A CRITICAL ANALYSIS OF SOME OF THE LEGAL ISSUES RAISED BY THE INDICTMENT OF PRESIDENT AL-BASHIR OF SUDAN BY THE ICC

Mini-dissertation submitted in partial fulfilment of an LLM: International Law degree

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DEDICATION

To my mother Elena Machemba, you are always a source of inspiration to me. I pray that I should become a daughter you are proud of.

To my sisters and friends, thank you for being constant pillars of strength in my life.

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List of Abbreviations

AU	African Union
ECCC	Extraordinary Chambers in the Court of Cambodia
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ISS	Institute for Security Studies
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
UN	United Nations

Abstract

There is a stark regress in the development of international criminal justice, in particular the fight against impunity on the African continent. This study explores various legal aspects that have arisen between Africa and the International Criminal Court (ICC) since the indictment of President al-Bashir of Sudan by the Court.

There is a presumption of conflict between some provisions of the Rome Statute, particularly Article 27 and Article 98. The indictment of President al-Bashir ICC has been the epitome of such a presumption. The African Union (AU) is among those opposed to the indictment of President al-Bashir and has requested the Security Council to defer the matter in accordance with Article 16 of the Rome Statute. The regional body has also refused to cooperate with the ICC in the arresting and surrendering of President al-Bashir to the Court on the basis of Article 98.

Therefore, this study seeks to critically analyse the indictment of President al-Bashir by the ICC and the AU's response to the same. The study further explores the legal validity of a deferral by the UN Security Council and the challenges it would will raise. The study also attempts to reconcile article 27 and article 98 of the Rome Statute in the context of President al Bashir's indictment. In doing so, the study endeavours to weigh the legal elements in both of the arguments offered in support and against the action taken by the ICC. The reason for such a discussion is to investigate the nature of the jurisdiction the Court has upon President al-Bashir by virtue of UN Security Council Resolution 1593(2005), which referred the al Bashir case to the court. The discussion also investigates the nature of the legal obligations on members of the international community including Sudan, to cooperate with the ICC by arresting and surrendering President al-Bashir to the Court.

In an effort to garner support for the ICC's indictment of President al-Bashir, the study also looks at the operation of the principle of complementarity under the Rome Statute and various principles of International Criminal Law that affirm the ICC's jurisdiction over the situation in Darfur and those principles that speak to the presumed liability of President al-Bashir. Although this study acknowledges the apparent competing demands of justice and peace, it challenges arguments that promote impunity and makes the case for addressing the AU's concerns relating to the ICC. More importantly, the study suggests that the UN Security Council and the ICC should be consistent and in condemning atrocities wherever they are committed and should be impartial in referring perpetrators of atrocities to the ICC irrespective of their political status. In so doing a clear message may be sent to individuals like President al-Bashir that commission of atrocities will invite international accountability.

CHAPTER 1: INTRODUCTION

1.1. Background to the study

The significance and relevance of international criminal justice has been on a steady upward progression since World War II. This progress resulted in the promulgation of the Rome Statute establishing the International Criminal Court (ICC or the Court) in 1998.[1] African States contributed immensely to this process. However, of late the continent's commitment to international criminal justice appears to be on a downward progression. The most concrete evidence of this regression was triggered by the African Union's (AU) refusal to cooperate with the ICC with regard to the its work in Darfur, Sudan.[2]

In 2005, the United Nations Security Council (Security Council) pursuant to Article 13(b) of the Rome Statute adopted a resolution (Resolution 1593 (2005)) under Chapter VII of the UN Charter and referred the situation in Darfur to the Prosecutor of the ICC for investigation.[3] At the time of the referral many applauded this decision by the Security Council.[4] The referral was seen to not only affirm the great strides international criminal justice had accomplished but also to reflect the conviction that trial of persons responsible for the human rights violations in Darfur would help restore peace and stability to the country and the region.[5]

The Prosecutor's investigations culminated in the indictment of a number of individuals by the Court including the current Head of State of Sudan - Omar Hassan Ahmad al- Bashir (President al- Bashir).[6] The Pre-Trial Chamber I (PTC-I) of the Court then proceeded to issue arrest warrants for President al-Bashir for war crimes and crimes against humanity and genocide.[7] On the African plane there was a loud outcry in opposition to the indictment of President al-Bashir by the ICC under the leadership of the regional organisation (the AU).[8]

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[1] Werle G (2005) Principles of International Criminal Law: T.M.C. Asser Press, The Hague, The Netherlands, at 3.
[2] Decision of the Meeting of African States Parties, 3 available at http://www.africa-union.org/root/au/conferences/2009/july/summit/13thsummit.html [accessed 31 July 2012].
[3] Security Council Resolution 1593, UN Doc S/Res/1593, 31 March 2005.
[4] This approval is evidenced by the fact that majority of the Security Council members voted in support of this resolution.
[5] Jalloh C. *et al*, 'Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court'(2011) *4 African Journal of Legal Studies* 5, at 6.
[6] *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")* ICC-02/05-01/7. *The Prosecutor v. Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09. *The Prosecutor v. Bahar Idriss Abu Garda* ICC-02/05-02/09. *The Prosecutor v. Abdallah Banda Abakaen Nourain and Saleh Mohammed Jerbo Jamus* ICC-02/05-03/09. *The Prosecutor v. Abdel Raheem Muhammad Hussein* ICC-02/05-01/12.
[7] *Id.*
[8] Ciampi A, 'The Proceedings against President al-Bashir and the Prospects of their Suspension under Article 16 Rome Statute', (2008) *6 Journal of International Criminal Justice* 885.

To date the AU has criticised the ICC for the indictment of President al-Bashir citing numerous reasons, chief among them being that the indictment defeats the regional body's peace efforts in the Sudan[9] and negatively impacts on the relationship between Africa and the Court.[10] Van der Vvyer[11] notes how at the Kampala Review Conference of the ICC held in 2010, Malawi speaking in its capacity as chair of the AU stated that the indictment of Heads of State could jeopardize effective co-operation with the ICC.[12] A further affirmation of this regress came about when the AU requested the Security Council to use its powers under Article 16 of the Rome Statute, and defer the indictment of President al-Bashir.[13]

The Security Council discussed this request together with the discussion on the extension of UNAMID, the AU-UN Hybrid Operation in Darfur established by Res.1769 (2007).[14] And under Res.1828 (2008) took note of the AU communiqué of 21 July, and *'having in mind* concerns raised by members of the Council,' decided 'to consider the matter further.'[15] To date no position has been taken by the Security Council regarding this matter. In the AU's view it appears as if their call to the Security Council for a deferral has not been heeded. In response, the AU reaffirmed its initial position not to cooperate with the ICC on the arrest of President al-Bashir.[16]

President al-Bashir, taking advantage of this state of affairs, has visited some of the African States parties namely; Chad, Djibouti, Kenya and Malawi without being arrested. These states declined to arrest President al-Bashir on the basis of Article 98 of the Rome Statute. Article 98 directs the ICC not to proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.[17] The ICC in turn has argued on the basis of Article 27 of the same statute that there is no legal validity for the argument of the AU or States parties for not cooperating with the ICC in effecting the arrest and surrender of President al- Bashir.[18] Article 27 removes the forms of

[9] *Id* and Jalloh C. *et al*, *supra* note 5, at 8.
[10] Ciampi, *supra* note 8, at 888.
[11] Van der Vyver J.D. 'Prosecuting President Omar Al Bashir in the International Criminal Court', (2011) http://web.up.ac.za/sitefiles/file/47/15338/PDF%20Files/Johan%20van%20der%20Vyver.pdf, 1 (accessed 30 September 2012), Jalloh C. *et al*, supra note 4 and Ciampi, *supra* note 7, at 887.
[12] *See* Decisions of the Review Conference at http://www.icc-cpi.int/Menus/ASP/ReviewConference/ (accessed 31 July 2012).
[13] Decision of the Meeting of African States Parties, *supra* note 2.
[14] Ciampi, *supra* note 8, at 887.
[15] Security Council Resolution1828 (2008), preambular paras 8 and 9(emphasis in the original).
[16] Jalloh C. *et al*, supra note 5, at 5.
[17] Rome Statute, art 98.
[18] Van der Vyver, *supra* note 11, at 3.

immunity traditionally afforded to state officials.[19] A number of scholars of repute support this view adopted by the Court.[20]

It can be argued that the AU's argument that the indictment of President al-Bashir is detrimental to peace efforts is not a sound one because the Security Council, as the primary international organ tasked with international peace and security concluded that ICC involvement in the matter would not harm peace efforts.[21] Furthermore, the AU only started vigorous peace efforts in Darfur after the indictment of President al-Bashir. This leaves one to question the AU's opposition to the indictment. A decision to defer the matter would reflect badly on the Security Council and would amount to political interference in the work of the Court by the Security Council.

Legal scholars in support of the indictment of President al-Bashir cite other situations where political leaders have been indicted and peace has been achieved, such as the case of President Milosevic and four other Senior Fry Officials who were indicted by the International Criminal Tribunal for the former Yugoslavia (ICTY) for committing international crimes in Kosovo,[22] and Charles Taylor[23] who was indicted by the Special Court for Sierra Leone (SCSL) while he was president of Liberia.[24]

Article 16 of the Rome Statute represents one of the ways in which the tension between the search for peace and the demands for justice may be reconciled.[25] It is important for the Security Council not to abuse this provision to the detriment of international criminal justice. The writer concurs with the view proffered by various International Organisations (IOs) that not discounting concerns about the negative consequences of pursuing justice in situations of on-going conflict, there is also the possibility of positive consequences for peace.[26] The examples cited by these institutions include minimising the number of casualties and the delegitimizing of dictators.

Pursuant to Article 17 of the Rome Statute which enshrines the principle of complementarity, the ICC will only exercise its jurisdiction if a State fails to genuinely investigate and prosecute a situation in which crimes under its jurisdiction have been committed. Sudan has not indicated that it is willing and able to prosecute President

[19] Rome Statute, art 27.
[20] See generally Van der Vyver, *supra* note 10, at 3, Akande D 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities', (2009) 7 *Journal of International Criminal Justice* 7(hereinafter: Akande 2009) 333, ISS Position Paper (2010) An African expert study on the African Union concerns about Article 16 of the Rome Statute of the ICC (2010) ISS, Pretoria South Africa.
[21] *See* in general Jalloh C. *et al*, *supra* note 4, who argue to the same effect.
[22] *Prosecutor v. Slobodan Milosevic and others,* Case No. IT-99-37, Trial Chamber, Indictment, 22 May 1999.
[23] *Prosecutor v. Charles Ghankay Tayor,* Case No. SCSL-2003-01-I, Appeals Chamber, Decision on immunity from jurisdiction, 31 May 2004, para52.
[24] Akande (2009), *supra* note 20, at 335.
[25] ISS Position Paper, *supra* note 20, at 5 and Jalloh C. *et al, supra* note 3, at 11.
[26] *See* in general articles available at http://www.crisisgroup.org/~/media/Files/africa/horn-of-africa/sudan/Sudan%20Justice%20Peace%20and%20the%20ICC.pdf and http://www.hrw.org/topic/international-justice/peace-and-justice and http://www.iss.co.za/uploads/positionpaper_icc.pdf (accessed 31 July 2012).

al-Bashir leaving the ICC as the only institution willing to prosecute President al-Bashir.[27] Therefore, it is important for stakeholders in the fight against impunity to support the action taken by the Court against President al-Bashir.

1.2. Statement of the Problem and Limitations of the study

The main problem this work seeks to address is the troubling stalemate situation between the ICC and the AU with regard to apprehending President al-Bashir and surrendering him to the Court. This mini-dissertation explores some of the legal issues raised by the indictment of President al-Bashir in an attempt to provide a solution to this stalemate.

Cognisance is given to other situations or proceedings involving Africa pending or having come before the ICC. However, this discussion centres solely on the indictment of President al-Bashir. In exceptional circumstances, other situations pending before the ICC, involving African countries will be referred to for the purpose of expounding on arguments that are critical to the present discussion.

Although the situation in Darfur was the first to come before the ICC through a Security Council referral, once again acting under Chapter VII of the UN Charter, the Security Council adopted Resolution 1973 (2011) and referred the situation in Libya to the ICC.[28] There are similarities between the referral of the situation in Darfur and the Libyan referral, given that when President Gaddaffi was indicted, he was still the Head of State in Libya and that both Sudan and Libya are not States Parties to the Rome Statute.[29] There is little doubt that the developments that ensued and the stance adopted by the AU with regard to in the Libyan referral have a bearing on the current work. However, as articulated above the focus of this work is on President al-Bashir. This is necessitated by the need to limit the scope of the study.

It must also be noted that this work does not seek to analyse the situation in Darfur that resulted in a Security Council referral. Only a very brief historical background of the situation that the Security Council referred to the ICC will be given, in order to distinguish the Darfur situation from the commonly known Sudanese civil wars and to create a contextual background for the legal issues discussed below. There have been varied responses from different African governments. Some of the African governments uphold the international obligations falling upon States Parties to the Rome Statute and or the UN Charter with regard to President al-Bashir. However, minimal reference will be made to individual African governments' positions unless it is imperative to do so. Therefore, any reference to 'African views' with regard to the ICC or the Security Council should be taken to literally mean the decisions, positions

[27] Van der Vyver, *supra* note 11, at 4.
[28] Security Council Resolution 1973, UN Doc S/RES/1593, 17 March 2011.
[29] Jalloh C. *et al, supra* note 5, at 6.

and communications of the AU by virtue of the endorsement of the majority of the AU States Parties.

This work does not seek to put forward the indictment of President al-Bashir as the ultimate yardstick for measuring or assessing the status of international criminal justice on the African continent. The indictment of President al-Bashir is only but a fraction of such an assessment and this study chooses to approach and analyse African international criminal justice from this angle.

1.3. Assumptions and Research Questions

This work is based on International Law, in particular a perspective on International Criminal Law. The assumptions and research questions asked and focused on are those emanating and pertinent to the field of International Criminal Law. There are other issues in existence, of inter alia, social and political nature, such as the view advanced by a number of African states that the ICC is targeting Africans only and a neo-colonialism tool of the West, against the African continent.[30] However, such matters are not covered under this discussion and therefore will not be dwelt upon.

The first assumption advanced is that: the international community (Africa included) is committed to making international criminal justice a reality. The second assumption the writer makes is that the ICC has jurisdiction to prosecute President al-Bashir. These two assumptions prove the main argument proffered in this mini-dissertation: there are international obligations resting upon Sudan and various members of the international community to cooperate with the ICC in the case of President al-Bashir. In support of this main argument the mini-dissertation also makes a further assumption on the liability of President al-Bashir based on principles of International Criminal Law. Therefore, the exposition establishes the main argument by an attempt to legally prove the above assumptions and an attempt to answer the following sub-questions in the chapters below:

1. What is the purpose and legal effect of Article 16 of the Rome Statute and how does it affect the present case of President al-Bashir?
2. Is the ICC allowed under the principle of complementarity to assume jurisdiction over the situation in Darfur?
3. What is the nature of the jurisdiction that the ICC has over President al-Bashir under UN Security Council Resolution 1593 (2005)?
4. Which principles of International Criminal Law provide a justification for the warrants of arrest that the ICC issued against President al Bashir?

[30] Du Plessis M. 'The International Criminal Court that Africa wants', (2010) Institute for Security Studies 6.

5. What is the relationship between impunity and immunity vis-a-vis the relationship between Article 27 and 98 of the Rome Statute? Is there a way of resolving the inherent tension between these two articles in order to advance international criminal justice?

6. What are the legal obligations of Sudan and other members of the international community regarding the issue of co-operating with the ICC in arresting and surrendering President al-Bashir to the Court?

Although there is a multiplicity of questions that this discussion could address, the study will only focus on the above questions.

1.4. Literature Review

The existence of the ICC has drastically and significantly altered the playing field for international criminal justice. The first decade of the ICC's existence has proven to be dramatic, dynamic and fast paced resulting in the proliferation of scholarly works on the envisaged strengths, potentials and weaknesses of the Court. These works seek to critically analyse the content of the Statute and its status in International Law. Various scholars also outline and trace the history that culminated in a permanent international criminal court.[31] This mini-dissertation seeks to contribute to the growing body of scholarly work from the authors briefly reviewed below and others who write extensively on the ICC and confirm the crucial role this Court has to play in advancement of international criminal justice.

