



ADDIS ABABA UNIVERSITY

College of Law and Governance Studies

**African Union-International Criminal Court Relations:
Implications on prevention of serious human rights violations
in Africa-the case of Darfur, the Sudan**

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Approval Sheet

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I. Declaration

I, the undersigned, hereby declare that I am the sole author of this thesis. To the best of my knowledge this thesis contains no material previously published by any other person except where due acknowledgement has been made. This thesis contains no material which has been accepted as part of the requirements of any other academic degree or non-degree program. This is a true copy of the thesis, including final revisions.

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II. Acknowledgement

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Biftu Fantahun



III. Abbreviations

AMIS	African Union Mission in Sudan
AU	African Union
AUHIP	AU High-Level Implementation Panel for Sudan
AUPD	AU High Level Panel on Darfur
CAR	Central African Republic
CFC	Ceasefire commission
CPA	Comprehensive Peace Agreement
DDPD	Doha Document for Peace in Darfur
DRC	Democratic Republic of Congo
DPA	Darfur peace agreement
PSC	Peace and Security Council
HRs	Human Rights
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
JEM	Justice and Equality Movement
NGO	Non-Government Organization
NGP	National Congress Party
NISS	National Intelligence and Security Services
OAU	Organization of African Unity
OCHA	UN Office for the Coordination of Humanitarian Affairs
OPCW	Organization for the Prohibition of Chemical Weapons
RSF	Rapid support force
SADC	Southern Africa Development Community
SAF	Sudanese Armed Forces
SLA	Sudan Liberation Army
SLA/MM	Sudan Liberation Army, Minni Minawi faction



SLA/AW	Sudan Liberation Army-Abdul Wahid
SPI	Sudan People's Initiative
UN	United Nations
UNAMID	United Nations Hybrid Mission in Darfur
US	United State
UNSC	United Nation Security Council



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CHAPTER ONE

1. Introduction

1.1. Background

The Rome Statute, adopted in 1998 by 120 countries, established the International Criminal Court (ICC). The ICC, which came into being in July 2002, is “a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern,” which include “genocide; crimes against humanity; war crimes; and the crime of aggression.”¹ These countries that ratified the Rome statute believed that global justice would benefit from and be greatly enhanced by the creation of an “international criminal justice regime empowered to prosecute individuals guilty of gross atrocities and human rights violations.”² The Rome Statute gave the mandate for the ICC with the mission to investigate, prosecute and try individuals’ accused of the crime of genocide, crimes against humanity, and war crimes³

There are research findings that claim Africa was involved in and supported the creation of the ICC. For instance, one research article made a bold claim that African states contributed extensively to the preparations leading up to, during and after the diplomatic conference in Rome at which the Rome Statute of the ICC was finalized.⁴

After the statute was adopted on 03 February 1999, Senegal became the first State Party to ratify the Rome Statute⁵. The ICC was not created specifically for the least developed

¹ Rome Statute of the International Criminal Court opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) (‘Rome Statute’).

² Charles Chernor Jalloh. 2012. Africa and the International Criminal Court: Collision Course or Cooperation? North Carolina Central Law Review, Vol. 34, p. 203-229, 2012. http://ecollections.law.fiu.edu/faculty_publications/253 accessed on 17 March 2017.

³ Rome Statute of the International Criminal Court opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) (‘Rome Statute’).

⁴ Charles Chernor Jalloh. 2012. Africa and the International Criminal Court: Collision Course or Cooperation? North Carolina Central Law Review, Vol. 34, p. 203-229, 2012. http://ecollections.law.fiu.edu/faculty_publications/253 accessed on 17 March 2017.

⁵ United Nations Press Office of Legal Affairs, 03 February 1991 Senegal first to ratify Rome Statue <https://www.un.org/press/en/1999/19990203.12905.html>. Accessed on 27 February 2019



and developing countries in Africa and Asia. ICC's Registry notes:

Contrary to the view that the ICC was shoved down the throats of unwilling Africans who were dragged screaming and shouting to Rome and who had no alternative but to follow their Western Masters under threat of withholding of economic aid if they did not follow, the historical developments leading up to the establishment of the court portray an international will of which Africa was a part, to enforce humanitarian norms and to bring to justice those responsible for the most serious crimes of concern to the international community.⁶

From this reasoning it appears logical to claim that ICC was not an institution imposed on African Union (AU), rather is one that received support from, and has been shaped by, AU.

