sudan to co-operate according to Resolution 1593. In spite of seven such reports, three after the issue of the warrants of arrest, the United Nations Security Council has not compelled Sudan to co-operate. The Prosecutor has stated that he hopes the June 2008 trip of the United Nations Secretary-General to Sudan will improve chances of the execution of the warrants.[243] More than two months after the visit, the warrants remain unexecuted. However, this is not surprising because even with the ICTY it took the intervention of the North Atlantic Treaty Organisation-led Stabilisation Force to apprehend indictees and not the actions of the Security Council.[244] Moreover, the Security Council did not state explicitly in Resolution 1593 that it would support the ICC.[245]

3.7.3 Summing up the execution of warrants of arrest

Self-referrals are to be preferred to Security Council referrals because they present a better chance of co-operation in respect of the execution of warrants. While the DRC has enhanced the work of the ICC

238 Rastan (n 126 above) 455.
239 International Refugee Rights Initiative 'Working towards justice in Darfur: What next after the ICC referral?' May 2005 2(1) Refugees Rights News <http://www.refugee-rights.org/Newsletters/Darfur/V2N1NextStepsforJustice.htm> (accessed 21 September 2008).
240 Bassiouni (n 173 above).
241 *Decision on the Prosecution application under Article 58(7) of the Statute* (n 107 above) 56-57. See also n 168 above 1.
242 Security Council Resolution 1593 para 8.
243 See n 168 above para 10.
244 Barria & Roper (n 137 above) 5.
245 Bassiouni (n 173 above).

through co-operation in the execution of three warrants for the arrest of Lubanga, Katanga and Chui, the government of Sudan has hampered the work of the ICC in the Darfur referral by refusing to execute the warrants for the arrest of Harun and Kushayb. The DRC is a party to the Rome Statute and is, therefore, bound to co-operate with the court. The ICC is also involved in the situation in the DRC because the national authorities made the referral of their own volition. Sudan cannot be expected to co-operate with the ICC since it has never agreed to be bound by the Rome Statute. Its only obligation to co-operate and offer any assistance required by the court arises under Resolution 1593. This situation is what some authors feared and their fears have not been allayed by events that occurred after the referral.

From the discussion, however, other factors might be playing a role in the DRC referral. The government of the DRC stands to benefit politically from the referral. In other words the status of the person against whom the warrants of arrest are issued will also determine the extent of co-operation even in a self-referral. An alleged perpetrator must be arrested in order to be prosecuted, and the inaction of the Sudanese government is hampering the ability of the court to prosecute Harun and Kushayb.

3.8 The duty of the Security Council to ensure the execution of the warrants in the Darfur referral

In general, it seems obvious that the Prosecutor and the ICC will face a formidable challenge if no assistance and co-operation are forthcoming from key actors, in particular the government of Sudan, the African Union and the United Nations. Furthermore, continuous support will be required from the Security Council.[246] It has been stated that the credibility of the Court would suffer if an arrest warrant issued by the judges of the Pre-Trial Chamber at the request of the Prosecutor remained ineffective over a long period because the states were slow, or failed, to execute it.[247] This applies equally to referrals that are made by the Security Council. If the warrants issued in the Darfur referral are allowed to remain ineffective for a long time the credibility of the ICC will suffer. The ICC welcomed the Security Council resolution like the 'Trojans with the Greeks bearing gifts',[248] and did not recognise the effect which the referral would have on its credibility. Since it is the Security Council that made the Darfur referral it is its responsibility to ensure the execution of the warrants.

246 Kaul (n 144 above) 381.
247 Kaul (n 144 above) 383.
248 Schabas (n 28 above) 51.

3.9 Conclusion

The work of the ICC is enhanced when situations are referred to it by states. The government of the DRC has co-operated with the ICC. However, the court has had its work hampered by the attitude of the Sudanese authorities. The DRC has an obligation to co-operate with the court because it is a party to the Rome Statute. The obligation of the government of Sudan arises from Resolution 1593. The authorities of the DRC have co-operated with the ICC in its investigations and in the execution of the warrants of arrest. Co-operation from the government of Sudan was low during investigations and it has not executed any of the warrants issued by the court.

