

**The Legality of the Indictment of
President Omar Hasen Al-Bashir by the
International Criminal Court Under
International Law**

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ACRONYMS

AU	African Union
AUPD	African Union High Level Panel on Darfur
AUPSC	African Union Peace and Security Council
CPA	Comprehensive Peace Agreement
CAR	Central African Republic
DRC	Democratic Republic of Congo
GOS	Government of Sudan
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
IMTEF	International Military Tribunal of the Far East
JEM	Justice and Equality Movement
LRA	Lord's Resistance Army
NCP	National Congress Party
NGO	Non Governmental Organization
OAU	Organization of African Unity
PSC	Peace and Security Council
SCSL	Special Court of Sierra Leone
SLA/M	Sudan Liberation Army/Movement
SPLM	Sudan peoples Liberation Movement
TJRC	Trust Justice and Reconciliation Commission
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

Abstract

In March 2005, the UN Security Council referred the situation in Darfur to the International Criminal Court (ICC). After investigating the case the prosecutor of the ICC made an application in July 2008 to the ICC requesting arrest warrant against Sudanese president Omar Hasan Al-Bashir for the crimes committed in Darfur since 2003. After the prosecutor's application, the ICC Pre-Trial Chamber I issued arrest warrant on 4 March 2009 for the first time in the Court's history against a sitting Head of State. The issuance of this arrest warrant raised a mixed reaction in favor of the indictment and against the indictment.

The main objective of this study is assessing as to whether the indictment issued against Al-Bashir is in accordance of the ICC Statute or not.

To analyze the legality of the indictment against Al-Bashir, various literatures, international and regional human rights instruments, different treaties and conventions including the ICC Statute, summary of the prosecutor's application and the Pre-Trial Chamber I decision have been consulted.

Finally the findings of the study reveal that the indictment issued against Al-Bashir is legally founded on the basis of ICC Statute and the international crimes lodged against Al-Bashir fall within the jurisdiction of the court.

In addition, this study pointed out some practical problems or challenges to bring Al-Bashir to justice so as to the court lacks enforcement mechanism to make arrest warrant effective and practical. To solve these problems, therefore, it needs the cooperation of Sudanese government, state parties to the ICC Statute and non-State parties to the Statute. More specifically, all possible efforts should be made by the U N Security Council. Where a State party fails to comply with a request to cooperate with the court's decision it is the U N Security Council which mandated by the UN Charter to take all necessary means.

Key words, *international criminal court, Al-Bashir, Sudan, Darfur, indictment, arrest warrant.*

CHAPTER ONE

INTRODUCTION

1.1 Background

In the war between government forces and rebel groups in Darfur, Sudan, since early 2003, the government forces and the Janjaweed militias have been reportedly violated rules of international humanitarian law and international human rights law.¹ As a result of this conflict approximately 2 million people was displaced and 700 villages were completely or partially destroyed and the lives of 200,000 people have been lost.²

The Darfur conflict became an international concern. International Organizations, Non Governmental Organizations (NGOs) and Civic Societies reported to the UN Security Council concerning for the violation of international human rights law and international humanitarian law in Darfur by all parties to the conflict.³

The United Nations Security Council(UNSC) using its mandate conferred to it under chapter VII of the United Nations Charter passed Resolution 1564 for the establishment of an International Commission of Inquiry to investigate the alleged atrocities of Human rights and violation of international humanitarian law in Darfur .⁴

Accordingly, the International Commission of Inquiry on Darfur concluded its mission and submitted a full report of its findings to the Secretary General of the United Nations on 25 January 2005. The major finding of the report focused on four interrelated points, namely, whether all parties involved in the conflict violate international human rights

¹ Ted Dagne, 'sudan: The Crises in Darfur, CRS Report for Congress' RS 21862(June 16 2004) available at <http://www.fas.org/man/crs/RS21862.pdf> accessed on 11 June 2009

² Ibid

³ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General pursuant to Security Council Resolution 1564 of 18 September 2004. The report is available at <http://www.un.org/news/dh/sudan/com-inq-darfur.pdf> accessed on 15 June 2009

⁴ UNSC/RES/1564(2004) (Adopted by the UN Security Council at its 5040th meeting on 18 September 2004) available at <http://www.un.org/docs/sc/unsc-resolutions04.html> accessed on 19 May 2009

and international humanitarian law , whether or not the acts of genocide has been committed, the identification of perpetrators and the accountability mechanism.⁵

Consequently, the UN Security Council based on the mandate given to it under chapter VII of the Charter, adopt Resolution 1593 (2005) at its 5158th meeting on 31 March 2005.⁶ This Resolution was not passed unanimously by 15 Members of the Security Council. Algeria, Brazil, China and the United States of America abstained from the vote.⁷ However, under this Resolution the UNSC referred the situation in Darfur since 1 July 2002 to the prosecutor of the International Criminal Court (ICC) and call on the Sudan government, other parties to the conflict in Darfur and also State parties and non State parties to the ICC Statute and concerned regional and international organizations to cooperate fully and to provide any necessary assistance to the prosecutor and the Court.⁸

Based on the referral by UNSC and on the ICC Statute, the prosecutor of the ICC issued an indictment against the perpetrators of the alleged crime. It was on 14, July 2008 the president of the Republic of Sudan Mr. Omar Hassan Al-Bashir was charged by the prosecutor of ICC for the crimes committed in the Darfur conflict, namely war crimes, genocide and crimes against humanity.⁹

It is worth noting that, the classical doctrine of international law held that, only States were ‘subjects’ of international law, that only they were international persons possessing rights and duties directly under the law.¹⁰ Individuals were deemed to be ‘objects’ of international law which reached them only through the intermediary of states.¹¹ Hence,

⁵ Paragraph 5 of the Executive Summary of the Report of the International Commission of Inquiry on Darfur (n 3)

⁶ UNSC/RES. 1593 (2005)(adopted by the Security Council at its 5158th meeting on 31 March 2005) available at <<http://www.un.org/news/press/docs/2005/SC8351.dochtm>> accessed on 25 August 2009.

⁷ Press ReleaseSC/8351 Security Council 5158th Meeting, ‘Security Council refers situation in Darfur, Sudan to prosecutor’ available at <http://www.un.org/news/press/docs/2005/SC8351.doc.htm> accessed on 29 May 2009

⁸ UNSC Resolution 1593(2005) (n 6) Paragraph 2

⁹ Situation: Darfur, Sudan, ‘ICC Issues a Warrant of Arrest for Omar Al-Bashir President of Sudan(Press Release 04-03-2009) available at <http://www.icc.cpi.int/NR/exeres/OEF62173-05ED-403A-80C8-F15EE1D25BB3.htm> accessed on 10 June 2009

¹⁰ Malcolm N. Shaw, *International Law* (5th ed. Cambridge University Press 2003) p 177

¹¹ Ibid

the legal implication of this position was States are the only 'bearers of rights and duties' and unlike in the municipal laws, individual human beings don't have rights and obligations under international law.¹²

The emergence of a general rule of individual responsibility for serious human rights violations took a long period of time, and is considered as violations of these rules qualify as violation of international norm.¹³ It is the Nuremberg Charter for the first time enumerates acts or crimes for which individuals shall be responsible under international law.¹⁴ These are crimes against humanity, war crimes and crimes against peace.¹⁵ Therefore, the Nuremberg judgment was cited as an authoritative precedence that laid foundation for individual responsibility in international law.

Unlike most of the past war crime indictments that have been lodged against former Heads of State, the ICC's indictment against President Omar Hasan Al-Bashir is unique, in the sense that it is issued against a sitting Head of State.¹⁶ However, Article 27 of the ICC Statute provides in clear terms that officials' capacity, including as a Head of State or government, does not exempt a person from criminal responsibility or constitute a ground for reduction of sentence.

The ICC prosecutor has indicted Mr. Al- Bashir based on the referral of the UN Security Council. The Court issued an arrest warrant against Al-Bashir. Al- Bashir is still in power and not arrested. The enforcement mechanism of the ICC is based on the State party's cooperation. But still the problems exist. Therefore, this essay will analyze the legal grounds that lead the UN Security Council to pass Resolution 1593 and referred the case to ICC and the legality of the indictment as per the ICC Statute and identifying the rules

¹² Ibid 178

¹³ Ilias Bantekas and Susan Nash, *International Criminal Law*, (2nd.ed.Cavendish Publishing Limited London. Sydney. Portland. Oregon 2003)p4

¹⁴ Ibid

¹⁵ Ibid p6

¹⁶ Dworkin A. and Katherine I., 'The ICC, Bashir, and the Immunity of Heads of State' (March 19, 2009)Crimes of War Project available at <http://www.crimesofwar.org/onnews-darfur9.html> accessed on 23 June 2009

and procedure to examine the case with the relevant rules and principles of international law.

1.2 Statement of the Problem

As far as international criminal responsibility is concerned the earlier assumption was that it is the parties to the treaties that have the duty to be bound by the terms of the treaty, and held responsible when they failed to discharge their treaty obligations, but according to the contemporary international law thinking the earlier assumption began to be challenged. The best example in this regard is the ICC Statute of the International Criminal Court.

The ICC under its Statute mandated to prosecute individuals for some violations of international human rights and international humanitarian law. Especially its jurisdiction primarily lies over genocide, war crimes and crimes against humanity. It was on the basis of UN Security Council referral that the ICC prosecutor indicted Al-Bashir, and as a result the ICC's Pre-Trial Chamber I found that there are 'reasonable grounds to believe that Al-Bashir is criminally responsible for war crimes and crimes against humanity' for his role in 'planning' and 'over seeing' the war in Darfur. The Court accordingly issued a warrant for his arrest.

Therefore, on the possibility of Al-Bashi's appearance before the ICC, there are conflicting opinions heard from different angles of the world upon the issuance of the indictment and the charge of arrest warrant.

On the one hand the advocates of human rights argued that the indictment and the issuance of arrest warrant against the Sudanese president is a significant step towards international fora ending impunity for crimes in Darfur and it will be considered as a historic victory for human rights.

On the other hand, many have expressed their fear that the move to arrest the president may complicate the peace process of the Darfur region. Moreover, this group of people

proposed the solution that the way of reconciliation like the practice of South Africa after the era of apartheid rather than move to the ICC. Some also disregarded the indictment of the ICC by saying that it is more political than legal. The debate is on going.

Accordingly, the move to indict Mr. Omar Hasan Al-Bashir raised different issues under international law. It is the first instance where the UN Security Council initiated criminal proceedings against an individual by way of referral to ICC.

The case is at hand and on going the researcher will try to raise and address the following problems.

1. The legality of indictment against Al-Bashir;
2. The legal implication of arrest warrant on the sovereignty of states and immunity of Heads of State.
3. The procedural and substantive issues of the case;
4. The problems may face the ICC in the exercise of its jurisdiction and enforcement mechanism of the arrest warrant to the state not party to the ICC Statute;
5. The enforcement mechanism of the UNSC Resolution.
6. Whether the case is legal or political

Therefore, the purpose of the study will be to analyze and examine the case with the ICC Statute and the existing international law rules and principles.

Research Questions

The proposed research has the following research questions.

1. What are the legal foundations for the indictment of Mr Al-Bashir?
2. Since the establishment of the ICC, the indictment against Mr. Al-Bashir is the first and ever issued against a sitting Head of State in power. Therefore, what are the reasons behind that led to the indictment of Mr. Al-Bashir?
3. What legal and practical challenges can be envisaged with respect to the indictment of Mr Al-Bashir?

4 What will be its implication on state sovereignty and immunity of Heads of State? These questions will be further justified by literature review and analysis contained in the study.

Objective of the Study

The general objective of this study is to identify and test the legality of the indictment against Mr. Omar Hasen Al-Bashir by the ICC for the violation of international human rights and international humanitarian law under the rules and principles of international law.

In a more specific term the objectives of this study are:

1. To examine the factors that leads the prosecutor to issue the indictment against the Sudanese president Omar Hasan Al-Bashir.
2. To examine how the arrest warrant will be enforced, and managed against Al-Bashir under the ICC Statute.
3. To examine the Al-Bashir case with the relevant legal frame works put in place under international law to the allegation lodged by the ICC prosecutor.
4. To examine the Pre-Trial Chamber I decision with the prosecutors allegation against Al-Bashir for the atrocities committed in Darfur, Sudan.
5. To explore the major challenges that may encounter the ICC in the application of the arrest warrant.

Scope of the Study

The scope of the study is limited in terms of time , content and place. The study focuses on the legality of the indictment against Al-Bashir by the ICC.

In terms of the content the study will give much emphasis on the legality of the indictment, the legal foundation of the ICC to indict Al-Bashir and the pros and cons of indictment with particular reference to the ICC statute.

In terms of place it is difficult for the researcher to assess relevant information from the prosecutor's and Al- Bashir or from Sudan and The Hague physically. Rather the scope of the study relied on documents issued against Al-Bashir.

Significance of the Study

The ICC prosecutor has indicted Al-Bashir based on the referral by the UN Security Council for the atrocities committed in Darfur, Sudan .The ICC Statute established individual criminal responsibility and laid down punishments .Article 27 of the ICC Statute provide individual criminal responsibility regardless of official capacity as Head of State or government or parliament, an elected representative or a governmental official.

The major significance of the study is that it attempts to show the legality of the indictment by ICC prosecutor against Al-Bashir, the major causes that leads prosecutor to indict Al-Bashir with respect to the ICC Statute.

In more specific terms the study will have the following significances.

1. it will help to reflect the problems that are frequently occurring along the indictment and an arrest warrant by the ICC against Al-Bashir and intended to address the legal issues based on the Rome Statute, State practices and relevant international law rules and principles.
2. It tries to suggest alternative solutions based on authoritative legal documents.
3. It helps to identify the legal gaps and made analysis within the framework of principles of international law and proposes some recommendations.
4. It serve as the source of information or reference when the need arise.
5. It will offer some contribution to the field of knowledge in international criminal law area.

Research Methodology

In general, the methodology of this study will employ both primary and secondary sources of international law. In writing this research the researcher will stick to the primary and subsidiary sources of international law as provided under Article 38 of the International Court of Justice (ICJ) Statute, international conventions, whether general or particular, international custom, as evidence of a general practice accepted as law, the general principles of law and judicial decisions. For theoretical analysis it will be based on existing literature of international criminal law, and international crimes in particular.

Given some of the issues discussed in the study need understanding of the ICC Statute with the individual criminal responsibility under international law with regard to Al-Bashir indictment. Hence well structured and focused techniques of interview and questionnaire will not be conducted. Rather information will be gathered from primary and secondary sources such as Statutes, prosecutor's application to the court, publications, decision of the ICC Pre Trial Chamber I, working papers, books, periodicals newspapers, and internet sources are consulted.

Organization of the Paper

The paper is organized in four chapters. The first introductory chapter deals with background, statement of the problem research questions, and objective of the study, scope of the study, methodology and organization of the paper.

Chapter two of the paper deals with the establishment of the International Criminal Court and individual criminal responsibility. Under this chapter the criminal responsibility of Heads of State and individual criminal responsibility under international law will be assessed in light of the ICC Statute. Chapter three of the paper deals with the investigation and prosecution under the ICC Statute, procedural issues, powers and duties of the prosecutors will be discussed in light of the ICC Statute.

Chapter four of the paper is about the legality of indictment, the Pre-Trial Chamber I decision and international responses against Al-Bashir's indictment. Here, Sudan and

the cause of conflict in Darfur, the legality of the ICC indictment against Al-Bashir, legal basis of the indictment, list of international crimes lodged against Al-Bashir, jurisdiction of the court to indict Al-Bashir, immunity issue of Al-Bashir under international law, the Pre-Trial Chamber I decision and the arrest warrant against Al-Bashir and the international responses against the indictment will be discussed. This chapter also tries to examine the legal obligation of member states and non member states to the ICC Statute to arrest and handover of Al-Bashir to the ICC's jurisdiction.

Finally the paper comes up with concluding remarks.

Limitation of the Study

As the case is under consideration (is still pending or active) and not settled yet continuous changes on the issue are likely to arise in the time to come. Thus, the researcher feels the need to follow up closely the situation by obtaining updated information. However, getting current information and documents remains to be the major difficulty in the course of the research. Thus, the major challenges will be reported to my advisor to make the necessary adjustment to the plan. The advisor's support is necessary in due course of this research.

CHAPTER TWO

THE INTERNATIONAL CRIMINAL COURT AND INDIVIDUAL CRIMINAL RESPONSIBILITY

2.1 Introduction

The International Criminal Court (ICC) is the first and only, a permanent international institution, established by a multilateral treaty for the purpose of investigating and prosecuting individuals accused of the most serious crimes of international concern listed under the ICC Statute.¹⁷ With then development of the concept of international crimes and the increasing need of international community to deter the commission of international crimes, there arises always the question of individual criminal responsibility.¹⁸

In view of the orthodox positivist doctrine it was only States that are subjects of international law and enjoy certain rights and incur liabilities under international law.¹⁹ Basically, the individual criminal responsibility under international law for international crimes widely developed after the Nuremberg trial.²⁰ The London Charter²¹ defines offences and sets out the parameters for individual criminal responsibility with regard to these offences and, it is after the Nuremberg, however, Heads of State are criminally responsible for acts committed in their official capacity regardless of their rank in the

¹⁷ Article 1 of the ICC Statute,

The Statute of International Criminal Court (adopted on 17 July 1998, entered into force on 1 July 2002) UNTS I 38544. The Treaty is available at <<http://www.treaties.un.org/pages/UNTSONline.aspx?id=2>> accessed on 21 September 2009. and see William A.Schabas, *An Introduction to the International Criminal Court*, (2nd ed. Cambridge University Press 2004) p.23

¹⁸ Ibid

¹⁹ Malcolm N.Shaw,(n 10) 177

²⁰ Ilias Bantekas and Susan Nash, *International Criminal Law*,(3rd.ed.Oxford University Press2007)p 498

²¹ Charter of International Military Tribunal. The London Agreement of 8 August 1945,

Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis 82 U.N.T.S 27959Stat.1544 E.A.S No.972. The Treaty is available at

<http://www.un.org/pages/UNTSONline.aspx?id=2>> accessed on 26 July 2009

government.²² Both the Charter and the judgment of the Nuremberg should be regarded as a landmark for individual criminal responsibility and serve for the development of ad hoc international tribunals and as well as the international criminal court.²³

Therefore, this chapter mainly focuses on the establishment of an international criminal court, jurisdiction, complementarity, and structure of the Court as well as the individual criminal responsibility under international law, especially criminal responsibility of Heads of State under international law and the criminal responsibility of individuals under the international criminal court Statute.

2.2 The Establishment of the International Criminal Court

The idea of setting up of an international criminal court goes back to the 19th century.²⁴ The idea predates World War I, when one of the founders of the International Committee of the Red Cross Gustave Moynier proposed in 1877 for the creation of a permanent court in response to punish the criminals of the Franco Prussian war.²⁵

The effort to establish a permanent international criminal court continued until the First World War.²⁶ After World War I, the Peace Treaty concluded between the Allied and Associated powers and Germany, concluded at Versailles in 1919 the Treaty of Versailles to try and punish the leading figures responsible for war crimes and crimes committed during the war.²⁷ More importantly, Article 227 of the Treaty of Versailles provides the need to have an ad hoc international criminal tribunal to prosecute the perpetrators especially the German Emperor Wilhelm the II for the supreme offence against

²² Ilias Bantekas and Susan Nash(n 20) 498

²³ Ibid

²⁴ Christiane E.Philpp, 'The International Criminal Court' : A Brief Introduction .Max Planck Year Book of United Nations Law(Volume7,2003)p332.Availableat

<http://www.mpil.de/shared/data/pdf/pdfmpunyb/philipp_7.pdf> accessed on 19 July 2009

²⁵ Ibid

²⁶ Antonio Cassese, *International Criminal Law*,(Oxford University Press 2003) p.327

²⁷ Ibid

international morality and the sanctity of treaties.²⁸ In addition to this, Article 228 and 229 of the Treaty of Versailles also provided for the prosecution of German military personnel accused of violating the laws and customs of war, before Allied military tribunals or before the military courts of any of the Allies or Associated powers.²⁹

In 1937, efforts have also made by the League of Nations for the establishment of a permanent international criminal court.³⁰ By initiation of France along with the Convention for the Prevention and Punishment of Terrorism, the League of Nations drafted a Convention for the establishment of an international criminal court with jurisdiction over terrorist crimes, but never adopted and entered into force.³¹

It was only after the end of World War II the effort to create a permanent international criminal court and the establishment of the two ad hoc international criminal courts took place to try the major suspects of the Axis powers (Germany and Japan).³² At this time, the serious effort began by establishing the International Military Tribunal at Nuremberg

²⁸ Ibid

The proposed tribunal consists five judges appointed by USA, Great Britain, France, Italy and Japan. Article 227 of the treaty reads in part: “the Allied and Associated powers publicly arraign William II of Hohenzollern, formerly German emperor, for supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees to the right of defense”. The Versailles Treaty of June 28, 1919 The Treaty is Available at<http://www.history.sandiego.edu/gen/text/versailles_treaty/vrecontents.htm> accessed on 15 July 2009

²⁹ Ibid

The specified Articles were never implemented because of several factors, among others the German Emperor had taken refuge in the Netherlands and the Dutch refused to extradite the emperor to the Allied and the Dutch government rose that the crimes of which the emperor was accused were not complemented in the Dutch constitution.

³⁰ Dr. S.K.Kapoor, *International Law and Human Rights* (14th ed Central Law Agency Ajanta Offset Printers India 2002) p 366

³¹ Ibid

³² Steven R .Ratner and S.Jason Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford, Clarendon press New York 1997) p.175

(IMT) and the International Military Tribunal of the Far East (IMTFE) is a milestone in the development of international criminal law.³³ Following Nuremberg and Tokyo tribunals, the United Nations General Assembly (UNGA) had given the International Law Commission (ILC) the assignment for the establishment of permanent international criminal court.³⁴ In this regard Draft Statutes were produced in 1950's, but because of the cold war the progress was in significant.³⁵

The other point that should be raised in relation to the creation of a permanent court has taken place since 1948 up until 1980's by the ILC the body of the UN which undertook to elaborate a Statute for an international criminal court.³⁶ However this effort was unsuccessful because of the cold war.³⁷

After the end of the cold war, things were dramatically changed and as a result in 1989 the president of Trinidad and Tobago Mr. Robinson in a special session of the UNGA proposed the creation of an international criminal court to prosecute the crimes of international drug trafficking.³⁸ This request was considered by the UNGA and the ILC was requested to conduct its work and to consider the issue "to address the question of establishing an international criminal court which has a jurisdiction including persons engaged in illicit trafficking in narcotic drugs".³⁹

³³ M.Charif Bassiouni, "Establishing an International Criminal Court: Historical Survey"(1995) 149 *Military Law Review* available at <<http://www.loc.gov/rr/frd/Military-Law/Military-Law-Review-/pdf.files/277875%7E1-pdf>> accessed on 24 July 2009

³⁴ Ibid

³⁵ M.Charif Bassiouni, "Historical Survey, 1919-1998" M.Charif Bassiouni,(ed) *The Statute of the International Criminal Court: A documentary History*, (Transnational Publishers Ardsley.N.Y1998.)p7. See also Laura Barnett, *The International Criminal Court: History and Role*'(2008) available at <http://www.parl.gc.ca/information/library/PRBpubs/prob_0211-eh.html>accessed on 25 July 2009.

³⁶ Von Hebel, Herman A.M,John and etail *Reflections on International Criminal Court: Essays in Honor of Adrian B.S Herman A.M and Von Hebel* (eds.) (The Hague T.M.C Asser Press 1999)p1

³⁷ Ibid

³⁸ Steven R. Ratner (n 32) 178

³⁹ Christiane E., Philpp. (n 24) 334 and see also Steven R. Ratner .S.Jason Abrams,(n 32) 177

Consequently, in 1993 the ILC set a draft by the instruction of UNGA and submitted a draft Statute to the UNGA in 1994.⁴⁰ Following that, the sixth committee of the UNGA⁴¹ thereupon established an ad hoc committee,⁴² in 1994 to review the ILC Draft Statute and in 1995 a preparatory committee (prep com) for the establishment of an international criminal court was set up.⁴³ Upon the conclusion of its work the prep com's report was submitted to the UNGA in 1996.⁴⁴

Moreover, the UNGA extend the committee's term with a specific mandate to negotiate proposals in order to produce a consolidated text of a Statute, and the committee completed its task in April 1998 and makes ready the Draft Statute to the Diplomatic Conference which was held in Rome, Italy.⁴⁵

It should be noted that the UN Diplomatic Conference of Plenipotentiaries held in Rome, Italy from 15 June to 17 July, 1998 governments overwhelmingly approved and adopted the Statute known as the Rome Statute of the International Criminal Court (ICC Statute).⁴⁶

⁴⁰ Steven R. Ratner (n 32) 178

⁴¹ Ibid The Sixth Committee is a composition of legal experts of the United Nations.

⁴² UNGA Res/49/53 (9 December 1994). "Establishment of an International Criminal Court" (adopted at the 84th plenary meeting 9 December 1994) available at <<http://www.un.org/Depts/dhl/res/resa49.htm>> accessed on 17 August 2009

⁴³ UNGA Res/50/46 (11 December 1995) "Establishment of an International Criminal Court" (adopted at the 87th plenary meeting, 11 December 1995) available

at <<http://www.un.org/Depts/dhl/res/resa49.htm>>. Accessed on 17 August 2009

44. Steven R. Ratner (n 32) 179

⁴⁵ Ibid. see also the UNGA Res. 51/207 (17th December 1996) (adopted at the 88th plenary meeting 17th December 1996) For the Mandate of the Prep. Comm., available at

<<http://www.un.org/Depts/dhl/res/resa49.htm>>. Accessed on July 24 2009

⁴⁶ Antonio Cassese, (n 26) 342-3

The ICC Statute adopted by 120 votes to 7 (USA, Libya, Israel, China, Iraq, Syria and Sudan) with 20 abstention. But Ilias Bantekas and Susan Nash, providing a different list including Qatar and Yemen instead of Syria and Sudan. Ilias Bantekas and Susan Nash, *International Criminal Law* (3rd.ed. Oxford

Indeed, as of October 2009, 110 States have become parties to the ICC Statute and among these 30 of them are African countries.⁴⁷ Finally, the Statute is divided in to 13 parts and comprised of 128 Articles.⁴⁸

Unlike the International Criminal Tribunal for former Yugoslavia (ICTY)⁴⁹ and International Criminal Tribunal of Rwanda (ICTR)⁵⁰ ICC is a permanent international criminal court established by its founding Statute.⁵¹

2.3 Jurisdiction of the ICC

The jurisdiction of the Court will be limited to the categories of the crimes stated under the ICC Statute.⁵² The ICC Statute variously describes these crimes as the most serious crimes of concern to the international community.⁵³ It is important to note here that the

University Press 2007) p.536. Kevin John Heller, also provide another list includes India, Qatar and Vietnam .Kevin John Heller” The Rome Statute in Comparative Perspective: Legal Research Paper No.370 (2008) available at <<http://www.ssrn.com>> Accessed on 17 August 2009.

⁴⁷ Lists of State Parties to the ICC Statute See ICC Home page Available at <<http://www.icc.cpi.int.org>> accessed on 15 July 2009.