After the ICC started its operations, which was asymmetrically focused on African continent, the views of AU officials and member states towards ICC changed. Since it came into existence in 2002, the ICC has dealt with nine "situations" involving international crimes, all from Africa but of these five have been referred to the Court by African states themselves: namely the Democratic Republic of Congo, Uganda, Central African Republic (two situations) and Mali⁷.

The other cases include the Sudan and Kenya; the heads of state in office are amongst the inditees, in which case the AU asserts that trials against seating heads of states would put countries at risk of instability⁸. Since the Security Council referred the situation in Darfur, Sudan, to the ICC in March 2005,⁹ the Prosecutor has issued various arrest

⁶ Mochochoko, P. 2005. Africa and the International Criminal Court. In E Ankumah and E Kwakwa (eds). African perspectives on international criminal justice, Ghana: Africa Legal Aid. 243.

⁷ Rowland J V Cole, 'Africa's Relationship with the International Criminal Court: More Political Than Legal.' (2013) Melbourne Journal of International Law, Vol 14: 1-29

⁸ ISPI Online 28 March 2017 Kenya and Sudan: the Two Cases that Shaped Africa's Criticism towards the ICC

<https://www.ispionline.it/it/publicazione/kenya-and-sudan-two-cases-shaped-africas-criticism-towards-icc-16454> Accessed on 27 February 2019.

⁹ S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).



warrants arising from his investigations.¹⁰ This thesis focuses on arrest warrant against incumbent Sudanese President Omar Hassan Al Bashir.¹¹ The Bashir warrant has proven to be highly controversial within legal and political circles in Africa. This is because if ICC prosecutes the head of states in Africa, to which the ICC has a legal mandate, it will however run contrary to AU goal of securing peace and security throughout the continent primarily through negotiations and agreements, this is through the political avenue than through the legal avenue. Among the more contentious issues, people have debated whether an indictment unlikely to be executed in the short-term, is a pragmatic prosecutorial strategy in the long-term, as well as the propriety of a Security Council deferral - as requested by AU leaders.¹²

Following the Prosecutor's application for an arrest warrant for President Bashir, in July 2008, the AU Peace and Security Council, the primary decision-making organ for conflict resolution in Africa, immediately adopted a decision calling on the UN Security Council to deploy Article 16 of the Rome Statute to "defer the process initiated by the ICC."¹³ The AU-ICC relation got worse when the AU States adopted, in Sirte in July 2009, the decision suspending cooperation with the ICC in respect of the arrest and surrender of the Sudanese leader. Basically, all AU Member States were instructed not to enforce the warrant. AU has not been successful in asking its member states to withdraw from the Rome Statute, but in October 2013, the AU summit passed a resolution demanding that no head of state be prosecuted.¹⁴ This included the case of the Sudanese president, Omar Al Bashir.

There are contrasting arguments regarding the nature of AU-ICC relations with regards to the Sudan. Two contrasting camps: on the one side, AU-ICC relation is presented as a

¹⁰ See, e.g., Warrant for Arrest for Ahmad Harun, INT'L CRIMINAL COURT, (Apr. 27, 2007), <http://www2.icc-cpi.int/iccdocs/doc/doc279813.PDF>.

¹¹ See Press Release, ICC Office of the Prosecutor, ICC Issues a Warrant of Arrest of Omar Al Bashir, President of Sudan (Mar. 3, 2009), <http://www.icc-cpi.int/Menu/Go?id=16072fd9-0b88-4cdb-87b4-a24de2fld7cf&lan=en-GB>. Accessed on 03 March 2018.

¹² Rowland J V Cole, 'Africa's Relationship with the International Criminal Court: More Political Than Legal.' (2013) Melbourne Journal of International Law, Vol 14: 1-29

¹³ AU's Peace and Security Council Resolution on Sudan President Indictment, SUDAN TRIM. Jul. 21. 2008, <http://www.sudantribune.com/AU-s-Peace-and-Security-Council27982>.