The study has revealed that the DRC may have co-operated with the court because of the rebel status of the persons involved in the referral. In other words, the investigations conducted by the Office of the Prosecutor pose no danger to the government. However, the politics of the DRC referral do not detract significantly from the overall argument of this chapter, that a self-referral goes much further to combat impunity than a Security Council referral. A self-referral enhances the ability of the ICC to fulfil its mandate better than a Security Council referral because the referring state undertakes to co-operate with the court in its investigations and prosecutions of the case.[249] Such a referral provides the Prosecutor with the advantage of knowing that the referring state has the political will to provide the OTP with all the co-operation that is needed to undertake investigations within the referring state.[250] Assistance in investigations and execution of warrants is assured.[251] After all, the state of its own volition referred the case to the ICC and is not expected, therefore, to put impediments in the way of the Prosecutor.[252]

The ICC is more likely, therefore, with respect to self-referrals to be able to investigate and prosecute cases involving international crimes and thereby bring justice to victims and perpetrators. As noted in Chapter 2, the Prosecutor acknowledged the importance of the advantages that a self-referral provides and that is way he solicited a self-referral from the DRC even though he had already decided to investigate the situation in that country.[253] The work of the ICC has been enhanced in the DRC referral because Lubanga, Katanga and Chui have been arrested and surrendered to the ICC by the government of the DRC. Therefore, the credibility of the ICC has been affected positively. It must be noted also that the principle of complementarity, which is the basis of the jurisdiction of the ICC, requires the consent of

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249 See n 145 above. See also Letter of Joseph Kabila to the Prosecutor dated 3 March 2004 (n 4 above) para 2.
250 See n 145 above.
251 See n 145 above.
252 See n 145 above.
253 Chapter 2, section 2.5.1

states because the corollary of complementarity is co-operation.[254] The government of the DRC has consented to the jurisdiction of the ICC over its situation and has therefore given to the court a higher level of co-operation than the government of Sudan which did not consent to the jurisdiction of the ICC over its situation. Unfortunately, the Security Council has not provided the support the ICC needs to enforce its orders in the Darfur referral and this has affected the credibility of the court negatively. It is submitted that it is this negative image of the court that the Prosecutor sought to avoid and that is why he solicited a self-referral from the government of the DRC.

[254] Razesberger (n 2 above) 185.

CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS

4.1 Conclusions

The principle of complementarity refers to the exercise of jurisdiction by the ICC over international crimes when states are unwilling or unable to investigate and prosecute these crimes. The principle is the basis of the jurisdiction of the court because of the need to ensure that the creation of a permanent international criminal court would be based on consent. The court is treaty-based and although the Rome Statute binds only parties to it, the Security Council can refer a case to the ICC, even a case involving a state that is not a party to the statute.

Complementarity raises issues of co-operation and the study has revealed the different levels of co-operation that flow from self-referrals and Security Council referrals, based on the comparison of the situations in the DRC and Darfur. The situation in the DRC is a self-referral whilst that in Darfur is a Security Council referral. The DRC is a party to the Rome Statute and Sudan is not. The comparison between the two situations showed that the level of co-operation in a self-referral is higher than in a Security Council referral, and the level of co-operation determines the ability of the ICC to conduct investigations and ensure the execution of warrants.