- Bassioumi M (1999) The Statute of the International Criminal Court: A documentary history New York: Transnational Publishers

  This textbook proves to be helpful in the first chapters of the mini-dissertation by providing a thorough documentary history of events that led to the creation of permanent international criminal court. It also contains a comprehensive discussion on the four of the main ad hoc tribunals which the mini-dissertation uses to build up the historical foundations of the ICC.

- Cassese A (2003) The Rome Statute of the International Criminal Court: A commentary (vol I & II) New York: Oxford University Press

  Coverage of principles, substantive aspects, and procedure of international criminal law makes this the ideal guide to the current state of international criminal law for writing a mini-dissertation that analyses aspects of the Rome Statute from an international criminal law angle. This book provides valuable critical assessment of the jurisprudence and latest developments underpinning international criminal law. The case analyses in this textbook

[31] For example Werle, *supra* note 1 and Du Plessis, *supra* note 30.

enable the understanding of both the theory and the practice of this fast developing field. The mini-dissertation employs the textbook to corroborate arguments advance in the later Chapters that concern the ICC jurisdiction and those that centre on States obligations to cooperate with the Court.

- Du Plessis M (2008) African Guide to International Criminal Justice Pretoria: Institute for Security Studies

  This textbook has precise and convincing analysis of the contentious issues between the AU and the ICC as a result of the indictment of President al-Bashir. The mini- dissertation concurs with the arguments Du Plessis puts forward and uses them in support of the main argument of the present work.

- K. Kittichaisaree, International Criminal Law, Oxford University Press, Oxford 2001.

  This textbook systematically analyses the current state of international criminal law and its place in the modern international legal system. The book focuses on the substantive law of international crimes, especially taking into account the impact of the Rome Statute. It also deals with procedural aspects that are crucial to an understanding of how international criminal law is implemented, and the mini-dissertation briefly turns to the aid of this book to garner support for the assumption it makes.

  The textbook also has an appealing focus on the implications of the Rome Statute which provides both an assessment of the current state of international criminal law and a guide to the prospects for future development.

- Cryer R et al (2007) An Introduction to International Criminal Law and Procedure Cambridge: Cambridge University Press

  This book examines the procedural aspects of the newly formed ICC. It proves to be a comprehensive text on this topic in spite of the limitations imposed by the scarcity of jurisprudence emanating from this Court. It provides a text which is a beneficial source for academic research such as this mini-dissertation. Thus this mini-dissertation is guided accordingly by the textbook enunciations on the principle of complementarity and the value in ensuring that domestic courts spearhead the international criminal justice's endeavour to address mass atrocities. This mini- dissertation also accedes to Cryer *et al* insightful observations on how the provisions of the Rome Statute governing genocide closely mirror the Genocide Convention of 1948 and the deductions made thereof.

- Schabas W (3rd ed) (2007) An Introduction to the International Criminal Court Cambridge: Cambridge University Press

The mini-dissertation agrees with the arguments proffered by this textbook in opposition of the AU's proposed amendment of Article 16 of the Rome Statute. Which arguments are to the effect that though the ICC is an independent institution it however needs to have a working relationship with other members of international community such as the organs of the UN and that no organisation can oblige another to the meeting of minds.

- Werle G (2005) Principles of International Criminal Law TMC: Asser Press

  This textbook contains a lot of valuable information and insights into the field of international criminal law. It lays the necessary contextual background for any academic work that centres on the Rome Statute. Werle employs footnotes to supplement and comprehensibly discuss issues that are pertinent to the subject. Therefore textbook was also instrumental in the discussions centred on general principles of international criminal law and the principles of legality that this mini-dissertation employs in Chapter 3 to bolster the arguments in favour of the ICC's jurisdiction over the situation in Darfur. This mini- dissertation readily adopts some of Werle's arguments concerning the validity of the superior or command responsibility and adopts this approach with regard to the case of President al-Bashir.

Clearly the above list is not exhaustive. Other scholarly work that has been used in this mini-dissertation is listed in the bibliography.

1.5. Significance of the study

This study seeks to address the question of impunity given that President al-Bashir remains at large and the fight against impunity appears to be regressing on the African continent is The relevance of this study is heightened by the fact that Africa has the highest membership in the ICC.[32] This leads to a presumption that the majority of African States recognise their inadequacy to address mass atrocities on the continent due to the lack of financial resources and political will. Without shifting responsibility for combating impunity, the continent is clearly appreciative of the value of the role that the ICC could play because it is better placed to circumvent such hurdles to international criminal justice.

The ICC has no police force of its own to implement its arrest warrants, thus it will always rely on the cooperation of other stakeholders in the realm of international criminal justice (such as States) for it to successfully try those who bear the greatest responsibility for international crimes. The challenges the Court is currently facing in apprehending President al-Bashir will continually confront the

[32] *See* ICC ratifications on the ICC's website available at http://www.icc-cpi.int/Menus/ICC (accessed 31 July 2012).

Court from time to time,[33] unless relevant amendments to the Rome Statute or other developments in the field of international criminal law alter the current status of international criminal law made manifest in this Statute.

1.6. Proposed methodology

This study uses the analytical, descriptive and comparative approaches of research. It endeavours to analyse provisions of the Rome Statute pertaining to the indictment of President al-Bashir. These include articles relating to arrest, cooperation, complementarity, jurisdiction, impunity and immunity. Where necessary the study will also look at relevant treaties, other documents and decisions making up the international criminal justice system.

A descriptive approach will be employed to set the necessary context. Such a description will be done by briefly recounting the events that led to the creation of a permanent international criminal court, the historical foundations of the AU, the AU's involvement and commitment to the ICC as well as giving a brief account of the situation in Darfur that led to a Security Council referral. As a result the descriptive approach will involve a review and analysis of legal literature, scholarly works and reports in existence that speak to the discussion.

The comparative approach will involve comparing ICC jurisprudence to that of ad hoc tribunals that have dealt with issues of international criminal justice that the current case of President al-Bashir presents. National, regional and global international criminal law systems will be compared against the Rome Statute in order to establish State practice towards the prevailing status of international criminal law. The comparative approach will also be employed to both bolster the legal arguments presented and the findings of this analysis in order to establish the best practices for enhancing cooperation between the ICC and the international community with regard to execution of arrest warrants.

Both primary and secondary sources gathered through desk, library and desktop research will be used in the study. The primary sources will mainly include the various instruments and documents making up the regional and global International Criminal Law frameworks identified as subjects of the study. The secondary sources will include scholarly work, journal articles, reports made by reputable members of the civil society and other works on the topic.

1.7. Chapter Outline

This study is divided into six chapters. Chapter 1 provides an introductory background to the discussion and delineates the scope of the study, its relevance and limitations. It also outlines the legal questions this study will attempt to settle.

[33] Jalloh C. et al, supra note 5, at 10.

Chapter 2 gives the historical background of the ICC, the AU, a summary of Africa's involvement with the ICC, a brief account of the Darfur Crisis, the indictment of President al-Bashir by the ICC after a Security Council referral, an analysis of the AU's response and an analysis of the deferral power of the Security Council under Article 16 of the Rome Statute.

Chapters 3 deals with the principle of complementarity enshrined in the Rome Statute and the manner in which this principle impacts the ICC's jurisdiction over the situation in Darfur. This chapter will also constitute an analysis of the jurisdiction created by UN Security Council Resolution 1593 (2005) and address the principles of International Criminal Law that govern the ICC's jurisdiction over President al-Bashir and those that affirm his liability.

Chapter 4 explores the relationship between immunity and impunity made manifest in the alleged tension between Article 27 and 98 of the Rome Statute. The chapter attempts to reconcile Article 27 and 98 in order to uphold the spirit and purpose behind the creation of the ICC. Lessons from State practice and the jurisprudence of international criminal tribunals will constitute the platform that will be employed to promote and emphasise the need to eradicate the culture of impunity.

Chapter 5 underscores the legal obligations resting upon Sudan and members of the international community to cooperate in arresting and surrendering President al-Bashir to the ICC.

Acknowledging the conflicting demands of peace and justice, chapter 6 sums up the legal findings from the preceding chapters, and makes a determination on the current status of international criminal justice. This chapter also embodies recommendations geared towards upholding this status quo and concludes by stressing Africa's unique and nervous regard of international mechanisms owing to the continent's colonial and political past, which past has negatively impacted on the advancement of international criminal justice on the continent.

CHAPTER 2: BACKGROUND

2.1. Historical foundations of the International Criminal Court (ICC)

According to Werle,[34] efforts to create a permanent international criminal court date back to the period before World War II. For example, after World War I the victorious powers attempted to prosecute war criminals before an international tribunal by concluding Peace Treaties with the vanquished, which contained provisions relating to individual criminal responsibility for war crimes.[35] Therefore, it is not surprising that an initial attempt to create an international criminal court within the framework of the League of Nations failed in 1937.[36]

The eventual establishment of the Nuremberg and Tokyo military tribunals in the aftermath of World War II which are criticised as 'victor's justice'[37], heralded the era of individual criminal responsibility for international crimes through the auspices of international criminal tribunals.[38] The Nuremberg and Tokyo Tribunals' legacy is seen today in the ICC. Despite the controversial legal and political status of these tribunals,[39] they were important in setting the stage for a permanent international criminal court by contributing to the development of International Criminal Law.[40]

"At the beginning of the 1990s, following the end of the Cold War, the United Nations activated its peace and enforcement mechanisms. This development triggered a renaissance of international criminal law, which many had thought a dead letter."[41] A series of ad hoc tribunals followed, and most of these tribunals were set up on the basis of Security Council resolutions under Chapter VII of the UN Charter or with the assistance of the UN.[42] These tribunals spearheaded the shift from impunity to accountability. Their jurisprudence significantly contributed to the development of international criminal law and to strengthening international rule of law and paved the way for the creation of a new body of rules: international criminal procedure.[43]

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[34] Werle, *supra* note 1, at 19.
[35] Martin L (2007) The Treaties of Peace, 1919-1923 (Peace Treaties of Versailles, St Germain-en-Laye, Ncuilly-sur-Seine, Trianon and Serves). Mullins C (1921) The Leipzig Trials: An Account of the War Criminals' Trials and a Study of German Mentality London: HF & G Witherby.
[36] Werle, *supra* note 1, at 18-19.
[37] *See id* at 9.
[38] Werle, *supra* note 1, at 7.
[39] *Id.*
[40] IBA Manual on International Criminal Law (hereinafter IBA Manual) available at http://www.ibanet.org/Human Rights Institute/HRI Publications/HRI Training Manuals .aspx (accessed 31 July 2012).
[41] Werle, *supra* note 1, at 15.
[42] Others include 'mixed' or 'internationalised' tribunals such as The Special Tribunal for Lebanon(STL), Extraordinary Chambers in the Court of Cambodia (ECCC), War Crimes Chamber in Bosnia, East Timor and Kosovo Tribunals, The Iraqi High Tribunal and War Crimes Chamber in Serbia.
[43] IBA Manual, *supra* note 40, at 60.

Those opposed to ad hoc tribunals argue that there is a sense of '*Tribunal fatigue*'[44] within the international community resulting from Nuremberg to present day. Ad hoc tribunals have dragged on for too long and no longer have the temporary aspect that made them appealing and justifiable as a means for addressing atrocities.[45] This 'fatigue' is seen as the rationale inter alia for the creation of the ICC.[46]

Another negative aspect of ad hoc tribunals is the divergent jurisprudence emanating from them resulting in further uncertainty, debate and fragmentation of international law. For example the ICTY in the Tadic case[47] took a different view from the ruling of the International Court of Justice (ICJ) in the Nicaragua case[48] and established a novel test for determining State responsibility (effective control test versus overall control test). The existence of the ICC is hoped to result in uniformity and consistency of international criminal law.

However, ad hoc tribunals are not necessarily an inherent evil. They have resulted in the positive development of international law.[49] The ICTR jurisprudence has enriched international law.[50] The tribunal was the first to rule that rape can constitute the crime of genocide.[51] Ad hoc tribunals can help fight impunity in situations where crimes alleged to have been committed fall outside the temporal ambit of the ICC's jurisdiction.

A proposal to establish a permanent international court was discussed by the UN during the negotiations of the Genocide Convention in 1947.[52] The International Law Commission (ILC) was then tasked in 1948 to work on a draft of a permanent international criminal court.[53] After a lengthy process the ILC adopted a draft of the statute for a permanent international criminal court in 1994,[54] and the final version of the code was adopted in 1996.[55]

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[44] *See* Alford P. R. (2000) The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance and Roger P. Alford Proceedings of the Annual Meeting (American Society of International Law) , Vol. 94, (APRIL 5-8, 2000), pp. 160-165

[45] The UN is in the process of implementing exit (completion) strategies for both the ICTY and ICTR

[46] Majority of States are now members of the Rome Statute.

[47] *Prosecutor v. Dusko Tadic a/k/a "Dule",* Case No.IT-94-1-AR72, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (AC).

[48] Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits), 1986 I.C.J. 14.

[49] *See* in general Werle, *supra* note 1, at 15-18.

[50] Werle, *supra* note 1, at 18.

[51] *See Prosecutor v. Jean-Paul Akayesu (Trial Judgment),* ICTR-96-4-T, 2 September 1998. Mugwanya G (2007) The Crime of Genocide in International Law: Appraising the Contribution of the UN Tribunal for Rwanda United Kingdom: Cameron May.

[52] Werle, *supra* note 1, at 19.

[53] UN Doc. A/RES/3/260(1948).

[54] See *Yearbook of the International Law Commission* 1994 II, Part 2, pp.26 et seq and Report of the International Law Commission on the Work of its 46th Session UN GAOR 49th Session Supp No 10, UN Doc A/49/10 (1994).

[55] ILC Draft Code Commentary UN Doc A/51/10 (1996).

A Preparatory Committee then held a number of meetings between 1996 and 1998 which resulted in the formulation of a Draft Statute.[56] The Preparatory Committee's Draft Statute was submitted to the Diplomatic Conference of Plenipotentiaries on the establishment of an international criminal court convened by the General Assembly on 15 June 1998 in Rome. The statute was adopted on 17 July 1998 and came into effect on July 1, 2002.[57] "The Rome Statute represents the first comprehensive codification of international criminal law, and it affirms and clarifies customary international criminal law."[58] Werle[59] describes this Statute as the core document of international criminal law.