⁴⁸ The Statute of International Criminal Court (n 17)

⁴⁹ The Statute of International Criminal Tribunal for former Yugoslavia (adopted on 25 May 1993 by UN Security Council Resolution UNSC/RES/827(1993). The Statute is available at UN.DOC. S25704 at 36,annex(1993) and S/25704/Add.1(1993) <<http://www.un.org/Docs/scres/1993/scres93.htm>> accessed on 28 July 2009

⁵⁰ The Statute of International Criminal Tribunal of Rwanda adopted by UNSC/RES.955 (1994) (adopted at its 3454th meeting on 8 November 1994). The Statute is available at <<http://www.un.org/icttr/statute.html>> accessed on 28 July 2009.

⁵¹ Antonio Cassese (n 26) 348

Article 1 of the ICC Statute provides the nature of the Court. It states in part “--- it shall be permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious concern of international crimes”. However, the ICTY and ICTR provides under their preamble the Courts establishment as an ad hoc basis. See both statutes available at <<http://www.treatiesun.org/pages/UNTSOnline.aspx?id=2>>

⁵² Article 5(1) of the ICC Statute (n 17)

⁵³ Ibid

Court has jurisdiction only to natural persons pursuant to Article 25(1) of the ICC Statute. Accordingly the jurisdiction of the Court is classified into three, subject matter, temporal and personal and territorial jurisdiction.

2.3.1 Subject Matter Jurisdiction

The ICC has subject matter jurisdiction over crimes stipulated in Article 5 of the ICC Statute. The Court has also jurisdiction over the crime of aggression when a provision is adopted defining the crime and setting out the conditions under which the Court is to exercise jurisdiction in this regard.⁵⁴ In addition to this, Articles 6, 7 and 8 simply define the Courts jurisdiction for the crimes namely, genocide, crimes against humanity and war crimes respectively.

The Court has jurisdiction under Article 8(2) (a) and (b) over the grave breaches of the 1949 Geneva Conventions and other serious violations of international humanitarian law in international armed conflict, including violations of The Hague Conventions IV of 1907 and its regulations and some violations of Protocol I of the Geneva Convention. With respect to violations over international humanitarian law in non armed conflict the Court also has jurisdiction. These is provided under Article 8 (2) (c) to (f) and Article 8(3) of the Statute, and it include the violations of common Article 3 of the 1949 Geneva Convention and Protocol II to those treaties as well as certain conduct that would be a violation if it occurred during international armed conflicts.

As Christiane E.philpp noted that, the definition of crimes during the draft stage and at the discussion on the Rome conference was a long and controversial one. Many delegation from different countries wanted more crimes included in the Statute than the three main crimes of genocide, crimes against humanity and war crimes .During the conference crimes like aggression, terrorism and the illicit trafficking in drugs was discussed in detail and some participants also needs these categories of crimes to be included in the Statute, but no consensus could be reached. See also Christiane.E.Philipp, note at 24 pp336-7

⁵⁴ Article 5(2) of the ICC Statute note at 17

2.3.2 Temporal Jurisdiction

The second category of Court's jurisdiction is temporal which is totally prospective.⁵⁵ Jurisdiction is also limited *ratione temporis* to offences committed after the entry in to force of the Statute, for the crimes committed after 1 July 2002.⁵⁶

It is worth mentioning that if a State ratifies the ICC Statute after 1 July 2002, the Court has jurisdiction over crimes committed by its nationals or in its territory only after the Statute enters in to force with respect to the acceding State, although the State can lodge a declaration with the Court accepting jurisdiction retroactive to 1 July 2002.⁵⁷ Therefore, this is simply mean if State "X" ratifies the treaty in September 2006 and lodge declaration by accepting the Court's jurisdiction, the Court may have jurisdiction to entertain cases starting from 1 July 2002 by retroactive basis.

2.3.3 Personal and Territorial Jurisdiction

The Court's jurisdiction lies also on personal and territorial jurisdiction. The Court has personal jurisdiction over nationals of States parties who are accused of committing crimes with in the subject matter jurisdiction of the Court, irrespective of where those crimes are committed.⁵⁸ The Court can also exercise jurisdiction and prosecute national of a non State parties if that State accepts the jurisdiction of the Court by declaration lodged with the registrar with regard to the crime committed,⁵⁹ and where the UN Security Council refers a situation to the Court under chapter VII of the UN Charter.⁶⁰

⁵⁵ Kevin Jon Heller, 'The Rome Statute in Comparative Perspective'. (2008)Legal Studies Research Paper No.370 Melbourne Law School, available at <<http://www.ssrn.com/> abstract =1304539> accessed on 23 July 2009.

⁵⁶ Art 11 (2) of the ICC Statute (n 17)

⁵⁷ Ibid Article 11(2) and 12(3)

⁵⁸ Ibid Article 12(2) (b)

⁵⁹ Ibid Article 12(3)

⁶⁰ Ibid Article 13(b)

Thus, the ICC Statute accepts the principles of territorial and nationality jurisdiction by virtue of Article 12(2) of the Statute. However, personal jurisdiction seems controversial according to writers like Von Hebel et al, Ilias Bantekas and Susan Nash commented up on Article 12(2) of the ICC Statute, which deal with personal jurisdiction.⁶¹ These writers pointed out that “jurisdiction set out in Article 12(2) of the ICC Statute can only be justified on the basis of the Court’s character as a universal institution whose legal personality necessarily affects the interests of third States”.⁶²

The other point that should be considered in relation to jurisdiction is, that the Court in some respects has no jurisdiction and is not entitled to exercise jurisdiction if the case is being investigated or prosecuted by a State which has jurisdiction over it,⁶³ or if the case has been investigated by a State which has jurisdiction and entitled to exercise jurisdiction, or if the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute for genuine reasons,⁶⁴ or if the person has already been tried for conduct which is the subject of the complaint by another Court.⁶⁵ Similarly, the Court will not have jurisdiction over any person who was not at the age of eighteen at the time of the alleged commission of a crime.⁶⁶

2.4 Complementarity of the Court

The cornerstone of the ICC Statute is the principle of complementarity which defines the relationship between member States and the ICC.⁶⁷ This notion is provided in paragraph 10 of the ICC preamble. “... the international criminal court established under this Statute

⁶¹ Von Hebel Herman A.M and et al (n 36) 61 and see also Ilias Bantekas and Susan Nash, *International Criminal Law* (2nd ed. Routledge Cavendish N.Y2003) pp538-9

⁶² Ibid

⁶³ Art 17(1)(a) of the ICC Statute (n 17)

⁶⁴ Ibid Article 17(1)(b) and (c)

⁶⁵ Ibid Article 20(3)

⁶⁶ Ibid Article 26

⁶⁷ Antonio Cassese (n 26) 358

shall be complementary to national criminal jurisdictions”, as well as in Article 1 of the ICC Statute,⁶⁸ and is spelled out in Articles 15,17,18 and 19 of the same Statute.

Unlike the ICTY and ICTR, the ICC is based on the principle of complementarity whereby the ICC is subsidiary or complementary to the national courts.⁶⁹ In the case of ICTY and ICTR primacy has been given to the international tribunals and national courts are subsidiary or complimentary, however in the case of the ICC Statute national courts take precedence over the ICC.⁷⁰

The principle of complementarity has two parts.⁷¹ First, as the ICC Statute under its preamble makes it clear, “States have the primary duty to bring those responsible perpetrators to justice,”⁷² and in paragraph 4 of the same preamble, the State parties affirm that “the most serious crimes of concern to the international community must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation” determine “to put an end to impunity”⁷³ and recall that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.⁷⁴

Second, as the Court will act only when States are “unwilling” or “unable” to investigate and prosecute the perpetrators;⁷⁵ one may pose a question that, what is meant by

⁶⁸ Article 1 of the Statute.

This Article states an ICC is “... a permanent institution and shall have a power to exercise jurisdiction over persons for the most serious crimes of international concern...and shall be complementary to national criminal jurisdiction.

⁶⁹ Antonio Cassese (n 26) 352

⁷⁰ Ibid 349

⁷¹ Ibid

⁷² Paragraph 4 of the Preamble of the ICC Statute (n 17)

⁷³ Ibid Paragraph 5

⁷⁴ Ibid Paragraph 6

⁷⁵ Art 17(1)(a) of the ICC Statute (n 17)

“unwillingness” or “inability” of State in investigation or prosecution of a person suspected or accused for international crimes?

More importantly, these two notions are clearly addressed under Article 17(2) and (3) of the ICC Statute. According to these Articles a State may be considered as “unwilling” when certain conditions took place.⁷⁶ To this end, in determining whether a State is “unwilling”, the Court shall consider whether the national proceedings were or being under taken or the national decision was made to shield the person concerned, if there has been unjustified delay in the proceeding and if the proceedings were not conducted in an independent or impartial manner, or they were conducted in a manner inconsistent with bringing the person to justice.⁷⁷

Similarly the grounds for a State “inability” have been enshrined under the Statute.⁷⁸ In determining “inability” in a particular case, the Court shall consider whether, “due to a total or substantial collapse or unavailability of its national judicial system”, and the State is unable to obtain the accused or the necessary evidence and testimony or unable to carry out its criminal proceedings.⁷⁹

Therefore, complementarity applies when a case is brought to the Court by State party,⁸⁰ when initiated by the prosecutor *motu proprio*⁸¹ and by the referral of the UN Security Council.⁸² Finally, the principle of complementarity will be applied not only with regard to States parties to the ICC but also with respect to States not parties to the ICC.⁸³

⁷⁶ Ibid Article 17 (2) and (3)

⁷⁷ Ibid

⁷⁸ Ibid Article 17(1)(a)

⁷⁹ Antonio Cassese (n 26) 351-53

⁸⁰ Article 13(a) and 14 of the ICC Statute (n 17)

⁸¹ Ibid Article 13(c) and 15

⁸² Ibid Article 13(b) and 52(c)

⁸³ Ibid Article 18(1)

2.5 Structure of the Court

The ICC is composed of four organs. The presidency, three judicial divisions which consists (Pre-Trial, Trial and Appeals), the Office of the Prosecutor and the Registry.⁸⁴ According to their task it can be classified as Judicial, Prosecutorial and Administrative branch.⁸⁵

2.5.1 Judicial Section

The judicial section comprises eighteen full-time judges in the three judicial divisions (Pre-Trial, Trial and Appeals) and their election will be conducted by the Assembly of State parties in a secret ballot for nine year non-renewable terms.⁸⁶ Although, the number can be raised by the Assembly of State parties to meet an increase in the work load.⁸⁷

With regard to the judge's competency, the ICC Statutes provide a requirement that at least out of 18 judges none of them possess competency in criminal proceedings while a minimum of five judges must be experts in relevant areas of international law, such as international humanitarian law and human rights law or the law of armed conflict.⁸⁸

Furthermore, according to Article 39 (1) of the ICC Statute the assignment of the judges to the three divisions is based on "the nature of the functions performed" and "the qualification and experience of the judges" elected to the Court taking into account their competence in criminal law and procedure and in international law.

⁸⁴ Ibid Article 34

⁸⁵ William A.Schabas, *An Introduction to the International Criminal Court*, (2nd ed. Cambridge University Press 2004)p 176

⁸⁶ Ibid 177

⁸⁷ Ibid

⁸⁸ Ibid

2.5.2 The Office of the Prosecutor

The office of the prosecutor is responsible for conducting investigations and prosecutions.⁸⁹ It is organized according to the activities assigned to it, the investigation division, the prosecution division and the jurisdiction complementarity and cooperation division.⁹⁰

The major task given to the office of the prosecutor is underlined and governed by the ICC Statute. To this end, the prosecutor determines whether to open an investigation, on the alleged crime, investigates and prosecutes individuals for the commission of crimes provided under the ICC Statute Articles 6, 7 and 8. This will be further discussed and elaborated under chapter three of the paper.

2.5.3 The Registry

The registry is one of the four organs of the Court and responsible for the non-judicial aspects of the administration and the servicing of the Court.⁹¹ According to Article 43 of the ICC Statute, the registry provides judicial and administrative support to all organs of the Court and carries out its specific responsibilities in the areas of “defense”, “victims and witnesses” “out reach” and “detention”.

2.6 Individual Criminal Responsibility under International Law

The individual criminal responsibility under international law traced back from the moment where individual human being has become a subject of international law.⁹² However, this section is not intended to explore the historical evolution of individual

⁸⁹ Article 15 of the ICC Statute (n17)

⁹⁰ Structure of the Court see ICC, Home Page Available at < <http://www.icc.cpi.int/faq/faq.htm>> accessed on 24 July 2009

⁹¹ Ibid

⁹² Malcolm N. Shaw (n 10) 232

criminal responsibility rather an attempt will be made to highlight after the end of the World War II developments.

It is during the World War II, after the establishment of Nuremberg and Tokyo trials 1945 and 1946 respectively, individuals could be criminally responsible for their wrongful act and appear before the court of law for adjudication.⁹³ The London Charter and the judgment of the Nuremberg trial recognized the principle of individual responsibility for crimes under international law.⁹⁴

The recognition of these principles paves a way to punish individuals for serious violations of international law.⁹⁵ Under the London Charter, Article 6 provides that individuals are fully responsible for acts defined as crimes under the Charter. According to this Article the tribunal shall have a power to try and punish individuals for their wrongful acts or for the commission of crime provided under sub Article (a), (b), and (c) of the same Article, namely crimes against peace, war crimes and crimes against humanity.

The above stated Article further provides “leaders”, “organizers”, “instigators” and “accomplices” which participated in the formulation or execution of the stated crimes would not be free from liability and will be held responsible for these acts. According to Article 7 of the IMT Charter the individual criminal responsibility goes further irrespective of their rank or official position and this is mainly for Heads of States and government officials.⁹⁶ Concerning the criminal responsibility of Heads of States under international law we will see in detail under 2.6.1 of this paper.

⁹³M.Cherif Bassiouni (ed) *International Criminal Law; Enforcement* (Vol.II Transnational Publisher .INC. Dobbs Ferry .N.Y 1987)p 27

⁹⁴ Gerhard Werle, *Principles of International Criminal Law* (T.M.C Asser Press, The Hague Netherlands,2005) p 118

⁹⁵ Article 6 of the London Charter (n 21)

This Article provides that, ‘individuals may be held liable or in their capacity as members of organizations or groups or in both capacities’.

⁹⁶Ibid Article 7

M.Cherif Bassiouni pointed out “whether it is under international criminal law or under domestic criminal law, individual criminal responsibility is a general principle of law”.⁹⁷ Furthermore, Article 6 of the IMT Charter established the principle of individual criminal responsibility which was supported by the enforcement mechanism. This is evident that the enforcement mechanism had taken place before the Nuremberg tribunal and Tokyo tribunal.⁹⁸

The individual criminal responsibilities were reinforced upon the establishment of ICTY and ICTR. The principle of individual criminal responsibility for the commission of international crimes is stipulated in Articles 7(1) and 23(1) of the ICTY Statute.

According to Article 7(1) of the ICTY Statute:

“A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute shall be individually responsible for the crime”.

In addition, Article 23(1) of the same Statute provides:

“The Trial Chambers shall pronounce judgments and impose sentences and penalties on persons convicted of serious violations of international humanitarian law”.

⁹⁷ M .Cherif Bassiouni, *Introduction to International Criminal Law*,(Transnational Publishers INC.. Ardsley N.Y,2003) p.65

⁹⁸ Ibid

“The Nuremberg tribunal indicted twenty four individuals, of those twenty-two prosecuted, three were acquitted, twelve were sentenced to death, three were sentenced to life imprisonment, and the rest were sentenced to terms of imprisonment from ten to twenty years. One defendant committed suicide at the end of the trial. All of these are German citizens. With regard to the Tokyo tribunal it empowered to try and punish Japanese war criminals and this tribunal found 28 defendant guilty, of those a few of them received light sentences, seven were executed, the majority were sentenced to life imprisonment, two of died during the proceedings, one defendant was suspended by the cause of insanity. See also Cenap Cakmak ‘ Historical Back Ground: Evolution of the International Criminal Law, Individual Criminal Responsibility and the Idea of Permanent International Court,(2006) Human Rights and Human Welfare Working Paper No. 39 available at <<http://www.edu19sis/hrhw/working/2006/39cakmak.2006.pdf> > accessed on 20 August 2009.

Like wise, under the ICTR Statute individuals responsible for committing the “respective crimes” referred to by it were to be criminally liable.⁹⁹ Article 6(1) of the ICTR Statute stipulates:

“A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime”.

Article 22 (1) of this Statute provides

“The Trial Chambers shall pronounce judgments and impose sentences and penalties on persons convicted of serious violations of international humanitarian law”.

The 1996 Draft Code of Offences against the Peace and Security of Mankind, which was prepared by the International Law Commission, made an important contribution to the evolution of the concept of individual criminal responsibility.¹⁰⁰

Article 1 of the Draft Code states that

*“Crimes against the peace and security of mankind are crimes under international law, and punishable as such, whether or not they are punishable under national law”.*¹⁰¹

According to Article 2 of this Draft document, “a crime against the peace and security of mankind entails individual responsibility”.¹⁰² Even if the code provides several principles

⁹⁹ Article 1 of the ICTR Statute (n 50)

¹⁰⁰ Eduardo Greppi, ‘The Evolution of Individual Criminal Responsibility under International Law’ (2004) International Review of the Red Cross No. 835 pp 531-553 available at <<http://www.ICRC.org>> accessed on 28 August 2009.

¹⁰¹ Article 1 of the Draft Code of Offences against the Peace and Security of Mankind. The Treaty is available at <http://www.untreaty.un.org/ilc/texts/instruments/.../draft%20articles/7_4_1996.pdf> accessed on 26 August 2009.

¹⁰² Ibid Article 2

and rules concerning peace and security of mankind still it is a draft and never adopted and entered into force by the UNGA.

Significantly, the ICC Statute in Article 25 contains detailed regulations of individual criminal responsibility. Hence, this will be discussed under section 2.6.2, of the paper 'ICC and individual criminal responsibility'. In short, it is possible to conclude that both the Charter and the judgment of IMT should be regarded as the cornerstone for the evolution and principles incorporated in ICTY and ICTR as well as for newly established international criminal court in respect of individual criminal responsibility.

2.6.1 Criminal Responsibility of Head of States under International Law.

Until the 20th century, there were no international courts which could exercise jurisdiction over Heads of State, and national courts could not exercise jurisdiction over sitting Heads of State for public acts carried out while in office.¹⁰³ It was after the First World War the attempt to prosecute Head of State had taken place.¹⁰⁴ It was developed first under Article 227 of the 1919 Treaty of Versailles¹⁰⁵ whereby the former Kaiser, William II of German leader was indicted for prosecution to be constituted by the 'victorious powers' for the crimes namely "the supreme offence against the sanctity of international treaties". Even though the treaty intended to prosecute the said German leader under the tribunal, the fact is that the said German leader failed to be tried and punished by the special tribunal which established by the Treaty of Versailles.¹⁰⁶

¹⁰³ M Cherif Bassiouni (n 93) 60

¹⁰⁴ Ibid

¹⁰⁵ Article 227 of the Treaty of Versailles provides "a special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defense See note at 28.

¹⁰⁶ Cenap Cakmak,, ' Historical Back Ground: Evolution of the International Criminal Law: Individual Criminal Responsibility and the Idea of Permanent International Court' (2006) Human Rights and Human Welfare WorkingPaper No. 39 available at<<http://www.edu19sis/hrhw/working/2006/39cakmak.2006.pdf>> accessed on 20 August 2009.

The reason for the failure of the trial against him was he fled to Holland and seek asylum, nevertheless the Allied powers requested for extradition through diplomatic means, but finally Holland refused for extradite the person.¹⁰⁷

As noted in the above section, Article 6 of the Charter of the IMT makes it clear that individuals are responsible for acts defined under the Charter. To this end, the Charter under Article 7 further provides the responsibility of Heads of State and government officials to be held liable and their rank in government is not considered as defense from liability and mitigating the punishment.¹⁰⁸

Treaties like the 1948 Genocide Convention,¹⁰⁹ the 1984 Convention on Torture¹¹⁰ also reaffirmed that “the official position of any accused person, whether as Head of State or government or as responsible government official, shall not be relieved from criminal responsibility nor entitled to lesser punishment”

¹⁰⁷ M. Cherif Bassiouni ,(n 93) 63

¹⁰⁸ Article 7 of the IMT Charter (n 21)

¹⁰⁹ Article IV of the 1948 Genocide Convention.

This Article states: ‘Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals. Convention on the Prevention and Punishment of the Crime of Genocide (adopted by Resolution 260(III)A of the United Nations General Assembly on 9 December 1948 and entered in to force 12 January 1951) available at< <http://www.un.org/documents/ga/res/3/ares3.htm>> accessed on 31 August 2009

¹¹⁰ Article 4 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.(Adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984 entered into force 26 June 1987).available at <<http://www2.ohchr.org/english/law/cat.htm#art4>> accessed on 31 August 2009. Article 4 of the Convention provides: ‘1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Although, Article 1 of the ICTY Statute provides the power to prosecute against crimes perpetrated in the territory of the former Yugoslavia since 1991 and specifically Article 7(2) of the Statute provides that ‘ individuals including Heads of State shall be held criminally responsible’.¹¹¹ From the recent State practice the ICTY paved the way to end impunity and ignoring the privileges which recognized under diplomatic customs and international legal rules including non-prosecution of Heads of States.¹¹²

This is evident from the indictment against the former president of Federal Republic of Yugoslavia Slobodan Milosevic when he was in power issued by an international tribunal ICTY for the violations of international humanitarian law without considering his official power and indicted him for a number of offences allegedly ordered or tolerated by him during the civil unrest in Kosovo in 1999.¹¹³ Even though, Milosevic challenged the indictment on a number of grounds, including the ‘absolute immunity traditionally enjoyed by sitting Heads of State, however, the ICTY dismissed Milosevic’s claims of immunity and upheld the indictment, suddenly, Milosevic passed away before the tribunal deliver its final judgment.¹¹⁴

As per Article 6(2) of the ICTR Statute, the official position of Heads of State can not exonerate from criminal responsibility. This Article read as follows:

“The official position of any accused person, whether a Head of State or Government or as a responsible Government official, shall not relieve

¹¹¹ Article 7 (2) of the ICTY Statute (n 49).

This Article states: “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.

¹¹² Ronald Slye, ‘Immunities and Amnesties: African Guide to International Criminal Justice’ available at <<http://www.iss.co.za/dynamic/---/AGCHAP7.PDF>> accessed on 20 July 2009.

¹¹³ Ibid

¹¹⁴ Ibid see also Gabrielle Kirk Mc Donald Olivia Swaak Goldman, (edrs) *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* vol.2 part 2 Documents and Cases (Kluwer Law International, The Hague, London, Boston, 2000) pp1681-96

*Such person of criminal responsibility nor mitigate punishment”.*¹¹⁵

In the Rwandan case, the tribunal based on Article 6(2) of the ICTR Statute which provides the non-applicability of Heads of State immunity and prosecuted Jean Kampana the Rwandan former Prime Minister.¹¹⁶ Finally, he was found guilty on six counts namely genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, crime against humanity (murder) and crimes against humanity (extermination) and sentenced to life imprisonment.¹¹⁷

Furthermore, concerning the criminal responsibility of Heads of State Article 3 of the Draft Code of Offences against the Peace and Security of Mankind provided that irrespective of their position or rank they have Heads of States or other government officials were to be held equally responsible for having committed the acts referred to as offences against the peace and security of mankind in the code.¹¹⁸

In African continent, the first international indictment (not an ICC indictment) cited as an example of a sitting Head of State was that of Charles Taylor a former Liberian president in June 2003 by the Special Court of Sierra Leone (SCSL).¹¹⁹ Article 6 (2) of

¹¹⁵ Article 6(2) of the ICTR Statute (n50)

¹¹⁶ Prosecutor vs. Kampana No.ICTR 97-23 S (4 September 1998) and Prosecutor vs KampanaNo.ICTR 97-23 I (19 October 2000) available at<<http://www.un.org/ictt/english/judgements/kambanda.html>> accessed on 25 August 2009. See also Gabrielle Kirk Mc Donald Olivia Swaak Goldman, (eds) *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* vol.2 part 2 Documents and Cases (Kluwer Law International, The Hague, London, Boston, 2000) pp1681-96

¹¹⁷ Ibid

¹¹⁸ Article 3 of the 1996 Draft Code of Offences against the Peace and Security of Mankind note at 101

¹¹⁹ Ilias Bantekas and Susan Nash, (n20) 559 ‘An agreement has been concluded between the UN and the government of Sierra Leone, which provides for the establishment of a special court for Sierra Leone, adopted the statute on 16 January 2002. Unlike the ad hoc tribunals, this special court was not established by virtue of chapter VII of the UN Security Council Resolution, rather it was a bilateral Treaty between the Government of Sierra Leone and the United Nations pursuant to Security Council Resolution 1315(2000)

the SCSL Statute stipulates that “the official position of any accused person whether as Heads of State or...shall not relive such person of criminal responsibility nor mitigate punishment”. Thus the indictment of Charles Taylor before the Special Court of Sierra Leone has given lesson and cited as a clear evidence to end an impunity and Heads of State are not free from liability for their wrongful acts under international law whether they are in power or not.

When we come to the ICC Statute, Article 27 provides for the ‘irrelevance of official capacity and removes substantive and temporal immunity for all public officials including Heads of States’. According to Article 27(1) the ICC Statute official capacity as a Head of State or government in no case exempts the person from criminal responsibility.¹²⁰

Recently, the best example at hand is the ICC’s indictment against Sudanese president Omar Hasan Al-Bashir who is a sitting Head of State. Unlike most war crimes indictment which has been served against former Heads of States, this ICC indictment was the first of its kind to be issued against a Head of State in its power in the history of ICC and makes it peculiar.

2.6.2 Individual Criminal Responsibility under the ICC Statute

It has just been said that the principle of individual criminal responsibility goes back to the Nuremberg trial. As can be observed from the ICC Statute this principle has been attributed under Article 25 of the Statute. Article 25 of the ICC Statute will entrenched criminal responsibility to individuals, in clear terms that the Court shall have jurisdiction over natural persons and that ‘a person who commits a crime within the jurisdiction of

of 14 August 2000 See also Ronald Slye (n 112).The Treaty is available at <http://www.specialcourts.org/documents/ statute.html> .Accessed on 22 August 2009.

¹²⁰Article 27(1) of the ICC Statute This Article provides: ‘the statute shall apply equally to all persons with out any distinction based on official capacity. In particular official capacity as a Head of State or Government, a member of a Government or Parliament an elected representative or a government official shall in no case exempt a person from criminal responsibility under this statute, nor shall it, in and of it self, constitute a ground for reduction of sentence.

the Court shall have the power to adjudicate criminal cases that are committed by individual person.¹²¹

Article 25(3) of the ICC Statute regulates in a detailed manner the various forms of individual criminal responsibility and provides several modes of criminal participation.¹²² As it has been addressed in Article 25(3) (a) to (d), individuals may be held criminally responsible not only for committing or attempt to commit the crime,¹²³ but also it goes further that, if they order, solicit, or induce others to do so,¹²⁴ aid, abet or otherwise assist others,¹²⁵ or assist group of persons acting with a common purpose.¹²⁶ According to this Article the modes of participation are categorized into four: (a) commission, (b) the different forms of instigation and ordering others to commit crimes, (c) assisting a crime and, (d) contribution to a group for a crime.¹²⁷

In addition individuals may also be held criminally responsible for their act pursuant to Article 25(3) (e) if they ‘directly and publicly insist others to commit genocide.’¹²⁸ Generally it is clearly observed from Article 25(3) of the ICC Statute that it provides for three different forms of commission, commission as an individual, joint commission and commission through another person.¹²⁹ In sum, Article 25 of the ICC Statute provides and deals with individual criminal responsibility for international crimes stipulated under Article 5(1) of the ICC Statute.