It can be seen from the study that the ICC is more able to enforce its orders in a self-referral than in a Security Council referral, and that a self-referral guarantees the highest form of co-operation from the state involved. The inability of the court to enforce its orders in the Darfur case is an impediment to its efforts to help bring an end to impunity. The work of the ICC in the DRC has been enhanced because the country is a party to the statute. The government of the DRC has co-operated with the court in its investigations and has arrested Lubanga, Katanga, and Chui. However, the activities of the court in Darfur have been hampered by the low level of co-operation offered by the government of Sudan to the court. Sudan has been found to be unwilling to investigate and prosecute cases involving the atrocities in Darfur and, therefore, cannot be expected to co-operate with the court. The matter has been further complicated by the fact that Sudan is not a party to the Rome Statute. This lack of co-operation is not surprising, however, because it has been acknowledged that the ability of the ICC to enforce its orders in respect of states that are not party to the statute will be problematic.[255] The government has stressed its unwillingness to co-operate by refusing to arrest Harun and Kushayb and surrender them to the ICC.

[255] See n 75 above 77.

It appears from the comparison of the situations in the DRC and Darfur that a Security Council referral is not as viable as a self-referral because the ICC has to rely on states to execute warrants. A state involved in a self-referral will be more willing to execute the orders of the ICC than a state involved in a Security Council referral.

The principle of complementarity seems to be more suitable to situations in which states are parties to the Rome Statute than states which are not. However, the competence of the Security Council to refer a case to the ICC remains important. Without such referrals states that are not parties to the statute or even states that are parties to the statute but are unwilling to investigate and prosecute cases will be able to avoid holding perpetrators accountable for international crimes.

The unfortunate situation is that the Security Council has not acted to ensure the arrest and surrender of Harun and Kushayb to the court. This attitude of the council confirms the notion that the ICC has welcomed Resolution 1593 like 'Trojans with the Greeks bearing gifts'.[256]

4.2 Recommendations

The study shows that the ICC requires substantial co-operation from the government of Sudan, the Security Council and the international community to ensure the viability of a Security Council referral. The repudiation by the government of Sudan of its obligation to co-operate with the ICC and the abject failure of the Security Council and the international community to respond to this non-compliance[257] is affecting the credibility of the ICC negatively. Justice can be done only when perpetrators are brought to trial and they must be arrested before they can be prosecuted.

Pre-Trial Chamber I in its *Decision on the Prosecution Application under Article 58(7) of the Statute* directed the Registry of the ICC to transmit requests for co-operation in the arrest and surrender to the ICC of Harun and Kushayb, to the government of Sudan, state parties to the Rome Statute, members of the Security Council that are not parties to the statute and, Egypt, Eritrea, Ethiopia and Libya.[258] PTC I recognised that without co-operation the arrest and surrender of the two will not be possible. It must be noted, however, that the Chamber acknowledged the fact that Resolution 1593 is binding only on the government of Sudan and other parties to the conflict in Darfur.[259] However, due to the gravity of the crimes with which Harun and Kushayb have been charged, the states identified by the chamber ought to co-operate with the ICC.

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256 Schabas (n 28 above) 51.
257 See n 168 above paras 9 & 10.
258 *Decision on the Prosecution Application under Article 58(7) of the Statute* (n 107 above).
259 *Decision on the Prosecution Application under Article 58(7) of the Statute* (n 107 above).

Concrete efforts are required in order to ensure the execution of the warrants for the arrest of Harun and Kushayb. The government of Sudan, which has the legal obligation and capacity to arrest the two, must enforce these warrants. The government is under a legal obligation to respect Resolution 1593 because Sudan is a member of the United Nations and Security Council resolutions are binding on members.

The Security Council must ensure that the warrants of arrest issued in the Darfur case are executed.[260] It must direct the government of Sudan to arrest Harun and Kushayb and surrender them to the ICC. It can ensure the execution of the warrants by stopping any kind of political and economic support to Harun, Kushayb and the government of Sudan.[261] The Security Council must adopt sanctions against the two and the government of Sudan.[262] Coercive political and economic instruments, when deployed, will increase the costs and risks to Khartoum so that its self-interest will coincide with the execution of the warrants.[263] The use of sanctions would isolate and render the government, Harun and Kushayb powerless and therefore compel the government to co-operate with the ICC.