2.2. Historical foundations of the African Union (AU)

The predecessor to the AU was the Organization of African Unity (OAU) which was founded in 1963 with the principal objectives of defending sovereignty and territorial integrity of its member States and to rid Africa of colonialism and racialism.[60] One of the basic principles of the OAU was that of non-interference in the internal affairs of States. "Conceived and born during the Cold War and the liberation struggle, most newly independent African States jealously guarded their freedom and deeply resented any measures which hinted at external interference with their internal affairs."[61] African states have traditionally insisted on rigorous compliance with this principle and have tended to regard international concern for human rights as a pretext for undermining their sovereignty.[62]

Changes in the international political arena rendered colonialism a thing of the past and resulted in the OAU needing to reform and identify new aims and objectives, hence the emergence of the AU. The AU is a union consisting of 54 African states.[63] It was established on 9 July 2002. Its leading objectives are to accelerate the political and socio-economic integration of the continent, to promote and defend common African positions on issues of interest to the continent and its peoples, to achieve

[56] Bassiouni M (1999) The Statute of the International Criminal Court: A Documentary History: New York: Transnational Publishers.
[57] For details on the negotiations in Rome, *See* Kirsch P and Robinson D, in Cassese A. Gaeta P and Jones J.R.W.D (eds), *The Statute of the International Criminal Court*, Vol. 1 (2002), pp. 67 et seq.
[58] Werle, *supra* note 1, at 3.
[59] Werle, *supra* note 1, at 24.
[60] OAU Charter, Art. 2 and 3. *See* further Naldi G.J (2nd ed) (1999) The Organization of African Unity London: Mansell. pp. 2-18; Amate C.O.C. (1986) Inside the OAU: Pan-Africanism in Practice London: Mcmillan, pp. 61-3; Elias T.O. (2nd ed) (1988) Africa and the Development of International Law London: Martinus Nijhoff, pp. 124-9.
[61] Evans M & Murray R (eds) (2002) The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000 Cambridge: Cambridge University Press.
[62] *Id* and See, for example, the statement made by Swaziland to the UN Human Rights Commission in 1997 UN Doc.E/CN.4/1997/SR.4, paras. 46-7; and Mika Miha v. Equatorial Guinea,Communication 414/1990 (UN Human Rights Committee), UN Doc.CCPR/C/51/D/414/1990, where Equatorial Guinea argued, unsuccessfully, that the communication submitted to the UN Human Rights Committee constituted interference in its internal affairs even though Equatorial Guinea had recognised the jurisdiction of the UN Human Rights Committee.
[63] The African Union, available at: <http://www.au.int/en/>(accessed 7 November 2012).

peace and security in Africa, and to promote democratic institutions, good governance and human rights. The AU intervenes on behalf of its member states whenever it is needed to do so and is the main body for maintaining peace and security on the continent.[64]

2.3. Africa's involvement with the ICC

Africa's commitment to eradicating impunity and promoting international criminal justice is not only found in the AU's Constitutive Act but also reflected in the continent's participation in the creation of a permanent international criminal court. "African governments, sub-regional bodies, civic societies and academic groups contributed extensively to the preparations leading up to, during and after the diplomatic conference in Rome at which the Rome Statute of the ICC was finalised."[65] During the Rome conference itself, several circumstances resulted in African states having a significant impact on the negations.[66] One of the examples cited by Du Plessis[67] as evidence of Africa's involvement in shaping the content of the Rome Statute is the fact that African delegates participating in the Rome conference had two guiding documents: the SADC principles[68] and the Dakar declarations.[69]

Both these documents indicated African aspirations for a court independent from Security Council control, staffed by an independent prosecutor, and with inherent jurisdiction over the core crimes of genocide, crimes against humanity and war crimes.[70] The Dakar declarations reflect the AU's original regard of the ICC. The declarations were a result of a meeting of the council of ministers of the OAU (now the AU) held in Dakar, Senegal in February 1998, which meeting called on all OAU member states to support the creation of the ICC.[71] This resolution was later adopted by the OAU summit of Heads of State and Government in Burkina Faso in June 1998.[72] From the afore-going there is a basis to conclude that Africa's opposition to some of the aspects of the ICC such as the involvement of the Security Council in the work of this Court is not solely politically motivated. The continent's leaders articulated their discontentment long before the indictment of President al-Bashir.

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[64] AU website, *supra* note 63.
[65] Du Plessis, *supra* note 30, at 6.
[66] *Id*, at 7.
[67] *Ibid*.
[68] *See* Maqungo S, 'The establishment of the International Criminal Court: SADC's participation and negotiations', African Security Review Vol 9 No 1, 2000.
[69] Available at:< http://www.iccnow.org/documents/DakarDeclarationFeb98Eng.pdf >(accessed 12 September 2012).
[70] Mochochoko, 'Africa and the International Criminal Court', 248-249 (cited from Du Plessis, *supra* note 29, at 7 and n13).
[71] Du Plessis, *supra* note 30.
[72] *Ibid*.

According to du Plessis, the" history of the ICC's creation and the serious and engaged involvement of African states in that history demonstrates the ICC to be a court created in part by Africans and ultimately for the benefit of African victim of serious crimes."[73] Over forty African countries are currently signatories to the Rome Statute of the ICC and thirty-three African countries have ratified the Rome Statute[74] and are members of the ICC, making Africa the highest represented region among the Court's membership.[75] Approximately twenty African countries have a final or draft national implementation legislation which incorporates the crimes listed under the Rome Statute.[76]

According to Du Plessis,[77] Africans occupy high-level positions within the Court, for example some of the Court's judges have been Africans.[78] In the 2009 elections for new judges, twelve out of a total of nineteen judicial candidates were Africans nominated by African governments. A large number of African civil society organizations are members of the Coalition for the International Criminal Court (CICC). The CICC from its name is a coalition of civil society organisations from all over the world whose primary objectives are to promote and support the work of the ICC. Du Plessis recounts how African civil society organisations under the leadership of the CICC lobbied in their respective countries for the early establishment of an independent and effective international criminal court.[79] To date twenty one African countries have National Coalitions for the ICC actively working for the implementation of Rome Statute provisions into national legislation and the strengthening of the Court's activities in Africa.[80]

From the on-going one cannot help but concur with Du Plessis who aptly surmises that the

> "suggestion that the court is a western creation, or anti-African, must defeat the overwhelming evidence of African involvement in the court. The African support for the ICC described above thus leads to an important conclusion: […] the Rome Statute was regarded by the majority of Africa's leaders as supportive of African ideals and values, including ridding the continent of its deserved reputation as a collage of despots, crackpots and hotspots where impunity for too long has followed serious human rights violations."[81]

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[73] *Id*, at 6.
[74] *See* ICC website under Assembly of State Parties, available at http://www.icc-cpi.int/Menus/ASP/states+parties/ (accessed 12 September 2012).
[75] Du Plessis, *supra* note 30, at 6.
[76] *See* for example the South African Implementation of the Rome Statute of the ICC Act 27 of 2002.
[77] *Ibid*.
[78] Fatoumata Dembele Diarra (Mali), Akua Kuenyehia (Ghana), Daniel David Ntanda Nsereko (Uganda), Joyce Aluoch (Kenya), Sanji Mmasenono Monageng (Botswana). One former judge, Navanethem Pillay (South Africa) is now the UN High Commissioner for Human Rights.
[79] Du Plessis, *supra* note 30, at 6.
[80] Mochochoko, *supra* note 70.
[81] Du Plessis, *supra* note 30, at 25.

2.4. A brief account of the crisis in Darfur

It is not necessary for the current work to give a detailed account of the situation in Darfur. It suffices to sum up what is common cause; namely that Darfur is a multi-ethnic region in Sudan and the fighting in Darfur is removed from the (decades) long civil war between north and south Sudan- which ended with a ceasefire that led to the establishment of a separate state called South Sudan which has its capital in Juba.

The fighting in Darfur is presumed by many analysts to have commenced in 2003.[82] It has led to a humanitarian crisis within the region.[83] Many people were killed,[84] lost their homes and others fled into neighbouring Chad resulting in the escalation of tensions between Chad and Sudan.[85]

Debate on the root causes for the fighting is inconclusive. Some argue that rebel groups arose to challenge the repression of the Darfur region by President al-Bashir's government (which is based in Khartoum).[86] Others argue that ethnical tensions between the diverse population of Darfur for scarce resources (land and water) eventually erupted into violence and the government of President al-Bashir exploited the situation for political gain. [87]

The AU was the first to send a peacekeeping force (AMIS) in Darfur, in 2004.[88] The underfunded and underequipped AMIS failed to fulfil its mandate of monitoring a ceasefire process and of protecting civilians.[89] Until recently the international community left the lead role in responding to the crisis to the AU.[90] Minority Rights Group (MRG) published a critical report, challenging the UN and the great powers that could have prevented the deepening crisis in Darfur.[91] Intensive international mediation resulted in a series of agreements and Security Council Resolution 1769(2007) which culminated in the deployment of a hybrid AU-UN force under AU command (UNAMID). UNAMID, the biggest peace operation in the world replaced AMIS in January 2008.

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[82] "Reuters AlertNet - Darfur conflict"<Alertnet.org. http://www.alertnet.org/db/crisisprofiles/SD_DAR.htm> (retrieved 5 March 2012).
[83] UN "Forty countries face food shortages, Darfur crisis is the most pressing: UN agency" (2006).
[84] Smith R "How many have died in Darfur?" (2005) BBC. Reuters "Darfur death toll may be 300,000, say UK lawmakers" (2005) http://www.radiodabanga.org/node/14852 (retrieved 5 March 2012).
[85] The Brussels-based International Crisis Group reported in May 2004 that over 350,000 people could potentially die as a result of starvation and disease: 'Dozens killed' in Sudan attack (BBC) 24 May 2004.
[86] Straus S "Darfur and the Genocide Debate" (2005) *Foreign Affairs, Vol. 84, No. 1*, pp. 123-133.
[87] "Darfur Report"http://www.africanholocaust.net/news_ah/darfur%20report.html. Shahadah A "Language and Africa" (2005) http://www.africanholocaust.net/news_ah/language%20new%20reality.htm (retrieved 5 March).
[88] *Id.*
[89] Reuters "AU will not abandon Darfur - AU chairman" (2006). Toronto Sun "200 UN troops to deploy in Darfur" (2006). United Press International "Extend Sudan U.N. mission" (2006).
[90] The Economist "The UN and Darfur: Watching, but still waiting" (2007) http://www.economist.com/world/africa/displaystory.cfm?story_id=E1_RRSTQDP (retrieved 5 March 2012).
[91] Independent Online "UN could have averted Darfur crisis – MRG" (2006).

To date, various armed groups are fighting against the government of President-al Bashir. Opportunistic bandits and militias have taken advantage of the anarchy in Darfur making it difficult to end the fighting.[92] President al-Bashir is reported to be financing some of the factions involved in the fighting.[93] He is also alleged to be violating human rights of the people in Darfur, expelling humanitarian aid groups to the detriment of the plight of civilians caught up in the fighting, obstructing the deployment of an international peacekeeping force and refusing to prosecute any individuals responsible for atrocities committed in Darfur.[94] Investigations by the Prosecutor of the ICC which led to the indictment of President al-Bashir seem to corroborate these allegations.

2.5. Referral of the situation in Darfur to the ICC and the indictment of President al-Bashir

In January 2005, the UN Commission of Inquiry on Darfur established by Security Council Res. 1564(2004) to look into the situation in Darfur submitted a report in which it determined that:

> "Government forces and militia conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement […] on a widespread and systematic basis."[95]

The Security Council, taking into account the report of the International Commission of Inquiry on Darfur but without mentioning any specific crimes then resolved to refer the situation in Darfur to the Prosecutor of the ICC for investigation.[96]

In 2008, after extensive investigations, the Prosecutor filed ten charges of war crimes against Sudan's incumbent President al-Bashir. The Prosecutor claimed that President al-Bashir "masterminded and implemented a plan to destroy in substantial part" three tribal groups in Darfur because of their ethnicity. After an arrest warrant was issued for the Sudanese president in March 2009, the Prosecutor appealed to have the genocide charges added. However, the PTC-I found that there was no reasonable ground to support the contention that President al-Bashir had a specific intent to commit genocide.[97]

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[92] MSNBC "Google Earth focuses on Sudan atrocities" (2007) http://www.msnbc.msn.com/id/18045002 /.
[93] Bechtold P. K. "A History of Modern Sudan *Middle East Journal"* (2009) 63(1), 149 - 150.
[94] Joe L "Darfur aid agencies leave after expulsion by Sudan"(2009) WSJ http://online.wsj.com/Article/SB123655809808566323.html. NYT "Aids groups expulsions, fear of more misery" (2009) http://www.nytimes.com/2009/03/23/world/africa/23darfur.html. TNR "Left behind: Why aid for Darfur's rape survivors has all but disappeared" (2009) http://www.tnr.com/Article/world/left-behind .
[95] *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary- General, 572,648, pursuant to Security Council Resolution 1564 of 18 September 2004,* 24 January 2005.
[96] Resolution 1593 (2005), *supra* note 3.
[97] Van der Vyver, *supra* note 11.

However, the Appeals Chamber of the ICC found that the PTC-I had applied "an erroneous standard of proof in evaluating the evidence submitted by the Prosecutor"[98] and that the Prosecutor's application for a warrant of arrest on the genocide charges should be sent back to the PTC-I to review based on the correct legal standard. In July 2010, President al-Bashir was charged for orchestrating the Darfur genocide.[99]

Two warrants for President al-Bashir's arrest have been issued by the ICC and he remains at large. These warrants of arrest list ten counts based on individual criminal responsibility under Article 25(3)(a) of the Rome Statute as an indirect/co-perpetrator.[100] On the basis of these arrest warrants, the Court then issued public requests for the arrest and surrender of President al-Bashir to Sudan, all States Parties to the Rome Statute of the ICC, as well as all UN members.[101]

2.6. Justification for the AU's Response to the indictment of President al-Bashir

The AU Peace and Security Council opposed the request by the ICC Prosecutor for an arrest warrant against President al-Bashir, asserting that such an arrest warrant could undermine the efforts aimed at resolving the conflict in Darfur.[102] This AU body "has over the years been engaged with Sudanese authorities in a mediation process aimed at finding a political solution to the Darfur conflict"[103] In 2008, the AU Peace and Security Council formally requested the Security Council to defer "the process initiated by the ICC" in accordance with Article 16 of the Rome Statute.[104] According to a report issued by Amnesty International,[105] the Security Council discussed the request during a public session on 31 July 2008 and "took note" of it but because some members of the Security Council were strongly opposed to requesting the ICC

[98] ICC-OTP-20080714-PR341.
[99] *Prosecutor v. Al Bashir,* Case No. ICC-02/05-01/09, Second Decision on the Prosecutor's application for a warrant of arrest, July 12, 2010.
[100] Rome Statute Art. 7(1)(a),(b), (d), (f) and (g), Art. 8(2)(e)(i) and (v) and Art. 6-a, 6-b and 6-c.
[101] Amnesty International Annual Report: Document- Bringing power to justice: Absence of immunity for heads of state before the International Criminal Court (hereinafter: Amnesty International Annual Report) http://www-secure.amnesty.org/en/library/assert/IOR53/017/2010/en... pp.2 1 (accessed 7 August 2012) at pg 12(accessed 7 August 2012).
[102] Assembly of the African Union, Decision on the application by the International Criminal Court (ICC) Prosecutor for the indictment of the President of the Republic of Sudan, No.Assembly/AU/Dec.221(XII), 3 February 2009 para3.
[103] Jalloh C. et al, supra note 5, at 7.
[104] AUPeace and Security Council "Communiqué of the 142nd meeting" No. PSC/MIN/Comm(CXLII) 2008, para11(i). "Communiqué of the 151st meeting" No. PSC/MIN/Comm.1 (CLI) 2008, para7; "Communiqué of the 175th meeting" No. PSC/MIN/Comm.1 (CLXXV), 2009, para6.
[105] Amnesty International Report, *supra* note 100, at 14.

to defer its proceedings, therefore, Security Council decided not to make such a request.[106]

In February 2009, the AU Assembly reiterating the call by the Peace and Security Council requested the Security Council to use its powers under Article 16 and suspend "the process initiated by the ICC."[107] Jalloh *et al*[108] note the regrettable development that ensued, how in July 2009, expressing regret at the perceived inaction of the Security Council and reiterating its request that the proceedings against President al-Bashir be suspended, the AU Assembly decided that AU Member States will not co-operate with the ICC pursuant to the provision of Article 98 of the Rome Statute relating to immunities, in the arrest and surrender of President a-l Bashir.[109] This decision was reiterated in July 2010.[110]

The AU's response and opposition to the indictment of President al-Bashir is hardly surprising. The fact that Sudan never ratified the Rome Statute makes the ICC's jurisdiction over Sudan one of a coerced nature.[111] President al-Bashir's government has objected to this exercise of jurisdiction in relation to Sudan.[112] The Sudanese Government argued its "sovereignty is being violated- both by the Security Council which referred the matter, and the ICC which was charged with implementing the decision."[113] On the basis of the consent theory of international law which argues that States are only bound by treaties that they have consented to through ratification,[114] Sudan arguably has a legal basis to be outraged by the ICC's imposed jurisdiction over its nationals and its territory because Sudan never acceded to the Rome Statute.