¹⁴ Extraordinary session of the Assembly of the African Union 12 October 2013, Addis Ababa, Ethiopia.



neocolonial domination. The core argument of the first camp is best captured by Professor Mahmood Mamdani, who argued that the "ICC is rapidly turning into a Western court to try African crimes against humanity."¹⁵ To Professor Mamdani, "the realization that the ICC has tended to focus only on African crimes, and mainly on crimes committed by adversaries of the United States, has introduced a note of sobriety into the African discussion" and fuelled concerns about a "politicized justice" and even bigger questions about the "relationship between law and politics."¹⁶ Mamdani proposed that the ICC should be rebranded International Criminal Court for Africa or the African International Criminal Court.¹⁷

Those in the second camp oppose the above argument. The second camp saw the criticisms raised by the first camp as 'exaggerated assessment'.¹⁸ Fatou Bensouda, the chief prosecutor of ICC rejects the claim that ICC is biased against Africa.¹⁹ She argues that the critical voices against ICC are an attempt by the powerful for impunity. She opposes the first argument by saying that if ICC leaves the human right violation as it is without punishing or accusing the wrong doers especially the seating heads of states it will be a challenge to legal system and also the violators of the human right go unpunished for their wrong acts. Similarly, Charles Chernor, points to the number of African states that have ratified the Rome Statute²⁰. As of 27 October 2017, 123 states have ratified or acceded to the Rome Statute and in the world Africa have generated the largest support base for the Court at thirty-four ratifying states.²¹ This number of states

¹⁵ Mahmood Mamdani, How the ICC's "Responsibility to Protect" is Being Turned Into An Assertion of Neocolonial Domination, PAMBAZUKA NEWS (Sept. 17, 2008), <http://www.pambazuka.org/en/category/features/50568>.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Jalloh, Charles Chernor, Africa and the International Criminal Court: Collision Course or Cooperation? (2012). North Carolina Central Law Review, Vol. 34, 203, 2012.

¹⁹ (<http://www.dw.com/en/fatou-bensouda-critics-dont-understand-the-icc/a-38372198> accessed on 22 may, 2018)

²⁰ Charles Chernor Jalloh. 2012. Africa and the International Criminal Court: Collision Course or Cooperation? North Carolina Central Law Review, Vol. 34, p. 203-229, 2012.

http://ecollections.law.fiu.edu/faculty_publications/253 accessed on 17 March 2017

²¹ For a current and complete list of States Parties, see, ICC, the States Parties to the Rome Statute, <http://www.icc-cpi.int/Menus/ASP/statesparties/>. Dec 10, 2017 and May 22, 2018.



constitutes over half of the continent's fifty-three (53) countries. Thirteen additional African nations have signed the Rome treaty.²²

The hypothesis of the research is that there are grains of truths in both sides of the arguments; both sides may be to blame for the stalemate in the AU-ICC relations. By drawing on a case study on Darfur, the Sudan, the thesis aims to make contribution to knowledge by elucidating that the reasons behind the current impasse is not as simple as either or, as the opposing camps seem to posit, rather a combination of arguments from both side.

1.2. Research Problem

The AU emphasized that prosecuting Al Bashir "may not be in the interest of the victims and justice" because it could lead to greater destabilization in Sudan and the region.²³ Partly due to the bad human rights record enjoyed by some African leaders, some question the good faith of AU leaders when they make these statements. To date, evidence is lacking to back the claims made by the AU.

Contrary to the seemingly AU's position, others have argued that AU's decision does not prevent human rights violations in Africa. Richard Goldstone, the first Prosecutor for the ICTY/ICTR, has argued that there is in fact no peace process to speak of in Darfur.²⁴ A claim implied in Richard's statement is that AU's decision did not lead to preventing human rights violations in Darfur. The research problem which this thesis aims to address is the whether AU's decision has led to prevention of human rights violations in Darfur or not.

This research project seeks to understand the implications of the decision of ICC to issue

²² ICC, African States, [http://www.icc-cpi.int/Menus/ASP/states\\$arties/African+States/](http://www.icc-cpi.int/Menus/ASP/states$arties/African+States/). Dec. 10, 2017.

²³ ISPI Online 28 March 2017 Kenya and Sudan: the Two Cases that Shaped Africa's Criticism towards the ICC <https://www.ispionline.it/it/pubblicazione/kenya-and-sudan-two-cases-shaped-africas-criticism-towards-icc-16454> Accessed on 27 February 2019.