¹²¹ Article 25(1) of the ICC Statute (n 17)

As per this Article the Court only have jurisdiction over natural persons, and its jurisdiction not go further to states or organizations

¹²² *ibid* Article 25(3)

¹²³ *Ibid*

¹²⁴ *Ibid* Article 25(3)(b)

¹²⁵ *Ibid* Article 25(3)(c)

¹²⁶ *Ibid* Article 25(3)(d)

¹²⁷ *Ibid* Article 25(3)(a)-(d)

¹²⁸ *Ibid* Article 25(3) (e)

¹²⁹ *Ibid* Article 25 (3). See also Gerhard Werle ‘Individual Criminal Responsibility in Article 25 ICC Statute, (2007) 5(4) 953-975, doc. 1093/jicj/mqmo59. Journal of International Criminal Justice available at <<http://www.jicj.oxfordjournals.org/misc/terms.shtml/>> accessed on 26 August 2009.

2.7 Conclusion

Unlike the ICTY and ICTR, the ICC was established permanently by member States aiming to indict and prosecute perpetrators of international crimes. Proceeding by the Court will be triggered in one of three ways, referral by State party, referral by UN Security Council or through the initiation of an investigation by the prosecutor upon information received from a variety of sources.¹³⁰ Because of the non-existence of international court at the international level individuals whether they are government officials, high ranking military officers or Head of States were never brought to international justice before the establishment of Nuremberg tribunals.¹³¹

However, the principle of individual responsibility for crimes under international law was recognized in the Charter and the judgment of the Nuremberg Tribunal: thus, the recognition of this principle has made it possible to prosecute and punish individuals for serious violations of international law.¹³²

Accordingly, the Nuremberg and Tokyo tribunals played a significant role in entrenching the concept of individual criminal responsibility in international law. In doing so, these tribunals paved the way that individuals even Heads of States, could individually be held criminally responsible under international law for their acts. Following these tribunals the establishment of ad hoc tribunals of 1990's the Special Courts and the ICC played a significant role in bringing to justice the perpetrators to these international crimes.

According to Article 27 of the ICC Statute therefore, it applies equally to all persons without any distinction based on official capacity, such as official capacity as a Head of State or Government, a member of a Government or Parliament, an elected representative or a Government Official for perpetration of crimes defined under the Statute.

¹³⁰ Article 13 of the ICC Statute (n 17)

¹³¹ Clare de Than and Edwin Shorts , *International Criminal Law and Human Rights* (Thomson Sweet and Max well 2003) p 315

¹³² The London Charter (n 21)

CHAPTER THREE

INVESTIGATION AND PROSECUTION UNDER ICC

3.1 Introduction

The major duties and responsibilities of prosecutor in investigation and prosecution are set out in the ICC Statute. According to this Statute, the initiation of investigations and prosecution under ICC is based on three possibilities, namely referral of a situation by a State party, referral of a situation by Security Council and initiation of investigation by the prosecutor *proprio motu* (on his/her initiation).¹³³

The decision to open an investigation by the prosecutor has been taken after thorough analysis of available information in order to ensure that requirements listed under Article 53 of the Statute are satisfied; among others the reasonable basis for the existence of a crime, (crimes) within the jurisdiction of the Court, the admissibility of the case, the gravity of the crime and the interests of victims.

Furthermore, after considering the information/evidence/ the prosecutor could if convinced there is reasonable basis to proceed, submit a request to the Pre-Trial Chamber for an investigation.¹³⁴ If the Pre-Trial Chamber decides that there is a “reasonable basis to proceed with an investigation”, it will authorize for the commencement of an investigation.¹³⁵

Therefore, this chapter mainly deals with the investigation and prosecution process of the Court and intended to give some clue about the mechanism of referring situations to the Court. The chapter further examines the obligation of State parties in cooperation with the Court in investigation and prosecution of the perpetrators of international crimes.

¹³³ Article 13 of the ICC Statute (n 17)

¹³⁴ Ibid Article 15(3)

¹³⁵ Ibid Article 15(4) and see also Rule 50 Rule of Procedure and Evidence (adopted by the Assembly of State Parties 3-10 September 2002) New York ICC-ASP/1/3 Available at <<http://www.icc.cpi.int>> accessed on 24 September 2009.

3.2 Investigation Process under the ICC Statute

As can be observed from the ICC Statute the ICC is intended to be a Court of last resort as per its preamble paragraph 10 and Article 1 of the Statute, and investigating and prosecuting perpetrators only where national courts have failed to do so.¹³⁶ An ICC investigation may be commenced either by the UN Security Council, pursuant to chapter VII of the UN Charter, by State party or by the prosecutor acting under the *proprio motu* power.¹³⁷

Any investigative action that the prosecutor may decide to take must first be approved by the Pre-Trial Chamber.¹³⁸ Moreover, if desirous of initiating an investigation without a UN Security Council or State party referral, under Article 15 of the ICC Statute the prosecutor must first apply to the Pre-Trial Chamber for a ruling on admissibility.¹³⁹

Under Article 15(3) of the same Statute, once the prosecutor is convinced that an investigation is warranted, he/she will then submitted a request to the Pre-Trial Chamber for authorization to commence investigation. Once the Pre-Trial Chamber considers that “there is reasonable basis to proceed with an investigation”, then it will authorize the commencement of a full investigation.¹⁴⁰

Concerning the determination of “reasonable basis” to proceed with an investigation under Article 15(3) the prosecutor will consider the factors setout in Article 53(1) (a) to (c) of the ICC Statute, among others the “availability of information, the admissibility of the case and the gravity of the crime and the interest of victims”.

¹³⁶ Paragraph 10 of the ICC Statute (n 17).

This Paragraph states, “...the international criminal court established under this statute shall be complementary to national criminal jurisdiction”. In addition Article 1 of the Statute stipulated in part that “...the ICC is a permanent institution and shall be complementary to national criminal jurisdiction”.

¹³⁷ Ibid Article 13

¹³⁸ Ibid Article 57

¹³⁹ Ibid Article 15

¹⁴⁰ Ibid Article 15(3)

On the other hand, if the case is referred by the State party to the Statute or by the UN Security Council no need of request to the Pre-Trial Chamber for authorization to commence an investigation.¹⁴¹ One may pose a question that in case of UN Security Council and State party referral why the prosecutor request to the Pre-Trial Chamber for authorization of an investigation need not be required?

According to Antonio Cassese's opinion, it is assumed that the "referring State has already undertaken the inquiry before referring the case to the Court" and, similarly in case of referral by the UN Security Council, the "UN Security Council may take inquiry and made screening of information on the perpetrators of the crime through different means before referring the case to the Court".¹⁴²

As stated in the preceding chapter it is the prosecutor who is responsible for conducting investigation and prosecution under the ICC regime. Accordingly, the duties and powers of the prosecutor with respect to investigations listed out in Article 54 of the ICC Statute.

In carrying out investigations, the prosecutor has a duty to establish the truth, to investigate evidence that is favorable as well as unfavorable to the person under investigation,¹⁴³ to respect the interests and circumstances of victims and to fully respect the rights of person.¹⁴⁴ Therefore, the prosecutor of the ICC as per Article 54(1) of the ICC Statute is required to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this statute and, in doing so, investigate incriminating and exonerating circumstances equally.

On the other hand the ICC Statute setout additional optional duties; including collecting and examining evidences,¹⁴⁵ questioning suspects victims and witnesses,¹⁴⁶ request the

¹⁴¹ Ibid

¹⁴² Antonio Cassese (n 26) 407

¹⁴³ Article 54(1)(a)of the ICC Statute (n 17)

¹⁴⁴ Ibid Article 54(1)(b)

¹⁴⁵ Ibid Article 54(30(a)

cooperation of any State or intergovernmental organization and take appropriate action and enter arrangements and agreement which are consistent to the Statute,¹⁴⁷ and where necessary to protect the confidentiality of information and persons concerned in the investigation.¹⁴⁸ In doing so, however, States are under a general obligation to cooperate with the Court during its investigation of crimes.¹⁴⁹ The cooperation of States or intergovernmental organizations may be needed in investigation including “collection and examination of evidence’ and “attendance and questioning of suspects” victims and witness.¹⁵⁰

More importantly, there are conditions to which the prosecutor refused to conduct investigation. This is mainly where “reasonable basis” is lacking and also where a “situation is considered inadmissible”.¹⁵¹ According to Rule 48 of the Rules of Procedure and Evidence of the ICC,¹⁵² the factors for the determination of the reasonable basis to proceed with an investigation, is setout in Article 53(1) to (c) of the ICC Statute. Thus, if these factors lack the prosecutor may refuse to conduct investigation.

Moreover, the issue of admissibility is provided under Articles 17-20 of the ICC Statute. The prosecutor may also refuse to investigate, if the situation referred to it considered inadmissible or inconsistent with the grounds provided under these Articles.

¹⁴⁶ Ibid Article 54(3)(b)

¹⁴⁷ Ibid Article 54(3) (c) and(d)

¹⁴⁸ Ibid Art 54(3)(f)

¹⁴⁹ Ibid Article 86

¹⁵⁰ Ibid Article 54(3) (a-c)

¹⁵¹ Ilias Bantekas and Susan Nash (n 20) 543

¹⁵² Rule 48 of the Rules of Procedure and Evidence (n135)

Rule 48 states, “in determining whether there is a reasonable basis to proceed with an investigation under Article 15 paragraphs 3, the prosecutors shall consider the factors set out in article 53 paragraph 1(a) to (c). Rules of Procedure and Evidence adopted by the Assembly of States Parties first session New York 3-10 September 2002. Official Records ICC ASP/1/3 available at <<http://www.icc.cip.org>. accessed on 1 October 2009

3.3 List of International Crimes Prosecuted by the Court

The ICC Statute which established the ICC embraces a list of international crimes to which the Court acquire jurisdiction.¹⁵³

Article 5 to 8 of the ICC Statute deals with the definitions and categories of crimes that face under the jurisdiction of the Court. The ICC Statute has adopted four categories of crimes which are the “most serious crimes to the international community as a whole”, namely genocide, crimes against humanity, war crimes and crimes of aggression.¹⁵⁴ Thus the Court will exercise its jurisdiction to the above noted crimes on the principle of complementarity meaning that it will exercise jurisdiction only if a State is “unwilling” or “unable” to prosecute, it is therefore not intended to replace national judicial process, but rather to complement them.¹⁵⁵

Crime is what ever conduct the laws of a particular country designate or formulate as criminal, and there are a lot of differences from one country to another as to what conduct constitutes as crime.¹⁵⁶

With regard to international crimes there is no uniform definition of its meaning and contents, however according to Claire de Than and Edwin Shorts international crime is defined as:

*“An international crime is an act which the international community recognizes as not only a violation of ordinary state criminal law but one which so serious that it must be regarded as a matter for international concern”.*¹⁵⁷

¹⁵³ Article 5(1) of the ICC Statute (n 17)

¹⁵⁴ Ibid Article 5 (1)

¹⁵⁵ Ibid Articles 1 and 17

¹⁵⁶ Paul E.Dow, *Criminal Law*, (Brooks Cole Publishing Company Monterey, California 1985)p 3

¹⁵⁷ Claire de Than and Edwin Shorts, (n 131) 13

For an offence to be considered as an international crime it must be defined as crime under international treaties and custom. This view was pointed out by Ilias Bantekas and Susan Nash.¹⁵⁸ They also argued that “...An international offence is any act entailing the criminal liability of the perpetrators and emanating from treaty or custom”¹⁵⁹

As suggested by Ilias Bantekas and Susan Nash now a day every international crime was codified under different multilateral treaties and accepted by international community regarded as an international crime.¹⁶⁰ In addition, M.Charif Bassiouni listed out 22 different categories of crimes as international crimes.¹⁶¹ Even if he listed out these crimes however the Statutes of international tribunals and Court adopt only four “core crimes” as international crimes.¹⁶²

He also defines international crime as follows:

*“International crimes are crimes whose violations are likely to affect the peace and security of man kind and is contrary to fundamental humanitarian values or which is the product of state action or a state favoring policy”.*¹⁶³

Antonio Cassese as well pointed out that:

*“International crimes are considered to be those which are of concern to the international community as a whole or acts which violate a fundamental interest protected by international law”.*¹⁶⁴

¹⁵⁸ Ilias Bantekas and Susan Nash (n 20) 6

¹⁵⁹ Ibid

¹⁶⁰ Ibid

¹⁶¹ M .Charif Bassiouni (ed) ,*International Criminal Law: Crimes*,(Transnational Publishers INC. Dobbes Ferry N.Y 1986) PP 1-2

¹⁶² Articles 2-5 of the ICTY Statute (n 49), Articles 2-4 of the ICTR Statute (n 50) and, Article 5(1) of the ICC Statute (n 17)

¹⁶³ M .Charif Bassiouni (n 161) 3

¹⁶⁴ Antonio Cassese (n 26) 23

According to these writers, international crimes are crimes which would be a direct or indirect threat to world peace and security of human kind and perhaps which could affect the public at large.

Moreover, Gerhard Werle pointed out the basic differences of international crimes from crimes under international law in terms of their applicability of punishment.¹⁶⁵ Indeed, international crimes are directly punishable under international law; whereas the basis of prosecution and punishment of other international crimes is not international rather it is domestic.¹⁶⁶

In fact, international crimes first established and developed under customary international law and then formulated and embodied in conventional international law.¹⁶⁷ To this end, customary and contemporary international law as recently codified by the ICC Statute incorporates genocide, crimes against humanity, war crimes and crimes of aggression in Article 5(1) of the ICC Statute as “core” international crimes. In the following section of this paper, an attempt will be made to briefly outline the “core crimes” that would make up an international crime namely genocide, crimes against humanity and war crimes.

3.3.1 War Crimes

Traditionally war crimes were sought to embrace only violations of international rules regulating war proper meaning that international armed conflicts to the exclusion of civil wars.¹⁶⁸ However, recently the serious violations of customary or applicable treaty law in

¹⁶⁵ Gerhard Werle, *Principles of International Criminal Law* (T.M.C Asser Press 2005) p36-37

¹⁶⁶ Ibid.

He also pointed out other international crimes which are classified as treaty-based crimes and mentioned some of them as an example, such as “crimes against air traffic and maritime navigation”, “certain forms of narcotics crimes”, “acts of terrorism”, counterfeiting and torture” which will be prosecuted and punished by national courts.

¹⁶⁷ David L.Sills (ed), *International Encyclopedia of the Social Science*, vol.7 (Simon and Schuster and Prentice Hall International 1972) p516

¹⁶⁸ Antonio Cassese (n 26) 47

internal armed conflicts began to be considered as war crimes.¹⁶⁹ This is evident from the ICC Statute Article 8 (2) (c-f) and clearly provided that “other serious violations of the laws and customs applicable in internal armed conflict” have been considered as war crimes.

In the history of individual criminal responsibility for war crimes, the World War I marked a new development.¹⁷⁰ This is mainly because of the gravity of the war that sacrifices the loss of lives of individuals.¹⁷¹ After the end of the war the Versailles Treaty introduced the concept of individual criminal responsibility for war crimes. Accordingly the Versailles Treaty under its Articles 227-230 provided for individual criminal responsibility and efforts has been made to prosecute and punish the perpetrators who took part in the war including ex-Kaiser Wilhelm II of Germany.¹⁷²

Consequently, the formation of International Military Tribunals the IMT and the IMTFE was an important step in the punishment of war criminals.¹⁷³ The London Charter of 8 August 1945, which established the IMT at Nuremberg under Article VI (b), formulated for the first time the authoritative definition of war crimes.¹⁷⁴ In addition to this, the Charter also gave power to the tribunal to try and punish individuals responsible for war

¹⁶⁹ Ibid

¹⁷⁰ M.Cherief Bassiouni (n 161) 31

¹⁷¹ Ibid

¹⁷² The Versailles Treaty of June 28 1919 available at <http://www.history.sandiego.edu/gen/text/Versailles_treaty/vercontents.html>. Article 227 in part provides that “The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties”. See also M.cherif Bassiouni (ed) note at 144 p32

¹⁷³ M.Cherif Bassiouni (ed) (n 161) 41

¹⁷⁴ The London Charter (n 21)

Article VI (b) of the Charter provides war crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

crimes irrespective of their rank or official position in the government.¹⁷⁵ Furthermore, the four Geneva Convention of 1949,¹⁷⁶ and their Additional Protocols dealt with the conduct of war in international armed conflicts and internal wars, notably civil wars.¹⁷⁷

The ICC Statute under Article 8 defined war crimes at a great length and detailed manner. According to this Article it includes offences which are recognized under customary international law. The major ones are grave violations of the Geneva Conventions of 1949 “willful killing”, “torture or inhuman treatment including biological experiments...”,¹⁷⁸ other serious violations of the laws and customs applicable in international armed conflict,¹⁷⁹ in armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 1949 listed out as war crimes.¹⁸⁰ Therefore, breaches of the above stated customary or conventional rules entail the personal criminal liability of individuals under international law.

3.3.2 Genocide

Among crimes stated under international law, genocide is the gravest one and before Nuremberg Tribunal this type of crime was considered to be a part and parcel of war crimes.¹⁸¹

The London Charter which established the Nuremberg Tribunal had three categories of crimes under Article VI namely crimes against humanity, crimes against peace and war

¹⁷⁵ Ibid Article 7

¹⁷⁶ Article 3 of the Geneva Conventions of 12 August 1949 (ICRC)

¹⁷⁷ Ibid see also Protocols Additional to the Geneva Conventions of 12 August 1949 and Additional Protocols of 1977 to the Geneva Conventions of 1949.

¹⁷⁸ Article 8(2) (a) of the Statute (n 17)

¹⁷⁹ Ibid Article 8(2)(b)

¹⁸⁰ Ibid Article 8(2)(c)

¹⁸¹ Mc Donald, Gabrielle Kirk and Swaak Goldman Oliva, *Substantive and Procedural Aspects of International law: The experience of international and national courts.* (Vol. 1 The Hague London Boston kluwar Law International 2000) p 117

crimes.¹⁸² In this category of crimes, genocide is not clearly provided, however, when one see Article VI (C) of the Charter there is a clue for the incorporation of genocide. Article VI (C) of the Charter reads as follows.

*“Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”*¹⁸³

As can be clearly seen from this Article and the Charter as a whole the word “genocide” is not included. However, when one see the second limb of this Article which states “...persecution on political, racial or religious grounds in execution of or in connection with any crime ...” seems to embrace the notion of genocide implicitly. More importantly, when we see this Article in connection with Article 6 of the ICC Statute which gives definition for genocide, some acts which are enumerated under the Charter seems similar with acts of genocide provided under Article 6 of the ICC Statute. In Article VI of the Charter therefore, the crime of genocide is impliedly incorporated under crimes against humanity.

At the Nuremberg trial for the first time genocide crimes were officially described in the indictment of major German war criminal for their brutal act destroying certain races and layers of nations and peoples, and religious groups in particular Jews, Poles, Gypsies and other.¹⁸⁴

In fact, after the end of the World War II the issue of the genocide became an international concern and the UNGA by Resolution 96(1) in 1946 underscored that

¹⁸² London Charter (n 21)

¹⁸³ Ibid Article VI (C)

¹⁸⁴ E.J.Osmanczyk *The Encyclopedia of the UN and International Relations* (2nd.ed. New York Taylor and Francis 1990) p 328

genocide is a crime under international law which the civilized world condemns.¹⁸⁵ The Genocide Convention affirmed that “genocide is a crime under international law,¹⁸⁶ whether private individuals, public officials or statesman, and whether the crime is committed on religious, racial, political or any other grounds are punishable.¹⁸⁷

It should be noted that in the history of international criminal law Article 2 of the 1948 Genocide Convention for the first time gave definition of genocide.¹⁸⁸ Similarly after the end of the Cold War the Tribunals (ICTY and ICTR) and the Court (ICC) adopt the same pattern without any change in words and way of enumerating, and gave identical definition for genocide under their Statutes.¹⁸⁹ It is worth noting that in all above stated Statutes and in the 1948 Genocide Convention an act of genocide entails individual criminal responsibility and is punishable regardless of the status or the rank of the perpetrators as Head of State or public official of the government or not.

¹⁸⁵UNGAR96 (1) 1st session 188-89 UNDOC A/64Add.(1946) available at <<http://www.un.org/documents/ga/res/1/ares1.htm>> accessed on 28 August 2009.

¹⁸⁶ Article 1 of the 1948 Genocide Convention (adopted by UN General Assembly Resolution.260 (III)A on 9 December 1948,entered in to force 12 January 1951) available at <<http://www.un.org.documents/ga/res/3ares3.htm>> accessed on 28 August 2009. This Article states “...whether committed in time of peace or in time of war, genocide is a crime under international law...”

¹⁸⁷ Ibid Article 4

¹⁸⁸ Ibid Article 2.

This Article provided that “ genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c)Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d)Imposing measures intended to prevent births within the group; (f)Forcibly transferring children of the group to another group.”

¹⁸⁹ See Article 2(2) of the ICTR Statute (n 50) ,Article 4(2) of the ICTY Statute (n 49) and Article 6 of the ICC Statute (n 17)

3.3.3 Crimes against Humanity

With the exception of the Genocide Convention there is no other separate Convention that deals with crimes against humanity.¹⁹⁰ But these categories of crimes are incorporated in different legal instruments.¹⁹¹ The concept of crimes against humanity was first articulated under the Charter of the Nuremberg Tribunal, and the Charter included a provision under which the tribunal was to try and punish persons guilty of crimes against humanity.¹⁹²

This is evident from Article VI(c) of the Charter.

“Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Similarly Article 5 (c) of the Charter of IMTFE¹⁹³ and Article II (C) of Control Council Law No.10¹⁹⁴ included crimes against humanity as an international crime under the Charter.

¹⁹⁰ M. cherif Bassiouni (n 97) 139

¹⁹¹ Ibid

¹⁹² Faustin Z.Ntoubandi, *Amnesty for Crimes against Humanity under International Law* (Martinus Nijhoff Publishers Leiden Boston 2007) p 39

¹⁹³ The Charter for International Military Tribunal for the Far East (convened on May 3, 1946) available at <http://www.stephen-stratford.co.uk/imtfe_charter.htm> accessed on 17 September 2009.

Article 5(C) of IMTFE stipulated that ‘Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or

Of course, until the establishment of the ICTY and the incorporation therein in Article 5 of the ICTY Statute no international definition was given to crimes against humanity.¹⁹⁵ For instance Eduardo Greppi in his article titled r “International Review of the Red Cross: The Evolution of Criminal Responsibility under International Law” quoted the decision given by the ICTY on *Erdemovic case* what constitutes a crime against humanity.

*“Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health and /or dignity. They are inhuman acts that by their extent and gravity go beyond the limits tolerable to the international community which must perforce demand their punishment”*¹⁹⁶

In addition Article 3 of the ICTR Statute similarly provided grounds which constitutes crimes against humanity and further stipulated an attack as a crime against humanity when it is perpetrated in either a widespread or systematic fashion.¹⁹⁷ To this end, both Statutes comprise acts like “murder, extermination, enslavement, deportation, imprisonment, torture and rape” as the crimes against humanity.¹⁹⁸

execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan’.

¹⁹⁴ Allied Control Council Law No 10, 20 December 1945 available at <<http://www.avalon.law.yale.edu/imt10.asp>> accessed on 12 September 2009. Article II (c) stipulates ‘crimes against humanity atrocities and offences including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other in human acts committed against any civilian population, or prosecution on political racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

¹⁹⁵ Ilias Bantekas and Susan Nash (n 20) 127

¹⁹⁶ Eduardo Greppi, ‘The Evolution of Individual Criminal Responsibility under International Law (2004) No. 835 pp 531-553 International Review of the Red Cross available at <<http://www.icrc.org>>accessed on 17 September 2009.

¹⁹⁷ Article 3 of the ICTR Statute (n 50)

¹⁹⁸ Ilias Bantekas and Susan Nash (n 20) 129

In the ICC Statute also the definition of these offences is given in a comprehensive manner under Article 7. According to Article 7(1) of the ICC Statute, crimes against humanity means:

*“... an act committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of attack”.*¹⁹⁹

Finally another distinguishing factor of crimes against humanity is that it can be conducted in peaceful circumstances as well.²⁰⁰ Thus, the three categories of crimes discussed above are crimes within the jurisdiction of the Court and the Court is given power to exercise its jurisdiction over persons. As a result, recently the ICC indicted and issued an arrest warrant against President Omar Hasan Al-Bashir of Sudan for the perpetration of these crimes. Concerning this issue however it will be further discussed in detail under chapter four of the paper.

3.4 Referring Situations to the Court (Trigger Mechanism)

As pointed out under the preceding chapter specifically in section 2.3 jurisdiction of the Court, the ICC Statute delineates the jurisdiction of the Court that the Court can take up only the most serious crimes of concern to the international community, namely genocide, crimes against humanity and war crimes.²⁰¹ The ICC Statute also provided the mechanism for triggering the Court’s jurisdiction.²⁰² The conditions that have to be met before the Court can exercise its competence are set out in Article 12 of the ICC

¹⁹⁹ Article 7(1) of the ICC Statute (n 17)

Unlike the ICTY and ICTR this Article enumerates in a detailed manner “acts” which are considered as crimes against humanity in Article 7(1) (a)-(k). Some of these acts are, murder, extermination, torture, enforced disappearance of persons, the crime of apartheid and etc. see the ICTY and ICTR Statutes Article 5 and Article 3 respectively to compare the difference.

²⁰⁰ Tomas Vince Adani, ‘International Relations and the Introduction of the International Criminal Court’ (2008) available at <<http://www.docs.google.com/giview?awebasa.org.publication/addny-2ndissue.pdf>> accessed on 19 September 2009.

²⁰¹ Article 5(1) of the ICC Statute (n 17)

²⁰² Ibid Article 13

Statute.²⁰³ As stipulated in Article 13 of the ICC Statute, the triggering mechanism rests on three possible mechanisms by which the jurisdiction of the Court is “triggered”: referral by State parties, referral by the UN Security Council and by the prosecutor acting on his own initiation (ex-officio). Accordingly, these three situations will be discussed under the following sections.

3.4.1 Referral by State Parties

Among the trigger mechanisms listed out under Article 13 of the Statute, the first one is referral by State party. According to Article 14(1) of the ICC Statute:

*“a State party may refer to the prosecutor a situation in which one or more crimes within the jurisdiction of the court appear to have been committed requesting the prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.”*²⁰⁴

In terms of this Article only a State party to the Statute refers the situation to the Court in which one or more crimes (those international crimes stipulated under Article 5(1)) with the jurisdiction of the Court appear to have been committed.²⁰⁵ As long as the preconditions for the Court’s exercise of jurisdiction have been met, i.e. the alleged perpetrators of the crimes are nationals of a State party²⁰⁶ or the crimes are committed on the territory of State party.²⁰⁷

As of October 2009, there were four situations that arise in African countries officially referred to the prosecutor of the ICC.²⁰⁸ Three of these cases were referred by State

²⁰³ Ibid Article 12

²⁰⁴ Ibid Article 14(1)

²⁰⁵ Ibid

²⁰⁶ Ibid Article 12(2)(a)

²⁰⁷ Ibid Article 12(2)(a)

²⁰⁸ Situations and Cases to the ICC, ICC home page available at <<http://www.icc.cip.org>> accessed on 26 September 2009.

parties themselves. Central African Republic, Democratic Republic of Congo and Uganda have referred their cases to the ICC with regard to the situations occurring in their territory.²⁰⁹ One case is however, referred by the UN Security Council concerning the situation in Darfur, Sudan pursuant to the UN Security Council Resolution 1593(2005).²¹⁰

(i) Referral by Uganda

In December 16, 2003 the government of Uganda referred the situation of its country by requesting that the prosecutor to open an investigation.²¹¹ Uganda became a State party to the ICC by ratifying the ICC Statute in June 2002.²¹² It should be noted that the ICC has jurisdiction for the crimes listed under Article 5(1) of the ICC Statute, and if these crimes were committed by Ugandan nationals or on the territory of Uganda as per Article 12(2) (a) and 12(2) (b) of the ICC Statute after July 1st 2002 or entry in to force of the ICC Statute the Court has a power to entertain the case.