On the other hand, if the above argument is allowed to prevail then the international community will never be able to combat impunity or address violations of fundamental human rights. A counter argument would be that because Sudan is

[106] UN Security Council Resolution 1828 (2008) UN Doc. S/RES/1828 (2008)-preamble. *See* Security Council "Record of the 5947th meeting" UN Doc. S/PV/5947, 2008.
[107] Assembly of the AU "Decision on the application by the ICC Prosecutor for the indictment of the President of the Republic of Sudan" No. Assembly/AU/Dec.221(XII), 2009, para3. Press Statement "The Chairperson of the Commission expresses deep concerns at the Decision of the PTC-I of the ICC on Darfur"Addis Ababa (2009).
[108] Jalloh C. et al, supra note 5, at 8.
[109] Assembly of the AU "Decision on the meeting of African States parties to the Rome Statute of the ICC" Doc. Assembly/AU/13(XIII), Assembly/AU/Dec.245(XIII), adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya 2009.
[110] Assembly of the AU "Decision on the Progress Report of the Commission on the Implementation of Decision" Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the ICC adopted by the Fifteenth Ordinary Session of the Assembly of the Union, Kampala, Uganda,2010, Doc. Assembly/AU/Dec.296(XV) (hereinafter 2010 AU Decision), para5(cited from Amnesty International 2012 Report *supra* note 84 at 15).
[111] Jalloh C. et al, supra note 5, at 15.
[112] *Id,* at 7.
[113] *Ibid*, and UN SCOR, 64th Session, 6096th meeting, UN Doc S/PV.6096, 20 March 2009, 3-4, 15.
[114] Seater J.K. 'An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law', Harv. Int'l L. J. 139, at 161 and Sir Humphrey Waldock ed., 6th ed. 1963. *See* also Vienna Convention on the Law of Treaties, art 34.

member of the UN decisions by the Security Council that affect it are not coercive. In addition, the principle of 'responsibility to protect' motivates the international community to intervene on behalf of nations of a foreign state. This paradoxical climate is an inescapable phenomenon of International Criminal Law. It is the root cause of one of the challenges the international community is confronted with in attempting to balance the demands of peace versus those of justice.

Another justification for the discontentment of the AU with the indictment is the ugly fact that the long arm of international criminal justice is only effective against weaker states,[115] (and at times ineffective against weaker states as well). Various scholars acknowledge this discrepancy in the fight against impunity.[116] Some of the most powerful States in the world are not party to the Rome Statute. The current "skewed nature of power distribution"[117] embodied in the UN system and global politics promotes the supremacy of these powerful States.[118] Hence equal application of international criminal justice is not feasible. It is highly unlikely that the five permanent members of the Security Council and some of their allies will ever be subjected to the jurisdiction of the ICC by virtue of a Security Council referral as was the case of Sudan (and Libya recently) if they are opposed to such a resolution.[119]

Jalloh *et al* further explain the basis of the AU's frustration over the Security Council's failure to consider its deferral request by outlining how two weeks after the Rome Statute entered into force, and before the ICC itself had opened its doors, Article 16 was controversially invoked at the behest of the United States to provide immunity from the ICC for US Peacekeepers. This was done after the United States had threatened in early June 2002, to veto renewal of the mandate of the UN mission in Bosnia and Herzegovina (as well as other future peace keeping operations).[120] Du Plessis notes another objection, that while the Security Council is entitled to send cases to the ICC it has made itself guilty of a double-standard since it has done so in respect of Sudan but has not done so in relation to Gaza for instance.[121] Jalloh *et al* insightfully conclude that "the uneven political landscape of the post-World War II collective security regime has become a central problem of the ICC."[122]

In light of the above, the AU's contentions cannot be dismissed as being merely politically motivated. The AU's contentions point to the core shortcomings of the prevailing international criminal justice system.

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[115] Jalloh C. et al, supra note 5, at 8.
[116] Ciampi, *supra* note 8, at 897.
[117] Jalloh C. et al, supra note 5, at 9.
[118] *Id.*
[119] Two of the permanent five Security Council members are also party to the Rome Statute (France and United Kingdom).
[120] Jalloh C. et al, supra note 4, at 17 citing Sean D. Murphuy, ' Efforts to Obtain Immunity from ICC for US Peacekeepers', 96 *Am. J. Int'l L. 725,* 725-27 (2002).
[121] Du Plessis, *supra* note 30, at 14.
[122] Jalloh C. et al, supra note 5, at 9-10.

2.7. Analysis of the AU's proposed amendment of Article 16 of the Rome Statute

Article 16 regulates the relationship between the ICC and the political organs of the international community.[123] The provision requires the ICC to refrain from commencing with an investigation or proceeding with a prosecution, for a period of 12 months (renewable), if the Security Council so requests in a resolution adopted under Chapter VII of the UN Charter.[124] Legal scholars note that because Article 16 gives the Security Council exclusive powers to request a deferral of ICC investigations- this in turn raises questions about the role, the composition and the functioning of the Security Council.[125] Many take the view that since the ICC is an independent judicial body, there ought not to be interference in its work by a political body such as the Security Council.[126]

In the AU's view Article 16 should empower the General Assembly to act whenever the Security Council fails to do so within 6 months, as was the case with Res. 377 A (V) (1950) titled Uniting for Peace.[127] As noted by Jalloh *et al,* the success of this proposal requires the support of the vast majority of ICC Member States and that of some powerful Security Council members whose interests may not coincide with those of the African States Parties.[128] This mini- dissertation concurs with legal scholars who argue against such an amendment because of the inherent legal defects such an amendment contains.[129] The status of the said resolution in international law is controversial and cannot be relied upon as a basis for amending Article 16.[130] De Wet accurately argues that the Rome Statute is barred in law to amend the UN Charter.[131] Giving the General Assembly power to act in instances of inaction by the Security Council through Article 16 alters the relationship between these two organs.[132] The relationship of UN organs is governed by the UN Charter alone and not the Rome Statute. Therefore it is inconceivable in law for Article 16 to be amended as per the AU suggestion.[133] "In a nutshell, the proposed amendment implicates the relationship not only of the UN and the ICC but also that between the two important UN organs: the Security Council and the General Assembly.[134]

[123] ISS Position Paper, *supra* note 20 at 5 and Ciampi, *supra* note 8, at 885.
[124] Rome Statute, art. 16.
[125] ISS Position Paper, *supra* note 20, at 5 and Jalloh C. *et al, supra* note 5, at 11.
[126] *Id* and Ciampi, *supra* note 8, at 890.
[127] Jalloh C. *et al, supra* note 5, at 9.
[128] *Id*, at 11.
[129] ISS Position Paper, *supra* note 20, at 15.
[130] *Ibid.*
[131] ISS Position Paper, *supra* note 20, at 16 citing Erika de Wet, 'Africa and International Justice: Participant or target, Speaking notes on the AU's proposed amendment of Article 16 of the Rome Statute at the conference on the Al Bashir warrant', 26 April 2010.
[132] ISS Position Paper, *supra* note 20, at 16.
[133] *Id.*
[134] Jalloh C. *et al, supra* note 5, at 29.

The AU's proposed amendment also fails to take note of the fact that the Security Council at times takes longer than 6 months to make a decision and that the lack of a decision on the part of the Security Council is not always premised upon negative reasons.[135] The veto power empowers the permanent members to also oppose any action that might threaten peace and security in the world.[136]

If one is being mindful of the preamble of the Rome Statute which affirms that the most serious crimes of concern to the international community as a whole must not go unpunished, the States Parties determination to put an end to impunity[137] and the jurisprudence from ad hoc tribunals, a deferral of the Darfur situation is not desirable. Such a deferral should never be entertained because of the negative effect it will have over the situation in Darfur resulting in the impunity of President al-Bashir.

It is instructive to note an argument proffered by some scholars that from a "legal point of view[…] one cannot exclude that the Security Council may exercise its 'positive' and 'negative' powers in relation to one and the same situation. It seems problematic to deny that the Security Council has the power to suspend the Court's investigations or prosecutions […] with respect to a situation it referred to the ICC[…]Nor is it easy to envisage limits to the discretion of the Security Council in relation to the[…]deferral."[138] However, this min-dissertation concurs with Ciampi[139] who notes that it would also be very suspicions for the Security Council to refer a matter then later on defer it on the basis of Chapter VII of the UN Charter.

"Article 16 is understood by many states as being limited to deferrals of investigations or prosecutions on a case-by case basis,…although the provision allows the Security Council a limited power of intervention in the workings of the ICC, it was not intended as a means by which the Security Council can undermine the nascent court."[140] Ciampi accurately concludes that Article 16 should be read as providing for the power of the Security Council to defer a 'situation', not cases, pending before the Court. Ciampi adds that a deferral specifically designed in relation to the prosecution of President al-Bashir would amount instead to the recognition of the power of the Security Council actually to select the target of the Court's investigation and prosecutions, including 'cases' (not) to be commenced or proceeded with under the Statute.[141]

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[135] *Ibid.*
[136] *See* Blum, 'Who killed Article 12 of the United Nations Charter? 129.' (Cited from ISS Position Paper, *supra* note 24, at 16).
[137] Preamble of the Rome Statute, paras (4)-(6).s
[138] Ciampi, *supra* note 8, at 889.
[139] *Id.*
[140] ISS Position Paper, *supra* note 20, at 10 and Jalloh C. *et al, supra* note 5, at 20.
[141] Ciampi, *supra* note 8, at 889-890.

The ICC is an independent international organization, but is has close and important relationship with the United Nations.[142] Therefore, it is imperative for the international community to be guided accordingly by Ciampi's legal argument that the " obligation of the Security Council to act consistently with the object and purpose of the Statute also flow from the Relationship Agreement between the ICC and the United Nations, concluded pursuant to Article 2 of the Statute.[143] This agreement recognises the status and mandates of both institutions under the respective provisions of the Charter and the Statute.[144] "In particular, while the Court recognises 'responsibilities of the UN under its Charter', the UN recognises 'the Court as an independent judicial institution which…has international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.'"[145] Schabas concludes that "it should be obvious enough that one organization cannot oblige another to a meeting of minds."[146] Thus, Article 16 can never be amended to constitute a basis for altering the relationship between the ICC and the UN or the internal operation of the organs of the UN.

In view of the on-going one hopes therefore that the deferral power granted to the Security Council under Article 16 should be used only in exceptional circumstances and not for politicising matters pending before the Court or for advancing impunity.

[142] Schabas W (3rd ed) (2007) An Introduction to the International Criminal Court Cambridge: Cambridge University Press, at 63.
[143] Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 4 October 2004 (entered into force upon signature), available on the Official Journal of the Court, at http://www.icc-cpi/about/Official.Journal.html (cited from Ciamp, *supra* note 7, at 890).
[144] Ciampi, *supra* note 8, at 890.
[145] *Id*, citing art 1 & art 4 of Agreement.
[146] Schabas, *supra* note 142, at 63.

CHAPTER 3: JURISDICTION AND LIABILITY

3.1. The Principle of Complementarity under the Rome Statute

As noted in chapter 1, this discussion utilizes inter alia the principle of complementarity to garner support for the ICC's indictment of President al-Bashir. Furthermore, in order to understand the ICC's jurisdiction over the situation in Darfur and the liability of President al-Bashir under international criminal law principles, one must be familiar with how the principle of complementarity operates.

The ICC is a Court of last resort.[147] Unlike ad hoc tribunals such as the ICTY and ICTR that have primacy over national courts- the ICC must defer to the competence of domestic courts.[148] By virtue of paragraph 10 of the Preamble of the Rome Statute and Article 17 thereof, the ICC is required to rule a case inadmissible when it is being appropriately dealt with by the national justice system.[149] It is only when the national courts are unwilling or unable to prosecute the alleged offences that the jurisdiction of the ICC is triggered.[150] This principle, which is known as complementarity, applies irrespective of the manner in which the Court came to be seized with a matter, including a Security Council referral.[151]

National prosecutions of international crimes are regarded as preferable to international prosecution, for political, sociological and practical reasons.[152] Such prosecutions are often regarded as having greater legitimacy, as being more directly grounded in the popular will and subject to democratic accountability. National prosecutions are also viewed as the primary vehicle for enforcement of international criminal justice.[153] This approach takes cognisance of the fact that international tribunals cannot try every individual alleged to have committed international crimes.[154]

National prosecutions contribute to the deterrent effect on other perpetrators within the region. They take place much more quickly and efficiently than international ones because they are backed by essential resources and rules of enforcement such as a police force, judicial and local expertise on cultural and ethnical nuances that the ICC

[147] *See* in general Benzing M, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between States Sovereignty and the Fight against Impunity', (2003) 7 *Max Planck Yearbook of United Nations Law* 591.
[148] Van der Vvyer, *supra* note 11.
[149] Rome Statute, art 17 and Du Plessis, *supra* note 30, at 41.
[150] Burke-White W 'Implementing A Policy of Positive Complementarity in the Rome System of Justice' (2008) *19 Criminal Law Forum* 59.
[151] Van der Vvyer, *supra* note 11, at 10.
[152] Cryer R *et al* (2007) *An Introduction to International Criminal Law and Procedure* Cambridge: Cambridge University Press and Du Plessis, *supra* note 30, at 42.
[153] IBA Manual, *supra* note 40.
[154] Burke-White W, *'*Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International criminal justice', (2008) *49 Harvard International Law Journal* 53.

might not be familiar with.[155] Its proximity to the territory where the crimes were alleged to have been committed might contribute to a participation of those whose lives were adversely impacted and hopefully contribute to reconciliation and peace within the region if justice is seen to have been done.[156]

Complementarity allows States to retain their right and responsibility to investigate offences committed on their territory or by their nationals.[157] This principle ensures that only the most serious/grave of crimes reach the ICC.[158] This in turn results in efficiency of the Court.[159] The principle also prevents the shielding of perpetrators of crimes (resulting in impunity) by State entities through conducting of sham proceedings. This is because a prosecution at the domestic level does not automatically exclude the ICC's jurisdiction. If proven that there was miscarriage of justice during the process, the ICC is empowered to step in.[160]

Complementarity also serves the interest of the defendants in criminal proceedings. For example, it ensures that an individual is safeguarded from the likelihood of being tried twice for the same offence by national courts and the ICC where there is no evidence that the national proceedings were a sham or resulted in miscarriage of justice *(res judicata)*. Ultimately, complementarity ensures that there is no conflict or overlap between national courts and the ICC.

Sudan's leadership is involved in the commission of atrocities in Darfur. Thus, it is doubtful that Sudan will ever conduct genuine criminal proceedings. Sudan has openly displayed that it will not prosecute President al-Bashir for the alleged offences. This is sufficient proof of Sudan's unwillingness to prosecute. In accordance with the principle of complementarity the ICC therefore, has jurisdiction over the offences alleged to have been committed in Darfur.[161] "The fulfilment of the aims and the objectives of the ICC on the African continent- in particular through the complementarity regime- are dependent on the support of African states and administrations, the AU and relevant regional organisations, the legal profession and civil society. Meeting this need requires commitment to a collaborative relationship between the stakeholders and the ICC."[162] In order to combat impunity in Darfur it is crucial for the AU to concede that the ICC has jurisdiction over the situation by virtue of the operation of the principle of complementarity. The AU must therefore support the ICC's efforts to apprehend President al-Bashir.

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[155] Du Plessis, *supra* note 30, at 41.
[156] *See* position paper by Richard Dicker of Human Rights Watch, available at http://www.hrw.org/news/2011/06/27/observations-and-recommendations-international-criminal-court-and-african-union (accessed 31 July 2012).
[157] Du Plessi M (ed) (2008) *African Guide to the International Criminal Justice* Pretoria: Institute for Security Studies.
[158] Van der Vvyer, *supra* note 11.
[159] Cassese A (2nd ed) (2008) *International Criminal Law* Oxford: Oxford University Press, at 351.
[160] Van der Vvyer, *supra* note 10, at 10.
[161] *Id,* at 11.
[162] Du Plessis, *supra* note 30, at ix.

3.2. Analysis of the jurisdiction created by Res. 1593 (2005)

Sudan is not a state party to the Rome Statute. Therefore, in principle, the ICC has no jurisdiction over Sudan. Res. 1593 (2005) triggered the ICC's jurisdiction over a particular situation in Sudan. The resolution did not explicitly confer jurisdiction of the ICC over the whole of Sudan but on the situation in Darfur alone.[163] The provision in the Rome Statute which gives authority to the Security Council to refer situations to the ICC acting under chapter VII of the Charter of the UN is Article 13(b) of the Rome Statute.