²⁴ Richard Goldstone, Editorial, Catching A War Criminal in the Act, New York. TIMES, Jul. 15, 2008, <http://www.nytimes.com/2008/07/15/opinion/15goldstone.html>.



arrest warrant against Al Bashir, a seating head of state, on the one hand, and on the other to examine the reasons behind AU's decision to suspend cooperation with ICC. Furthermore, this research project assesses the direction of change in the serious human rights violations in Darfur since 2009 by drawing on available human rights reports. This research project problematizes the implications of the impasse in AU- ICC relation on the prevention of serious human right violations in Darfur since 2009. Following AU's decision to suspend cooperation with the ICC, the question of whether human rights violations in Darfur increased or decreased need to be investigated.

In summary, the major research problem of this thesis is answering the implications of the impasse in AU-ICC relations on the prevention of serious human rights violation in Darfur. The AU decided to suspend its relation with ICC concerning Darfur in 2009. AU's decision, it was claimed, was to prevent further escalations in human rights violations in Darfur. The knowledge gap which this thesis identifies is whether, as a result of AU's decision violations of human rights in Darfur been prevented or at least decreased.

1.3. Research objective and research questions

The overall objective of this research is to describe the implication of the AU-ICC relations on serious human rights violations in Darfur, the Sudan since 2009. With this in mind, the following research questions have been raised:

- ❖ What were the bases for AU's decision to suspend cooperation with the ICC with respect to the issuance of arrest warrant of Al Bashir?
- ❖ What has been the trend in serious human right violations in Darfur (the Sudan) since AU decided to suspend cooperation with ICC?
- ❖ How does AU's decision relate with the trends in serious human rights violation in Darfur since 2009?



1.4. Research methods and instruments of data collection

This research adopts doctrinal legal research method. For this desk-based review, several secondary data sources have been identified and reviewed. This includes:

- ❖ ICC documents and reports: the Rome Statute, ICC arrest warrants and other related documents such as, the charge issued against AL Bashir;
- ❖ AU documents and reports: reports and position papers with regards to the situation in Darfur; AU official reports and documents concerning AU-ICC relations including the decision to suspend cooperation with ICC; AU human rights situations reports on Darfur,
- ❖ UN Organizations' reports on human rights situations in Darfur,
- ❖ Human Rights Watch (HRW) reports on Darfur, and
- ❖ Academic literatures on AU-ICC relations, and on the implications of the impasse in relation on the prevention of serious human rights violation in Darfur.

I have narrowed down the discussion on human rights violations in Darfur since 2009 to Kordofan and Blue Nile states.

1.5. Significance of the study

The research will be an input to academia and legal practitioners in international human rights law. The output of this research will contribute to filling the knowledge gap identified in this research-that is highlighting the current relationship of ICC-AU and its implications on preventions of serious human right violations in the Darfur, the Sudan. The focus of scholarly works so far have focused on the bias of ICC against Africa and also on the reasonability of leaving ICC for African States not on the implications of the suspending relations on prevention of human rights violations in Africa particularly in Darfur. So this thesis will show the trend of the human right violation since AU decided to suspend relations with ICC, and by doing so becomes a modest input for pertinent



organizations working on prevention of human right violations to review their strategies in view of the findings of this thesis.

1.6 Scope of the research

This research deals with the implications of the post 2009 relationship between African Union and International Criminal Court (ICC) on the prevention of serious human right violations in Africa. There have been eight cases investigated by the ICC in Africa: Sudan, the Democratic Republic of the Congo (DRC), Uganda, the Central African Republic (CAR), Kenya, Libya, Côte d'Ivoire and Mali. The scope of the study will be limited to Darfur (especially Kordofan and Blue Niles states), the Sudan.

1.7. Organization of the thesis

This thesis is organized in to five chapters. Chapter two presents the AU and ICC relations. Chapter three presents the basis for the impasse in the AU-ICC relations in respect of the arrest of Al Bashir. In chapter four the trends in human right violations in Darfur since 2009 is presented. It also presents the role of the African Union resolution on the status of human rights violations in Darfur since 2009. Finally, in chapter five concluding remarks and recommendations have been presented.