The Security Council should offer the ICC some political support, although Resolution 1593 did not explicitly offer the prospects of any future political support of the council to the court.[264] It must create a regime of co-operation with the ICC, with particular regard to states that are not party to the Rome Statute, and ensure compliance in case of unco-operative states.[265] Moreover, Resolution 1593 requires the Prosecutor to apprise the Security Council of the Darfur referral every six months. This obligation, which the Prosecutor has fulfilled diligently, should not be reduced to an exercise in futility. If the Security Council does not act victims and perpetrators alike may regard the ICC as a powerless institution which cannot give justice to either victims or perpetrators.

The Security Council needs to pass a resolution calling upon the government of Sudan to comply with its legal duty under Resolution 1593 and also to surrender Harun and Kushayb to the ICC without delay. The resolution must also provide for the council to take other measures that would ensure that Harun and Kushayb are promptly located, arrested and surrendered to the court.[266]

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260 See n 168 above para 9.
261 See n 168 above para 9.
262 Art 41 of the United Nations Charter.
263 KA Rodman 'Darfur and the limits of legal deterrence' (2008) 30(3) *Human Rights Quarterly* 549.
264 Bassiouni (n 173 above).
265 Neuner (n 12 above) 343.
266 Justice for Darfur (n 25 above).

All members of the United Nations, the African Union and the international community must send a strong and unanimous message to the government of Sudan on the execution of the warrants.[267]

The United States of America, although not a party to the Rome Statute, should co-operate with the ICC in order to enhance the effectiveness of the court with regard to the situation in Darfur. The United States has already alluded to co-operation with the ICC in this regard.[268] The co-operation of the United States is important because of its ability to exert influence and gather information, its instruments of power, and its presence in numerous countries.[269]

Of course, the Prosecutor will present evidence to the Pre-Trial Chamber for the issue of warrants but it is ultimately the duty of the government of Sudan, the International community and the Security Council in particular to ensure that the warrants are executed.[270] The ICC must not be made to appear powerless through the inaction of the international community. The court must be given the assistance needed to prove that impunity will no longer be tolerated.

Word count, including footnotes, is 17 853

267 See n 168 above para 10.
268 A Compact Between The United Sates And Europe, 17 February 2005, 8 <http://www.brookings.edu/fp/cuse/analysis/USEUCompact.pdf> (accessed 14 October 2008).
269 Kaul (n 144 above) 381.
270 See n 168 above para 111.

REFERENCES

Books and Chapters from Books

Cassese, A (2003) *International Criminal Law* Oxford: Oxford University Press

Guariglia, F 'Investigation and Prosecution' in Lee, RS (ed) (1999) *The International Criminal Court: The Making of the Rome Statute* The Hague: Kluwer Law International

Holmes, JT 'The principle of complementarity" in Lee, RS (ed) (1999) *The International Criminal Court: The Making of the Rome Statute* The Hague: Kluwer Law International

International Justice Tribune Series (2006) *ICC in 2006: Year One* Verona: Industrie Grafiche Leardini SRL

Lee, RS 'The Rome conference and its contributions to international law' in Lee, RS (ed) (1999) *The International Criminal Court: The Making of the Rome Statute* The Hague: Kluwer Law International

Miskowiak, K (2000) *The International Criminal Court: Consent, Complementarity and Co-operation* Copenhagen: DJØF Publishing Grafiche Leardini SRL

Razesberger, F (2006) *The International Criminal Court (The Principle of Complementarity)* Frankfurt: Peter Lang GmBH

Sands, P (ed) (2003) *From Nuremburg to the Hague: The Future of International Criminal Justice* Cambridge: Cambridge University Press

Schabas, WA (2007) *An Introduction to the International Criminal Court* Cambridge: Cambridge University Press

Swart, B & Sluiter, G 'The International Criminal Court and International Criminal Co-operation' in Von Hebbel, AM, Lammers, JG & Schukking, J (1999) *Reflections on the International Criminal Court* The Hague: Asser Press