Article 13(b) was not referred to in the Res. 1593 (2005). However, the PTC-I in the al-Bashir Arrest Warrant decision[164] held that "the Security Council had accepted that investigations and prosecutions from the Darfur situation will take place in accordance with the statutory framework provided for in the statute…" If this is the case then a legal argument can be made that the Security Council by referring a situation to the ICC is granting jurisdiction to the Court even in the case of a non-state party to the Rome Statute without stating the specific article. To quote Akande: "at a minimum, the referral of a situation to the ICC is a decision to confer jurisdiction on the Court in circumstances where such jurisdiction may otherwise not exist."[165]

Existing legal arguments adopt the position that the provisions of Chapter VII of the UN Charter empower the Security Council with broad powers for the maintenance of peace and security.[166] The provisions understood to in support of this position are Article 39 and 41 of the UN Charter. Article 39 gives the Security Council the primary responsibility for determining whether a threat to peace or breach of peace has occurred.[167] Article 41 gives the Security Council the primary discretion to decide on the appropriate measure to take when a threat to peace or a breach of peace exists.[168]

In support of the above interpretation, Amnesty International[169] cites the ICTY which in 1995, when it was called to review the validity of its establishment clarified that "the establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41" of the UN Charter.[170] The ICTY argued that although the Security Council is not a judicial organ and is not provided with judicial powers, it resorted to the establishment of a judicial organ in the form of an

[163] Akande (2009), *supra* note 20.
[164] Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al Bashir* (ICC-02/05-01/09), Pre- Trial Chamber 1, 4 March 2009 [henceforth : President al-Bashir Arrest Warrant case].
[165] Akande (2009), *supra* note 20.
[166] Amnesty International Annual Report, *supra* note 101, at 41.
[167] UN Charter, art 39.
[168] UN Charter, art 41.
[169] Amnesty International Annual Report, *supra* note 101 at 41.
[170] Tadic case, *supra* note 47, at para36.

international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security.[171]

In addition, the Security Council also has the power to call upon members to apply such measures it deems appropriate in the maintenance of peace and security. This authority is enshrined in Article 25 of the same Charter which obliges member states to perform whatever measures that have been decided by the Security Council.[172] Therefore, if the Security Council, by exercising its Chapter VII powers and through a resolution refers the situation to the ICC, then even states not party to the Rome Statute are obligated to cooperate with the Court because the resolution emanates from the Security Council acting under Chapter VII.[173] However, there is a caveat; a non-member state to the Rome Statute is only bound to cooperate with the ICC, if the resolution expressly states such an obligation.[174]

Resolution 1593 (2005) has no explicit obligation for states other than Sudan to cooperate with the ICC. The example often cited to corroborate this reasoning is the unanimous Resiolution 1973 (2011) on the situation in Libya.[175] The Security Council passed this resolution when it referred the situation in Libya to the ICC. Resolution 1973 (2011) had express terms which called upon states to cooperate with the ICC. Many argue that a resolution like that will always get the support of a lot of countries because of the unanimous votes it received before it was passed and the express terms contained in it.[176]

On the other hand, Security Council referrals are problematic because they potentially limit the ICC prosecutor's discretion.[177] The Security Council is a highly politicized body and decisions to refer cases to the ICC will be highly affected by political influences. For instance Article 6 of Res. 1593 (2005) decides "…that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute […] shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State" This article is viewed by some commentators as taking away the whole essence of the ICC as it was set up to punish impunity.

According to Amnesty International,[178] who are opposed to Article 6 of Res. 1593(2005), by having a provision like that in a Security Council resolution one has

[171] Tadic case, *supra* note 47, para36 and para38.
[172] UN Charter, art 25.
[173] Akande (2009), *supra* note 20, at 336
[174] *Id.*
[175] Resolution 1973 (2011), *supra* note 28.
[176] Amnesty International Annual Report, *supra* note 101 at 41.
[177] Gallavin C, 'Prosecutorial discretion within the ICC: Under the Pressure of Justice', (2006) *17 Criminal Law Forum* 43-58.
[178] *Supra* note 101.

to ask the obvious question: Are there people excluded from prosecution before this Court? To alleviate the irregularity created by Article 6 of Res. 1593(2005) Ciampi[179] argues that Article 53 of Rome Statute which governs the ICC prosecutor's discretion to initiate an investigation, is exceptional in nature and does not cover provisions like Article 6 of Res. 1593 (2005). Ciampi credibly concludes that despite the existence of Article 6 in Res. 1593 (2005), there is a presumption in favour of investigation or prosecution because this falls within the mandate of the Office of the Prosecutor of the ICC.[180] Therefore, the answer to the question posed above by Amnesty International is that no person should be excluded from prosecution before the ICC.

Another problematic feature of a Security Council referral that has been cited is that it tends to predetermine the legal position of questions embedded in a situation it refers to the ICC.[181] Res. 1593 (2005) was passed following the Report of the International Commission of Inquiry on Darfur.[182] This report found out that there was no genocidal intent in the Darfur situation.[183] With a report this exhaustive, many believe it is already predetermining the outcome of the prosecution.[184] The view expressed is that such a report clouds the prosecutor's judgement when he is expected to conduct an independent investigation and meddles with the Court's jurisdiction over a situation. This once again points to the unsettled controversy surrounding the involvement of the Security Council in the work of the ICC. However, despite these shortcomings of Res. 1593 (2005) what emerges from the above discussion is that the resolution did effectively trigger the ICC's jurisdiction over the situation in Darfur.

3.3. The Principles governing the ICC's jurisdiction over President al-Bashir

Res. 1593 (2005) was the trigger for the ICC's jurisdiction over the situation in Darfur. However, the ICC's jurisdiction over the situation in Darfur is actually premised on principles of international criminal law. The Lotus case[185] is authority that states have jurisdiction over all crimes committed over their territory. As we have established earlier on under the discussion of the principle of complementarity, the ICC is in a position to assume jurisdiction on behalf of Sudan. This assumption makes the Court the 'territorial State' in this instance. The ICC must therefore link the alleged offences of President al-Bashir to the territory of Darfur in order to affirm its jurisdiction.

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[179] Ciampi, *supra* note 8, at 893.
[180] *Id.*
[181] Amnesty International Annual Report, *supra* note 101 at 41.
[182] *Supra* note 95.
[183] *Supra* note 95, at 3: The report stated to be, "*Based on a thorough analysis of information gathered in the course of its investigations, the commission established that the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law.*
[184] Amnesty International Annual Report, *supra* note 101 at 41.
[185] *France v Turkey* (1927) PCIJ Rep. Ser. A, No 10.

The advantages of the territoriality principle are that the collection of sufficient evidence for a criminal prosecution is easy to accomplish in the place where the crime was committed; the territorial State is where the rights of the defendant are best protected since it is expected that he will have some knowledge of his rights at the trial and the participants in the proceedings will know the culture and language of the territorial State. In addition, deterrence and rehabilitation are best served at local level.[186]

Personal (ratione personae) jurisdiction under the Rome Statute is defined as the Court's jurisdiction over nationals of States parties, regardless of where the acts were perpetrated. Akande argues that Res. 1593 (2005) places the ICC in a position analogous to that of a State party.[187] Therefore, it is accurate to concluded that Res. 1593 (2005) also affords the Court the exercise of personal jurisdiction over President al-Bashir and any other individuals in Sudan who are alleged to have committed atrocities in Darfur.

The jurisdiction of the ICC over the above individuals may also be validated on the basis of the nationality principle by proving that President al-Bashir is a national of Sudan whom the ICC has jurisdiction over by virtue of Res. 1593 (2005). This is in keeping with the decision of the Nottebohm case,[188] which established that States have the right to legislate with regard to the conduct of their nationals.

The atrocities alleged to have been committed in Darfur have been classified as "genocide, crimes against humanity and war crimes", all of which are crimes which the ICC has jurisdiction over. This jurisdiction of the ICC over core crimes is known as subject-matter (ratione materiae) jurisdiction. In order for the ICC to exercise this type of jurisdiction, it must abide by the different requisite of the mother principle, that of legality. The principle of legality inter alia requires that criminal behaviour be laid down as clearly as possible in the definition of the crime.[189] The principle of *nullum crimen sine lege* enshrined in Article 22 of the Rome Statute which derives from the principle of legality[190] enables the Court to have jurisdiction over the alleged offences. This principle is to the effect that there is no crime unless the conduct was a crime at the time of commission.[191] The acts President al-Bashir is alleged to have committed constituted offences in terms of the Rome Statute at the time they were committed. Thus, the Court can also use this principle to argue in favour of the exercise of its jurisdiction over President al-Bashir.

[186] See generally Reisman M W, 'Institutions and Practices for Restoring and Maintaining Public Order', (1995) 6 *Duke J Comp & Int'l L* 175.
[187] Akande (2009), *supra* note 20, at 342.
[188] *Nottebohm Case (Liechtenstein v. Guatemala); Second Phase* [1955] ICJ.
[189] Werle, *supra* note 1, at 33.
[190] Schabas, *supra* note 142, at 413-16.
[191] Werle, *supra* note 1, at 32.

The temporal jurisdiction (ratione temporis) of the ICC is defined in terms of its Article 11.[192] Schabas notes that Article 11 is interrelated to Article 22 of the Rome Statute which governs non-retroactivity.[193] The ICC only has jurisdiction over crimes committed after the entry into force of the Statute.[194] The Security Council therefore cannot retroactively trigger the application of the Statute by empowering the ICC to deal with any crimes committed prior to 1 July 2002.[195] The conflict in Darfur commenced in 2003, thus the ICC can investigate the alleged offences of President al-Bashir because they fall within the temporal ambit of the Court.

According to Werle,[196] crimes under international law are directed against the interests of the international community as whole. It follows from this universal nature of international crimes that the international community is empowered and obliged to prosecute and punish these crimes, regardless of who committed them or against whom they were committed.[197] The authority to punish derives from the crime itself ("criminal jurisdiction is based solely on the nature of the crime").[198] The offences alleged to have been committed are also of a jus cogens nature from which no derogation is permitted.[199] There is an obligation erga omnes on Sudan to prosecute the alleged perpetrators failing which another State may prosecute on the basis of universal jurisdiction and in this instance the ICC is empowered to act as another State would. The Eichmann case,[200] which affirms the principle of universal jurisdiction, is authority for asserting the Court's universal jurisdiction over the situation in Darfur and over President al-Bashir.

3.4. Liability of President al-Bashir under International Criminal Law principles

Article 28 of the Rome Statute establishes responsibility of a commander and other superiors. The ICC exists to try perpetrators of the core crimes of international law and at the highest level.[201] National courts will continue to cater for the lower ranking offenders. This phenomenon is not peculiar to the statute of the ICC. This was the basis of the Nuremberg and Tokyo tribunals. The Rome Statute goes a step further to distinguish between military and non-military superiors. The SCSL preamble aptly sums up the purpose of international tribunals: they are created to try those who bear the greatest responsibility for international crimes. The jurisprudence of

[192] Schabas, *supra* note 142, at 419.
[193] Schabas, *supra* note 142, at 274.
[194] Rome Statute, art 11.
[195] Van der Vvyer, *supra* note 11.
[196] Werle, *supra* note 1, at 58.
[197] *Id.*
[198] *See* Principle (1) of the *Princeton Principles on Universal Jurisdiction*, in S.Macedo (ed.), *Universal Jurisdiction* (2004), p. 21. (cited from Werle, *supra* note 1, at 59).
[199] Barcelona Traction case ICJ Reports 1970.
[200] *Attorney-General of Israel v. Adolf Eichmann,* (1968) 36 ILR 227 (Supreme Court of Israel).
[201] Van der Vvyer, *supra* note 11, at 13.

international criminal tribunals[202] and state practice affirm this approach to atrocities.[203]

Superior or command responsibility is a distinct mode of liability in international criminal law[204] and has no paradigms in national legal systems.[205] Superior or command responsibility though a recent and original creation of international criminal law,[206] is a principle that is now anchored firmly in customary international law.[207] The principle takes a very different approach to the nature of the requisite link between the conduct of the accused and that of the direct perpetrator(s) of the criminal offence.[208] It is well established that certain eligible superiors may be held responsible for offences committed by their subordinates, even though the superior made no contribution to the criminal activity at all.[209] Liability is usually premised upon omission to act in order to prevent the atrocities being committed by subordinates or facilitating the commission of the offence.[210] In this regard the superior is viewed as either having grossly neglected his duty to prevent the atrocities by virtue of the authority he exercises over subordinates or acquiesced to their commission by his failure to act.[211]

Superior responsibility also reflects an individual's liability for the failure to prevent or punish the criminal conduct of their subordinates.[212] Although the charge against the superior is determined by the conduct of their subordinates, their liability is predicated on their own culpable failure.[213] The Oric case[214] is authority that a superior is generally viewed to possess effective control and material resources to prevent or punish the commission of offences by subordinates.

President al-Bashir satisfies the three elements of superior responsibility, namely that as Head of State and military leader he had a 'superior – subordinate' relationship with his troops, that he as the military leader knew or had reason to know (the mental element) that his subordinates (the troops) were committing or about to commit offences and that he failed to take the necessary measures to prevent the subordinates from committing crimes and or punish the subordinates for the crimes (physical element). He is also culpable as head of the government which

[202] *Prosecutor v Akayesu,* Case No.ICTR-94-4-T, Judgment, 2 September 1998 (TC); *Prosecutor v Bagilishema,* Case No.ICTR-95-1A-A, Judgment, 3 July 2002, (AC); *Prosecutor v Blaskic,* Case No.IT-95-14-PT, 29 July 1997 (AC); *Prosecutor v Delalic,* Case No.IT-96-21-T, 23 July 1997 (AC); *Prosecutor v Halilovic,* Case No.IT-01-48-AR73, 21 June 2004 (AC); *Prosecutor v Naser Oric* (Trial Judgment), IT-03-68-T, (ICTR)30 June 2006.
[203] Werle, *supra* note 1, at 131.
[204] IBA Manual, *supra* note 40, at 283.
[205] Werle, *supra* note 1, at 128.
[206] *Id*, at 128.
[207] *Ibid*, at 129.
[208] IBA Manual, *supra* note 40, at 283.
[209] *Ibid*.
[210] *Ibid*, at 284 and Werle, *supra* note 1, at 128.
[211] IBA Manual, *supra* note 40.
[212] Werle, *supra* note 1, at 129.
[213] IBA Manual, *supra* note 40, at 284.
[214] *Supra* note 202.

is alleged to have furnished the militia groups with weapons and financed their activities in Darfur that resulted in atrocities being committed.

The government of Sudan has declared that it will not prosecute President al-Bashir. This is evidence of the State's failure to punish President al-Bashir for the alleged criminal conducts. President al-Bashir as the Head of State and the military embodies the government of Sudan as its superior, thus the ICC has justification to hold him liable for the atrocities committed by his troops.

CHAPTER 4: IMMUNITY AND IMPUNITY

4.1. The relationship between immunity and impunity

Immunity though very different from impunity can promote the latter. "A high degree of immunity could ultimately protect the most powerful authors of crimes under international law."[215] The Rome Statute makes it clear that traditional immunities do not apply to those officials suspected of committing acts prohibited by the Statute.[216] The international community has made great strides in eroding immunity in an effort to do away with impunity. In the Rome Statute, Article 27 epitomises this erosion of immunity. Article 27 stipulates the irrelevance of official capacity and states that the Rome Statute applies equally to everyone regardless of the office of the accused and points out that no immunities or special procedural rules which may attach to a person under national or international law shall bar the Court from exercising its jurisdiction over such a person.[217]

Wirth[218] says immunity describes a negative set of rules; namely when a court may not hear a case. Immunity, if available, prohibits all kinds of measures, including extradition and surrender, and not only the actual trial.[219] Immunity can be divided into two categories, namely functional and personal immunity.[220] Functional immunity (immunity ratione materiae or 'subject matter' immunity) protects an individual from liability for conduct performed on behalf of the state (official acts). Personal immunity (immunity ratione personae or 'procedural' immunity) attaches to the person and provides protection from legal process regardless of the nature of the act in question.[221]

Sovereign equality of States (known as the principle of *par in parem non habet iudicium*)[222] under international law has traditionally resulted in State representatives being granted immunity from foreign jurisdictions.[223] State officials still enjoy the benefit of strong immunity claims (both functional and personal) before national courts. Slye[224] points out that personal immunity[225] may be waived by the diplomat's

[215] Werle, *supra* note 1, at 172.
[216] Gaeta P, 'Official Capacity and Immunities', in Cassese A *et al* (eds) (2002) 'The Rome Statute of the International Criminal Court: A Commentary' Oxford: Oxford University Press, Volume I, p994. See also: Kress & Prost (2008) at 1607.
[217] Rome Statute, art 27.
[218] Wirth S, 'Immunities, Related Problems, and Article 98 of the Rome Statute', (2001)12 *Crim LF* 429 at 430.
[219] *Ibid* and Werle, *supra* note 1, at 173.
[220] Slyle R.C, 'Immunities and Amnesties', (2009) *African Guide to International Criminal Law* 181.
[221] *Ibid* and Werle, *supra* note 1, at 173.
[222] *See Prosecutor v. Blaskic,* ICTY (Appeals Chamber), judgement (on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997) of 29 October 1997, paras.38, 41.
[223] Akande D, 'International Law Immunities and the International Criminal Court' (2004) 98 Am J Int'l L 419.
[224] *Id*, at 413.
[225] Codified in the Vienna Convention on Diplomatic Relations of 1961.

state, as the immunity is the right of the state and not of the individual.[226] The "Personal immunity does not prevent criminal liability as such, but only creates an obstacle to prosecution."[227] Pinochet case[228] is authority that diplomats may be prosecuted after they no longer hold a diplomatic position for unofficial acts committed while they were diplomats but functional immunity remains intact (before national courts).