CHAPTER TWO

2. Formative History of the ICC: AU and ICC relations

2.1. The International Criminal Court

The ICC was set up as a permanent institution to exercise its jurisdiction over persons for the ‘most serious crimes of international concern’ and is to be ‘complementary to national criminal jurisdictions’²⁵. It was created via the Rome Statute of 17 July 1998, which entered into force on 1 July 2002.²⁶ ICC is a permanent institution unlike other international criminal tribunals, which are not. The conflict that took place in Former Yugoslavia led to the creation of International Criminal Tribunal for Former Yugoslavia (ICTY). Similarly, the genocide that took place in Rwanda led to creation of International Criminal Tribunal for Rwanda (ICTR).²⁷

The ICC is intended to be a court of last resort, investigating and, if necessary, prosecuting only where national courts are unwilling or unable to investigate or prosecute a case.²⁸ It will have subject matter jurisdiction over genocide, war crimes, and crimes against humanity. In other words, the crimes within its jurisdiction are genocide, crimes against humanity, war crimes and aggression.²⁹ The court’s jurisdiction over aggression comes to effect once the definitions of the crime and the conditions under which the court may exercise jurisdiction over the crime have been agreed upon³⁰.

2.2. African involvement in the creation of the ICC

This sub-section describes the involvement of African states in the creation of ICC. To this end, names of African states who played a role and later ratified the Statute will be

²⁵ Rome Statute of the International Criminal Court, 2002, Arts 5–8

²⁶ Rome Statute of the International Criminal Court, 2002, Arts 5–8.

²⁷ Rowland J V Cole, ‘Africa’s Relationship with the International Criminal Court: More Political Than Legal.’ (2013) Melbourne Journal of International Law, Vol 14: 1-29

²⁸ *Rome Statute of the International Criminal Court, 2002, Art 17.*

²⁹ Williams, Sharon A. "The Rome Statute on the International Criminal Court: From 1947-2000 and beyond." *Osgoode Hall Law Journal* 38.2 (2000): 297-330.

³⁰ Williams, Sharon A.. "The Rome Statute on the International Criminal Court: From 1947-2000 and beyond." *Osgoode Hall Law Journal* 38.2 (2000): 297-330.



listed. The available body of literatures point to the argument that Africa was involved in and supported the creation of the ICC. African states contributed extensively to the preparations leading up to, during and after the diplomatic conference in Rome at which the Rome Statute of the ICC was finalized.³¹ After the statute was completed, on 3 February 1999, Senegal became the first State Party to ratify the Rome Statute. Thirty three African states have ratified the Rome Statute: Benin, Botswana, Burkina Faso, Central African Republic, Chad, Comoros, Congo (Brazzaville), Democratic Republic of the Congo, Djibouti, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritius, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Tanzania, Uganda Zambia Seychelles, Tunisia, Cape Verde and Côte d'Ivoire³².

In the period leading up to the Rome diplomatic conference, various ICC related activities were organized throughout the African continent. Radio talk shows, interviews and seminars were conducted in countries such as Botswana and South Africa. Some 90 African organizations based in, among others, Kenya, South Africa, Nigeria, Uganda, Rwanda and Ethiopia joined the NGO Coalition for an International Criminal Court. They lobbied in their respective countries for the early establishment of an independent and effective international criminal court.³³ Fourteen nations of the Southern African Development Community (SADC) had been very active in ICC-related negotiations at the time that the International Law Commission presented a draft statute for an international criminal court to the General Assembly in 1993.³⁴ Experts from the group

³¹ Charles Chernor Jalloh. 2012. Africa and the International Criminal Court: Collision Course or Cooperation? 34 N.C. Cent. L. Rev. 203 (2012). http://ecollections.law.fiu.edu/faculty_publications/253 accessed on 17 March 2017; see also Rowland J V Cole, 'Africa's Relationship with the International Criminal Court: More Political than Legal.' (2013); Mochochoko, P 2005. Africa and the International Criminal Court. In E Ankumah and E Kwakwa (eds). African perspectives on international criminal justice. Ghana: Africa Legal Aid.

³² International Criminal Court Peace Palace library 2016. Africa and withdrawal from the ICC. <https://www.peacepalacelibrary.nl/2016/10/africa-and-icc-withdrawal/> Accessed 3 March 2019.