Following to receiving the case the ICC indicted five senior commanders of the Lord's Resistance Army (LRA) including its leader Joseph koney. In January 2004, the prosecutor of ICC indicted the LRA leaders that have allegedly committed "brutal attacks

²⁰⁹ Ibid

²¹⁰ Ibid

²¹¹ Laura Barnett, 'The International Criminal Court: History and Role'(2008) available at <<http://www.parl.gc.ca/information/library/PRBpubs/prob/02111-e.html>> accessed on 25 July 2009.

In addition a press release held on January 29, 2004, the ICC prosecutor disclosed that "the president of Uganda Uvari Musavini refers situation of northern Uganda concerning the Lord's Resistance Army (LRA) to the ICC. Available at <<http://www.icc.cip.org>> press release accessed on 25 September 2009

²¹² Lists of state parties to the Rome Statute available at <<http://www.icc.cip.org>> accessed on 25 September 2009. see also for the ICC member states to the ICC Statute annex I

on innocent civilians,” including murder, forced abduction, sexual enslavement, and mutilation, amounting to crimes against humanity and war crimes.²¹³

(ii) ***Referral by the Democratic Republic of Congo***

The other referral made by a State party to the ICC is that of Democratic Republic of Congo (DRC). The DRC referred the situation to the Court in April 2004 pursuant to Article 13(a) of the ICC Statute requesting that the prosecutor kick off an investigation against Thomas Lubanga Dyilo, leader of the Union of Congolese patriots and other three individuals, Bosco Ntaganda, Germain Katanga and Mathieu Ngudjolo all in custody except Bosco Ntaganda.²¹⁴

Furthermore, the ICC issued an arrest warrant against Lubanga in March 2006, and charges were confirmed in January 2007 for the alleged war crimes and crimes committed in Congo including mass killing, rapes, use of children under the age of 15 as soldiers and other gross human rights violations.²¹⁵

At the time of writing this paper (October 10, 2009) the trial in the case of Thomas Lubanga Dyilo the Trial Chamber I issued the decision to hear the evidence of the defense of the person in October 2009 and as a result the chamber started to hear the evidence. The case of Germain Katanga and Mathieu Ngudjolo Chui is scheduled for 24 November 2009.²¹⁶

²¹³ Alexis Arieff, and et al ‘International Criminal Court Cases in Africa: Status and Policy Issues’ (2008) CRS Report for Congress available at <<http://www.fas.org/sgp/crs/row/RL34665.pdf>> accessed on 15 September 2009.

²¹⁴ ‘Coalition for the International Criminal Court’ “Democratic Republic of Congo” available at <<http://www.iccnw.org/index.php?Mod=drc>> accessed on 20 August 2009

²¹⁵ Ibid

²¹⁶ ICC weekly update of 05-10-2009 available at <<http://www.icc.cpi.int/NR/rdonlyres/6654FF28-B3FC-4701-929B-8B3DDBE63FB1/280916/ICC-WUED4-ENG-pdf>> accessed on 9 October 2009.

(iii) Referral by the Central African Republic

The third referral made to the ICC prosecutor was held in 7 January 2005 by the Central African Republic (CAR) for the crimes committed any where on CAR territory.²¹⁷ The government of CAR referring the situation of crimes within the jurisdiction of the Court committed any where on the territory of the CAR since 1 July 2002.²¹⁸ It is important to note here that the CAR ratified the ICC Statute on 3 October 2001.²¹⁹

On 23 May ,2008 the ICC issued an arrest warrant for Jean-Pierre Bemba the alleged president and commander in chief of the ‘Mouvement de Lebe’ration du Congo’(Movement for the Liberation of Congo) MLC.²²⁰ As a result he was arrested on 24 May, 2008 by Belgian authorities and transferred to the detention center in The Hague on 3 July, 2008 and also faces three counts of crimes against humanity, including rape, torture and murder as well as five counts of war crimes in CAR from 25 October 2002 up to 15 March 2003.²²¹

Recently it is observed that Jean Pierre Bemba had been granted conditional release by Pre-Trial Chamber II on 14 August 2009 until his trial started in 2010.²²²

²¹⁷ Coalition for the International Criminal Court “Central African Republic” available at <<http://www.iccnw.org/index.php?mod=car>> accessed on 27 September 2009

²¹⁸ Ibid

²¹⁹ Ibid

²²⁰ ‘Coalition for International Criminal Court’, Cases and Situation “Bemba Case” available at <<http://www.icc.now.org>> accessed on 25 September 2009

²²¹ Ibid

²²² Ibid see also ICC Press Release ICC-OTP20090825-PR445,25 August 2009.available at <[http://www.icc.cpi.int/NR/exeres/4F21AF-53-EDFC-44BD-A25E0098D5238E99 .htm](http://www.icc.cpi.int/NR/exeres/4F21AF-53-EDFC-44BD-A25E0098D5238E99.htm)> accessed on 28 September 2009.

3.4.2 Referral by the UNSC

Article 13 of the ICC Statute also described another trigger mechanism of the Court's jurisdiction. This is referral by the UN Security Council. Concerning this mechanism of prosecution, there was a debate during the preparatory phase of ICC negotiation, granting the UN Security Council such a right.²²³

Those States that opposed granting such a right to the UN Security Council voiced their concern and expressed their stand that such a role would reduce credibility and 'moral authority of the Court', 'under mine its independence', and 'impartiality' and open a possibility for exerting 'political influence' on the Court.²²⁴

On the other hand, those supporting granting such a right to the UN Security Council underscored that, one of the reasons for the creation of the ICC was to remove the need for the creation of an ad hoc tribunals by the UN Security Council in the future as had been done in the ICTY and ICTR.²²⁵ This group of States strengthened their view that the assignment of this right to the UN Security Council was considered consistent with its responsibility for the maintenance of international peace and security under the Charter.²²⁶

It is true that if the crime committed fall within the jurisdiction of the Court, the Court may exercise its jurisdiction based on Article 13(b) of the ICC Statute "if a situation in which one or more of such crimes appears to have been committed is referred to the prosecutor by the UN Security Council acting under chapter VII of the Charter of the United Nations".²²⁷

²²³ William A. Schabas (n 85) 83

²²⁴ Ibid

²²⁵ Ibid 84

²²⁶ Ibid

²²⁷ Article 13 (b) of the ICC Statute (n 17)

When a case is referred to the Court by the Security Council, acting under chapter VII of the UN Charter, no State consent is required.²²⁸ This is because under the United Nations Charter, Member States have agreed to be abiding by UN Security Council decisions relating to the maintenance of international peace and security.²²⁹ Since the UN Security Council is a responsible body for maintaining international peace and security, States would indeed, be required to accept the jurisdiction of the Court for situations referred by the UN Security Council. By this assertion, the Court will have jurisdiction over the crimes even if committed in non-States parties by nationals of non-States parties and in the absence of consent by the territorial State or the State of nationality of the accused.²³⁰

(i) ***The Darfur Case***

The crises of Darfur resulted in the violation of international humanitarian law and human rights law .As a result on 31 March 2005 the UN Security Council adopted Resolution 1593 which referred the situation concerning the Darfur region in Sudan to the ICC.²³¹ Darfur is the fourth referral to the ICC and the first referral of the UN Security Council to ICC since the entry into force of the Statute.²³²

The ICC prosecutor on 27 February 2007 indicted two Sudanese officials, Ahmad Harun, the then Ministry of State for Internal Affairs and Janjaweed Militia leader Ali

²²⁸ Ilias Bantekas and Susan Nash, *International Criminal Law* (2nd ed Cavendish Publishing Limited ,London .Sydney .Portland Oregon 2003)p 378

²²⁹ Article 25 of the United Nations Charter. (UN Charter Signed on 26 June 1945) available at<<http://www.un.org/en/documents/charter>> accessed on 24 August 2009

This Article provides, ‘The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter’

²³⁰ Ilias Bantekas and Susan Nash (n 228) 378

²³¹ UNSC/RES. 1593 (2005) (n 6)

²³² ICC Situations and Cases, Situations ICC 02/05 ICC-02/05-01/07 the Prosecutor vs Ahmad Muhamad Harun(“Ahmad Harun”) and Ali Muhammad Ali-Abd-Al-Rhaman (“Ali Kushayb”) available at <<http://www.icc.cpi.int/Menus/GO?id=c7a002f5-4cfb-4cb7-89af-5acb6eOffeOe&lan=enGB>> accessed on 8 October 2009.

Mohammed Ali Abdel-Rhaman also known as Ali Kushyab, were charged on 51 counts each of them for war crimes and crimes against humanity.²³³ But the government of Sudan refused to hand over these officials to the ICC and they are not arrested yet or appeared before the Court to this date.

Recently, Al-Bashir is the third Sudanese national indicted by the ICC on 14 July 2008 and to whom the ICC has issued an arrest warrant on 4 March, 2009. Hence, the legality of indictment by ICC towards Al-Bashir will be discussed in detail in the next chapter of the paper.

The fourth individual indicted by ICC and the first individual who appeared voluntarily before the Chamber on 18 May 2009 is called Abu Garda a member of the Zaghawa tribe of Sudan.²³⁴

3.4.3 Initiation by the ICC prosecutor (Ex-Officio Initiation)

The third mechanism of trigger the situation to the Court is by the initiation of the ICC prosecutor (*ex-officio* initiation).

According to the ICC Statute, the prosecutor of the ICC take action *proprio motu* (on his or her own initiatives) is based on information received on crimes within the jurisdiction of the Court.²³⁵ The prosecutor upon receiving the information, he or she should have to be sure that, the condition of admissibility setout in Article 17 are met. These conditions which elaborated under Article 17 are, "unwillingness" or "inability" of the State to

²³³ Ibid

²³⁴ 'Situation in Darfur, Sudan', "Abu Garda case" available at <http://www.icc.cpi.int/NR/rdonlyres/A8FC5BA9-73F9-4> accessed on 19 October 2009.

"He is charged with three war crimes (violence to life, in the form of murder, whether committed or attempted; intentionally directing attacks against personnel, installations, materials, units, and vehicles involved in a peacekeeping mission; and pillaging) allegedly committed during an attack carried out on 29 September, 2007, against the African Union Mission in Sudan (AMIS), It is alleged that the attackers killed twelve and severely wounded eight soldiers, destroyed communication facilities and other materials and appropriated property belonging to AMIS."

²³⁵ Article 15(1) of the ICC Statute (n 17)

conduct investigations, decision not to prosecute by State, double jeopardy, gravity of the case, “shielding the person”, unjustifiable delay, lack of impartiality, collapse or unavailability of national judicial system.²³⁶

In fact, the various sources of information are mentioned in Article 15(2) of the ICC Statute. According to this Article the sources might be States, United Nations organs, intergovernmental or non governmental organizations and other reliable sources that the prosecutor deems sufficient to set justice in motion.²³⁷

Moreover, if the prosecutor receives information from non governmental organization alleging that crimes within the ICC’s jurisdiction have been committed, he is duty bound to evaluate the information and make two determinations: first, whether there is “reasonable basis” to proceed with the investigation; and second whether the case appears to fall within the jurisdiction of the Court.²³⁸ Therefore, if the prosecutor answers both of these questions in the affirmative, he must then apply in writing to three judge panel, called the Pre-Trial Chamber, for authorization to commence an investigation.²³⁹

Consequently, if the Pre-Trial Chamber agrees that there is reasonable basis to proceed with an investigation and that the case appears to be within the Courts jurisdiction, it must authorize the commencement of an investigation.²⁴⁰ On the other hand, if the Pre-Trial Chamber refuses to the prosecutor’s request, then the prosecutor may submit a

²³⁶ Ibid Article17

²³⁷ Ibid Article 15(2)

²³⁸ Ibid Article 15(4)

²³⁹ Ibid Article 15(3) and see Rule 50(2) (n 135)

Rule 50(2) provides “when the prosecutor intends to seek authorization from the Pre-Trial Chamber to initiate an investigation pursuant to Article 15(3) ...a request for authorization by the prosecutor shall be in writing”. Rules of Procedures and Evidence, (adopted by the assembly of state parties first session New York 3-10 September 2002.) official records ICC-ASP/1/3 available at <<http://www.icc.cpi.int>> accessed September 24,2009

²⁴⁰ Ibid Article 15(4)

“subsequent request” based on the new facts and evidence.²⁴¹ Alternatively, if the prosecutor finds that the information he has received does not provide reasonable basis to proceed with an investigation, he must inform those who provide the information of his conclusion.²⁴²

3.5 Conclusion

As ICC is complementary to the national courts, initiation of investigation and prosecution take place after the national courts failed to do so.²⁴³ The ICC Statute also sets out three ways of triggering mechanism, referral by State party, referral by UN Security Council pursuant to chapter VII of the UN Charter and by the prosecutor acting on his/her own motion.²⁴⁴

Unlike the *proprio motu* initiation, when prosecution is initiated by referral by a State party or at the request of the UN Security Council, it would seem that the prosecutor has no discretion as to whether or not to proceed,²⁴⁵ and also the prosecutor’s request to the Pre-Trial Chamber for the authorization of an investigation is not required.²⁴⁶

The prosecutor is not only under the obligation of initiation and investigation to prosecute the perpetrators, but it goes further to gather evidence both against and in favor of the suspect or accused.²⁴⁷

In general, the prosecutor under takes investigation and prosecution properly, it highly needs to rely upon the cooperation of States and States are under a general obligation to cooperate with the Court as the case so requires.

²⁴¹ Ibid Article 15(5)

²⁴² Ibid Article 15(6)

²⁴³ Ibid Article 1

²⁴⁴ Ibid Article 13

²⁴⁵ Ibid Article 54(1)

²⁴⁶ Antonio Cassese (n 26) 407

²⁴⁷ Article 54(1) of the ICC Statute (n 17)

CHAPTER FOUR

THE LEGALITY OF INDICTMENT, THE PRE-TRIAL CHAMBER I DECISION AND INTERNATIONAL RESPONSE AGAINST OMAR HASAN AL-BASHIR'S INDICTMENT

4.1 Introduction

International crimes are gross violations of Human Rights usually committed by state and non state actors in a systematic manner. Without a certain degree of cooperation and coordination of actions; it is virtually impossible to perpetrate atrocities such as genocide or crimes against humanity.²⁴⁸ It is well established under the ICC Statute that criminal responsibility is attributed to individuals, most precisely to natural persons.²⁴⁹ One of the main objectives of the ICC is to put end impunity for the perpetrators of these crimes²⁵⁰ and to punish individuals who are responsible for these international crimes.²⁵¹

It is now well established under the ICC Statute that a person can be held responsible for war crimes, crimes against humanity, genocide and other international crimes on the basis of the principle of individual criminal responsibility.²⁵² Hence, individual criminal responsibility embraces both commission of a crime in person and participation in a group criminality as stipulated under the ICC Statute.²⁵³

As Sudan has not ratified the ICC Statute, in principle the ICC can not investigate crimes that may have taken place in Darfur unless the UNSC refer the case to the Court pursuant to Article 13(b) of the ICC Statute. Thus, in 31 March 2005 the UNSC based on the

²⁴⁸ Gunel Guliyeva, 'The Concept of Joint Criminal Enterprise and the ICC Jurisdiction'(2008) available at <<http://www.americastudents.us/pages%20form%Guliyerva.pdf> > accessed on 11 October 2009

²⁴⁹ Article 25 of the ICC Statute (n 17)

²⁵⁰ Ibid Paragraph 5 of the Preamble

²⁵¹ Ibid Paragraph 4

²⁵² Ibid Article 25, and see also Gerhard, Werle, *Principles of International Criminal Law*, (T.M.C Asser Press, 2005)p94

²⁵³ Ibid Article 25(3)(a)

mandate given to it under chapter VII of the UN Charter adopted Resolution 1593 and referred the situation in Darfur to the ICC.²⁵⁴

According to the ICC prosecutor's allegation the prime suspect for the atrocities committed in Darfur is president Omar Hasan Al-Bashir for the reason that he is "the commander in chief of the army and he used the whole State apparatus, master minded and implemented a plan to destroy in substantial part the three tribal groups namely the Fur, Masalit and Zaghawa".²⁵⁵

On 14 July 2008 the prosecutor of the ICC applied for an arrest warrant against Al-Bashir on ten counts of genocide, crimes against humanity and war crimes.²⁵⁶ Based on this application, it was on 4 March 2009 the ICC Pre-Trial Chamber I issued an arrest warrant against Al-Bashir for two counts of war crimes and five counts of crime against humanity; of course by excluding the alleged crime of genocide submitted by the prosecutor.²⁵⁷ It is to be noted that, in the ICC's history the indictment and the issuance of arrest warrant is historic in a sense that it was issued for the first time against a sitting Head of State.

Therefore, this chapter mainly deals on the legality of the indictment by the ICC against Al-Bashir and attempts to discuss Sudan and the Darfur conflict in general, list of international crimes committed in Darfur and the UN Security Council Resolution 1593. In addition, this chapter further examines the ICC's investigation and prosecution process against Al-Bashir, the legal basis of the Court to indict Al-Bashir, execution of arrest warrant and enforcement mechanism, the obligation of State parties to the ICC Statute and non parties to the Statute to arrest and surrender Al-Bashir and the indictment and the subsequent regional and international responses.

²⁵⁴ Resolution 1593 (n 6)

²⁵⁵ Summary of the Case, Prosecutor's Application for Warrant of Arrest under Article 58 against Omar Hasan Ahmad Al-Bashir available at <<http://www.icc.cpi.int/NR/rdonlyres/64FA6B33-0513-4E9-A672-3FA2B58CB2cg/277758/iccotpsSUMMARY20081704engPDF>> accessed on 25 September 2009

²⁵⁶ Ibid

²⁵⁷ The pre-Trial Chamber I Decision, 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hasan Ahmad Al-Bashir No. ICC-02/05-01/09(4 March 2009) available at <<http://www.icc.cip.int/iccdocs/doc/doc639096.pdf>> accessed on 20 September 2009

4.2 Sudan and the Darfur Conflict: an overview

The Republic of Sudan, the largest country in Africa, lies on the western shore of the Red Sea.²⁵⁸ It is bordered by Eritrea, and Ethiopia to the east, Kenya, Uganda and Democratic Republic of Congo to the south, the Central African Republic, Chad and Libya to the west, and Egypt to the north.²⁵⁹ Sudan is inhabited by two distinctive groups of people; the Arabs and Arabised Sudanese predominantly inhabiting the northern part of the country while the southern part is occupied by the black Africans, who are mainly Christian.²⁶⁰

The population of the country in 2009 was estimated around 41 million comprises a diverse range of ethnic groups.²⁶¹ Sudan achieved independence from the United Kingdom (UK) in 1956, since then conflicts are traditionally considered to be between the north and south of the country.²⁶² Sudan is divided into 25 “Wilayat” (states) and 8 big regions. The official language is Arabic and over 100 other languages are spoken.²⁶³

According to Nancy Mc Dermott the causes of Sudan conflict are numerous and are rooted in “tribal, economic, religious, social and political” factors.²⁶⁴ It is worth noting that like many conflicts in Africa much of the causes of Sudan’s conflict can be traced back to its colonial past.²⁶⁵

²⁵⁸ *The New Encyclopedia Britannica* (15th ed. Volume II Encyclopedia Britannica, INC, Chicago 1995)pp349-50

²⁵⁹ Ibid

²⁶⁰ Ibid

²⁶¹ ‘Sudan: Facts and Figures’ available at <<http://www.infoplease.com/ipa/A0107996.html>> accessed on 4 November 2009

²⁶² ibid

²⁶³ Ibid

²⁶⁴ Nancy Mc Dermott, ‘ Darfur Aquifer: A Source of Peace or Conflict?’, (2006) International Institute for Justice and Development available at <<http://www.ijjd.org/News%20and%20Publications%20NEWSLETTER%ARTICLES%20folder/newsletters/Darfur%20Aquifer%20A%20A%20Source%of%20peace%20or%20Conflicthtml>> accessed on 29 October 2009

²⁶⁵ Ibid

The UK, the then colonial power built strong economic and political power in the northern part of the country whereas isolated the southern part from economic and social development.²⁶⁶ This resulted in big economic and infrastructural disparity between the northern and the southern parts of the country. This imbalance between the northern region and the southern region may be the main cause of conflict in Sudan.²⁶⁷ Indeed, after many years of war between SPLM and the Government of Sudan (GOS) forces on January 9, 2005 a final peace agreement called the Sudan Comprehensive Peace Agreement (CPA) was signed in Nairobi, Kenya.²⁶⁸

The Darfur region is one of the 8 regions that constituted the Sudan. This region is divided into the States of north, south and west Darfur. Darfur is located in the western most part of the Sudan and covered one fifth of the Sudan having approximately six million inhabitants and this figure comprises one seventh of Sudan total population.²⁶⁹

The Darfur conflict which attained an international concern has begun in February 2003 where the two rebel groups' one called JEM and the other called the SLA attacked major towns in northern Darfur, and government troops.²⁷⁰ As noted above conflict in Sudan was caused by several factors and engulfed several parties in different times and different regions of the country. It is the JEM and the SLM/A, two rebel groups that accused Sudan's government of pursuing policies of "marginalization, racial discrimination, exclusion, exploitation, and divisiveness" against the Darfurian and rose up against the government seeking greater political power and development for the region.²⁷¹ The two local rebel groups the JEM and the SLA are the major armed factions that took part in the

²⁶⁶ Ibid

²⁶⁷ Ibid

²⁶⁸ International Crises Group(ICG), 'The Khartoum –SPLM Agreement: Sudan's Uncertain Peace', 25 July 2005 Africa Report No. 96 available at <<http://www.crisisgroup.org/home/index.cfu?htm>> accessed on 23 October 2009

²⁶⁹ David Hoile, 'Darfur In Perspective',(2005) European Sudanese Public Affairs Council available at <<http://www.darfurinperspective.com>> accessed on 22 October 2009

²⁷⁰ Amnesty International USA: Darfur History available at <<http://www.amnestyusa.org/darfur/darfur-history/pages.do?id=1351103>> accessed on 28 October 2009

²⁷¹ Robert Cryer, 'Sudan, Resolution 1593, and International Criminal Justice'(2006)19 Linden Journal of International Law available at <<http://journals.cambridge.org/action/displayfulltext?type==6&fid=466529&jid=LJLvolumeId=19&issueId=01&aid=430036>> accessed on 29 September 2009

Darfur conflict.²⁷² The SLA generally belongs to the Fur and Masalit people while the JEM is affiliated with the Zaghawa people inhabited at the northern Darfur.²⁷³

With regard to rebel's accusation on the issue of marginalization of Darfur region from the rest regions of Sudan, several writers commented on it. For instance Dr. David Hoile argued that "the Darfur conflict has no connection with the issue of marginalization".²⁷⁴ According to him the main cause of the conflict is "poverty and under development" rather than marginalization.²⁷⁵ Similarly, Ghazi Suleiman Sudan's most prominent human rights activist toled to the Sudan Net "the conflict in Darfur has nothing to do with marginalization or the unequal distribution of wealth".²⁷⁶

Moreover, the ICC prosecutor on its application to the court made responsible the Sudanese president Omar Hasan Al-Bashir for the international crimes committed in Darfur. Who is Al-Bashir?