As Akande[229] notes, unless President al-Bashir chooses to surrender himself voluntarily (which is most unlikely), the Court needs a state to arrest him and turn him over to the Court because the ICC has no independent powers of arrest. The question that arises is whether President al-Bashir is immune from arrest by national authorities acting to support the ICC? According to some legal scholars, "…the immunity accorded to a serving head of state…from foreign domestic criminal jurisdiction (and from arrest) is absolute and applies even when he is accused of committing an international crime."[230] The ideal position to adopt towards this incongruity is to accede that, to allow immunity at the national level to defeat arrest and surrender to the Court is to prevent the Court from exercising its jurisdiction,[231] therefore immunity should not be permitted even before national courts.[232]

The PTC-I's decision in President al-Bashir's Arrest Warrant case[233] did not consider whether immunity is to be respected at the national level. Akande[234] however, persuasively concludes that the text of Article 27(2) which states that not only international immunities, but also national law immunities, shall not bar the exercise of the Court's jurisdiction is evidence of removal of immunities at the national level as well. This arguably is a legal ground for barring immunity at the national level.

International criminal law therefore, no longer supports either functional or personal immunity before an international criminal tribunal, nor does it absolutely support the defence of functional immunity before a national court.[235] The Tadic case[236] is authority that absolute immunity has been done away with. Though a state official may not be held criminally liable for his official acts, it is clear that since Nuremberg, certain acts have become per se unofficial: torture, genocide, crimes against

[226] Akande (2009), *supra* note 20 at 339 who agrees with Slye, *supra* note 220.
[227] *See* Cassese A, 13 *Journal of International Law* (2003) 853 at 864 and Werle, *supra* note 1, at 172.
[228] *R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte,* [1999] 2 All ER 97, 144 (House of Lords).
[229] Akande (2009), *supra* note 20 at 351.
[230] *Id*, at 334.
[231] *Ibid,* at 336.
[232] *See* Art. 6(2) of the Statute of SCSL, Art. 7(2) of the Statute of ICTR, Art. 6(2) of the Statute of ICTY, Art. 7 of the Nuremberg Charter which echo Art. 27 of the Rome Statute and the position advanced above.
[233] *Supra* note 6.
[234] Akande (2009), *supra* note 20.
[235] *Id*.
[236] Tadic case, *supra* note 47, "… It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State Sovereignty be allowed to be raised successfully against human rights." para. 58.

humanity, war crimes and aggression.[237] Lord Brown-Wilkinson accurately summed it up as follows: "How can it be for international law purposes an official act to do something which international law itself prohibits and criminalises?"[238] The jus cogens nature of the rules prohibiting international crimes, 'trumps' the non-jus cogens rules that govern immunity.[239] There is also evidence of a developing customary rule to the same effect.[240]

The Furundzija case[241] asserts that the absolute nature of functional immunity has been greatly diminished. The ICJ,[242] ICTY[243] and SCSL[244] jurisprudence and other authorities heavily suggest that both of the above immunities do not apply before an international tribunal. As evidenced through statutes of various international criminal tribunals[245] the lack of such immunity is primarily based on treaty law. Ratification of a treaty is implied to be a waiver of any immunity in existence.

From the fore-going we can see that "…international law has resolved the tension between immunity and international criminal law almost exclusively in favour of international criminal law."[246] Akande[247] citing a number of states that have adopted domestic legislation implementing (implicitly or explicitly) provision of the Rome Statute[248] concludes that state practice of parties to the Rome Statute suggest that they view Article 27 as removing immunity before both national and international courts.

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[237] *Ibid*.
[238] Pinochet case, *supra* note 228.
[239] Akande (2004), *supra* note 223.
[240] *In re Goering & others,* (1946) 13 International Law Reports 203 221, See also Akande D & Shah S 'Immunities of state officials, international crimes, and foreign domestic courts' (2011) *European Journal of International Law* 185.
[241] *Prosecutor v Anto Furundzija* Case No IT-95-I-T para. 140 (10 Dec 1998)(noting that 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.')
[242] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) 2002 ICJ Reports 3.
[243] *Prosecutor v Blaskic* ,Objection to Issue of subpoena duces tecum,IT-95-14-AR, 110 ILR 609 para. 41.
[244] *Prosecutor v Taylor* 128 International Law Reports 239 (31 May 2004) & *Amicus Brief in the Matter of David Anyaele and Emmanuel Egbuna v Charles Ghankay Taylor and Others*, A submission from the Open Society Justice Initiative to the Federal High Court of Nigeria, Abuja Division (2004).
[245] ICTY, ICTR, SCSL and ICC.
[246] Werle, *supra* note 1, at 174.
[247] Akande (2009), *supra* note 20 at 338.
[248] *See* Canada's Crimes Against Humanity and War Crimes Act (2000), Estonian code of Criminal Procedure (2003)New Zealand's International Criminal Court Act (2000), United Kingdom International Criminal Court Act (2001), Swiss Federal Law on Cooperation with the International Criminal Court (2001), Malta's International Criminal Court Act (2002), Samoan International Criminal Court Act (2007), South Africa's Implementation of the Rome Statute of International Criminal Court Act (2002) and The Commonwealth's Model to implement the Rome Statute of the International Criminal Court.

4.2. Analysis of Article 27 and Article 98(1)

Article 27 does away with immunity[249] whereas Article 98 as a whole limits the amount of cooperation from member states to the ICC if the request from the Court is contrary to a state's international law obligations.[250] Akande explains that Articles 27 and 98 are different in nature because Article 27 relates to the Court's jurisdiction, while as Article 98 relates to surrender or assistance which is technically an exercise of the requested state's jurisdiction.[251]

Van der Vvyer[252] cites Rinoldi[253] who deduces that Article 98(1) "clashes with the spirit of the Statute and…with Article 27(2)." Which article according to Van der Vvyer[254] discards immunities and special procedural rules which may attach to official capacity of a person indicted to stand trial at the ICC. Since the ICC cannot execute arrest warrants by itself and cannot conduct trials in absentia, using Article 98(1) to justify a failure to comply with a request for surrender or assistance would in practice bar the Court from exercising its jurisdiction over Heads of State, rendering Article 27 ineffective.[255] This makes Article 27 and 98(1) closely related.[256]

According to leading scholarly work on the Rome Statute, read in conjunction with Article 27, Article 98(1) can only be interpreted as to refer exclusively to state or diplomatic immunity of property, which is not addressed in Article 27.[257] This interpretation is confirmed by the preparatory works concerning Article 98(1) during the negotiations of the Rome Statute.[258] Article 27 and 98(1) should be interpreted to complement each other as opposed to being in conflict with one another.[259] Scholars argue that if Article 27 is interpreted to constitute a waiver by a State party of any immunity (through ratification of the Rome Statute) and Article 98(1) is interpreted as applying only to officials of non-States Parties, the ICC would only be obliged to seek the waiver of immunity with respect to non-States Parties.[260]

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[249] Rome Statute, art 27.
[250] Rome Statute, art 98.
[251] Akande (2009)*, supra* note 20, at 338 and Amnesty International Annual Report 2012, *supra* note 101.
[252] Van der Vvyer, *supra* note 11 at 4.
[253] Rinoldi, in Dino Rinoldi & Nicoletette Parisi, 'International co-operation and judicial assistance between the International Criminal Court and states parties' *Essays on the Rome Statute of the International Criminal Court* 339 389 (eds Flavia Lattanzi & William A Schabas, 1999).
[254] Van der Vvyer, supra note 11.
[255] Kress C & Prost K (2nd ed) (2008) 'Article 98 Cooperation with respect to waiver of immunity and consent to surrender' in Otto Triffterer (ed) 'Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article' Munich: C.H. Beck, Oxford: Hart and Baden-Baden: Nomos at 1607 and 1613.
[256] Akande (2004), *supra* note 223, at 425.
[257] Prost K & Schlunck A 'Cooperation with respect to waiver of immunity and consent to surrender' *Commentary on the Rome Statute of International Criminal Court* 1131 1131 (ed Otto Triffterer, 1999) and Amnesty International Annual Report 2012, *supra* note 100, at 21.
[258] *Id*, at 21.
[259] *See* Akande (2004), *supra* note 223 and Du Plessis, *supra* note 30 at 77.
[260] *See* Amnesty International Annual Report, *supra* note 101, at 18-22.

Therefore, "Article 27…affirms that official capacity neither exempts from criminal responsibility no in and of itself constitute a ground for reduction of sentence."[261] The legal argument advanced by Akande,[262] that Article 27 governs State Parties to the exclusion of Article 98(1) is a preferable interpretation of these provisions. It is inconceivable that the drafters of the Rome Statute intended to defy the spirit and purpose of the Rome Statute by promoting impunity via the auspices of Article 98.[263] The assertions advanced by some scholars that an interpretation which concludes that the above two articles are in conflict, allows States Parties to violate their treaty obligation on the basis of Article 98(1), and deprives Article 27 of its effect, is contrary to the spirit of the Rome Statute and the general purpose for the establishment of the ICC and that the principle of effectiveness that governs interpretation of treaties[264] should be upheld in order to give effect to the provisions of the Rome Statute.[265]

Citing Kress and Prost, Amnesty International concludes that Article 27(1) of the Rome Statute does away with functional immunity, Article 27(2) does away with personal immunity and Article 98(1) refers to pre-existing obligations.[266] Kress and Prost conclude that Article 98(1) does not revive immunities that are no longer accepted under international law.[267] They say the term "immunity", therefore, refers exclusively to those immunities (if any) that the third state might be able to assert under international law at the time of the request for surrender or assistance by the Court. Akande points out the same that "…Article 98 expressly allows parties to give effect to immunity obligations they owe to non-parties." As has been established above Sudan should be regarded as a state party by virtue of Res. 1593 (2005). Many scholars of repute with Gaeta[268] who argues that Article 98(1) therefore, cannot be used by a State party not to comply with a Court's request for the arrest of President al-Bashir because any immunities attaching to Sudan (now in the same position as a state party) are removed by Article 27.

In relation to cases involving non-State Parties, Amnesty International[269] argues in a manner that upholds the spirit of the Rome Statute that Article 98(1) is addressed to the Court and not to States. Rule 195 of the Rules of Procedure and Evidence of the ICC[270] describes the procedure that the requested States must follow when they believe that executing a Court's request for surrender or assistance would conflict

[261] Werle, *supra* note 1, at 175.
[262] Akande (2009), *supra* note 20.
[263] *See* Amnesty International Annual Report, *supra* note 101.
[264] *See* generally R. Gardner *Treaty Interpretation* (Oxford: OUP, 2008) at 159.
[265] Akande (2009), *supra* note 20, at 338.
[266] *See* Amnesty International Annual Report, *supra* note 101, at 19.
[267] Kress C & Prost K, *supra* note 252, at 1603 & 1606.
[268] Gaeta P, *supra* note 216, at 994. *See* also Kress and Prost (2008), *supra* note 252, at 1607.
[269] *See* Amnesty International Annual Report, *supra* note 101, at 21.
[270] *See* Werle, *supra* note 1, at 49, who notes that the Rules of Procedure and Evidence supplement and clarify the rules of procedure contained in the Statute itself and are binding on the Court and all States Parties.

with their international law obligations with respect to immunity.[271] According to Vvyer[272] this rule confirms "…that the Court cannot without the permission of the sending State insist on the surrender of a person enjoying sovereign immunity to the court."[273]

If the arrest must be executed, the requested state has to execute the arrest of the suspect first. It is the Court, not the requested state, which decides the existence and scope of any claimed immunity or makes the determination whether there is a problem under international law obligations. The Court must therefore give a ruling on whether a particular state would violate its obligations by surrendering the accused. Any state deciding so would amount to prematurely usurping the judicial function of the ICC. It is for the Court alone, not states, to decide whether to proceed with a request for surrender or assistance, when the circumstances described in Article 98(1) occur. Thus, only if the Court determines that there is a problem in execution, would the Court need to obtain a waiver of immunity from the third state.

An alternative and preferable legal argument is the one discussed below in relation to obligations of UN member states to the ICC that is advanced by some scholars, that acknowledges the supremacy of the UN Charter over the AU Constitutive Act made manifest by Article 2(4), 25 and 103 of the UN Charter. This interpretation mitigates the seeming legal anomaly created by Article 27 and 98. It is therefore imperative for all those in pursuit of international criminal justice to accede to the above interpretation. Triffterer[274] argues that Articles 27 and 98 were drafted by different committees, without giving much attention to their potential inconsistency hence the contradiction witnessed between these two articles. From the fore-going it is conclusive that the immunity of Heads of States has been done away with before international criminal tribunals and that in exceptional cases the "…personal immunity enjoyed by Heads of State and Government, foreign ministers, and diplomats only stands in the way of prosecution for crimes under international law for the duration of their tenure in office, and only in regard to state criminal courts."[275]

4.3. Analysis of Article 98(2) of the Rome Statute

Article 98(2) echoes Article 98(1) and obliges the Court to obtain the cooperation of a third State. The weight of authority suggests that this subsection is meant to apply to status of forces agreements (such as the bilateral agreements the US has entered into with a number of states, mutually agreeing not to surrender a national of the

[271] Rules of Procedure and Evidence Rule 195 *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3-10 September 2002,* Part IIA (2002) (RPE).
[272] Van der Vvyer, *supra* note 11, at 2.
[273] *Supra* note 271.
[274] Triffterer O 'Article 27', in Triffterer (ed). *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes. Article by Article* (Baden Baden: Nomos Verlagsgesellschaft, 1999).
[275] Werle, *supra* note 1, at 176.

other party to the ICC).[276] Debate over the matter is inconclusive when the other party is also a State Party to the ICC. On the other hand if both parties are non-States Parties they could arguably refuse to surrender the individual concerned. Others argue that Article 98(2) only applies to non-States Parties.[277]

Clearly the controversial aspects of this article are unsettled. Werle desperately concludes that Article 98 in its entirety does not bar the Court from seeking legal assistance but enjoins the Court to take account of existing interstate agreements to assure that they would not hinder ratification.[278] However, he does conclude accurately that against this background it is highly problematic for states like the United States to attempt to avoid the jurisdiction of the ICC by subsequently concluding bilateral non-extradition treaties.[279]

4.4. Lessons from State Practice and the Jurisprudence of International Criminal Tribunals

Since 1946, every single instrument adopted by the international community expressly involving the prosecution of crimes under international law excluded immunity for government officials.[280] These instruments were intended to reflect a general principle applicable in both national and international courts.