³³ Mochochoko, P 2005. Africa and the International Criminal Court. In E Ankumah and E Kwakwa (eds). African perspectives on international criminal justice. Ghana: Africa Legal Aid. pp:252

³⁴ Max du Plessis: The International Criminal Court that Africa wants, August 2010 Monograph 172



met in Pretoria, South Africa, in September 1997 to discuss their negotiation strategies and to agree on a common position in order to make a meaningful impact on the outcome of negotiations. This meeting provided impetus for a continent-wide consultation process on the creation of the Court.³⁵ The participants agreed on a set of principles that were later sent to their respective ministers of justice and attorneys-general for endorsement.

On the basis of the principles submitted to them, SADC ministers of justice and attorneys- issued a common statement that became a primary basis for the SADC's negotiations at Rome.³⁶ These principles also appeared in the Dakar declaration on the ICC and other declarations.³⁷ At a meeting on 27 February 1998, the council of ministers of the Organization of African Unity (OAU, now the African Union) took note of the Dakar Declaration and called on all OAU member states to support the creation of the ICC. This resolution was later adopted by the OAU summit of heads of state and government in Burkina Faso in June 1998.³⁸

During the Rome conference itself, several circumstances resulted in African states having a significant impact on the negotiations; for example, African delegates participating in the Rome conference had two guiding documents: the SADC principles and the Dakar declarations. Both the SADC principles and the Dakar declaration were in line with the principles of the 'like-minded group', the members of which were committed to a court independent from Security Council control, staffed by an independent prosecutor, and with inherent jurisdiction over the core crimes of genocide,

³⁵ Charles Chernor Jalloh. 2012. Africa and the International Criminal Court: Collision Course or Cooperation? 34 N.C. Cent. L. Rev. 203 2011-2012).

³⁶ Rowland J V Cole, 'Africa's Relationship with the International Criminal Court: More Political Than Legal.' (2013) Melbourne Journal of International Law, Vol 14: 1-29

³⁷ Mochochoko, P 2005. Africa and the International Criminal Court. In E Ankumah and E Kwakwa (eds). African perspectives on international criminal justice. Ghana: Africa Legal Aid. pp: 248

³⁸ AU's Peace and Security Council Resolution on Sudan President Indictment, SUDAN TRIm., Jul. 21. 2008 available on <http://www.sudantribune.com/AU-s-Peace-and-Security-Council.27982>. Accessed 3February 2017.



crimes against humanity and war crimes.³⁹ Most of the work of the conference was carried out in working groups and informal working sessions. It is fair to argue that African states played a role either in chairing or coordinating various issues. For instance, the Lesotho delegate was elected one of the vice-chairpersons of the conference and also coordinated the formulation of part 9 of the Rome Statute; South Africa was a member of the drafting committee of the conference and coordinated the formulation of part 4 of the Rome Statute; and Zambia was a member of the credentials committee of the conference.

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The continent has played a major role in the creation of the ICC. Indeed, as Professor Tiya Maluwa, the legal advisor to the Organization of African Unity (OAU) observed during the Rome negotiations, the continent of Africa had a special interest in the establishment of the ICC because its people had for centuries endured human rights atrocities such as slavery, colonial wars and other horrific acts of war and violence which continue today despite the continent's post-colonial phase.⁴¹

The ICC was not created specifically for the least developed and developing countries in Africa and Asia. Indeed, as Mochochoko noted:

A senior legal adviser in the ICC's Registry has noted that contrary to the view that the ICC was shoved down the throats of unwilling Africans who were dragged screaming and shouting to Rome and who had no alternative but to follow their Western Masters under threat of withholding of economic aid if they did not follow, the historical developments leading up to the establishment of the court portray an international will of which Africa was a part, to enforce humanitarian norms and to bring to justice those responsible for the most serious crimes of concern to the international community.⁴²

On the basis of the formative history of the ICC outlined above, it can be argued that the ICC was not an institution imposed on AU. The creation of the ICC symbolized a

³⁹ Mochochoko, P. 2005. Africa and the International Criminal Court. In E Ankumah and E Kwakwa (eds). African perspectives on international criminal justice, Ghana: Africa Legal Aid. Pp: 253

⁴⁰ Ibid.

⁴¹ Plenary, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. See UN, Statement Delivered by Tiyanjana Maluwa, OAU Legal Counsel, (17 June 1998), <http://www.un.org/icc/index.htm>. Accessed 18 February 2017.