Omar Hasan Al-Bashir is Sudan's current president who happened to be a first sitting Head of State to be charged by the ICC. Al-Bashir came to power through a Military coup 'detai on 30th of June 1989 by overthrowing the then civilian president Sadiq Al-Mahadi.²⁷⁷

Following the coup, he took several measures. He created the Revolutionary Command Council for National Salvation as the central executive force in Sudan, proclaiming himself chairman and declaring himself a General, banning all political parties and arresting many government officials and military officers.²⁷⁸ In addition, as soon as he

²⁷² Ibid

²⁷³ Ibid

²⁷⁴ David Hoile, (n 269)

²⁷⁵ Ibid

²⁷⁶ 'Seven Myths Hindering Peace in Darfur: Sudan Net', available at <<http://www.sudan.net/nwes/press/postedr/316.shtml>> accessed on 23 October 2009

²⁷⁷ Profile, Omar Hasan Al-Bashir the President of Sudan available at <[http://www.209.85/29132/search?q.cache=jsqyevnbd8zwww.guardian.co.uk/world2008/July14 Sudan war crimes](http://www.209.85/29132/search?q.cache=jsqyevnbd8zwww.guardian.co.uk/world2008/July14+Sudan+war+crimes)> accessed on 25 October 2009

²⁷⁸ Omar Hasan, 'Biography Highlights' <<http://www.encyclopediajrank.org/articles/pages5578bashir-omar-al1944html>> accessed on 29 September 2009.

came to power he took measures like, abolishing the constitution, national assembly, and trade unions and closed down many private news papers.²⁷⁹

It is in 1993, that he dissolved the military junta that had brought him to power and appointing himself as a civilian president without any election.²⁸⁰ It is evident that throughout his leadership there are two big bloody civil wars in his country. In the south with the Sudan People's Liberation Movement/Army (SPLM/A). In addition to the longstanding fighting against SPLM, another civil war broke out in the western particularly called Darfur region with the rebel forces called Justice and Equality Movement (JEM) and the Sudan Liberation Army (SLA).²⁸¹

Al-Bashir was born in 1944 in Hosh Bannaga which is located in the northern part of Sudan 100 kilometers north east of Khartoum from farming family.²⁸² In 1960 he joined the armed forces, where he trained as a pilot and graduated in 1966.²⁸³ He earned two Master's degrees in Military Science from the Sudanese College of Commanders and Malaysia.²⁸⁴ He had served in Sudan military in different ranks up to the coup, June 1989. Among others, he fought in the Egyptian army in the 1973 war against Israel and he has served as a military attaché to the United Arab Emirates from 1975 -1979.²⁸⁵

Due to his policy of Islamization of the Sudan and implementation of the Islamic law (Sharia), the conflict in south enraged and fueled.²⁸⁶ His goal has always been to keep a unified Sudan and his biggest fear is that the south will vote to secede in 2011; referendum as it is stipulated in the peace deal of 2005.²⁸⁷

²⁷⁹ Ibid

²⁸⁰ Profile Omar Hasan Al-Bashir (n 277)

²⁸¹ Ibid

²⁸² 'Biography Omar Hasan Al-Bashir' available at

<<http://www.sudan.net/government/biography/bashir/html>> accessed on 25 October 2009

²⁸³ Ibid

²⁸⁴ Ibid

²⁸⁵ Biography for Omar Hasan Al-Bashir, available at

<<http://www.encyclopediajrank.org/articles/pages15578/basher-omar-al.1944.html>> accessed on 29 September 2009

²⁸⁶ Ibid

²⁸⁷ Ibid

As Alex de Wall, the Sudan analyst observed, Al-Bashir is “a man for whom dignity and pride are very important and he’s a man who’s quite hot-headed –prone to angry outbursts especially when he feels his pride has been wounded”²⁸⁸ Al-Bashir and his regime have received considerable criticism for Darfur crisis and instability in whole Sudan from human rights activists and non-governmental organizations.²⁸⁹ For instance David Wallechinsky noted in Parade Magazine listed him “the world’s worst dictator”, most recently in 2008.²⁹⁰

4.3 list of International Crimes Lodged against Al-Bashir

The prosecutor of International Criminal Court after concluding its investigation lodged application on July 14, 2008 under Article 58 of the ICC Statute requesting the Pre-Trial Chamber I for the issuance of arrest warrant against the Sudanese president Omar Hasan Al-Bashir for his alleged criminal responsibility on ten counts in genocide, war crimes and crime against humanity.²⁹¹

According to the prosecutor’s application Al-Bashir bears criminal responsibility for three counts of genocide under Article 6(a) of the Statute “for killing members of the Fur, Masalit and Zaghawa ethnic groups” and pursuant to Article 6(b) of the ICC Statute “causing serious bodily or mental harm to members of those groups” and pursuant to Article 6(c) of the ICC Statute “deliberately inflicting on those groups conditions of life calculated to bring about their physical destruction in part”.²⁹²

The second category of crime that Al-Bashir was indicted is on five counts of crimes against humanity stipulated under Article 7(1) of the ICC Statute, “committed as part of a

²⁸⁸ Alex de Wall, ‘Sudan and the International Criminal Court a Guide to Controversy’, (2008) available at <<http://www.opendemocracy.net/articles.sudan.-and-the-international-criminalcourt-a-guideto-the-controversy>> accessed on 16 November 2009

²⁸⁹ Hman Rights Watch, ‘Darfur Conflicts Spills into the Chad’, (Report) (February21,2006) available at <<http://www.humanrightswatch.org/english/docs/2006/02/16/chad12684.htm>> accessed on 27 October 2009

²⁹⁰ David Wallechinsky, ‘Omar Al-Bashir’, (2008) available at <<http://www.parade.com/dictators/2008/profiles/omar-al-bashir.html>> accessed on 3 November 2009

²⁹¹ Summary of the Case, Prosecutor’s Application note at 255

²⁹² Ibid

widespread and systematic attack directed against the civilian population of Darfur with knowledge of the attack”, and committing acts such as “murder, extermination, forcible transfer of the population, torture and rapes”.²⁹³

The third international crime that Al-Bashir was indicted is on two counts of war crimes under Article 8(2) (e) (i) of the ICC Statute “for intentionally directing attacks against the civilian population ” and as per Article 8(2) (e) (v) of the ICC Statute “pillaging a town or place”.²⁹⁴

(I) War Crimes

Al- Bashir was accused by ICC prosecutor on two counts of war crimes i.e. “intentionally directing attacks against the civilian population and pillaging a town or place”.²⁹⁵ According to the prosecutor’s application Al-Bashir did not directly commit this crimes by himself, rather he committed through the State “apparatus”, including the army and Janjaweed militias.²⁹⁶ In its application the prosecutor made reference to Article 8(2) (f) of the ICC Statute for the determination of the kind of conflict. The prosecutor established criminal responsibility of Al-Bashir as per Article 8 (2) (e) (i) of the ICC Statute and Article 8(2) (e) (v) for the war crimes committed in Darfur.

Article 8(2) (e) (f) of the ICC Statute provides:

“Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups”.

²⁹³ Ibid

²⁹⁴ Ibid

²⁹⁵ Summary of the Case, Prosecutor’s Application (n 255)

²⁹⁶ Ibid

Antonio Cassese pointed out that “war crimes are simply a violation of international humanitarian law of armed conflict” traditionally known as “the law of the Hague” that concerns with the regulation of the means and method of warfare and based on “the Geneva Conventions ” which deal with international humanitarian law.²⁹⁷ It is evident that war crimes have two elements, the subjective element and the objective elements of the crime.²⁹⁸ In the objective criteria war crimes may committed in international armed conflicts and war crimes perpetrated in internal armed conflicts.²⁹⁹

The subjective element of war crimes or mental element (*mens rea*) is another element for a war crime. Under the ICC Statute Article 30 provides the mental element. The subjective element of international crimes as provided under Article 30(1) of the ICC Statute declares that: “unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge”. Article 31(2) further defines the notions of intent and knowledge. Therefore, in the determination of objective criteria the accusation of Al-Bashir is internal not an international armed conflict.

The Pre-Trial Chamber I on its decision confirmed that:

“...there are reasonable grounds to believe that from March 2003 to at least 14 July 2008, a protracted armed conflict not of an international character, with the meaning of article 8(2)(f) of the Statute existed in Darfur between the GOS and several organized armed groups, in particular the SLM/A and the JEM’s”.³⁰⁰

The Court in deciding an armed conflict in Darfur is an internal character citing an example such as the peace agreement signed between the GOS and the SLM/A and the JEM on 3 and 4 September 2003, the ceasefire of April 2004, and, the Darfur Peace Agreement signed on May 5, 2006.³⁰¹

²⁹⁷ Antonio Cassese (n 26) 47

²⁹⁸ Ibid p 54

²⁹⁹ Ibid

³⁰⁰ Paragraph 70 of the Pre-Trial Chamber I Decision (n 257)

³⁰¹ Ibid Paragraph 68

The second count brought against Al-Bashir was based on Article 8(2) (e) (v) of the ICC Statute. This Article mainly deals with the serious violation of the laws and customs of war and committing an act of “pillaging a town or place, even when taken by assault”. In this case this act committed or not in Darfur by Al-Bashir and its “apparatus” the Pre-Trial Chamber I decides based on its examination of the materials submitted by the prosecution and the Court found “since the beginning of the counter insurgency campaign...war crimes were committed within the meaning of Articles 8(2) (e) (i) and 8(2) (e) (v) of the ICC Statute by the GOS through its apparatus”.³⁰²

It is safe to argue that Al-Bashir has a primary responsibility under international law to prosecute perpetrators for the crimes committed against his own citizen. As a Head of State, he should have to take appropriate measures against the perpetrators to prosecute them in domestic courts. States are obliged to prosecute international crimes by customary and conventional laws. It is evident that obligation to prosecute international crimes at a national level stipulated under common Articles 49,50,129 and 146 Of the 1949 Geneva Conventions, Article IV of the UN Convention of Genocide and Article 2 of the UN Convention on Torture which are binding to the Sudanese government.

The failure to control and bring to justice those perpetrators seems Al-Bashir’s full intention for the participation in the commission of the crime. Therefore, being Al-Bashir is a sitting Head of State, does not serve as the defense to relive him from criminal liability under international law for the crimes perpetrated in Darfur.

(ii) Genocide

Among three international crimes that Al-Bashir was accused of genocide is the one. The prosecutor’s request for an arrest warrant was based on three counts of genocide.³⁰³ The application relied on Article 6(a),(b) and (c) of the ICC Statute and noted “ Al-Bashir allows the willful killing of members of the Fur, Masalit and Zaghawa ethnic groups,

³⁰² Ibid Paragraph 78

³⁰³ Summary of the Case, Prosecutor’s Application (n 255)

causing serious bodily or mental harm to members of those groups and deliberately inflicting on those groups conditions of life calculated to bring about their physical destruction”, respectively”.³⁰⁴

However, before the application of the prosecutor to the Court, the International Commission of Inquiry on Darfur submitted a report to the UN Secretary General and on its report concluded that “the violence in Darfur did not amount to genocide and no genocidal policy has been pursued and implemented in Darfur by the government authorities or through the Janjaweed militias”.³⁰⁵

The crime of genocide, as defined in various Statutes³⁰⁶ and the Genocide Convention of 1948, requires proof that the perpetrator intended to “destroy in whole or in part, a national, ethnical, racial or religious group, as such”.³⁰⁷ Article II of the 1948 Genocide Convention describes two elements of the crime of genocide, the mental element and the physical element. The mental element according to this Article includes, “intent to destroy in whole or in part, a national, ethnical, racial or religious groups as such and the physical element also includes, killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group”.

The element of crimes which elaborates the definition of genocide provides the grounds must always be fulfilled for the existence of genocide. These grounds are (i) the victims must belong to the targeted group;(ii) the killing, the serious bodily harm, the serious

³⁰⁴ Ibid

³⁰⁵ Paragraph 640 of the Report of International Commission of Inquiry on Darfur (n 3)
The Commission established in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine whether acts of genocide have occurred and to identify perpetrators of such violations with a view to ensuring that those responsible are held accountable.

³⁰⁶ See Article 4 of the ICTY Statute (n 49), Article 2 of the ICTR Statute (n 50) and Article 6 of the ICC Statute (n 17)

³⁰⁷ Article 2 of the Genocide Convention (n 186)

mental harm, the condition of life...and,(iii) the perpetrator must act with the intent to destroy in whole or in part the targeted groups.³⁰⁸

By the subjective and objective elements of the genocide discussed above can one argue that Al-Bashir committed genocide in Darfur? Whether Al-Bashir is criminally responsible for the alleged genocide crime it should be proven as per Article 30 of the ICC Statute.

As stated in Article 30 of the ICC Statute:

“Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the court only if the material elements are committed with the intent and knowledge”.

In the Al-Bashir case the existence of intent and knowledge can be inferred from relevant facts and circumstances brought by the prosecutor, and the determination of the existence of knowledge and intent is the duty of the Pre-Trial Chamber I judges. Therefore in determining Al-Bashir’s commission of genocide, the Pre-Trial Chamber I after evaluating the alleged crime in genocide, decided by the majority “there are no reasonable grounds to believe that Al-Bashir committed genocide in Darfur”³⁰⁹

Nevertheless, the judges stressed that “if the prosecution gathers additional evidence, the decision would not prevent the prosecution from requesting an amendment to the warrant of arrest in order to include the crime of genocide”.³¹⁰

The justification for the Pre-Trial Chamber I for the non- existence of genocide in Darfur is specified in the decision of the Pre-Trial Chamber I. According to this, the Majority considers that there are “no reasonable grounds to believe that nationality, race and/or religion are a distinctive feature of any of the three different groups - the Fur, the Masalit

³⁰⁸ International Criminal Court, Elements of Crimes UN.DOC.PCNICC/2001/Add.2(2000) available at <<http://www1.umn.edu/humanrts/instate/iccelementsofcrimes.html>> accessed on 2 November 2009

³⁰⁹ Paragraph 206 of the Pre-Trial Chamber I Decision (n 257)

³¹⁰ Ibid Paragraph 207

and the Zaghawa - that, according to the Prosecution, have been targeted”³¹¹ and the “materials provided by the prosecution do not show reasonable grounds to believe in the existence of government of Sudan’s acted with *dolus specialis*/ specific intent” to destroy the above mentioned groups of people.³¹²

However, Judge Anita Usacka under the separate and partly dissenting opinion noted that “there are reasonable grounds to believe that Al-Bashir possessed genocide intent and is criminally responsible for genocide”.³¹³ Her justification for the existence of genocide in Darfur is noted under her dissenting opinion. According to her opinion “forcible transfer alone could constitute genocidal intent when the transfer is conducted in such a way that the group can no longer re-constitute itself”.³¹⁴ She also further argued that “genocidal intent does not require the physical destruction of the group” and many of the Darfur people displaced from their place and a vast majority of civilian were forced to flee and subject to the conditions which risked for their survival and these acts of Al- Bashir is a clear evidence for the genocidal intent.³¹⁵

(iii) Crimes against Humanity

The third category of international crime lodged against Al-Bashir was crime against humanity. In what capacity Al-Bashir is criminally responsible for crimes against humanity committed in Darfur? According to the prosecutor’s application Al-Bashir does not physically or directly carry out any of the crimes against humanity, rather he committed indirectly through the State apparatus, the army and the Janjaweed /militia.³¹⁶

³¹¹ Ibid Paragraph 136

³¹² Ibid Paragraph 161 and Paragraph 206

³¹³ Paragraph 1 of Separate and partly Dissenting Opinion of Judge Anita Usacka ICC02/05-0109(4 March 2009) available at <<http://www.icc.cpi.int/icc.docs/644001.pdf>> accessed on 24 September 2009

³¹⁴ Ibid Paragraph 97

³¹⁵ Ibid Paragraph 97-102

³¹⁶ Summary of the Case, Prosecutor’s Application (n 255)

One can infer from the prosecutor’s application that Al-Bashir was accused on five counts of crime against humanity committing acts of murder³¹⁷, extermination³¹⁸, forcible transfer³¹⁹, torture³²⁰, and rape³²¹ as a crime against humanity. The Court analyzed the definitional aspect of Article 7(1) of the ICC Statute whether the violence was “widespread or systematic” and whether the violence was committed with “knowledge”.³²²

Finally the Pre-Trial Chamber I concluded that there is reasonable ground to believe that the GOS with its apparatus³²³ committed crime against humanity on five counts applied by the prosecutor namely, murder, extermination, forcible transfer, torture, and rape throughout the Darfur region and Al-Bashir as a Head of State was in control of all branches of the “apparatus”.³²⁴ For the crimes committed in Darfur the Court underscored that Al-Bashir is with full knowledge for the acts committed in Darfur by the “apparatus” and that he might have ordered the commission of the acts himself.³²⁵

One can assume that Al-Bashir as a commander in chief of the army and in control of all branches of the government apparatus the primary responsibility rests on Al-Bashir for acts committed in Darfur. Therefore, the writer agreed to the decision of the Pre-Trial Chamber that Al-Bashir is criminally responsible for the alleged crimes committed in Darfur.

³¹⁷ Article 7(1)(a) of the ICC Statute (n 17)

³¹⁸ Ibid Article 7(1)(b)

³¹⁹ Ibid Article 7(1)(d)

³²⁰ Ibid Article 7(1)(f)

³²¹ Ibid Article 7(1)(g)

³²² Paragraph 81 of the Pre-Trial Chamber I Decision (n 257)

Under this paragraph the majority noted that the terms “widespread” and “systematic” are not defined in the ICC Statute and defines it that the term “widespread” refers to “the large scale nature of the attack as well as to the number of victims and the term “systematic” refers to the organized nature of the acts of violence and to the improbability of their random occurrences”

³²³ Ibid Paragraph 55

This paragraph describes the “apparatus” of the state of Sudan, including “the Sudan People’s Armed Forces (“the Sudanese Armed Forces”) and their allied militia group known as “Janjaweed Militia”, the Sudanese police forces, the National Intelligence and Security Services, (“the NISS”) and the Humanitarian Aid Commission (“the HAC”)

³²⁴ Ibid paragraph 109

³²⁵ Ibid

4.4 The UNSC Resolution 1593 and other Subsequent Measures (Efforts)

Before adopting Resolution 1593 which lawfully refers the situation to the ICC, however the UN Security Council adopted several Resolutions to end the Darfur crisis peacefully. Among others Resolution 1547 of June 11, 2004, which condemned all acts of violence and violation of human rights and international humanitarian law by all parties,³²⁶ Resolution 1556 of 30 July 2004, which despite condemning violence by all parties, mentioned the Janjaweed specifically and condemned especially those crimes with an ethnic dimension.³²⁷ More importantly, this Resolution made a reference for criminal responsibility and instructed the GOS “to investigate the atrocities and prosecute those responsible and disarm the Janjaweed and bring to justice Janjaweed leaders’”.³²⁸

In addition Resolution 1564 of September 18, 2004 noted that “... reiterated the demand for the disarming and arrest of those responsible for atrocities and called for the establishment of an International Commission of Inquiry to determine whether acts of genocide have occurred and to identify perpetrators”.³²⁹ Based on this Resolution the UN Commission of Inquiry was set up in October 2004 and finalized its investigation and brought to the UN Secretary General 176 pages of report on 25 January 2005, the result of its investigation.³³⁰ Among the findings of the commission the most important findings were “the acts amounting war crimes and crimes against humanity had occurred in Darfur” and additionally the commission concluded that “the government of the Sudan has not pursued a policy of genocide”.³³¹

As stated under the report the possibilities to bring those responsible for international crimes to justice, the commission recommended that the UN Security Council refers the

³²⁶ UNSC/RES/1547(2004) (Adopted by the UN Security Council at its 4988th meeting on, 11 June 2004) available at <<http://www.un.org/docs/sc/unsc-resolutions04.html>> accessed on 19 September 2009

³²⁷ UNSC/RES/1556(2004) (Adopted by the UN Security Council at its 5015th meeting on 30 July 2004) available at <<http://www.un.org/docs/sc/unsc-resolutions04.html>> accessed on 20 September 2009

³²⁸ Ibid

³²⁹ UNSC/RES/1564(2004) note at 4

³³⁰ Report of the International Commission of Inquiry (n 3)

³³¹ Ibid Paragraph 640

case in Darfur to the ICC, under Article 13(b) of the ICC Statute.³³² Consequently the UN Security Council on March 31,2005 adopted Resolution 1593(2005) by taking note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur, Sudan.³³³ The main objective of the Resolution is to refer the case in Darfur to the ICC. More importantly, this referral gave the ICC jurisdiction over the case in Darfur and a mandate to investigate a crime which was perpetrated in that region.³³⁴ This mandate is clearly provided under paragraph I of the Resolution which stated that, the UN Security Council “decides to refer the situation in Darfur since 1 July 2002 to the prosecutor of international criminal court”; even though, Sudan is a non party state to the ICC Statute.³³⁵

Moreover, this Resolution calls on that the GOS should have to “cooperate fully with the Court and provide any necessary assistance to the Court” and the Resolution further requesting the “cooperation of non-party States to the ICC Statute, international and regional organizations” to the Court.³³⁶

4.5 The ICC’s Investigation and Prosecution Process against Al-Bashir

The prosecutor of the ICC in the course of its investigation is required to cover “all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute” and in doing so expected to “investigate, incriminating and exonerating circumstances equally”.³³⁷

It is the prosecutor who is responsible for conducting investigation and prosecution under the ICC regime. Accordingly, the duties and powers of the prosecutor with respect to investigation listed out in Article 54 of the ICC Statute. In carrying out investigations,

³³² Ibid paragraph 569-572

³³³ Resolution 1593(2005) (n 6)

The Resolution was adopted by vote of 11 in favor, non against, and with four abstentions. The United States of America, China, Algeria and Brazil

³³⁴ Ibid

³³⁵ Ibid paragraph I

³³⁶ Ibid paragraph II

³³⁷ Article 54(1)(a) of the ICC Statute (n 17)

the prosecutor has a duty to establish the truth, to investigate evidence that is favorable as well as unfavorable to the person under investigation,³³⁸ to respect the interests and circumstances of victims and to fully respect the rights of person.³³⁹

There are procedures which would be followed by the prosecutor before commencing an investigation. If the prosecutor of the ICC believes that there is reasonable basis to begin an investigation it has to submit a request to the Pre-Trial Chamber for authorization of an investigation together with any supporting materials.³⁴⁰ It is after the Pre-Trial Chamber's authorization that the prosecutor commences an investigation to which the Pre-Trial Chamber considers there is reasonable basis to proceed with an investigation.³⁴¹ Thus, based on the above principles the prosecution informed the Pre-Trial Chamber I and request authorization for investigation in to the Darfur situation on 1 June 2005.³⁴²

Under the prosecutor's application the prosecutor noted the scope of the investigation conducted against Al-Bashir and the means employed to undertake investigation. According to this, the prosecutor has "collected relevant statements and evidences by way of examination, incriminating and exonerating in an independent and impartial manner, under taking 105 missions in 18 countries including five missions to Khartoum to meet extensively with representatives of the government, and of the judiciary".³⁴³

Mr. Kuol Alor, Sudanese Ambassador in South Africa in a panel discussion held in Pretoria, South Africa noted "the ICC prosecutor has no evidence of these allegations and has not conducted an investigation, as he has never been to Sudan".³⁴⁴

³³⁸ Ibid

³³⁹ Ibid Article 54(1)(b)

³⁴⁰ Ibid Article 15(3)

³⁴¹ Ibid Article 15(4)

³⁴² Paragraph 3 of the Pre-Trial Chamber I Decision (n 257)

³⁴³ Summary of the Case, Prosecutors Application (n 255)

³⁴⁴ ICC and Sudan: What Implications for President Al-Bashir Indictment by ICC.(2009) (ICC Seminal Report) available at <www.iss.co.za/index-php?link-id=1&link-type-13-pdf> accessed on 15 October 2009

The Al-Ahram weekly news paper journalist Hend El-Sayd conducted an interview with Mr. Luis Moreno Ocampo, the ICC prosecutor on May 5, 2009 about the case of Al-Bashir and the investigation process.³⁴⁵ The journalist asked the prosecutor whether the prosecutor conducted direct investigation or not in Darfur. The prosecutor replied we relied primarily on “eye witness, victims of attacks in Darfur, recorded interview of government officials, statements taken from individuals including Janjaweed militia, documents and other information provided by government of Sudan, the report of the UN Inquiry Commission and other materials obtained from other sources”.³⁴⁶ He further replied “the ICC investigators never visited Darfur because the government issued no visas, and they were concerned about witness protection” he added “the investigators only visited Khartoum but mainly relied on the testimony of refugees and other sources”.³⁴⁷

The Pre-Trial Chamber I noted under its majority decision that the case against Omar Hasan Al- Bashir has arisen out of the investigation in to the Darfur and accepted the evidences submitted by the prosecutor and the Chamber was satisfied that “there are reasonable grounds to believe that Al-Bashir is criminally responsible for war crimes and crimes against humanity except the crime of genocide.”³⁴⁸

However, the Office of the Prosecutor appealed the decision of the majority of Pre-Trial Chamber I that refused to issue a warrant of arrest against Al-Bashir for three charges of genocide on 6 July 2009.³⁴⁹ According to this, the prosecution therefore, requested among others, that the appeals chamber “to overturn the decision to the extent that it held the prosecution had not established reasonable grounds to believe that president Omar Al-

³⁴⁵ Hend El-Sayd, ‘the ICC v Al-Bashir’ Al-Ahram Weekly (May 5,2009) available at <<http://209.85.129-132/search?q-cache:HUPK6krxq1UJwww.emmabonino.it/news17463>>accessed on 4 October 2009

³⁴⁶ Ibid

³⁴⁷ Ibid

³⁴⁸ Paragraph 223 of the Pre-Trial Chamber I Decision (n 257)

³⁴⁹ The Prosecutor v Omar Hassan Ahmad Al-Bashir: : ‘Prosecution Document in Support of Appeal against the Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al-Bashir’, No.ICC-02/05-01/090A(6 July 2009) available at <<http://www2.icc.cpi.int/NR/exeres/F288BDBB-4E80443D-AO43-C9CB837C8A51-htm>>accessed on 24 October 2009

Bashir had genocide intent: and “direct the Pre-Trial Chamber I to issue a warrant of arrest on these counts; or in the alternative” .³⁵⁰

Hence, can one say in the absence of direct investigation, the conducted investigation is credible? As noted above the evidences are obtained from different sources, such as the UN Commission of Inquiry which comprises prominent and independent individuals, from the victims of the crime and from other relevant sources who have direct or indirect connection to the victims of the crime including the government of Sudan. Thus the absence of direct evidence is not an obstacle for the credibility of the evidence. What was observed from the Pre-Trial Chamber I decision is that the evidence and document submitted through investigation is satisfactory for the Court.

4.6 The Legality of the ICC Indictment

4.6.1 Legal Basis of the ICC to Indict Al-Bashir

Before a certain case goes to trial at the ICC there are two conditions to be fulfilled by the prosecutor. First, to establish sufficient evidence that proven whether the accused has committed a crime within the jurisdiction of the Court, and second, to ascertain whether the case at hand can not or will not be tried by the courts of any State without international criminal court.³⁵¹ To assess the legal basis for the prosecutor to indict Al-Bashir simply it is better to see the summary of the case for the prosecutor’s application for the arrest warrant and the Pre-Trial Chamber I decision for the warrant of arrest with the ICC Statute.

The prosecutor’s application relied not on command responsibility as per Article 28 of the ICC Statute but the prosecutor refer to on “perpetration through means”³⁵² the argument of the prosecutor’s based on that, Al-Bashir as the Head of State controls the

³⁵⁰ Ibid

³⁵¹ Article 53 of the ICC Statute (n 17)

³⁵² Summary of the Case, Prosecutor’s Application (n 255)

system and “whoever controls the system also controls the anonymous will of all its human components”³⁵³

It is clearly noted under the arrest warrant that Al-Bashir “committed crimes through members of the State apparatus, the army and the militia/Janjaweed and thus as a form of indirect perpetration by means”.³⁵⁴ This implies that Al-Bashir is not physically perpetrating the crimes rather did commit the crime through organization. However, concerning the mode of Al-Bashir’s liability the dissenting judge noted her opinion that “there are reasonable grounds to believe that Omar Al-Bashir is responsible as co perpetrator under Article 25(3) (a) of the ICC Statute.”³⁵⁵

Furthermore, the arrest warrant was sought against Al-Bashir in three capacities namely as president of the Republic of Sudan, as head of the ruling party the National Congress Party (NCP) and as a commander in-chief of the armed forces.³⁵⁶

Concerning the choice of prosecutor’s application, why he relied on perpetration through means, Alex de Wall a Sudanese analyst in his analysis noted that “proving that Al-Bashir committed the crimes as an indirect perpetrator in the way proposed is the most difficult of all modes of liability to prove”.³⁵⁷ He also noted the reason why prosecutor’s have preferred common purpose liability, including conspiracy and joint criminal enterprises that “because it is much easier to prove guilt in this way”.³⁵⁸

The doctrine of joint criminal enterprise provides that an individual can be held criminally responsible when he associates with others to effectuate a shared criminal purpose.³⁵⁹ Individuals can be held responsible for the commission of the criminal

³⁵³ Ibid

³⁵⁴ Paragraph 223 of the Pre-Trial Chamber I Decision (n 257)

³⁵⁵ Paragraph 106 of Separate and Partly Dissenting Opinion of Judge Anita Usacka (n 313)

³⁵⁶ Ibid

³⁵⁷ Alex De Wall, ‘Analysis of the Application’ available at <www.ssrc.org/blogs/darfur/wp-content/uploads/2009/01/bashir/publication-critique-d6-250109pdf> accessed on 13 October 2009

³⁵⁸ Ibid

³⁵⁹ Beta van Schaack, ‘Judgment on Genocide Prosecution Closing Argument’, (July 2008) Legal Studies Research Papers Series Working Paper No.08-59 available at <<http://ssrn.com/abstract=1160451>> accessed on 17 October 2009

objectives of the group and also for any crimes that were the natural and foreseeable result of the shared criminal goals of the group.³⁶⁰

Does the Court has competence to exercise its functions?

The ICC Statute gives the Court an international legal personality with the authority to exercise functions and powers on the territory of any State or, by special agreement, on the territory of any other State.³⁶¹ Secondly, the UN Security Council by Resolution 1593 (2005) gives mandate to the ICC referring the case to the Court as per Article 13(b) of the Statute being party or non party to the ICC Statute confer jurisdiction to indict any person responsible to the international crime.