As pointed out earlier on, ad hoc tribunals excluded immunity for Heads of State and other government officials. Recently the ICJ found that immunity of government officials would not bar prosecution before an international tribunal.[281] It would be absurd and constitute a regress in the fight against impunity for the international community to promote immunity for international crimes in the Rome Statute, which

[276] Scheffer D, ' Article 98(2) of the Rome Statute: America's Original Intent', *Journal of International Criminal JusticeI* 3 (2005), 333-353.
[277] Akande (2004), *supra* note 223, at 407,426-429).
[278] Werle, *supra* note 1, at 177.
[279] *Id.*
[280] These include: UNGA Resolution 95(I)(1946). Nothing in the drafting history of this resolution, its text or subsequent history suggested that the principles applied only in international courts; Convention on the Prevention and Punishment of the Crime of Genocide (1948) *United Nations Treaty Series*, vol78, pp277. **Article VI** makes clear that the Genocide Convention applies in both national and international criminal courts; Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal adopted by the ILC at its 2nd session and submitted to the UNGA as a part of the Commission's report covering the work of that session. *Yearbook of the International Law Commission, 1950*, vol. II, para97, Principle III. The Nuremberg Principles are not limited to international courts; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, UNGA Resolution 2391 (XXIII), UN Doc. A/7218 (1968), Art.II. The Convention was intended to regulate proceedings before national jurisdictions and International Convention on the Suppression and Punishment of the Crime of *Apartheid* UNGA Resolution 3068 (XXVIII), UN Doc. A/9030 (1974), Art.III. **Articles IV** and **V** provide for prosecution in national and international courts.
[281] Arrest Warrant case (DRC v. Belgium), *supra* note 242, at para61.

Statute is a cumulative result of the progress that international criminal justice has achieved since Nuremberg.

Amnesty International[282] concludes that a complete analysis of the evolution of international law since 1945 shows that the rejection of immunity from prosecution for crimes under international law is based on the nature of the crimes allegedly committed, rather than on the international character of the tribunal asserting jurisdiction over those crimes. Therefore, the rule granting immunity to Heads of States and other government officials finds an exception not only when crimes under international law are prosecuted before international tribunals, but also when crimes under international law are prosecuted before national tribunals.

Citing Liivoja,[283] Akande[284] instructively notes that despite the arguments above, there is one set of immunities that may not be removed by the Security Council. He points out the immunities of representatives of the United Nations enshrined in Article 105(2) of the UN General Convention on Privileges and Immunity. He argues that since the immunities under the General Convention derive from the Charter, they are binding on the Security Council. Akande convincingly concludes that if President al-Bashir were to travel to the United States to attend a meeting of the UN General Assembly (or to any other country for the purpose of representing his country at a UN meeting) he would be immune from arrest.[285]

[282] *See* also the Dissenting Opinion of Judge Van den Wyngaert, *ibid*., in particular para31.
[283] R. Liivoja 'The Scope of the Supremacy Clause of the United Nations Charter', *57 International Comparative Law Quarterly* (2008) 583 at 567.
[284] Akande (2009), *supra* note 20, at 351.
[285] However, Karadic was arrested in a hotel in the United States whilst attempting to arrest the UN, therefore such immunity depends on the location and official ranking of the diplomat.

CHAPTER 5: STATES' OBLIGATIONS TO THE ICC UNDER INTERNATIONAL LAW

5.1. Sudan's legal obligations under Res. 1593 (2005)

According to Amnesty International, "Sudan is not a party to the Rome Statute and has not made any declaration under Article 12(3) of the Statute accepting the exercise of jurisdiction by the Court. Thus Sudan's obligation to cooperate fully with the Court does not derive from the Rome Statute, but from Res. 1593 (2005) and, ultimately, from the UN Charter."[286] This mini-dissertation accedes to the argument that the formulation of Res. 1593 (2005) clarifies this position by imposing on Sudan an obligation to cooperate with the ICC "pursuant to this resolution." However, it disagrees with the conclusion that Sudan's obligation to cooperate with the ICC is ultimately derived from the UN Charter.

The Security Council referral serves as a mere avenue for the ICC to have jurisdiction over a situation. Once the ICC has jurisdiction over a situation, its Statute is the primary focus regardless of the manner in which the Court came to be ceased with the matter or whether the State concerned is party to the Rome Statute or not. The issue of the Security Council referral falls away and the obligations upon Sudan should primarily emanate from the Rome Statute itself. Such an interpretation promotes the idea of an independent international criminal court as was intended at the Rome Conference in 1998. The power of referral granted to the Security Council through Article 13(b) of the Rome Statute is a manifestation of the desire of the international community to combat impunity not a desire to curb the independent operation of the ICC. As explained by the ICC itself,"…by using its power of referral under Article 13(b) of the Rome Statute, the Security Council automatically accepted that investigations and prosecutions into the situation in Sudan would be regulated by the Statute."[287]

According to Kress and Prost[288] the Security Council has the power to "decide explicitly or by implication that even immunities ratione personae do not constitute a bar to the cooperation of States in the execution of requests made by the Court for arrest and surrender". One has to accedes to the correct argument advance by Amnesty International that because Res. 1593 (2005) mentions Article 16 and Article 98(2) of the Rome Statute, but makes no mention of Article 98(1), Sudan cannot therefore evoke President al-Bashir's official capacity as a basis for non-cooperation.

[286] *See* Amnesty International's Report, *supra* note 101, at 41.
[287] Quoted from Amnesty International's Report, *supra* note 101, at 44 who cite UN DOC.S/25704, para126.
[288] Kress C & Prost K, *supra* note 255, at 1613.

Rastan[289] says that if the Security Council intended to limit the jurisdiction of the Court to individuals other than the head of state, it would have mentioned Article 98(1).[290] This is particularly true as the Security Council was "conscious of the possible levels of responsibility" involved in the Court's investigation and prosecution of the situation in Darfur, having examined the report of the International Commission of Inquiry on Darfur.[291] Amnesty International concludes that the Security Council accepted that the Court would apply its legal regime in its entirety regarding the situation in Darfur.[292]

Akande concludes that Res. 1593 (2005) places Sudan in the same position as a state party and like other States Parties to the Rome Statute it is bound by all the provisions of that statute.[293] A waiver of immunity by Sudan under Article 98(1) is not necessary. Van de Vvyer concludes that Res. 1593 (2005) renders Article 98(1) redundant with respect to Sudan,[294] therefore, Sudan is in essence governed by Article 27 alone. Sudan is therefore obliged in terms of Article 86 of the Rome Statute to cooperate fully with the Court.

In agreement with Amnesty International,[295] the mini-dissertation adopts the argument that the jurisprudence emanating from the ICTY Statute can be interpreted to confirm the position that the Security Council acting under Chapter VII of the UN Charter is competent to remove the immunity of Heads of States from prosecution.[296] Amnesty International cites Article 7(2) of the ICTY Statute which provided that the official position of any accused person, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment and concluded that by implication the same can be inferred in respect of the ICC.[297]

From the on-going the most plausible position to adopt is that if "the Security Council has authority to create international criminal tribunals, it must necessarily have the power of referring a situation to a treaty-based permanent international criminal court."[298] According to Amnesty International the ICC affirmed this interpretation when it said; "The Court may, where a situation is referred to it by the Security

[289] Rastan R, 'The emerging jurisprudence of the ICC: Legal issues arising from the first case-law', in Making Peace Through Justice: New development in International Criminal Law, Ling Yan (ed.) (Beijing: World Affairs Press, 2009) 16.
[290] *See* Amnesty International Annual Report, *supra* note 101, at 41.
[291] *Supra* note 286.
[292] *See* Amnesty International Annual Report, *supra* note 101, at 45.
[293] Akande (2009), *supra* note 20, at 340-342.
[294] Van der Vvyer, *supra* note 11.
[295] *See* Amnesty International Annual Report, *supra* note 101, at 41.
[296] Tadic case, *supra* note 45, at para36.
[297] UN Doc. S/25704, cited, para55.
[298] *See* Amnesty International Annual Report, *supra* note 101, at 41.

Council, exercise jurisdiction over crimes committed in the territory of States which are not party to the Statute and by nationals of States not Party to the Statute.[299]

Legal scholars[300] conclude that by virtue of Article 103 of the UN Charter, Sudan's obligation to cooperate prevails over any other treaty obligation to which Sudan is bound.[301] Article 103 establishes the supremacy of UN Charter obligations over any other international law obligations a member of the UN might have.[302] According to Akande[303] PTC-I referring to paragraph 2 of Resolution 1593 (2005) pointed out this position and emphasised that Sudan's obligations, pursuant to Resolution 1593 (2005), to cooperate fully with and provide any necessary assistance to the Court shall prevail over any other obligation that the State of Sudan may have undertaken pursuant to 'any other international agreement'".[304] Ciampi's position that Sudan also has human rights and international humanitarian law obligations, in accordance with relevant customary rules and treaties to which it is party, lends weight to the argument that Sudan is obliged to cooperate with the ICC.[305]

Therefore, as we have seen from this discussion, an important prospect of Security Council referral is that it imposes cooperation. This makes it apparent that the ICC has no obligation to seek cooperation from Sudan for the surrender of President al-Bashir or other officials but rather Sudan is obliged to cooperate with the ICC.

5.2. Obligations of States Parties to the Rome Statute

Through ratification States parties to the Rome Statute have expressly recognized that Article 27 constitutes a waiver of any claims to immunity for government officials and that heads of states are not entitled to immunity for crimes under the jurisdiction of the Court. Article 27 applies to the exclusion of Article 98(1) with regard to States Parties. According to Akande, State parties to the Rome Statute have an irrevocable obligation to cooperate with the Court.[306] This obligation to comply with the request for surrender and assistance derives from Article 59 of the Rome Statute on arrest proceedings in the custodial state and Article 86 of the same statute on the general obligation to cooperate with the ICC in investigation and prosecution of crimes within the jurisdiction of the ICC that is incumbent upon all States Parties to this Statute.

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[299] *Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Al Abd-Al-Rahman (Ali Kyshayb")*, Pre- Trial Chamber I, Decision on the Prosecution Application under Article 58(7) of the Statute, No. ICC-02/05-01/07-Corr, 27April 2007, para16.
[300] Akande (2009), *supra* note 20, Ciampi, *supra* note 7 and Amnesty International Annual Report, *supra* note 101.
[301] Akande (2009), *supra* note 20, at 334, Amnesty International Annual Report, *supra* note 101, at 41 and Ciampi, *supra* note 7 at 895.
[302] UN Charter, art 103.
[303] Akande (2009), *supra* note 20, at 335.
[304] ICC-02/05-01/09-3, cited, para247 (emphasis in the original).
[305] Ciampi, *supra* note 8 at 896.
[306] Akande (2009), *supra* note 20, at 334.

In Resolution 1593 (2005) the Security Council stated "that States not party to the Rome Statute have no obligation under the Statute." In effect the resolution imposes an express obligation to cooperate with the Court only on one non-party (Sudan).[307] This is evidence of the Security Council awareness of the fact that State parties to the Rome Statute have an obligation to the Court and will therefore be governed by Article 27.[308] The ICC affirmed such an interpretation when the PTC-I based Kenya and Chad's obligation to cooperate with the Court in the enforcement of the arrest warrant against President al- Bashir on two concurrent grounds: on Article 87 and 89 of the Rome Statute to which Kenya and Chad are parties,[309] and also the Security Council Res. 1593 (2005).[310]

According to Onyiego,[311] several AU member states that are also parties to the Rome Statute recognised that their obligations under the Statute and, ultimately, the UN Charter, prevail over their obligations under the AU Decisions. He points to the fact that Kenya originally responded to the PTC-I Decision about President al-Bashir's visit by citing its binding obligations to the AU arising from the 2009 and 2010 AU Decisions.[312] However, after the IGAD summit scheduled to take place in Kenya in October 2010, was moved to Ethiopia, Kenyan Assistant Minister for Foreign Affairs, Richard Onyonka, reportedly stated that Kenya would honour "whatever the ICC requires".[313] The government of South Africa declared that, despite the 2009 AU Decision, it would fulfil its cooperation obligations under the Rome Statute.[314] The government of Uganda likewise reiterated its commitment to the Rome Statute and support for the ICC.[315] The government of Botswana also reaffirmed, both in 2009 and in 2010, its commitment to its cooperation obligations under the Rome Statute.[316]

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[307] Akande (2009), *supra* note 20, at 343.
[308] *See* Amnesty International Annual Report, *supra* note 101, at 41-42.
[309] Van der Vvyer, *supra* note 11, at 3.
[310] ICC-02/05-01/09-107, cited; ICC-02/05-01/09-109, cited.
[311] Onyiego M "IGAD Summit Postponed Amid Controversy Surrounding Bashir Attendance", cited from Amnesty International Annual Report, *supra* note 101.
[312] Kenya, Ministry of Foreign Affairs 'Press release on Kenya's response to the Decision of the PTC-I of the ICC to refer the matter of President Omar Al Bashir's presence in Kenya to the UNSC' (2010) available at http://www.mfa.go.ke/mfacms/index.php?option=com_content&task=view&id=413 (accessed 31 September 2012).
[313] *Supra*, note 311.
[314] South Africa, July 2009 Briefing, (cited Amnesty International Annual Report, *supra* note 98).
[315] Uganda, Ministry of Foreign Affairs "Uganda committed to ICC" (2009) http://www.mediacentre.go.ug/details.php?catId=3&item=477 (accessed 31 September 2012).
[316] Botswana, Ministry of Foreign Affairs and International Cooperation, Press release (2009) http://appablog.wordpress.com/2009/07/07/government-of-botswana-position-on-au-summit-regarding-icc/, (accessed 31 September 2012) 'Botswana Stands by the ICC' (2010) http://www.gov.bw/en/News/Botswana-stands-by-the-International-Criminal-Court-/ (accessed 31 September 2012).

5.3. Obligations of States Parties to the UN Charter

Amnesty International[317] argues that the referral by the Security Council links the legal regime of the Rome Statute to the legal regime of the UN Charter. Non - States parties to the Rome Statute (including UN Members) are governed by Article 89 of the Rome Statute. This Article directs the registry to transmit arrest warrants to members of the UN. Amnesty International[318] argues that by virtue of Article 25 read together with Article 2(5) of the Charter decisions of the Security Council are binding on all UN Members.[319] In support of this position Amnesty International cites the ICJ[320] which noted that in accordance with Article 103 of the Charter, the obligations of UN member states prevail over their obligations under any other international agreement, including the directives from the AU.[321] Even though Article 23(2) of the Constitutive Act of the AU obligates all member states to "comply with the decisions and policies of the Union" (such as the directive not to cooperate with the ICC in the arrest and surrender of President al-Bashir to the Court),[322] scholars surmise that the AU Constitutive Act does not have any provision comparable to Article 103 of the UN Charter and that the UN Charter's directives are therefore superior to the directives of a regional body such as the AU.

The mini-dissertation agrees with this argument, that the AU is a regional organization, its authority on peace and security related issues is ultimately subordinate to that of the Security Council acting under Chapter VII of the UN Charter, because the Security Council regulates "regional arrangements". Akande concludes that those AU members who have membership in the UN and are party to the Rome Statute are bound to comply with the arrest warrant because Article 103 of the UN Charter establishes the supremacy of their obligation under the Charter and renders compliance with the arrest warrant mandatory.[323]

However, had it been the intention of the Security Council to bind all UN Members (including non-State Parties to the Rome Statute) to cooperate with the Court, Resolution 1593 (2005) would have established so. This was the case with the Security Council resolutions that established the ICTY and ICTR.[324] In these two resolutions the Security Council expressly called upon all UN Members to cooperate

[317] Amnesty International Annual Report, *supra* note 101, at 41.
[318] *Id*.
[319] *See* respectively art 25 and art 2(5) of the UN Charter.
[320] Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April1992, I.C.J. Reports 1992, p114 and ff., para42.
[321] UN Charter, art 103.
[322] Art 23(2) of the Constitutive Act of the African Union provides: "Furthermore, any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly."
[323] Akande (2009), *supra* note 20 at 345-348.
[324] *See* generally the Statute of the ICTY and ICTR and Akande (2009), *supra* note 20, at 343.

with these tribunals. In fact Resolution 1593 (2005) recognises "that States not party to the Rome Statute have no obligation under the Statute". In order to mitigate this situation the Security Council then "urges all States" to cooperate with the ICC.[325]

Some scholars argue that all UN members cannot use Article 98(1) as a ground to delay the execution of a Court's request for surrender or assistance in relation to arresting President al-Bashir on the basis that the obligation arises because all UN member states have accepted the jurisdiction of the Court in relation to the situation in Darfur by virtue of Resolution 1593 (2005).[326] The reply to such an argument is that the argument flies in the face of Article 34 of the Vienna Convention on the Law of Treaties (VCLT) which says that states are only bound by treaties they consented to (through ratification).[327]

In corroboration of the arguments above the mini-dissertation concedes that UN members have a duty to abide by Security Council directives with regards to peace and security. However, the ICC is exercising a judicial function over Sudan. This judicial function might lead to peace and security in Darfur, therefore, it is extreme for one to conclude that Resolution 1593 (2005) which is addressed to a single UN member (Sudan), creates an obligation on all UN Members to cooperate with the Court to enable it to carry out its judicial function. Article 36 of VCLT supplements the position of Article 34 above by clarifying that no treaty can create rights for non-parties.[328] Therefore, those states that are not party to the Rome Statute but are UN members have no obligation to the ICC. This is one instance where the Security Council resolution falls short and creates a lacuna in the fight against impunity. Ideally Resolution 1593 (2005) should have expressly addressed all UN members and not Sudan alone with regard to cooperating with the ICC.