Journal Articles

Barria, LA & Roper, SD 'Evaluating the influence of the International Criminal Court on the apprehension of indictees' 1 <http://www.allacademic.com//meta/p_mla_apa_research_citation/1/5/2/7/9/pages152795/p152795-1.php> (accessed 17 October 2008)

Bassiouni, MC "The ICC – Quo Vadis' (2006) *Journal of international Criminal Justice* <http://jicj.oxfordjournals.org/cgi/content/full/4/3/421> (accessed 21 September 2008)

Burke, W 'Complementarity in practice: The international Criminal Court as part of a system of multi-level global governance in the Democratic Republic of Congo' (208) 19 *Criminal Law Forum* 557

Cassese, A 'Is the ICC still having teething problems?' (2006) 4 *Journal of International Criminal Justice* 431

Clancy, D 'The Darfur Investigation – Stalemate and State craft' (2008) 35 *The Monitor* 9

Du Plessis, M & Gevers, C 'Darfur goes to the International Criminal Court (perhaps)' (2005) 14 *African Security Review* <http://www.iss.co.za/index.php?link_id=24&slink_id=1928&link_type=12&slink_type=12&tmpl_id=3> (accessed 9 March 2008)

El Zeidy, MM 'The principle of complementarity: A new machinery to implement international criminal law' 2002) 23 *Michigan Journal of International Law* 869

Graybill, L 'Punishment, pardon and amnesia: Three African post-conflict methods' (2004) 25(6) *Third World Quarterly* 1117

Kaul, H-P 'Construction site for more justice: The International Criminal Court after two years' (2005) 99(2) *The American Journal of International Law* 370

Maillet, O 'Second DRC case spotlights importance of co-operation' (2008) 35 *The Monitor* 1

Marler, MK 'The International Criminal Court: Assessing the jurisdictional loopholes in the Rome Statute' (1999) 43(2) *Duke Law Journal* 825

Moreno-Ocampo, L 'Lessons from the first cases' *The Future of the International Criminal Court – Salzburg Retreat May 2006* 9 <http://www.sbg.ac.at/salzburglawschool/Retreat.pdf> (accessed 18 September 2008)

Neuner, M 'The Darfur referral of the Security Council and the scope of the jurisdiction of the International Criminal Court' (2005) 8 *Yearbook of International Humanitarian Law* 320

Pichon, J 'The principle of complementarity in the cases of the Sudanese nationals Ahmad Harun and Ali Kushayb before the International Criminal Court' (2008) 8 *International Criminal Law Review* 185

Philippe, X 'The principles of universal jurisdiction and complementarity: How do the two principles intermesh?' (2006) *International Review of the Red Cross* 375

Rastan, R 'Testing co-operation: The International Criminal Court and national authorities' (2008) 21 *Leiden Journal of International Law* 431

Rodman, KA "Darfur and the limits of legal deterrence' (2008) 30(3) *Human Rights Quarterly* 529

Schabas, WA 'Complementarity in practice: Some uncomplimentary thoughts 2008) 19 *Criminal Law Forum* 5

Wenqi, Z 'On co-operation by states not party to the International Criminal Court' (2006) 88(861) *International Review of the Red Cross* 87

Williamson, CA 'Justice empowered or justice hampered: The International Criminal Court in Darfur' (2006) 15(1) *African Security Review* 20

International instruments

Charter of the United Nations 26 June 1945 59 Stat. 1031, T.S. 993, 3 Bevans 1153. Entered into force on 24 October 1945.

Rome Statue of the International Criminal Court A/CONF.183/9 of 17 July 1998. Entered into force on 1 July 2002.

Statute of the International Criminal Tribunal for the Former Yugoslavia UN DOC S/RES/827 (1993). Adopted 25 May 1993.