Third, according to Article 27 of the ICC Statute, the Court has jurisdiction over all persons without any distinction based on official capacity, such as Head of State or government or Member of Parliament. In addition according to Article 38 of the 1969 Vienna Convention on the Law of Treaties, “the third States are binding by a treaty as a customary rule of international law recognized as such”.³⁶² Meaning that, if the crime committed in Sudan is an international crimes and this crime attain the status of *jus cogens* Sudan is liable under international law whether party to the treaty or not.

Therefore, based on the above points it is Resolution 1593 and the ICC Statute confers the Court’s jurisdiction to indict Al-Bashir and Al-Bashir or the GOS may not have any convincing argument to contest the legality of the Court and the process which taken /will be taken by the Court.

³⁶⁰ Ibid

See also Article 25(3) (a) of the ICC Statute (n 17)

It states “an individual is criminally responsible and liable...commits such a crime, whether as an individual, jointly with another through another person, regardless of whether that other person is criminally responsible”

³⁶¹ Article 4 of the ICC Statute (n 17)

³⁶² Article 38 of the Vienna Convention on the Law of Treaties

Vienna Convention on the Law of Treaties, 1969(Done at Vienna on 23 May 1969 Entered into force on 27 January 1980) Vol. 1155 UNTS No. 331. 8 ILM 679(1969) available at <<http://www.untreaty.un.org/ilc/texts/instruments/english/conventions/11969.pdf> accessed on 21 September 2009

4.6.2 Jurisdiction of the Court to indict Al-Bashir

As stated under the preceding chapter the jurisdiction of the Court lies towards subject matter jurisdiction (*ratione materiae*), temporal jurisdiction (*ratione temporis*), and personal and territorial jurisdiction (*ratione personae*) and as well as space (jurisdiction *ratione loci*).

(i) *Ratione Materiae*

Concerning the jurisdiction *ratione materiae* the ICC Statute limited the jurisdiction of the Court only to certain categories of international crimes namely genocide, crimes against humanity, war crimes and aggression.³⁶³

In the prosecutor's application to the Pre-Trial Chamber I requesting an arrest warrant against Al-Bashir of 14 July, 2008, indicated that, Al-Bashir has committed crimes that fall within the jurisdiction of the Court.³⁶⁴ According to the application the prosecutor accused Al-Bashir for crimes of genocide, crimes against humanity and war crimes, in Darfur since 1 July 2002.³⁶⁵

What is observed from the prosecutor's application is that, Al-Bashir "bears criminal responsibility for the crime of genocide under Article 6 (a) of the ICC Statute, killing members of the Fur, Masalit and Zaghawa ethnic groups (b) causing serious bodily or mental harm to members of those groups, and (c) deliberately inflicting on those groups conditions of life calculated to bring about their physical destruction in part; for crimes against humanity under Article 7 (1) of the ICC Statute, committed as part of a widespread and systematic attack directed against the civilian population of Darfur with knowledge of the attack, the acts of (a) murder, (b) extermination, (d) forcible transfer of the population, (f) torture, and (g) rapes; and for war crimes under Article 8 (2) (e) (i) of the Statute, for intentionally directing attacks against the civilian population as such, and

³⁶³ Article 5(1) of the ICC Statute (n 17) and see also M. Cherif Bassiouni (n 97) 506-7

³⁶⁴ Summary of the Case, Prosecutor's Application (n 255)

³⁶⁵ Ibid

(v) pillaging a town or place”.³⁶⁶ This application is simply presenting evidence implicating Al-Bashir in three counts of genocide, five counts of crimes against humanity and two counts of war crimes.

The Pre-Trial Chamber I through its power observed that whether the said conducts give rise to the above mentioned crimes according to the application of the prosecutor or not. In the issue of *ratione materiae* the Court affirmed in its decision that “Al-Bashir is allegedly responsible for two counts of war crimes and five counts of crimes against humanity excluding genocide and on the stated crimes the Court has *ratione materiae* (subject matter jurisdiction) in the Al-Bashir case.”³⁶⁷

(ii) *Ratione Tempories*

With regard to the ICC Statute, jurisdiction also rests on *ratione temporis* meaning that the offences committed after the entry into force of the Statute, this is only for crimes committed after 1 July 2002.³⁶⁸ According to Article 11(2) of the ICC Statute the ICC has no jurisdiction for the crimes committed before the entry into force of the ICC Statute, 1 July 2002.

When one look at the contents of the prosecutor’s application against Al-Bashir concerning the *ratione tempories* the prosecutor demanding arrest warrant for the crimes committed in Darfur from March 2003 to the date of filing the application 14, July 2008.³⁶⁹ The Pre-Trial Chamber I after assessing the parameters *ratione temporis* accepted the prosecutor’s application that the case against Omar Al-Bashir falls within the jurisdiction of the Court.³⁷⁰

³⁶⁶ Ibid

³⁶⁷ Paragraph 249 of the Pre-Trial Chamber I Decision (n 257)

³⁶⁸ Article 11(2) of the ICC Statute (n 17) and see also M.Charif Bassiouni (n 97) 505.

³⁶⁹ Summary of the Case, Prosecutor’s Application (n 255)

³⁷⁰ Paragraph 37 of the Pre-Trial Chamber I Decision (n 257)

(iii) *Ratione Personae*

The other jurisdiction of the Court taken in to consideration to indict an individual before the Court is personal and territorial jurisdiction. With the meaning of Article 12 and 13 of the ICC Statute the Court's jurisdiction lies on *ratione personae* on the three grounds, over nationals of State parties,³⁷¹ on the national of non-State parties if that State accepts the jurisdiction of the Court by declaration lodged with the registry with regard to the crime committed,³⁷² and where the UN Security Council refers a situation to the Court pursuant to chapter VII of the United Nations Charter.³⁷³

Having in mind this, the office of the prosecutor has acquired jurisdiction by Resolution 1593(2005) which referred a situation to the Court by the UN Security Council acting pursuant to Article 13(b) of the ICC Statute.³⁷⁴ Thus, the ICC has the three above mentioned jurisdictions. According to the above discussed grounds, to indict Al-Bashir the issue of jurisdiction is not a point of controversy.

4.6.3 *Issues of Admissibility*

It is evident from the ICC Statute that, ICC was created to complement the national Courts. As indicated in Article 17(1) of the ICC Statute, the Court will not begin investigating a crime if the State concerned is already investigating or prosecuting it or even if the State has investigated it and then decided not to prosecute the person concerned.

The question of admissibility arises at a subsequent stage, and seeks to establish whether matters over which the Court properly has jurisdiction should be litigated before it.³⁷⁵ As a general principle even if the Court has jurisdiction for specific crimes within the territory of a State party or involves its nationals as perpetrators, the case will be

³⁷¹ Article 12(2) (b) of the ICC Statute (n 17)

³⁷² Ibid Article 12(3)

³⁷³ Ibid Article 13(b)

³⁷⁴ Summary of the Case, Prosecutor's Application (n 255)

³⁷⁵ William A.Schabas (n 85) 86

inadmissible if the individual suspect is being prosecuted by a national legal system..³⁷⁶ With regard to admissibility, however, Article 17 of the ICC Statute provides the relationship between the national legal system and international criminal court. According to this Article the primary duty to prosecute individuals for perpetration of international crimes is the duty of domestic courts.

It is worth noting that, to assess the admissibility of the Al-Bashir case it is proper to rely on the Prosecutor's Application for Warrant of Arrest and the Pre-Trial Chamber I's Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hasan Al-Bashir. As pointed out in the summary of the case of prosecutor's application for warrant of arrest against Al-Bashir, the prosecutor noted that "...the prosecution has assessed the existence of national proceedings in the Sudan in relation to those crimes. However, this case is not being investigated or prosecuted by the GOS"³⁷⁷ and the prosecutor further noted that "there are not national proceedings in the Sudan against the perpetration of crimes relevant to this application".³⁷⁸

Moreover, the Pre-Trial Chamber I decide the issue of admissibility based on the materials presented by the prosecution in support of the prosecution application.³⁷⁹ In the determination of admissibility the Court affirmed that there is no indication in the side of Sudan's government at the national level proceedings may be conducted, or may have been conducted for the alleged crimes contained in the prosecution or the grounds provided in Article 17(1) (d) of the ICC Statute may not be met.³⁸⁰

The Pre-Trial Chamber I finally decided on the admissibility of the case against Omar Hasan Al-Bashir as:

- "(i) the prosecution application still remains confidential and exparte, and*
- (ii) there is no ostensible cause or self evident factor which implies the*

³⁷⁶ Ibid

³⁷⁷ Summary of the Case Prosecutor's Application (n 255)

³⁷⁸ Ibid

³⁷⁹ Paragraph 50 of the Pre-Trial Chamber I Decision (n 257)

³⁸⁰ Ibid

*chamber to exercise its discretion pursuant to Article 19(1) of the Statute”.*³⁸¹

Thus, it is proper for the Court to indict Al-Bashir for the alleged crimes, for the fact that the case is admissible before the Court as the grounds set out in the ICC Statute permitted.

4.6.4 Exhaustion of Local Remedy

The ICC Statute under its preamble recalls that “every State has a duty to exercise its criminal jurisdiction over those responsible for international crimes”.³⁸² As enshrined under the Statute, the jurisdiction of the ICC is not automatic rather it is complementary to the national criminal jurisdiction.³⁸³

If Sudan is able and willing to deal with the perpetrators of the crimes set out in Article 5(1) of the ICC Statute the ICC would not exercise its jurisdiction. Whether Sudan failed to exhaust its local remedy or not is a point which will be seen in relation to the ICC prosecutor’s application and the Sudan government’s response. On the one hand, the government of Sudan noted that Sudan’s justice system is able to investigate and prosecute the perpetrators without intervention of ICC³⁸⁴, and on the other hand, the ICC prosecutors argued the “inability and unwillingness” of the GOS.³⁸⁵

In this case however the failure to exhaust local remedy was ascertained by the report of UN Inquiry Commission and by the ICC prosecutor. It is evident as it was stated in the report of the UN Inquiry Commission to the UN Secretary General that at the time of investigation made by the commission “it was Sudan had by that time proved itself to be unable and unwilling to prosecute offences, so the movement for prosecution was originated from Sudan itself”.³⁸⁶

³⁸¹ Ibid Paragraph 51

³⁸² Paragraph 6 of the ICC Preamble (n 17)

³⁸³ Ibid Paragraph 10 and Article 1

³⁸⁴ International Crises Group (ICG), Sudan: Justice, Peace, and the ICC, 17 July 2009 Africa Report No. 152 available at <<http://www.unhcr.org/refworld/doci/d/4a641a992.htm>> accessed 13 August 2009

³⁸⁵ Summary of the Case Prosecutor’s Application (n 255)

³⁸⁶ Paragraph 609 of the Report of the Inquiry Commission (n 3)

Furthermore the report pointed out that:

*“The Sudanese justice system is unable and unwilling to address the situation in Darfur....restrictive laws that grant broad powers to the executive have undermined the effectiveness of the judiciary, and many of the laws in force in Sudan today contravene basic human rights standards. Sudanese criminal law do not adequately proscribe war crimes and crimes against humanity and the criminal procedure code contains provisions that prevent the effective prosecution of these acts”.*³⁸⁷

Mr. Luis Moreno Ocampo prosecutor of the ICC confirmed the inadequacy of the Sudan national proceedings in relation to international crimes. He noted” in accordance with the principle of complementarity, the prosecution has assessed the existence of national proceedings in the Sudan in relation to those crimes. There are none”.³⁸⁸

Even though the ICC prosecutor and the UN Inquiry Commission noted in this manner to the contrary Al-Bashir in the press conference held in Turkey, Istanbul, on August 20, 2008 argued that “Sudan has the capacity to investigate and try perpetrators of violence in Darfur domestically”.³⁸⁹ Al-Bashir further argued that “the Sudan’s judicial system had a proven record of high professional independence and integrity, such that there was no need for ICC involvement in Darfur.”³⁹⁰ Whether the judiciary is independent or not needs a further assessment, however, according to International Crises Group report “as soon as he proclaimed Sharia law in the country in 1989 replaced most non Islamic members of the judiciary with its partisans”.³⁹¹

Nevertheless, after the ICC issued an arrest warrant against two Sudanese officials Ahmad Muhammad Harun and Ali Muhammad Al-Rahman (Ali Kushayb) in early

³⁸⁷ Ibid Paragraph 451

³⁸⁸ Luis Moreno-Ocampo, ‘Prosecutor’s Statement on the Prosecutor’s Application of a Warrant of Arrest under Article 58 against Omar Hasan Ahmad Al-Bashir’ (The Hague, 14 July 2008). available at <<http://www.icc.cpi.int>> accessed on 14 October 2009.

³⁸⁹ Open Source Center , ‘Transcript of Al-Bashir’s Press Conference in Istanbul, Turkey (August 2008) available at <<http://www.worldbuliten.net.news-detail.php?id=49462>> accessed on 25 September 2009

³⁹⁰ Ibid

³⁹¹ International Crises Group Report (n 384)

August 2008 the GOS appointed a special prosecutor and established a special court to try perpetrators domestically.³⁹² Alexis Arieff, Rhoda Margesson and Marjorie Ann Browne under their report to USA Congress “International Criminal Court Cases in Africa: Status and Policy Issues” quoted Abdelmoniem Abu-Edries the journalist of Agence France Press that “Sudanese law does not contain provisions for genocide, war crimes or crimes against humanity”.³⁹³

To sum up, it is safe to argue that in the conditions to which State is unable or unwilling to prosecute the perpetrators and in the legal system where there is no proper law or weak law to prosecute atrocities it is the ICC which has a mandate to prosecute the perpetrators. Hence, the issuance of arrest warrant against Al-Bashir is legal because of the failure of the GOS as provided under Article 1 of the ICC Statute.

4.6.5 Whether Al-Bashir is Immune from Criminal Liability for Crimes Committed in Darfur?

It is possible to see immunity of Head of States before domestic courts and international tribunal in this way because the question of immunity of Head of State arises either in domestic courts or in international tribunals.

First, in case of domestic courts, the determination of immunity of Head of State is under the hands of individual concerned State and not uniformly applicable in all States.³⁹⁴ As a general principle Head of State immunity was grounded in customary international law and meaning that Head of State immunity was primarily attributed to State sovereignty, not an individual right.³⁹⁵ In international law however as stipulated in the Vienna

³⁹² Alexis Arieff, and et al (n 213)

³⁹³ Ibid

³⁹⁴ Malcolm N. Shaw (n 10) 656

³⁹⁵ Ibid

Convention on Diplomatic Relations of 1961, serving Head of State benefit from absolute immunity from the exercise of the jurisdiction by other state courts.³⁹⁶

Concerning the immunity issue, the International Court of Justice (ICJ) in its judgment *Congo vs. Belgium case* stated under paragraph 51 that “...in international law it is firmly established that...certain holders of high ranking office in a State, such as the Head of State, head of government and minister for foreign affairs, enjoy immunities from jurisdiction in other States, both civil and criminal”³⁹⁷

Does this mean that in all of their acts Heads of States are immune from international criminal liability?

When we see the provisions of those established international tribunals, this immunity does not seem absolute rather it seems restrictive. For instance, the Versailles Treaty, 1919 in Article 227, the Charter of the International Military Tribunal at Nuremberg, 1945 in Article 7, the Statutes of the Yugoslavia and Rwanda war crimes tribunals Article 7 and 6 respectively, and the ICC Statute of the ICC Article 27 all provides in a clear terms that individual criminal responsibility will exist irrespective of any official status, including that of Head of State. Therefore, the absolute immunity provided under the Vienna Convention on Diplomatic Relations of 1961 perhaps intended to protect Heads of State from foreign courts. It does not seem to protect Heads of State from national jurisdictions and international tribunals which established for specific purposes.³⁹⁸

As per Article 27(2) of the ICC Statute, immunities or special procedural rules which may be attached to the official capacity of an individual whether under national or

³⁹⁶ Article 31(1) of Vienna Convention on Diplomatic Relations of 1961 UNTS vol. 500 p.95 (1965)(Adopted by a UN Conference on Diplomatic Intercourse and Immunities in 18 April 1961 and Entered in to Force on 24 April 1964) available at

<<http://www.untreaty.un.org/ilc/texts/instruments.conventions/9-11961pdf>> accessed 13 November 2009

³⁹⁷ *Case concerning the arrest warrant of 11 April 2002(Democratic Republic of Congo vs. Belgium)* (ICJ Judgment) 2002 available at <<http://www.icj.cij.org/icjwww/iddecisionshtm>> accessed on 12 November 2009

³⁹⁸ Article 31 (4) of the Vienna Convention on Diplomatic Relations (n 396)

international law, may not bar the Court from exercising its jurisdiction over such a person.

According to this Article, since the Court is different from domestic courts established to try individuals who commit the specified international crimes it applies equally to all persons without a distinction based on their official capacity.³⁹⁹ Hence, immunity of Heads of State is not absolute with regard to international crimes as per the provisions of the ICC Statute.

Whether Al-Bashir could invoke personal immunity before the ICC as a sitting Head of State for the reason Sudan is not a party to the ICC Statute? To answer this question it could be argued from two directions, first, since Sudan is not a party to the ICC Statute, it has not waived the immunity of Al-Bashir by virtue of Article 27 of the ICC Statute. This line of argument is based on Article 34 of the Vienna Convention on the Law of Treaties, 1969 which stipulated that “a treaty does not create either obligations or rights for a third State without its consent”. Second, the truth concerning Al-Bashir is that even if immunity could be invoked before the ICC, it could be argued that when the UN Security Council used its chapter VII powers to refer the Darfur situation to the ICC by Resolution 1593(2005) granting the Court jurisdiction to entertain the case pursuant to Article 13(b) of the ICC Statute, it implicitly repudiated or revoked Al-Bashir’s Head of State immunity. Therefore, the immunity of Head of States provided under international law does not serve as a defense for Al-Bashir in this indictment and he has no immunity according to the ICC Statute and he should be liable for the crimes committed in Darfur.

The Pre-Trial Chamber under its decision dealt with the status of Al-Bashir as Head of State under paragraphs 41-45 of the decision. The Chamber under its decision concluded that, the “current position of Omar Al-Bashir as Head of a State which is not a party to the Statute, has no effect on the court’s jurisdiction over the present case”.⁴⁰⁰

³⁹⁹ Article 27(1) of the ICC Statute (n 17)

⁴⁰⁰ Paragraph 45 of the Pre-Trial Chamber I Decision (n 257)

One can see from the Sudan interim Constitution of 2005, that it grants immunity from prosecution to the President and first Vice President of the Republic of Sudan for all crimes except those of high treason, gross misconduct in relation to state affairs, and gross violations of the Constitution.⁴⁰¹ In these cases action against alleged perpetrators can only to be undertaken with the approval of three quarters of national legislature members.⁴⁰² Based on the above mentioned instruments including ICC Statute, Al-Bashir serving as a Head of State does not relieve him from criminal responsibility for the alleged crimes perpetrated in the Darfur region.

4. 7 The Pre-Trial Chamber I Decision and the Arrest Warrant

The need for an arrest should be based on at least one of the three considerations specified in Article 58(1) of the ICC Statute; (i) to ensure the appearance of the accused in court, (ii) to ensure that he does not obstruct or endanger the investigation or the court proceedings; or (iii) to prevent him, where applicable from continuing with the commission of the crimes in question or related crimes that are under the jurisdiction of the Court.⁴⁰³

According to the Statute before the issuance of arrest warrant there are procedures which will be followed by the Chamber. Based on the application of the prosecutor the Pre-Trial Chamber I is duty bound to assess whether the application of the prosecutor is pursuant to Article 58(1) of the ICC Statute or not. According to this Article a warrant is issued if there are “reasonable grounds to believe that the person has committed a crime within the

⁴⁰¹ Article 60 of the Sudanese Constitution

This Article provides about immunity and impeachment of the president and the vice president.

60(1) the president of the republic and the first vice president shall be immune from any legal proceedings and shall not be charged or sued in any court of law during their tenure of office.

(2) notwithstanding sub-article (1) above, and incase of high treason, gross violations of this constitution or gross misconduct in relation to state affairs, the president or the first vice president may be charged before the constitutional court upon a resolution passed by three quarters of all members of the national legislature. The Constitution is available at <<http://www.sudanembassy.de/c-sudanpdf+sudan>> accessed on 5 October 2009.

⁴⁰² Ibid

⁴⁰³ Article 58(1) of the ICC Statute (n 17)

In addition see Rule of Procedure and Evidence, Rule117 (n 135) it states that “ the procedures which considered to arrest individual suspected to international crimes and issued arrest warrant up on him/her by the Pre-Trial Chamber”

jurisdiction of the Court”,⁴⁰⁴ and “if the arrest of the person is necessary to ensure his/her presence at trial”,⁴⁰⁵ “ensure the person does not obstruct justice”,⁴⁰⁶ or “to prevent the person from continuing with the commission of the crime”.⁴⁰⁷

To issue a warrant of arrest in the Al-Bashir case the Courts has to answer three questions in the affirmative. This is evident from the decision of the Pre-Trial Chamber I on the prosecution’s application for a warrant of arrest against Omar Hasan Al-Bashir of March 4, 2009.⁴⁰⁸ First, are there reasonable grounds to believe that at least one crime with in the jurisdiction of the Court has been committed? Second, are there reasonable grounds to believe that Al-Bashir will bear criminal liability for such crimes under any of the modes of liability provided for in the Statute? Third, does the arrest of Al-Bashir appear necessary under Article 58(1) of the ICC Statute?⁴⁰⁹

Moreover, the Pre-Trial Chamber I after examining the written and oral evidences submitted to the Chamber issued an arrest warrant against Al-Bashir by majority and the majority stated that “there was sufficient evidence to issue a warrant for two counts of war crimes and five counts of crimes against humanity as a co perpetrator”.⁴¹⁰ However, judge Anita Usacka one of the three judges dissented by stating that, “genocide should be included as one of the charges”.⁴¹¹ In addition she noted that, “Al-Bashir could be liable as an indirect perpetrator for all three crimes” crimes against humanity, war crimes and genocide perpetrated in Darfur.⁴¹²

⁴⁰⁴ Ibid

⁴⁰⁵ Ibid Article 58(1)(b)(i)

⁴⁰⁶ Ibid Article 58(1)(b)(ii)

⁴⁰⁷ Ibid Article 58(1)(b)(iii)

⁴⁰⁸ Pre-Trial Chamber I Decision (n 257)

⁴⁰⁹ Ibid paragraph 28

⁴¹⁰ Ibid Paragraph 249

⁴¹¹ Paragraph 1 of the Separate and partly dissenting opinion of Judge Anita Usacka (n 313)

Under her dissenting opinion she stated” I agree with my colleagues as to the out come of the decision,...there are reasonable grounds to believe that Omar al- basher is criminally responsible for war crimes and crimes against humanity, and that a warrant should be issued for his arrest. I disagree with majority , however, as I am satisfied that the there are reasonable grounds to believe that Omar Al-Bashir possessed genocidal intent and is criminally responsible for genocide”

⁴¹² Ibid paragraph 104

In deciding the mode of liability judge Anita Uscaka under her dissenting opinion noted that “there is sufficient evidence to establish reasonable grounds to believe that there was a common plan which targeted African tribes and some members of the government some times acted with Omar Al-Bashir” and for this

4.7.1 Contents of the Arrest Warrant

Article 58(3) of the ICC Statute provides what the arrest warrant should contain. According to this Article the arrest warrant should contain three major elements. These are, (i) the name of the person and any other relevant identifying information; (ii) a specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought and (iii) a concise statement of the facts which are alleged to constitute those crimes.

On the basis of the above grounds it is the duty of the Pre-Trial Chamber to issue an arrest warrant against any suspected individual based on the application brought to it. It is evident from Al-Bashir case; the warrant of arrest contained these three above mentioned grounds. First, pursuant to Article 58 (3) (a) of the ICC Statute, the name of the person, and other relevant identifying information's contained on arrest warrant. According to this, Omar Al-Bashir, a male who is a national of state of Sudan, born on 1 January 1944 in Hoshe Banaga, Shendi Governorate, in the Sudan member of the Jaali tribe of northern Sudan, president of the Republic of The Sudan since 16 October 1993 and elected as such successively since 1 April 1996 and whose name is spelt Omar-Al-Bashir, Omar Hassan Ahmed El Bashire, Omar Al-Bashir, , Omar Al-Beshir, Omar elbashir, Omer el-bashir Omer albasheer, Omar Elbashir and Omar hassan ahmad elbeshir.⁴¹³

Second, pursuant to Article 58(3) (b) of the ICC Statute the Court ascertained that the crimes perpetrated in Darfur fall within the jurisdiction of the Court for which Al-Bashir's arrest is sought. To the majority of the Pre-Trial Chamber I judge's, Al-Bashir is alleged criminal responsibility on two counts of war crimes and five counts of crime

reason Al-Bashir's mode of liability should rest on "indirect perpetration" as alleged by the prosecution application.

⁴¹³ 'Situation in Darfur Sudan, in the case of the Prosecutor v Omar Hasan Ahmad Al-Bashir' No. ICC-02/05-01/09(4 March 2009) available at <<http://www.icc.cpi.int>> accessed on 27 October 2009 see Annex iv

against humanity and for dissenting judge in addition to the majority opinion on three counts of genocide.⁴¹⁴

Third, the arrest warrant noted that Al-Bashir is criminally responsible under Article 25(3) (a) of the ICC Statute and there is reasonable ground to believe that he “committed crimes through members of the State apparatus, the army and the militia/Janjaweed and thus as a form of indirect perpetration by means”.⁴¹⁵ The warrant of arrest for Omar Al-Bashir listed down seven counts on the basis of his individual criminal responsibility pursuant to Article 25 (3) (a) of the ICC Statute including five counts of crimes against humanity: murder Article 7 (1) (a), extermination Article 7 (1) (b), forcible transfer Article 7(1) (d), torture Article 7 (1) (f) and rape Article 7 (1) (g) of the ICC Statute and two counts of war crimes: intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities Article 8(2) (e) (i); and pillaging Article 8 (2) (e) (v) of the ICC Statute.⁴¹⁶

Finally the Court decides that the arrest warrant of Omar Hasan Al-Bashir shall be included in a separate self executing document containing information required by Article 58(3) of the ICC Statute.⁴¹⁷

4.7.2 Execution of Arrest Warrant

Unlike domestic courts, arrest and surrender of individuals responsible for international crimes are not easy tasks. This is because at international level there is no international police force and it is only based on cooperation of States.

It is evident from the ICC Statute that; the Court does not have a mandate to execute arrests.⁴¹⁸ The mandate of the Court is to transmit a request for the arrest and surrender of

⁴¹⁴ Ibid Paragraph 34

⁴¹⁵ Andre Nolkaemper, ‘State Responsibility for International Crimes: A Review of Principles of Reparation’, (2009).Amsterdam Center for International Law, University of Amsterdam available at <<http://ssrn.com/abstract=1357320>> accessed on 16 October 2009

⁴¹⁶ Paragraph 249 of the Pre-Trial Chamber I Decision (n 257)

⁴¹⁷ Ibid

a person. According to Article 89(1) of the ICC Statute a request for the arrest and surrender of an individual must be accompanied by an arrest warrant and supporting materials. These supporting materials should include the arrest warrant and describe the person sought and his/her possible location.⁴¹⁹

There are some grounds to which individuals may challenge the ICC request for the arrest and surrender before their national courts. These are, first, it is on the basis of *ne bis in idem* (double jeopardy),⁴²⁰ second, a state need not surrender an individual who is serving a sentence in that State for different crime that for which surrender to the Court is sought.⁴²¹ Third, a State need not surrender an individual to the Court, when there is a competing extradition request for the individual.⁴²² These listed grounds are not an exhaustive lists, there are other grounds specified under Articles 72, 93(3), 93(4) and 93(5) of the ICC Statute.