A wishful approach, that would promote international criminal justice is the one recommended by Akande,[329] for non- parties to deny President al-Bashir's immunity and cooperate with the ICC on the basis that those immunities President al-Bashir had under international law were removed by Resolution 1593 (2005) and Article 27 of the Rome Statute. Since the removal of President al-Bashir's immunities operates by virtue of a Security Council resolution and not by treaty, all UN members must therefore disregard Article 98 of the Rome Statute because of the operation of Article 25 of the UN Charter. As we have seen, there is a legal argument to be made that Article 25 entitles UN member states to rely on Resolution 1593 (2005) (as opposed to obligated to) to justify co-operation with the ICC in the case of President al-Bashir.[330]

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[325] *Id*, at 343 and Van der Vvyer, *supra* note 11, at 12.
[326] Sluiter G, 'Using the Genocide Convention to Strengthen Cooperation with the ICC in the *Al Bashir* Case', *Journal of International Criminal Justice* (2010) 8 (2) 365, at 370-372.
[327] Akande (2009), *supra* note 20, at 343 and Amnesty International Annual Report, *supra* note 101, at 43.
[328] Akande (2009), *supra* note 20, at 345.
[329] *Id.*
[330] Akande (2009), *supra* note 20, at 348.

5.4. Obligations of States Parties to the Geneva Conventions of 1949

The Geneva Conventions of 1949 (GCs), which place an obligation on States Parties to either prosecute or extradite those who are alleged to have committed offences that are regarded as grave breaches of the GCs also raise an obligation under international law for those States who are party to the GGs to co-operate with the ICC.[331] It follows that those members of the international community (including AU members) that have ratified the GCs have an obligation enshrined in the GCs which is inter alia to either prosecute those alleged to be responsible for the grave breached of the GCs or to extradite the alleged offender to a state that will prosecute. Given that some of the offences committed in Darfur fall within the ambit of grave breaches of the GCs and that at the present moment the ICC has jurisdiction over offences committed in Darfur one can conclude that there is an obligation to arrest and surrender certain individuals to the ICC irrespective of their official capacity, President al-Bashir included.

5.5. Obligations of States Parties to the Genocide Convention of 1948[332]

According to Amnesty International[333] the charges of genocide link the legal regime of the Rome Statute to the legal regime of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Genocide Convention). Ad hoc tribunals have established that this Convention contemplates both domestic[334] and international prosecution[335] for the crime. In support of this argument, Akande[336] cites the Bosnian Genocide Convention Case[337] where the ICJ held that the Genocide Convention implicitly contains an obligation to cooperate with competent international courts, including an obligation to arrest persons suspected of genocide. The ICJ concluded that the ICTY in this case could be interpreted as a competent international court. Akande insightfully argues that the same may be applied with regard to the ICC when it is acting under a Security Council referral.

Cryer[338] states that the Rome Statute reproduces Article II of the Genocide Convention in its Article 6. However, the terms of Article III of the Genocide Convention, which set out five different forms of punishable acts were omitted. The

[331] Werle, *supra* note 1, at 51.
[332] See in general Schabas W (3rd ed) (2000) *Genocide in International Law: The Crime of Crimes* Cambridge: Cambridge University Press.
[333] Amnesty International Annual Report, *supra* note 101.
[334] Adolf Eichmann Case in Israel in 1961- for crimes against the Jewish People-was a genocide trial & Special Prosecutor v Col Mengistu Hailamariam et al.
[335] ICTY & ICTR-Akayesu, Jelisic, Kayishema & Ruzindana, Kristic cases *supra* note 162.
[336] Akande (2009), *supra* note 20, at 349.
[337] *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia Herzegovina v. Serbia & Montenegro)* 2007 ICJ Reports.
[338] Cryer R et al (2007), *supra* note 152, at 185.

forms of participation which attract individual criminal responsibility are the same as those set out for all other offences under the Rome Statute and are enumerated in Article 25 of the Rome Statute. Article 25 however, omits conspiracy to commit genocide as an offence.[339] Conspiracy to commit genocide was omitted as a form of liability because of the resistance by civil law countries, to which the notion of conspiracy was alien.[340] This gap, however, may be filled by the Statute's provision on contribution to a common purpose.[341]

Amnesty International argues that when charges of genocide are formulated under the Rome Statute, they fall within the scope of Article IV of the Genocide Convention. They cite the ICJ, which in interpreting Article VI, found that once an "international penal tribunal" has been established, Article VI obliges the Contracting Parties "which shall have accepted its jurisdiction" to cooperate with it.[342] Amnesty International concludes that this implies the contracting parties will arrest persons accused of genocide who are in their territory even if the crime of which they are accused was committed outside it and failing prosecution of them in the parties' own Courts, that they will hand them over for trial by the competent international tribunal.[343]

According to Sluiter[344], the ICC is an "international penal tribunal" within the meaning of Article VI.[345] Article VI of the Genocide Convention requires suspects to be tried either in national or in international courts. The inescapable conclusion is the one reached by the European Parliament[346] that all parties to the Genocide Convention, including those not parties to the Rome Statute have obligations that attach to the ICC to arrest and surrender President al-Bashir to the ICC. European Parliament stated in September 2010 that "countries which have ratified the UN Genocide Convention of 1948 have an obligation to cooperate with the ICC, even if they are not signatories to the Rome Statute."[347] As pointed out by Akande,[348] the other thing to be gained by finding an obligation to cooperate within the Genocide Convention is to allow the ICJ to exercise jurisdiction over a dispute about non-cooperation because Article IX of this Convention allows for reference of disputes concerning the interpretation or application of the Convention to the ICJ.

The jus cogens nature of some of the offences committed in Darfur creates obligation of erga omnes nature upon all States. It makes them matters of concern to

[339] Cassese, *supra* note 159.
[340] Cryer R et al, *supra* note 152, at 185.
[341] IBA Manual, *supra* note 40.
[342] ICJ: *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 26 February 2007, para443.
[343] *Id.*
[344] Cited at 55 in Amnesty International Report, *supra* note 101.
[345] Sluiter, *supra* note 326, para445.
[346] Cited at pp. 55 of Amnesty International Report, *supra* note 101.
[347] European Parliament 'Resolution on Kenya: failure to arrest President Omar al-Bashir' 9 September 2010.
[348] Akande (2009), *supra* note 23, at 351.

the whole international community.[349] Cassese defines jus cogens as a body of peremptory norms from which no derogation is permitted.[350] The ICJ has stated that the prohibitions of the Genocide Convention constitute part of customary international law and are of a jus cogens nature.[351] Thus, one can conclude that there is a peremptory obligation to cooperate with the Court.

[349] In terms of Article 5 of the Rome Statute, they are "the most serious crimes" and "are of concern to the international community as a whole."
[350] See Cassese (2008), *supra* note 159, at 144.
[351] ICJ: Advisory Opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951).

CHAPTER 6: CONCLUSSION

6.1. The prevailing status of International Criminal Justice

As ascertained earlier in Chapter 3, there is a legal basis for the ICC's jurisdiction over President al-Bashir. The legal arguments in Chapter 3 briefly prove President al-Bashir's liability under principles of international criminal law. Chapter 4 persuasively reconciled the tension between Article 27 and 98. The chapter also illustrates that state practice and jurisprudence of international criminal tribunals confirm the legal interpretation given to Article 27 and 98 by scholars of repute in an effort to uphold the spirit behind the creation of the ICC to eradicate impunity and diminish the negative aspects of diplomatic immunity. Chapter 5 lucidly outlined the legal obligations resting upon members of the international community to arrest and surrender President al-Bashir to the ICC.

What arises from this discussion is that though the international criminal justice is fraught with imperfections, it has made great strides towards eliminating the perverse culture of impunity for atrocities. The international community has made international criminal justice a reality in today's world order by creating the ICC. The creation of a permanent international criminal court is the greatest assurance of the international community's (Africa included) potential for and commitment to the rule of law and respect for fundamental human rights. It is in light of this prevailing status of international criminal justice that the recommendations below are made.

6.2. Recommendations to foster cooperation with the ICC

i. The Security Council issued Resolution 1593 (2005), and therefore it is obliged to take action against President al-Bashir's government for not cooperating with the ICC. Security Council action would signify the Security Council's support of the work of the ICC over the situation in Darfur. The Security Council should establish a set of sanctions against President al-Bashir and can call upon the international community for cooperation in ensuring the same. This establishes the gravity of Sudan's and States parties'[352] outright defiance of the ICC's directives. In the future it may also deter political leaders who might be emboldened by President al-Bashir's stance towards the Security Council referral and action taken by the ICC.

ii. The AU and the ICC should prioritise the establishment of a cooperation forum. There is need for the regional body to assist and complement the ICC's efforts to address atrocities committed in Darfur.

[352] Chad, Djibouti, Kenya and Malawi.

Such action would be in line with Article 4(m) and Article 4(o) of the Constitutive Act of the AU which underscore the fact that the AU shall function in accordance with respect for human rights and rule of law, condemnation and rejection of impunity.

iii. The Security Council should at minimum, discuss in detail some of the AU's contentions regarding the indictment of President al-Bashir. These contentions will undoubtedly be a recurring theme because they point to the defects of the current international criminal justice mechanism vis-à-vis world power politics. Possible action by the Security Council is to formally resolve that the amendment of Article 16 is a matter best addressed at the next Review Conference of the ICC and to emphasise the legal challenges that arise where the Rome Statute should attempt to alter the provisions of the UN Charter by giving power of deferral to the General Assembly where the Security Council fails to act.

iv. As we have seen from the discussion above, state practice and jurisprudence of international tribunals have eradicated the significance of both forms of immunities traditionally afforded to state officials. The more plausible approach in the current writer's opinion is for the international community (AU included) to cease seeking an amendment of Article 16 of the Rome Statute but rather to remove Article 98 of the same statute which is a manifestation of regress in the fight against impunity. Article 98 is contrary to the spirit behind the establishment of the Rome Statute articulated above, whereas Article 16 is a necessary evil that the international community must live with in order to advance international criminal justice. This is premised on the fact that not all States will ratify the Rome Statute in the near future. The role of a Security Council referral constitutes an additional and valuable tool for triggering the ICC jurisdiction over a situation. In addition to this radical recommendation Rule 195 of the Rules of Procedure and Evidence discussion should be amendmend in keeping with the suggestion to remove Article 98 proffered here.

6.3. Concluding Remarks

A number of important factors can be deduced from the foregoing discussion: Africa via the auspices of the AU is not opposed to the ICC as such. The involvement of Africa in the creation of the ICC is evidence to that effect. As aptly summed up by Du Plessis the " ICC is a Court created by Africans and ultimately for the benefit of

African victims of atrocities."[353] To date Africa has shown great involvement in the ICC and support of this Court.

The AU's peculiar founding history, which was marred with colonialism and suppression of African States by the West, has made Africa very nervous and distrustful of the international community. Stakeholders in the advancement of international criminal justice should endeavour, wherever possible, to eradicate Africa's fears concerning the Court. This can be done by employing transparent and inclusive policies in dealing with matters involving the continent.

Although the AU is subordinate to the Security Council and is removed from the impartial and independent ICC, wherever possible these three bodies should network and complement each other's efforts against impunity. To the possible maximum extent, Africa through the leadership of the AU should spearhead any international criminal justice processes undertaken on the continent. The AU should be afforded a role and consulted in matters involving African States. Such an approach fosters cooperation and trust between the various stakeholders of the international community and advances the rule of law and the fight against impunity on the continent.

However, the AU should not lose sight of the fact that "Africans make up the largest regional bloc of nations that have ratified the Rome Statute […] it is acceptable (if not probable) that more cases will come from the African continent."[354] African governments, together with civil society, played an active role in establishing the Court and African governments were among the founding states of the Rome Statute.[355] In ratifying the Rome Statute, these states signalled their dedication to cooperate with the ICC to defend the rights of victims and to end impunity.[356] Ensuring that such determined steps to end impunity are not undermined requires a collective effort by all Africans.[357] Instead of retreating from important achievements to date, African governments should remain steadfast in their support for justice for victims of the worst crimes, including reaffirming their commitment to cooperate with the ICC, evidenced by arresting and surrendering President al-Bashir to the Court.

The international community should not lose sight of the most important reasons for the creation of the ICC namely; to combat impunity and advance international criminal justice for the victims of atrocities. In so doing, the international community needs to speak with one consistent voice regardless of where atrocities emanate from. Trust and adherence to human rights standards need to become a reality everywhere. Equal application of the law is the most important avenue for establishing the same. The Security Council and the ICC should whenever possible

[353] Du Plessis, *supra* note 30.
[354] *Id*.
[355] *Ibid.*
[356] *Supra* note 124.
[357] *Ibid.*

condemn atrocities wherever they are committed and attempt to bring or refer the perpetrators of such crimes before the ICC irrespective of the political status of the individuals involved in the matter. Such attempts can serve to reassure the world at large that the international community is not regressing on its commitment to addressing atrocities that heralded the ad hoc tribunals and culminated in the eventual creation of the ICC. In so doing a clear message is sent to individuals like President al-Bashir that suppression of fundamental rights and atrocities are no longer tolerated internationally.

As has been accurately noted by Dicker, downgrading justice to achieve other objectives undermines the rule of international law and slights the victims of injustice.[358] Moreover, peace based on impunity is unlikely to be durable. Diplomats need to do more than congratulate themselves for having done the right thing 10 years ago by establishing the ICC.[359] They must align peace negotiations with the commitment to justice that was articulated when the treaty was first codified in Rome.[360] Assertions by members of the international community that peace and justice are complementary, rather than mutually exclusive should be echoed everywhere where the fight against impunity is on-going. States should lead and reject the claim that justice must be sacrificed to ensure peace and reconciliation.[361]

The fact that President al-Bashir has not been surrendered to the ICC is an unequivocal indication of the Sudanese government's defiance of its express obligations enshrined in Resolution 1593 (2005). Such insolence makes a mockery of the international criminal justice system as a whole and sadly enough, the ICC itself lacks the coercive resources to address the same. This unfortunate and inescapable feature of most international tribunals greatly undermines the effectiveness of international criminal law and at times renders principles of international criminal justice a mere rhetoric of ideals that have no actual application in today's world.

Ciampi notes that the decision of the prosecutor of the ICC to indict President al-Bashir falls within his mandate.[362] She also acknowledges that "the Prosecutor should also be expected to take into account the general political and diplomatic context before taking action."[363] However, as much as stakeholders in the fight against impunity are called upon to balance the demands of peace versus those of justice, the international community must stress the fact that the above defects and challenges of the international criminal justice system do not diminish the legal validity of the indictment against President al-Bashir or the international obligations

[358] *Supra* note 159.
[359] *Id.*
[360] *Ibid.*
[361] Amnesty International Annual Report, *supra* note 101.
[362] Ciampi, *supra* note 8, at 893.
[363] Ciampi, *supra* note 8, at 893-894.

resting upon various members of the international community to support the ICC's efforts to apprehend President al-Bashir and make him face justice.

The explanation proffered in a Policy Paper by the Office of the Prosecutor with regard to the office's attitude to Article 53 of the Rome Statute (which relates to prosecution) that there is a difference between the concepts of interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of the Prosecutor are in the opinion of the current writer satisfactory and prove the main argument of this discussion stated in chapter 1. The most important thing to note is that the present discussion does provide a valid legal solution to main problems identified in Chapter 1- that of the stalemate between the AU and the Court regarding co-operation in the apprehension of President al-Bashir to undergo trial in the ICC.

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