Statute of the International Criminal Tribunal for Rwanda UN Doc S/RES/955 (1994). Adopted 8 November 1994

United Nations Security Council Resolution 1593 UN Doc. S/RES/1593. Adopted 31 March 2005

International cases

Decision on the Defence Motion for Interlocutory Appeal (*Prosecutor v Tadic)* Case No. IT-94-1-AR72

Decision on the Prosecution application under article 58(7) of the Rome Statute ICC-02/05-01/07-1, 27 April 2007
<http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-1_English.pdf> (accessed 6 September 2008)

Decision to initiate an investigation ICC-02/05-2, I June 2005
<http://www.icc-cpi.int/library/cases/ICC-02-05-2_English.pdf> (accessed 23 September 2008)

Letter of Joseph Kabila to the Prosecutor dated 3 March 2004, ICC-01/04-01/06-39-USAnxB1-tENG_English
<http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-39-USAnxB1-tENG_English.pdf> (accessed 3 October 2008)

Letter of Joseph Kabila to the Prosecutor dated 3 March 2004 ICC-01/04-01/06-39-USAnxB1_French
<http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-39-USAnxB1_French.pdf> (accessed 3 October 2008)

Prosecutor's Application under Article 58(7) ICC-02/05-56, 27 February 2007
<http://www.icc-cpi.int/library/cases/ICC-02-05-56_English.pdf> (accessed 6 September 2008)

Prosecutor v Kanyabashi ICTR-96-15-T, 18 June 1997

Prosecutor v Tihomir Blaskic (Decision on the objection of the Republic of Croatia to the issuance of subpoena duces tecum) 18 July 1997 <http://www.un.org/icty/blaskic/trialc1/decisions-e/70718SP2.htm>

The Prosecutor v Bosco Ntaganda (Warrant of Arrest) ICC-01/04-02/06-2.Anx-tENG, 22 August 2006 <http://www.icc-cpi.int/library/cases/ICC-01-04-02-06-2-tENG.pdf> (accessed 23 September 2008)

The Prosecutor v Germain Katanga (Warrant of Arrest) ICC-01/04-01/07-1-tENG, 2 July 2007 <http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-1_tEnglish.pdf> (accessed 22 September 2008)

The Prosecutor v Mathieu Ngudjolo Chui (Warrant of Arrest) ICC-01/04-02/07-1-tENG, 6 July 2007 <http://www.icc-cpi.int/library/cases/ICC-01-04-02-07-1-tENG.pdf> (accessed 22 September 2008)

The Prosecutor v Thomas Lubanga Dyilo (Decision on the Prosecutor's Application for a warrant of arrest, article 58) ICC-01/04/01-01/06-8-Corr , 10 February 2006 <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-8-US-Corr_English.pdf> (accessed 23 September 2008)

The Prosecutor v Thomas Lubanga Dyilo (Warrant of Arrest) ICC-01/04-01/06-2-tEN 10 February 2006 <http://www.icc-cpi.int/lbrary/cases/ICC-01-04-01-06-2_tEnglish.pdf> (accessed 5 September 2008)

Prosecutor v Ahmad Muhammad Harun Ahmad Harun' and Ali Muhammad Ali Abd-Al-Rahman 'Ali Kushayb' (Warrant of Arrest for Ahmad Harun) ICC-02/05-01/07-2, 27 April 2007 <http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-2_English.pdf> (accessed 4 September 2008)

Prosecutor v Ahmad Muhammad Harun'Ahmad Harun' and Ali Muhammad Ali Abd-Al-Rahman 'Ali Kushayb' (Warrant of Arrest for Ali Kushayb) ICC-02/05-01/07-3, 27 April 2007 <http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-3_English.pdf> (accessed 12 September 2008)

Reports

'Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications'
<http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf>
(accessed 6 September 2008)

Paper on some policy issues before the Office of the Prosecutor
<http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf> (accessed 14 August 2008)

Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General <http://www.un.org/News/dh/sudan/com_inq_darfur.pdf> (accessed 18 August 2008)

'Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)'
<http://www.icc-cpi.int/library/organs/otp/UNSC_2008_En.pdf> (accessed 15 September 2008)

Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (14 June 2006)
<http://www.icc-cpi.int/library/organs/OTP_ReportUNSC3-Darfur_English.pdf>
(accessed 15 September 2008)

UN Doc. S/PV. 5158 <http://www.iccnow.org/documents/PVs_1593_DarfurReferral_31March05.pdf>
(accessed 23 August 2008)

Internet articles

'Appeals Chamber confirms the stay of proceedings and reverses decision on the release of Thomas Lubanga Dyilo <http://www.icc-cpi.int/press/pressreleases/433.html> (accessed 28 October 2008)

Bouwknegt, T 'ICC arrest warrant against 'Terminator' Bosco Ntaganda'
<http://www.rnw.nl/internationaljustice/icc/DRC/080429-ICC-Ntaganda> (accessed 2 August 2008)

Coalition for the International Criminal Court 'ICC announces third arrest in DRC situation'
<http://www.iccnow.org/documents/CICC_PressRelease_NgudjoloArrest_07feb08_eng1.pdf> (accessed 29 July 2008)

De Waal, A 'Darfur, the Court and Khartoum: The politics of cooperation' 1
<http://www.globalpolicy.org/intljustice/icc/2008/030/courting.pdf> (accessed 14 September 2008)

First arrest for the International Criminal Court' The Hague, 17 March 2006
<http://www.icc-cpi.int/press/pressreleases/132.html> (accessed 24 August 2008)

Human Rights Watch 'Sudan: Hand over war crimes suspect to ICC' <http://www.hrw.org/english/docs/2007/05/02/sudan15822.htm> (accessed 3 August 2008)

ICC Press Release 'ICC judges order release of Thomas Lubanga Dyilo' 2 July 2008, The Hague, International Criminal Court <http://www.rnw.nl/internationaljustice/icc/DRC/080702-lubanga> (accessed 2 August 2008)

ICC Newsletter 'Chronology of the Lubanga Dyilo case' November 2006 <http://www.icc-cpi.int/library/about/newsletter/10/en_01.html> (accessed 22 September 2008)

International Criminal Court 'ICC Prosecutor Ready with Evidence Against Darfur War Criminals' New York, 14 December 2006 <http://www.icc-cpi.int/pressrelease_details&id=217&l=en.html> (accessed 23 September 2008)

International Refugees Initiative 'Working towards justice in Darfur: What next after the ICC referral?' <http://www.refugee-rights.org/NewsLetters/Darfur/V2N1NextStepsforJustice.htm> (accessed 21 September 2008)

International Criminal Court 'Prosecutor receives referral of the situation in the Democratic Republic of Congo' <http://www.icc-cpi.int/pressrelease_details&id=19&11=en.html> (accessed 29 July 2008)

Justice for Darfur 'Sudan: Open letter to members of the United Nations Security Council' 1 <http://www.justice4darfur.org/letters/J4D.LetterUNSC.May29.Eng.pdf> (accessed 6 October 2008)

'Prosecutor's statement on Prosecutor's application for a warrant of arrest under article 58 against Omar Hassan Al Bashir' <http://www.icc-cpi.int/library/organs/otp/ICC-OTP-ST20080714-ENG.pdf> (accessed 29 July 2008)

'Situations and cases' <http://www.icc-cpi.int/cases.html> (accessed 2 July 2008)

'Sudan: Open letter to members of the United Nations Security Council' <http://www.amnestyusa.org/df/j4d_unscltr.pdf> (accessed 2 August 2008)

'Sudan Rejects UN Resolution on Darfur' Associated Press 4 April 2005 <http://www.publicinternationallaw.org/docs/PNW4/PNW.11Apr_05.html> (accessed 23 August 2008)

Update Report No. 4 Sudan/Darfur 11 June 2008
<http://www.securitycouncilreport.org/site/c.glKWLemTIsG/b.419809/> (accessed 23 August 2008)