As stated above the biggest challenges that face the Court in Al-Bashir case will be its ability to enforce the arrest warrant given that the ICC lacks its own enforcement mechanism which makes it difficult to enforce arrest warrant without the cooperation of States.

The Pre-Trial Chamber I decided that the Registry of the Court shall prepare a request for cooperation seeking the arrest and surrender of Al-Bashir for the GOS, all State parties to the Statute and all UN Security Council Members that are not State parties to the Statute.⁴²³ Accordingly, the registry requests the execution of arrest warrant as instructed by the Court.⁴²⁴ However, the GOS including the AU failed to comply with the request of

⁴¹⁸ Article 89 of the ICC Statute (n 17)

⁴¹⁹ Ibid Article 91(2)(a) and (b)

⁴²⁰ Ibid Article 89(2)

In addition Article 20 of the same Statute further provides the principle of *ne bis in idem*

⁴²¹ Ibid Article 89(4)

⁴²² Ibid Article 90(1)

⁴²³ paragraph 249 of the Pre-Trial Chamber I Decision (n 257)

⁴²⁴ Sara Williams and Lena Sherif, 'The Arrest Warrant for President Al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court' (2009) vol.14 No.1 Journal of Conflict and Security Law pp71-92 available at <<http://www.jcsl.oxfordjournals.org/cgi/reprint/14/1/171.pdf>> accessed 14 November 2009

the Court. The AU justification not to cooperate with the Court is set out in paragraph 10 of the Decision on the Meeting of African States Parties to the ICC Statute of the International Criminal Court (ICC) held in Libya, Sirte from 1 to 3 July 2009.⁴²⁵ This paragraph states:

*“DECIDES that in view of the fact that the request by the African Union has never been acted upon, the AU Member states shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of president Omar El -Bashir of the Sudan.”*⁴²⁶

What measures will be taken if the governments failed to execute the arrest warrant?

As stated under the Pre-Trial Chamber I decision the only solution is pursuant to Article 87(7) of the ICC Statute “decide to refer the matter [...] to the UN Security Council to take appropriate measures pursuant to chapter VII of the UN Charter.”⁴²⁷

Since Al-Bashir resides in Sudan the primary duty to arrest and surrender of the person rests on the GOS. The Pre-Trial Chamber I under its decision recalled the GOS “to cooperate fully with and provide any necessary assistance to the Court” and the “obligation to cooperate with the Court prevails over any other obligation that the Sudan government under taken”.⁴²⁸

⁴²⁵ Assembly/AU/Dec.245(XIII)Rev.1.Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) (Adopted by the 13th Ordinary Session of the Assembly in Sirte, Great Socialist People’s Libyan Arab Jamahiriya on 3 July 2009) available at <<http://www.africanunion.org/root/au/index.htm>> accessed on 26 October 2009.

⁴²⁶ Ibid

Even if these countries decided however, the AU decision was not adopted unanimously not to cooperate with the ICC. Countries such as Botswana, Chad and Uganda disclosed to comply with the ICC Pre-Trial Chamber I decision to fulfill their treaty obligation and to fully cooperate with the ICC in the arrest and surrender of Al-Bashir. See Bornwell Chakaodza, ‘Al-Bashir Saga: Why the AU got it wrong’(24 July,2009) available at <<http://www.fingaz.co.zw/index.php%3F?option%3Docm>> accessed on 26 October 2009

⁴²⁷ Paragraph 248 of the Pre-Trial Chamber I Decision (n 257)

What the Chamber noted under the said paragraph is that, if the government of Sudan failed to comply with its legal obligation the Chamber obliged to refer the matter to the Security Council to make measures pursuant to Articles 41 and 42 of the United Nations Charter to take appropriate measures on the government of Sudan.

⁴²⁸ Ibid Paragraph 247

Even if the Court recalled however, what was practically observed from the GOS is to the contrary. According to the International Crises Group report the GOS argued that “Resolution 1593 was flawed, incoherent, and in contradiction with the Vienna Convention on the Law of Treaties of 1969”.⁴²⁹ The GOS further argued that “since Sudan is not a party to the ICC Statute and has not entered into a special agreement for cooperation with the ICC, the UN Security Council had no legal right to refer alleged atrocity crimes committed in Sudan to the Court”.⁴³⁰

Subsequent to the issuance of arrest warrant the GOS rejected the ICC jurisdiction over Darfur as a violation of its sovereignty and accused the Court of being part of a western plot against a sovereign African and Muslim State and accused the Court as the tool of imperialist forces.⁴³¹ Indeed, the possibility of the execution of arrest through the Sudan government and the AU seems impossible when one observed from the current stands of the AU and the Sudan government. The best example cited here is that the government of Nigeria party to the ICC Statute recently invited Al-Bashir to attend the 207th meeting of Peace and Security Council of African Union at the level of the Heads of State and Governments held in Abuja, Nigeria on 29 October 2009.⁴³² But Al-Bashir has not attending the meeting and Sudan is represented by vice president Ali Osman Mohamed Taha.⁴³³

What the writer would like to recommend is that the UN Security Council as it had played an important role in adopting Resolution 1593 which referred the case to the ICC, it also has an important role to take measures for the execution and enforcement of arrest warrant against Al-Bashir as the UN Charter permits under chapter VII of the Charter.

⁴²⁹ International Crises Group (ICG), Sudan: Justice, Peace and the ICC, (n 384)

⁴³⁰ Ibid

⁴³¹ Alexis Arief, and et al (n 213)

⁴³² Paul Okolo and Maram Mazen, ‘African Union Leaders Accept Mbeki Report on Darfur Conflict,’ (2009) available at <<http://www.bloomberg.com/apps/nwes?pid=20601116&sid=algoQ1HF6UA>> accessed on 31 October 2009

⁴³³ Ibid

4.8 Obligation of States to Cooperate with the ICC's Decision

The ICC will look to States for assistance in investigating cases and gathering evidence.

This cooperation includes arrest and surrender of suspects, and State parties are under obligation to cooperate fully with the Court in investigations and prosecution of crimes within its jurisdiction.⁴³⁴ Furthermore, under the ICC Statute States are obligated to respond to request for other forms of cooperation in essence, the type of assistance with evidence gathering analogous to mutual legal assistance in criminal matters in State to State practice.⁴³⁵

As a general principle the scheme for the arrest and surrender of suspects and the gathering of evidence under the ICC Statute is cooperative one, involving the active participation of State parties and, in some cases, non-State parties and international organizations.⁴³⁶

State parties to the ICC Statute thus have an obligation to cooperate and to execute requests for arrest and surrender or other forms of cooperation presented by the Court. This is clearly reflected in Articles 86-89 of the ICC Statute. Article 86 imposes a general obligation on States to cooperate fully with the Court in the investigation and prosecution of the crimes within the jurisdiction of the Court. Articles 89 and 93 of the same Statute give mandate that States must comply with requests for arrest and surrender and other forms of cooperation respectively.

Under Article 87 of the Statute, the Court is empowered to obtain assistance from a non State party on the basis of an arrangement or agreement or on any other appropriate means. Similarly as per this Article the Court may seek information or documents or other forms of assistance from any intergovernmental organizations.

⁴³⁴ Article 86 of the ICC Statute (n 17)

⁴³⁵ Ibid Article 87

⁴³⁶ Ibid Article 89

It is worth noting that the cooperation of States party to the Statute and non parties to the Statute are very important to execute arrest warrants. From the Court's practice what is clearly cited as a best example is that in the surrender of Thomas Lubanga Dyilo, Germain Katanga and Mathieu Ngudjolo of DRC and Jean-Pierre Bemba of CAR, States have played a crucial role in surrender of these individuals to the Court.⁴³⁷ It is possible to presume that the arrest and surrender of Al-Bashir also needs similar cooperation from States. In the following section the attempt will be made to the obligation of State parties and non-parties to the Statute and the GOS in the arrest and surrender of Al-Bashir to the ICC.

4.8.1 Obligation of State Parties under the ICC Statute

As in the other international treaties, States which become parties to them have certain obligations to fulfill. This is also evident under the ICC Statute. Under this Statute these obligations are classified in to two fundamental obligations: the first is complementarity and the second is full cooperation.⁴³⁸

The ICC Statute under its preamble and Articles 1 and 17 provide that, States have primary responsibility for bringing those responsible for international crimes namely genocide, crimes against humanity and war crimes to justice⁴³⁹. In addition, State parties affirmed that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by international cooperation."⁴⁴⁰

Moreover, State parties to the ICC Statute are under obligation to carry out justice for the crimes under their jurisdiction and have an obligation to enact then enforce national legislation which provides these international crimes and makes punishable under

⁴³⁷ ICC, 'Situations and Cases', available at <<http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>> accessed on 4 November 2009

⁴³⁸ Article 1 and 86 of the ICC Statute (n 17)

⁴³⁹ Ibid Paragraph 6 of the Preamble and Articles 1 and 17

⁴⁴⁰ Ibid Paragraph 4 of the Preamble

national courts.⁴⁴¹ This is true when we see Article 1 in conjunction to Article 17 of the Statute which provides about the principle of complementarity and issues of admissibility. According to these Articles the Court is referred to as the “Court of last resort” because it only comes into picture and intervenes when all remedies have been exhausted at the national level that the national courts “unable” or “unwilling” to prosecute perpetrators in the national level.

Under the ICC Statute, State parties have a general obligation to cooperate fully with requests made by the Court⁴⁴² and equally to ensure that there are procedures available under their national law for all forms of cooperation contained in the Statute.⁴⁴³ The general obligation provided under Articles 86-89 of the ICC Statute mainly dealt with the obligation that State parties ensure for the prosecutor and the defense to conduct effective investigation in their jurisdiction,⁴⁴⁴ that their courts and other authorities provide full cooperation in obtaining documents,⁴⁴⁵ locating and seizing assets of the accused,⁴⁴⁶ conducting searches and seizures of evidence,⁴⁴⁷ locating and protecting witnesses and arresting and surrendering persons accused of crimes by the Court.⁴⁴⁸

M.Cherif Bassiouni pointed out that the international crimes like aggression, genocide; crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture are parts of *jus cogens*.⁴⁴⁹ According to him *jus cogens* means “the compelling law” and as such, a *jus cogens* norm holds the highest hierarchical position among all

⁴⁴¹ Ibid Article 88

⁴⁴² Ibid Article 86

This Article provides that, “state parties shall in accordance with the provisions of this Statute cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court”

⁴⁴³ Ibid Article 88

⁴⁴⁴ Ibid Article 87

⁴⁴⁵ Ibid Article 93

⁴⁴⁶ Ibid

⁴⁴⁷ Ibid

⁴⁴⁸ Ibid Article 89 and 91

⁴⁴⁹ M. cherif Bassiouni (n 97) 68

other norms and principles under international law from which ‘no derogation is permitted’.⁴⁵⁰

It is evident from the clarification of Bassiouni that “there is no consensus as to what constitute a peremptory norm” and how a given norm rise to that level, *Jus cogens* norms are deemed to be ‘peremptory’ and non derogable.⁴⁵¹ Although, the 1969 Vienna Convention on the Law of Treaties affirmed *Jus cogens* as an accepted doctrine of international law and non derogable peremptory norms.⁴⁵²

Bassiouni strengthened his view that the concept of *jus cogens* and *erga omnes* is almost similar and considered as two sides of the same coin.⁴⁵³ In international criminal law, therefore, *jus cogens* refers to the legal duties and arise in connection with high profile crimes, including the duty to prosecute or extradite, the non applicability of any immunities up to and including Heads of State, the non applicability of the defense of “obedience for superior orders and universal jurisdiction over perpetrators of such crimes”.⁴⁵⁴

In the Al-Bashir case however, at the request of the Pre-Trial Chamber, the Registry issued the arrest warrant the same day, transmitting the warrant, together with a request for cooperation, to authorities in Sudan, all States parties to the ICC Statute and all member States of the United Nations.⁴⁵⁵ Therefore, since genocide, crimes against humanity and war crimes are considered as *jus cogens* and from which non derogation is

⁴⁵⁰ Ibid 72

⁴⁵¹ Ibid 67

⁴⁵² Article 53 of the Vienna Convention on the Law of Treaties (n 362)

This Article provides and established the rule that “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”

⁴⁵³ M.Cherif Bassiouni, ‘International Crimes Jus Cogens and Obligation Erga Omnes (1996) Duke Journal of International Law Vol.59 No 4 pp63-74 available at <http://www.law.duke.edu/journals/lcp/downloads/lcp59dfall1996p.63.pdf> accessed on 23 October 2009

⁴⁵⁴ Ibid

⁴⁵⁵ Sara Williams and Lena Sherif (n 424)

permitted the duty to investigate, prosecute and extradite the perpetrators are an international obligation of all States whether they are party to the ICC Statute or other treaties or not.

What if a certain State fails to comply with its obligation? What measures will be taken against it? With regard to this issue, it is appropriate to see the failure of states from two angles. From the State parties point of view, and from non-State parties point of view to the ICC Statute. In cases of refusal or failure to comply with such obligations by State party to the Statute, the Statute provide that, the Court can only “make a finding to that effect” and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the UN Security Council.⁴⁵⁶

Thus, State parties are under a general obligation to surrender perpetrators of international crimes to the Court including Al-Bashir when ever they are found on their territory.

4.8.2 Obligation of non-state Parties to the ICC

Under the ICC Statute, the primary obligation rests on member States to the ICC Statute to arrest and surrender Al-Bashir to the ICC. If this is the case does a State not a party to the ICC under obligation to cooperate with the Court? When one sees Article 34 of the Vienna Convention on the Law of Treaties with the ICC Statute, it seems the Statute does not create obligations or rights without the consent of non State parties.⁴⁵⁷ However, according to Article 38 of this Convention, non State parties to the treaty will be bound by the treaty if the treaty consist customary rule of international law.⁴⁵⁸

⁴⁵⁶ Article 87(7) of the ICC Statute (n 17)

⁴⁵⁷ Article 34 of the Vienna Convention on the Law of Treaties (n 362)

Article 34 of this treaty provides a general rule regarding third states. According to this Article “a treaty does not create either obligations or rights for a third state with out its consent”

⁴⁵⁸ Ibid Article 38

This Article provides about rules in a treaty binding on third states through international custom. It stated “nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognized as such”.

Non-member States may be called upon by ICC to cooperate with the Court through an ad hoc agreement or arrangement entered between the Court and the non Member State.⁴⁵⁹ As stated earlier in chapter two of this paper as of October 2009 there are 110 States are parties to the ICC Statute from 192 UN Member States.⁴⁶⁰ The rest of them are however non party to the ICC Statute. As setout in Article 87(5) of the Statute, therefore the Court expected to enter an ad hoc agreement or arrangement with none party to the Statute.

Article 4 of the ICC Statute gives the Court an international legal personality with the authority to exercise its functions and powers on the territory of any State party, or by special agreement on the territory of any other State. In addition, Article 89 of the ICC Statute provides that the Court may call upon State parties as well as non-State parties to arrest and surrender an individual suspected committed an international crimes setout in Article 5 of the Statute.

If the agreement or arrangement is not made it is recommendable that the Court should have to enter an ad hoc arrangements or agreements with the non State parties to make an arrest warrant and surrender effective against Al-Bashir.

What if a non State party failed to comply with its obligations? According to the ICC Statute, if a State not party to the Statute failed to comply with the obligation that had entered into an ad hoc agreement or arrangement with the Court, the Court may inform the Assembly of State parties or, where the UN Security Council referred the matter to the Court, to the UN Security Council.⁴⁶¹

When one looks at Resolution 1593 concerning non-State parties to the ICC Statute it is not obligatory, rather the Resolution said merely that the UN Security Council “urges”

⁴⁵⁹ Article 87(5)(a) of the ICC Statute (n 17)

⁴⁶⁰ Lists of UN Member states available at <<http://www.un.org/en/members/index.shtml>> accessed on 24 October 2009

⁴⁶¹ Article 87(5) (b) of the ICC Statute (n 17)

non parties to cooperate fully with the Court.⁴⁶² Therefore, one can assumed that as to Resolution 1593 there is no obligation on non State party to the Statute to execute the arrest warrant and transfer of Al-Bashir to the ICC when ever he traveled in to their territory. Similarly, the Pre-Trial Chamber I also highlight that in relation to States other than Sudan as well as regional and international organizations to cooperate with the Court by virtue of the UN Security Council Resolution 1593.⁴⁶³

To fill the gap of State party and non State party in the execution of arrest warrant and to surrender Al-Bashir promptly to the Court, what the writer would like to recommend is that, the ICC should have to enter an ad hoc agreement or arrangement with the non State parties to the ICC. To this end, even though non State parties to the ICC Statute have no primary obligation as to the Member States, if the Court entered an ad hoc arrangement or agreement with them and by virtue of Resolution 1593 and the Pre-Trial Chamber I decision, they are under obligation to cooperate with the Court to arrest and surrender Al-Bashir to the Court.

To sum up, no doubt that crimes such as genocide, crimes against humanity and many war crimes are not only prohibited by customary international law but rises the level of *jus cogens* constitute *obligatio erga omnes* which is inderogable.⁴⁶⁴ Therefore, it is possible to argue that if this international crimes rises to the level of *jus cogens* and non-derogable, whether the State is party to the ICC Statute or not, whether Resolution 1593 is obligatory or not, since the atrocities committed in Darfur are threat to international peace and security and violation of customary international law every and each State is under international obligation to surrender Al-Bashir to justice.

⁴⁶² Paragraph 2 of UNSC Resolution 1593(2005) (n 6)

The paragraph stated in part "...while recognizing that states not party to the Rome statute have no obligation under the statute, urges all states and concerned regional and other international organizations to cooperate fully"

⁴⁶³ Paragraph 249 of the Pre-Trial Chamber I Decision (n 257)

⁴⁶⁴ I .Brownlie, *Principles of Public International Law* (Oxford University Press 2003)pp 448-9 and see also M.Charif Bassiouni, *Crimes Against Humanity in International Criminal Law*(Dordrech Martinus Nijhof 1999)p 210

4.8.3 Obligation of Sudan to Arrest and Surrender Al-Basher to the ICC

The important issue that has arisen in the Sudan's obligation towards ICC to arrest and surrender of Al-Bashir seems impossible because of the fact that Sudan is not party to ICC. Sudan is a signatory to the Statute in 2000 but it has never ratified it.⁴⁶⁵ But one may raise a question that does this mean that the Sudan government has no obligation to arrest and surrender Al-Bashir? The answer to the writer is that, the Sudan government is under obligation to arrest and surrender Al-Bashir to the ICC and this obligation is emanates from treaty obligation and customary international law.

As stated above under section 4.8.2 crimes such as genocide, crimes against humanity and many war crimes are not only prohibited by customary international law, but are norms of *jus cogens* which are non-derogable.⁴⁶⁶ Hence, since Sudan is party to the Geneva Convention of 1949⁴⁶⁷ and accepted common Article 3 of those Conventions which prohibits attacks on those not taking part in hostilities and acts of inhumanity towards those persons. Thus, the GOS's obligation to punish and arrest the perpetrators first emanated from the Geneva Convention which attained the status of customary international law.

The other obligation of Sudan as the territorial State and the State of nationality is obligation "to fully cooperate with the Court" pursuant to the UN Security Council Resolution 1593 which would include the arrest and surrender of Al-Bashir.

This Resolution states that "the government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and

⁴⁶⁵ Anthony Dworkin and Katherine Iliopoulos, 'The ICC, Bashir, and the Immunity of Heads of State', (2009) available at <<http://www.facebook.com/topics.php?uid=54632558750&topic=8959>> accessed on 16 November 2009.

⁴⁶⁶ I .Brownlie (n 464) 450 and see also Article 53 of the Vienna Convention on the Law of Treaties (n 362)

This Article in part provides "---a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted ..."

⁴⁶⁷ ICRC home page 'State party to the main treaties' available at <<http://www.icrc.org/web/eng/siteengO.nsf/htmlall/partymaintreaties>> accessed on 29 October 2009
Sudan is party to the 1949 the four Geneva Convention on 23/09/1957

the prosecutor”.⁴⁶⁸ By virtue of this Resolution therefore, Sudan is under obligation to fully cooperate with the Court. The “necessary assistance” which provided under the Resolution whether goes up to arrest and surrender of Al-Bashir or not is not clear from the Resolution. However, the writer deems that these necessary assistances may include assistance which may be helpful for the prosecutor and the Court starting from investigation up to arrest and surrender of the suspected criminals.

Moreover, Article 87(5) of the ICC Statute provides that a State not a party to the ICC Statute may be subject to an obligation to cooperate with the ICC on an ‘appropriate basis’.

The other obligation of Sudan under international law emanate from the United Nations Charter. Under the UN Charter Article 24(1) provides States are under obligation to comply with the decisions of the Security Council. According to this Article:

“In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying its duties under this responsibility the security council acts on their behalf”.

Similarly, Article 25 of the UN Charter puts an obligation on Member States.⁴⁶⁹ Thus, since Sudan is a UN Member State,⁴⁷⁰ Sudan is under a duty to comply with the decisions of the UN organs. In this case Sudan must comply with the UN Security Council Resolutions adopted under chapter VII of the United Nations Charter.

The other obligation of Sudan is enshrined under the Pre-Trial Chamber decision. The Pre-Trial Chamber I in its decision issued on 4 March 2009 underscored the obligation of

⁴⁶⁸ Paragraph 2 of UNSC Resolution 1593(2005) (n 6)

⁴⁶⁹ Article 25 of the UN Charter (n 229)

This Article states ‘the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter’.

⁴⁷⁰ Lists of UN Member states, available at <<http://www.un.org/en/members/index.shtml>> accessed on 4 November 2009 Sudan admitted to UN on 12/11/1956 and Sudan became Member to the UN Charter since 1956

the GOS “to fully cooperate with the Court to arrest and surrender of Al-Bashir”⁴⁷¹. In this decision the Court under scored that if the GOS failed to comply with its obligation the Court is under a duty to refer the matter to the UN Security Council as set out in Article 87(7) of the Statute and seek solution as stated under Article 41 and 42 of the United Nations Charter.⁴⁷²

Moreover, what is observed from the Resolution 1593 and the Pre-Trial Chamber I decision is that, both of them do not clearly specify the time limit. Failed to comply when? Six month, one year, five year, ten year/ is not clear.

It is safe to say from the above points that, as a general principle Sudan is not obliged under the ICC Statute, because Sudan is not party to the ICC Statute. This does not mean that Sudan is totally free from its obligation. Accordingly, if the matter is referred to the Court by UN Security Council and the Court conferred jurisdiction to entertain the case, Sudan is under obligation to abide by the decision of the Court as well as to the decision of the UN Security Council as Sudan is one of the UN Member State, obliged to comply with the decision of the organ of the UN pursuant to Article 25 of the United Nation Charter.

What the writer recommends for the non compliance of Sudan to cooperate with the decision of the Court is that the Court should have to refer the matter to the UN Security Council pursuant to Article 87(7) of the ICC Statute for strong measures which may oblige Sudan to arrest and surrender Al-Bashir to the Court.

⁴⁷¹ Paragraph 240 of the Pre-Trial Chamber I Decision (n 257)

⁴⁷² Ibid paragraph 248

4.9 The Indictment and International Response

From the date of Al-Bashir's arrest warrant issued by the ICC there are mixed reactions that heard around the world in favor of the indictment and against the indictment. According to Alexis Arieff, Rhoda Margesson and Marjorie Ann Browne's observation, there are different views against Al- Bashir's arrest warrant.⁴⁷³ Some have argued that the attempt to prosecute Al-Bashir could endanger the Comprehensive Peace Agreement for Southern Sudan and the peace process in Darfur and it may destabilize the political situation in that country.⁴⁷⁴

On the other hand proponents, of international prosecution argued that the ICC request for arrest warrant against Al-Bashir has "opened up new opportunities to secure a just peace in Darfur".⁴⁷⁵ This group further argued that this move is an "important and historical step against impunity in the region".⁴⁷⁶ Furthermore, Issaka K.Souare under his 'Situation Report' noted that the indictment against Al-Bashir serves as an instrument to "render justice to the victims, enhance the credibility of international justice and also it will force the Sudanese authority to effectively participate in the peace process".⁴⁷⁷

Therefore, it is possible to argue with the side of proponents of the Court that the indictment against Al-Bashir is a good move to end impunity and bring to justice perpetrators irrespective of their official capacity. As noted above the crises in Darfur resulted in death of hundreds of thousands and displaced millions of others from their place. The crimes that are committed in Darfur are not only perpetrated by Sudan government but it is also by the participation of the rebel groups. Primarily the Sudan government is responsible for the violence in Sudan, since the government controls State power as a whole and the duty to maintain peace and stability in a peaceful manner should be expected from the government. However, to the contrary the government of

⁴⁷³ Alexis Arieff, and et al , (n 213)

⁴⁷⁴ Ibid

⁴⁷⁵ Ibid

⁴⁷⁶ Ibid

⁴⁷⁷ Issaka K.Souare, 'Sudan: What Implications for President Al-Bashir's Indictment by the ICC 'Situation Report (2008) available at <<http://www.iss.co.za/.../SUDANSITREP26SEP08.pdf>> Accessed on 16 May 2009

Sudan through its apparatus committed such crimes over its citizen. Even if for the time being the indictment of Al-Bashir destabilizes the political situation in Sudan the issue of peace shouldn't shield these international criminals and perpetrators from liability and punishment for the interest of justice and interest of victims.

In addition, the indictment against Al-Bashir serves as a means to draw a lesson for those who have intention to violate the rules and principles of international law especially for those who attempt to commit international crimes against their citizen. To this end, the appearances of Al-Bashir before the ICC serve as a deterrent for future violators of human rights and international humanitarian law.

4.9.1 The African Union's Position

The African Union is an intergovernmental organization consisting of 52 African States. Established on July 9, 2002, the AU was formed as a successor to the Organization of African Unity (OAU).⁴⁷⁸ The most important decisions of the AU are made by the Assembly of the African Union, a semi-annual meeting of the Heads of State and Government of its Member States. The AU's secretariat, the African Union Commission, is based in Addis Ababa, Ethiopia.⁴⁷⁹

Concerning the arrest warrant of Al-Bashir the African countries expressed their view in different way. The AU Heads of State and Governments for the first time dealt on the issue of Al-Bashir in the 12th ordinary session of Assembly of Heads of states and Governments held in Addis Ababa, Ethiopia from 1-3 February, 2009.⁴⁸⁰ In this summit the Heads of State made a Decision called "Decision on the Application by the

⁴⁷⁸ 'African Union Member States' available at <<http://www.africanunion.org/root/au/memberstates/map/htm>> accessed on 12 October 2009

⁴⁷⁹ 'The Organs of the AU' available at <<http://www.africa-union.org/about-AU-in-a-nutshell.htm>> accessed on 17 October 2009

⁴⁸⁰ African Union (Assembly of Heads of States and Governments) (Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan.) (AU Addis Ababa 2009) AU/Doc .221 (XII) available at <<http://www.africa.union.org>> accessed on 19 October 2009.

International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan”.⁴⁸¹

The Assembly on its decision noted that “the approval of the application⁴⁸² would seriously undermine the ongoing efforts which aimed to take place to resolve the conflict in Darfur”.⁴⁸³ Moreover, the Assembly in its decision endorses the 142nd communiqué issued by the Peace and Security Council (PSC) of the African Union and “urges the United Nations Security Council to defer the case pursuant to Article 16 of the ICC Statute”.⁴⁸⁴

Before the 12th ordinary session of the Assembly of Heads of States and Governments of African States, however, the official position of AU was adopted by 142nd meeting of AUPSC held on 21 July 2008 in Addis Ababa, Ethiopia and adopted the Decision in Relation to the Application made on 14 July 2008 by ICC Prosecutor for a Warrant of Arrest against Al-Bashir.⁴⁸⁵

The communiqué under paragraph 2 states:

“reiterates AU’S unflinching commitment to combating impunity and promoting democracy the rule of law and good governance throughout the entire continent, in conformity with its constitutive act, and , in this respect, condemn once again the gross violations of human rights in Darfur”.

In addition to this, the communiqué under paragraph 9 stated, the move of ICC to indict Al-Bashir “could seriously undermine the ongoing efforts in promotion of peace and reconciliation, may cause destabilization in Sudan and may lead to further suffering to the

⁴⁸¹ Ibid

⁴⁸² This Application is the Application for Warrant of Arrest which to the Pre-Trial Chamber by the ICC Prosecutor Pursuant to Article 58 of the ICC Statute against Omar Hasan Al-Bashir . the Application is available at <<http://www.icc.cpi.int/NR/rdonlyres/64FA6B33-0513-4E9-A672-3FA2B58CB2cg/277758/iccotpsSUMMARY20081704engPDF>

⁴⁸³ Paragraph 2 of the AU Decision (n 480)

⁴⁸⁴ Ibid paragraph 3

⁴⁸⁵ Ibid

Sudan people”.⁴⁸⁶ Furthermore, the PSC on his meeting requested the UNSC to defer the case and invites the AU Commission for the establishment of an independent high-level panel called “the African Union High Level Panel on Darfur (AUPD)” to examine the situation in depth and submit recommendations about the Darfur case”, to the AU Commission.⁴⁸⁷

The African Union as an organization after the arrest warrant issued against Al-Bashir decided not to cooperate to the ICC and appealed to the United Nations to delay the case. This is apparent from the communiqué issued by the PSC of the African Union in its meeting held on 5 March 2009 in Addis Ababa Ethiopia.⁴⁸⁸

Moreover, in the AU 13th ordinary session of Assembly of Head of State and Governments held in Sirte, Libya from 1 to 3 July 2009 the AU Heads of States and Governments adopted a decision not to cooperate with the ICC pursuant to Article 98 of the ICC Statute.⁴⁸⁹ The Assembly on its “Decision on the Meeting of African States Parties to the ICC Statute made a decision to non cooperation to the ICC in arrest and surrender of Al-Bashir.

This decision under paragraph 10 provides:

“ decides that in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities

⁴⁸⁶ Ibid paragraph 9

⁴⁸⁷ Ibid paragraph 11(ii)

The African union high level panel on Darfur (AUPD) was established by the African Union in March 2009. This panel headed by the former president of South Africa Thabo Mbeki and consist two former presidents of Nigeria and Burundi and other four high officials. The panel completed its work and submitted a 145 pages report to the AU Commission on 8 October 2009. the Report is available at <<http://www.africanunion.org>>

⁴⁸⁸ African Union Peace and Security Council (communiqué, peace and Security Council 175th meeting) (5 March 2009. Addis Ababa Ethiopia) PSC/PR/Comm CLXXV available at <<http://www.africanunion.org>> accessed on 10 October 2009

⁴⁸⁹ African Union (Assembly of Heads of State and Governments) (Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)) (13th ordinary session 1-3 July 2009 Sirte, Great Socialist People’s Libyan Arab Jamahiriya) AU/Dec.243.267(XIII)Rev.1 Assembly AU/Des 1-5 (XIII) available at <<http://www.africanunion.org>> accessed on 13 October 2009. In this decision however reservation was entered by Chad.

*for the arrest and surrender of president Omar El-Bashir of the Sudan”.*⁴⁹⁰

Although the decision further addressed that “reiterates the unflinching commitment of Member States to fight impunity and promote democracy and rule of law and good governance throughout the continent, in conformity with the Constitutive Act of the African Union”.⁴⁹¹ The African Union in its Constitutive Act⁴⁹² and on its several decisions repeatedly stated as “it stands on commitment to battle impunity and to end impunity”.⁴⁹³

In addition in the 13th ordinary session of the Assembly of Head of States and Governments decided to hold review Conference of States Parties to the ICC Statute scheduled for Kampala, Uganda in May 2010, to address the following issues:

- (i.) Article 13 of the ICC Statute granting power to the UN Security Council to refer cases to the ICC;
- (ii.) Article 16 of the ICC Statute granting power to the UN Security Council to defer cases for one year;
- (iii.) Procedures of the ICC;
- (iv.) Clarification on the Immunities of officials whose States are not party to the Statute;
- (v.) Comparative analysis of the implications of the practical application of Articles 27 and 98 of the ICC Statute;
- (vi.) The possibility of obtaining regional inputs in the process of assessing the evidence collected and in determining whether or not to proceed with prosecution; particularly against senior state officials; and
- (vii) Any other areas of concern to African States Parties to the ICC statute⁴⁹⁴

⁴⁹⁰ Ibid paragraph 10

⁴⁹¹ Ibid paragraph 4

⁴⁹² Article 4(o) of the AU Constitutive Act available at < <http://www.africa.union.org/root/au/---/constitutive-act-en.htm> >

⁴⁹³ See PSC Communiqué 142nd, 175th and 12th and 13th assembly decisions available at <<http://www.africanunion.org>>

⁴⁹⁴ Paragraph 8 of the Assembly Decision (n 489)

The writer of this paper surprised by the AU decision specially the decision stipulated in paragraph 8. It is pertinent to see this decision in relation to the treaty obligations of African States party to the ICC Statute. At the time of ratification it is assumed that all parties to the Statute including 30 African States agreed on the terms and conditions of the treaty without any interference and compelling situations ratified it by their consent. However, as stated above they made a decision contrary to their treaty obligation to the treaty that party to it. Article 121 of the ICC Statute declared about the amendment of the treaty. It provides “after the expiry of seven years from the entry into force of this Statute any State party may propose amendments thereto”.

When one sees the decision of the Head of States and Governments in relation to this Article it seems contradictory. Why at this moment the Head of States and Governments need to address this issue? If these Articles are full of controversy why should they failed to raise before three or four years? If the case is not against Al-Bashir or any African leader should we think that they raise this issue? To this end, despite the fact is that the decision of the Assembly held in Libya puts under question to the commitment of African Heads of State that have to fight impunity and promote democracy and the rule of law in light of Article 4 (o) of the Constitutive Act of the AU.

Furthermore, the Head of States and Governments was made justification for their non-cooperation to the Court. The major cause for AU Member States to take this decision is because of the UNSC’s lack of response to the AU’s request for deferral of the ICC’s case against Al-Bashir. This is set out in paragraph 9 of the decision.

“Deeply regrets that the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of the ICC, has neither been heard nor acted upon, and in this regard, reiterates its request to the UN Security Council”.

Even if the Heads of States and Governments decided not to cooperate with the ICC, countries such as Botswana, Chad and Ghana resisted the decision.⁴⁹⁵ The only country that made reservation in the 13th AU summit was Chad.⁴⁹⁶ The Sudan Tribune, quoted “Associated Press” that the Western Sahara Deputy leader Bachir Mustapha Sayed in his statement, “we are worried by the decision of the AU summit”, and he further argued, “we need more international justice, not less, otherwise it is a jungle”.⁴⁹⁷ As stated above the AU Member States passed a decision expressing a refusal on the part of its Members to cooperate with the ICC. The point which will be raised here is that whether Al-Bashir freely travels to these countries specifically to those 30 countries to the ICC members? It is doubtful, because for instance countries such as Botswana, South Africa Uganda and Chad announced that they will apprehend Al-Bashir if he visits their country.⁴⁹⁸

The other point is that, whether this AU decision has legal power or a mere political decision? To answer this question, it is important to see inline with the principles of international law. From the public international law point of view, the legality of the AU decision is questionable. The fact is that international treaty obligation override to the decision of the AU or the AU decision override the international treaty?

Ultimately, and regardless of the AU decision, international treaty obligation prevails over decisions. Therefore, the ICC State parties have a legal obligation to cooperate with the Court in arresting and surrendering of Al-Bashir pursuant to the Pre-Trial Chamber I decision.

The AUPD under its 145 pages report made recommendations under paragraph 280-377. The recommendations among others include, “the creation of a special court made up of local and international judges to try those accused of atrocities of crimes committed in the conflict in Darfur”, “bolstering Sudan’s justice system and removing immunity from officials who commit atrocities”, “the establishment of a Hybrid Court to deal

⁴⁹⁵ ‘AU Agree to Protect Sudanese President from Arrest’, the Sudan Tribune (Sunday 4 July 2009). available at <<http://www.sudantribune.com/spip.php?articles31702>> accessed on 28 October 2009

⁴⁹⁶ Decisions of the AU 13th Summit (n 489)

⁴⁹⁷ AU Agree to Protect Sudanese President from Arrest (n 495)

⁴⁹⁸ Ali- Al-Sadiq, ‘Sudan Accuse Western Countries of Working to Thwart AU’s ICC Decision’, *Sudan Tribune* (Monday 3 August 2009) <<http://www.sudantribune.com/spip.php?article32007>> accessed on 19 November 2009

particularly with the most serious crimes to be constituted by Sudanese and non-Sudanese judges and senior legal support staff”, “to remove all immunities of State actors suspected committing crimes in Darfur and establishment of a Trust, Justice and Reconciliation Commission (TJRC) to promote truth telling and appropriate acts of reconciliation and to grant pardons as considered suitable”⁴⁹⁹

It is evident that from 54 African countries 30 of them are parties to the Rome Statute.⁵⁰⁰ This shows that they strongly supported the creation of the ICC. As stated under the preceding chapter, recently three African State parties to the Rome Statute referred their case to the ICC and the only African case referred by the UNSC is that of Darfur case which for the first time indict the sitting Head of State under the ICC with the support of African Members in Security Council, without dissenting vote at the time of Resolution 1593 was adopted.⁵⁰¹ To the contrary, after the warrant of arrest issued against Al-Bashir the position of the some African leaders changed and stand against the ICC. In a simple example those countries vote in favor of Resolution 1593 also agreed in the decision made by the AU Heads of State and Governments in Sirte, Libya not to cooperate with the ICC in arrest and surrender of Al-Bashir.⁵⁰²

The African Union’s position against Al-Bashir seems contradictory with its Constitutive Act; especially Article 4(o) which intended acted to fight impunity in the region. For whom the AU stands? For the dictator leader’s or for the victims of African people?

To sum up, what would be understandable is that, all African State parties to the ICC Statute first of all have a primary obligation to arrest and handover Al-Bashir to the ICC, practically what has been observed from the AU Member States to the ICC Statute is that executing the arrest and surrender of Al-Bashir to the ICC seems difficult. The fact is

⁴⁹⁹ Report of the African Union High level Panel on Darfur(AUPD) available at <http://www.africanunion.org/root/AUPD-ReportFinalDarfur.doc.pdf> accessed on 6 November 2009

⁵⁰⁰ See annex I

⁵⁰¹ See Chapter three of the paper section 3.24 and 3.2.5 Algeria Tanzania and Benin at the time of Resolution 1593 was adopted, they are members of the UN Security Council and they vote in favor of the Resolution. See press release SC/8351 of 31 March 2005 available at <http://www.un.org/news/press/docs/2005/SC8351.doc.htm> accessed on 30 October 2009.

⁵⁰² African Union 13th Ordinary Session Decision (n 489)

that, these countries intended to shift the case against Al-Bashir, from legal issue to the political matter.

Despite, African leaders attempt to shift the issue from legal to political matter we believe that the ICC indicted Al-Bashir based on evidences and documents submitted to it and as the rule and procedure of the Court permitted. To this end the Court was convinced that there is reasonable ground to believe that Al-Bashir is criminally responsible for the acts committed in Darfur and issued a warrant of arrest against him.

4.9.2 The Arab League's position

The Arab League was established in 1945 and comprises 22 members: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen.⁵⁰³ Among these states as of October 2009 only 3 of them were parties to the Rome Statute, namely, Djibouti, Comoros and Jordan.⁵⁰⁴

It is at the Sudan's request, first on July 19, 2008 the Arab League held an emergency meeting in Cairo Egypt at the level of foreign ministers to discuss on the Al-Bashir's indictment.⁵⁰⁵

In this meeting the ministers proposed their solutions for the conflict rather than supporting the ICC. Among others they proposed "... those found responsible for war crimes in Darfur would be prosecuted under Sudanese law by Arab League and African Union attorneys".⁵⁰⁶

⁵⁰³ 'The League of Arab States: Arab League member states' available at <<http://www.al.bab.com/arab/docs/league.htm>> accessed on 23 October 2009

⁵⁰⁴ See annex I

⁵⁰⁵ . Green, 'Controversy in the Arab World over ICC Indictment of Sudan President Al-Bashir (July24, 2008) available at <<http://www.sudan.net/news/posted/16146.htm>>l accessed on 28 October 2009.

⁵⁰⁵ Ibid

⁵⁰⁶ Ibid

Here it is important to note the findings of UN Inquiry Commission report to the UN Secretary General paragraph 609 that the Sudan government is ‘unable’ or ‘unwilling’ to prosecute those perpetrators in domestic courts and as Alexis Arieff, and et al pointed out in their report to the congress “International Criminal Court Cases in Africa: Status and Policy Issues”, the Sudan law do not included these international crimes in the penal code and criminal procedure code of Sudan”.⁵⁰⁷ Hence, in the absence of this pre-condition in the Sudan how is it possible to try perpetrators including Al-bashir in Sudan courts?

Amir Mousa, the Arab League General Secretary in his interview with Associated Press conducted on 21 March 2009 disclosed the Arab League position. According to him “our legal position on the matter does not allow what the ICC is requesting” and added the Arab League will “not cooperate with the ICC to arrest and surrender Al-Bashir to the ICC because it is against the sovereignty of the Sudan”.⁵⁰⁸

Following the issuance of arrest warrant by the ICC Pre-Trial Chamber I the Arab League leaders reacted for the second time in a Doha summit held in 29 March 2009 in Doha, Qatar ignoring the ICC Pre-Trial Chamber I decision for cooperation by supporting Al-Bashir.⁵⁰⁹ The leaders did not change their position taken in Cairo rather they confirmed their past decision and stated “...we confirm our solidarity with Sudan and reject the decision of the Pre-Trial Chamber to the ICC regarding the president of Sudan Omar Hasan Al-Bashir”.⁵¹⁰ In addition, the decision of the leaders stressed that the ICC Pre-Trial Chamber I decision breaches the Geneva Convention on Diplomatic Relations of 1961 and customary international law.⁵¹¹

⁵⁰⁷ Alexis Arieff, and et al (n 213)

⁵⁰⁸ Associated press Interview with Amir Mousa available at <<http://www.ap.org/aparchive/index.html>> accessed on 28 October 2009.

⁵⁰⁹ Doha Summit to Back Bashir’s Defiance of Arrest Warrant available at <<http://www.france.com/.../20090329arab-league-summit-doha>> accessed on November 16 2009.

⁵¹⁰ Ibid

⁵¹¹ Ibid

As stated above, from 22 members of the Arab League three of them are ICC member States. According to Article 86 of the ICC Statute these State parties to the Statute are under a general obligation to cooperate with the ICC in arresting and surrender of Al-Bashir whenever he is in their territory and they are under legal obligation to comply with the treaty obligation to which they are party to it. The non member States are also under obligation to comply with the UN Security Council Resolutions since they are Member States to the United Nations and they are under obligation to fully cooperate with the Court in arrest and surrender of Al-Bashir pursuant to UN Security Council Resolution 1593 and Article 25 of the UN Charter which declares that “Members of the United Nations to accept and carry out the decisions of the Security Council”.

4.9 .3 other’s position

(i) The Ethiopian Government’s Position

Ethiopia is a non Member State to the ICC Statute.⁵¹² However, the Ethiopian government officials disclosed the Ethiopian government’s position in different occasions. Among others on 23 April 2009 the Ethiopian Prime Minister Meles Zenawi in a press conference told journalists confirming his government’s position on the subject of the ICC arrest warrant issued against Omar Al-Bashir, said that, “It is a wrong decision that would revitalize the Darfur situation which is currently calming down”.⁵¹³

The Ethiopian PM insisted that the African Union also believes that “the ICC indictment is very unwelcome and needs to be deferred, and we support the African Union’s position on the matter as Ethiopia”.⁵¹⁴

In addition the Ethiopian Minister of Foreign Affairs, Seyoum Mesfin confirmed that, “Ethiopia remains convinced that the arrest warrant issued by the International Criminal Court would not serve justice nor promote peace and stability in Sudan and the sub

⁵¹² See annex I

⁵¹³ Desalegn Sisay, ‘Ethiopia and Omar Al-Bashir, hence forth’(2009)

available at <<http://www.enafrik.com/articles15606.html#separable>> accessed on 10 November 2009

⁵¹⁴ Ibid

region”.⁵¹⁵ He also further argued that, “Ethiopia has taken a clear and firm position on the matter not only as a member of the AU and the IGAD (Intergovernmental Authority on Development of East Africa) but also on its own as a responsible member of the region”.⁵¹⁶

To the writer of this paper, from the legal point of view the position that Ethiopian government took against Al-Bashir’s indictment is not consistent with the UN Security Council Resolution 1593 which urges non member States to cooperate with the Court. It is also not consistent with the UN Charter Article 25 which obliges member States to be abide by the decisions of the UN Security Council.

(ii) Other’s views

As stated above the indictment against Sudan’s president has produced intense debate between the supporters of the ICC indictment and the opponents of the indictment. The United States of America and the European Union in one side supporting the indictment; China, the African Union and the Arab League on the other side opposing the indictment and claiming the deferral pursuant to Article 16 of the ICC Statute.⁵¹⁷ These positive and negative views towards the indictment and the warrant of arrest against Al-Bashir are still on going.

The European Union with regard to the decision of the Pre-Trial Chamber I made a declaration which was issued by the presidency of the European Union on behalf of the European Union that the Union reiterates its full support and respect for the ICC decision.⁵¹⁸ The declaration further noted that the European Union has taken note and support the UN Security Council Resolution 1593(2005) and the European Union “urges

⁵¹⁵ Ethiopia Reaffirms its Decision to Continue as a Close Partner of Sudan available at <<http://www.209.85.135.132/search?q=cache:1xh7LQJ3KCsJwww.eastafricafourmnet/2009/04/30/ethiopia-n-reaffirms-its-decision-to-continue-as-a-close-partner-of-sudan/>> accessed on 10 November 2009.

⁵¹⁶ Ibid

⁵¹⁷ International Crises Group Report (n 384)

⁵¹⁸ Council of the European Union, ‘declaration by the presidency on behalf of the European union following the ICC decision concerning the arrest warrant for the president Al-Bashir’ available at <<http://www.conslium.europa.eu/lucdocs/cms-data/docs/pressdata/en/ctsp1106504-pdf>> accessed on 12 November 2009.

the GOS and all other parties to the conflict to cooperate fully with the ICC in order to comply with its obligations under international law and to combat impunity in Darfur.⁵¹⁹

The rebel groups in Sudan, the JEM and SLM/A have supported the ICC request for arrest warrant towards Al-Bashir in their various statements⁵²⁰ and the SPLM through his president Salva kiir declared its position by saying that “the indictment towards Al-Bashir endangered the CPA and would affect Sudan’s democratic transition”.⁵²¹ In addition he contested the ICC warrant of arrest arguing that “it may affect the 2011 of the south Sudan referendum which is part of the CPA”.⁵²²

4.10 Conclusion

The current president of Sudan Omar Hasan Al-Bashir came to power in 1989 through a coup by overthrowing the civilian government.⁵²³ During his leadership there were two big civil wars in the south and western part of the country.⁵²⁴ Recently, the Darfur conflict which began in February 2003 by two rebel groups the JEM and SLM/A in Darfur region against the Sudan government followed by counter-insurgency campaign by Sudan government resulted in violation of international humanitarian and human rights law in the region.⁵²⁵

This conflict however attracts an international attention and as a result the United Nation Security Council adopted several Resolutions, among others Resolution 1564(2004) which established the International Commission of Inquiry in Darfur and Resolution 1593 (2005) which referred situation in Darfur, Sudan since 1 July 2002 to prosecutor of international criminal court in accordance with Article 13(b) of the Statute.

⁵¹⁹ Ibid

⁵²⁰ International Crises Group (n 384)

⁵²¹ Ibid

⁵²² Ibid

⁵²³ Profile, ‘Omar Hasan Al-Bashir the President of Sudan’ (n 277)

⁵²⁴ Ibid

⁵²⁵ David Hoile (n 269)

The prosecutor's of the ICC after concluding its investigation established the primary responsibility against Al-Bashir and filed an application on July 14, 2008 under Article 58 of the ICC Statute requesting the Pre-Trial Chamber for the issuance of arrest warrant for his alleged criminal responsibility on ten counts of genocide, war crimes and crimes against humanity perpetrated in Darfur.⁵²⁶

Following the request for warrant of arrest the ICC Pre-Trial Chamber I on March 4, 2009 by Majority vote issued an arrest warrant against Al-Bashir on two counts of war crimes and five counts of crimes against humanity as a co-perpetrator.⁵²⁷ However, one of the three judges, dissented by stating that genocide should be included as one of the charges and Al-Bashir could be liable as an indirect perpetrator for all three crimes.⁵²⁸

⁵²⁶ Summary of the Case (n 255)

⁵²⁷ Paragraph 249 of the Pre-Trial Chamber I Decision (n 257)

⁵²⁸ Separate and partly Dissenting Opinion of Judge Anita Usacka (n 313)

5. GENERAL CONCLUSION

Unlike the ICTY and ICTR, the international criminal court is the first permanent world Court capable of trying individuals accused of war crimes, crimes against humanity and genocide when national courts are unable or unwilling to do so.⁵²⁹ Proceeding by the Court will be triggered in one of three ways, referral by State party, referral by UN Security Council and through the initiation of an investigation by the prosecutor upon the information received from different sources.⁵³⁰

Traditionally only States were subjects of international law and enjoy certain rights and incur liabilities under international law. However, it is after the Nuremberg trial that the individual criminal responsibility for international crimes widely developed and Heads of States are criminally responsible for acts committed in their official capacity regardless of their rank in the government.⁵³¹ This individual criminal responsibility of Heads of State was reinforced upon the establishment of ICTY, ICTR, and ICC respectively.

Although Article 25 of the ICC Statute entitled individual criminal responsibility in a clear terms that the Court shall have jurisdiction over natural persons and that a person who commits a crime within the jurisdiction of the Court shall have individually responsible and liable for punishment in accordance with the Statute. This responsibility for international crimes is equally applicable to all persons without any distinction based on official capacity such as official capacity as a Head of State or Government, a Member of Government or Parliament, an elected representative of a government official for perpetration of crimes defined under the ICC Statute.⁵³²

In February 2003 the situation in Darfur escalated significantly when a two new armed political groups, the Sudan Liberation Movement/Army (SLM/A) and the Justice and

⁵²⁹ Article 1 and 17 of the ICC Statute (n 17)

⁵³⁰ Ibid Article 13

⁵³¹ Ilias Bantekas and Susan Nash (n 20) 498

⁵³² Article 27 of the ICC Statute (n 17)

Equality Movement (JEM), launched an armed resistance against government forces claiming they are oppressed by the Arab dominated central government.

During the war between rebel groups and the government forces, rules of international humanitarian and international human rights law have been violated by both parties. In that region as a result of the conflict millions of people were displaced, hundreds of thousands of people were killed and infrastructures destroyed.

Acting under chapter VII of the United Nations Charter the UN Security Council a body responsible for international peace and security gave due attention to the conflict and on September 18, 2004 adopt Resolution 1564 for the establishment for an International Commission of Inquiry for the investigation of violation against international humanitarian law and international human rights law committed in Darfur by all parties.

It was on 31 of March 2005, the United Nations Security Council, decides to take action to bring justice to Sudan by adopting Resolution 1593, under chapter VII of the United Nations Charter to refer the situation in Darfur since 1 July 2002 to the prosecutor of the ICC and after detailed investigation made by the prosecutor hence on July 14, 2008 the prosecutor presented “evidence showing that Sudanese president Omar Hasan Al-Bashir committed the crimes of genocide, crimes against humanity and war crimes in Darfur”.⁵³³ The power to issue arrest warrant is given to the ICC Pre-Trial Chamber and as a result the Court considered that the requirements to issue an arrest warrant were met because there are sufficient grounds to believe that Omar Hasan Al-Bashir is individually responsible for crimes against humanity and war crimes.

The indictment against Sudanese president Omar Hasan Al-Bashir who is a sitting Head of State by ICC unlike most war crimes indictment which has been served against former Heads of States will lead to several legal issues. The main and important issue that has arisen is the jurisdictional aspect of the ICC’s involvement in Sudan in view of the fact that Sudan is not party to the ICC Statute however; under the ICC Statute non-

⁵³³ Summary of the Case Prosecutor’s Application (n 255)

membership of the treaty does not mean that the ICC does not have jurisdiction over any country. Hence, it is by the Security Council referral pursuant to Article 13(b) of the ICC Statute that the Court acquired jurisdiction over any crimes falling under the jurisdiction of the Court regardless of the country's membership of the ICC.

The other legal issue is the immunity of Heads of State under the ICC Statute. It is evident in contemporary international law especially to the ICC Statute the current position of Al-Bashir as a Head of State which is not a party to the ICC Statute has no effect on the Court's jurisdiction. The fact is that Al-Bashir being Head of State does not preclude the Court's jurisdiction over it. According to Article 27 of the ICC Statute the Court has jurisdiction over all persons without any distinction based on official capacity, such as Head of State or Government or Member of Parliament. Thus, the official capacity of Al-Bashir as a Head of State is in no case exempt him from liability for the crimes committed in Darfur.

Like the other contemporary international tribunals the ICC lacks any enforcement power to arrest individuals and is entirely dependent on States for cooperation.⁵³⁴ Although, the ICC Statute puts legal obligation on State parties to cooperate over the arrest and surrender of any person accused of a crime under the ICC jurisdiction with the Court and this cooperation further goes to non-State parties and international organizations.⁵³⁵

Moreover, the ICC made request for cooperation to member States and organizations to arrest and surrender Al-Bashir to the Court.⁵³⁶ However the AU as an organization in various decisions announced the refusal to cooperate with the Court, because of the United Nations Security Council lacks response to their request for deferral of the ICC's case against Al-Bashir pursuant to Article 16 of the ICC Statute.⁵³⁷

⁵³⁴ Article 86 of the ICC Statute (n 17) ,and see also Article 29 of the ICTY Statute (n 49) and Article 28 of the ICTR Statute (n 50)

⁵³⁵ Article 86 of the ICC Statute (n 17)

⁵³⁶ Paragraph 249 of the Pre-Trial Chamber I Decision (n 257)

⁵³⁷ African Union Assembly of Heads of State and Governments Decision (n 489)

The arrest warrant for Sudanese President Omar Al-Bashir on charges of crimes against humanity and war atrocities announced by the International Criminal Court on March 4, 2009, has made a significant move towards ending impunity. But president Al-Bashir denies the allegations against him and does not recognize the ICC or its decisions.

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