⁴² Mochochoko, P 2005. Africa and the International Criminal Court. In E Ankumah and E Kwakwa (eds). African perspectives on international criminal justice. Ghana: Africa Legal Aid. pp: 259



struggle to fight impunity, not a neo-colonial exercise; it is one that has received support from, and has been shaped by, African States. After the ICC started its operations, it has been claimed that ICC's operation was asymmetrically focused on African continent, which contributed to changes in the views of AU officials and member states regarding ICC. On 27 May 2013, the AU has accused the International Criminal Court (ICC) of "hunting" Africans because of their race⁴³. The AU stated its opposition to the ICC trying Kenya's President Uhuru Kenyatta on charges of crimes against humanity, said former Ethiopia's Prime Minister Hailemariam Desalegn. In September 2013, Kenyan MPs approved a motion to leave the ICC. It can be argued that this development has had contribution in straining AU-ICC relations.

Despite all these, courts in some African countries continued to collaborate with ICC. For example, in June 2015 South African court issued an interim order stopping Sudanese leader Omar al-Bashir from leaving the country. This came after the ICC called on South Africa to arrest the Sudanese president Omar al-Bashir who was in Johannesburg attending an African Union (AU) summit.⁴⁴

2.3. The African Union-International Criminal Court relations: conflicting views

In literature there are two contrasting arguments regarding the nature of AU-ICC relations. On the one side, AU-ICC relation is presented as neocolonial domination, and on the other side, the critical voices against ICC are presented as either attempt by the powerful for impunity or as legal challenges. When the Rome Statute entered into force in July 2002, the ICC was seen as an historic milestone, including by African states and

⁴³ BBC 2013. The AU has accused the International Criminal Court (ICC) of "hunting" Africans because of their race. May 27 2013. <https://www.bbc.com/news/world-africa-22681894> Accessed on 03 March 2019.

⁴⁴ BBC 2015 South Africa court bid to arrest Sudan's Omar al-Bashir. 15 June 2015. <https://www.bbc.com/news/av/world-africa-33125193/south-africa-court-bid-to-arrest-sudan-s-omar-al-bashir> Accessed on 3 March 2019.



civil society⁴⁵. Just over a decade later, the Court has come under scathing criticism from various quarters in Africa. Today, some African nations, including those not parties to the Rome Statute, are increasingly questioning what they perceive as an insensitive application of the international criminal law instrument to indict only weak individuals from generally poor African states.⁴⁶ For example, President Paul Kagame of Rwanda has gone so far as to suggest that the ICC is a "fraudulent institution" reminiscent of "colonialism" and "imperialism" that is seeking to undermine and to control Africa.⁴⁷ It is important to note here that Rwanda is not a member of the ICC.

Professor Mamdani has eloquently captured this sentiment. He argued that the "ICC is rapidly turning into a Western court to try African crimes against humanity."⁴⁸ With similar reasoning, Mamdani proposed that the ICC should be rebranded International Criminal Court for Africa or the African International Criminal Court.⁴⁹ To Professor Mamdani, "the realization that the ICC has tended to focus only on African crimes, and mainly on crimes committed by adversaries of the United States, has introduced a note of sobriety into the African discussion" and fuelled concerns about a "politicized justice" and even bigger questions about the "relationship between law and politics."⁵⁰ In its Decision on Africa's Relationship with the International Criminal Court, the AU reiterated its "concern on the politicization and *misuse of indictments against African leaders by the ICC*" and suggested that prosecutions *against* heads of state, like President Uhuru Kenyatta and Deputy President William Ruto of Kenya, "could undermine

⁴⁵ Jalloh, Charles Chernor, Africa and the International Criminal Court: Collision Course or Cooperation? (2012). North Carolina Central Law Review, Vol. 34, p. 203, 2012; U. of Pittsburgh Legal Studies Research Paper No. 2013-31; Florida International University Legal Studies Research Paper No. 17-41. Available at SSRN: <https://ssrn.com/abstract=2325520>

⁴⁶ See David Kezio-Musoke, Kagame Tells Why He is Against ICC Charging Bashir, AFR. PRESS INT'L, Aug. 5, 2008, <http://africanpress.me/2008/08/05/kagame-tells-why-he-is-against-icccharging-bashir/> Accessed 20 October 2017.

⁴⁷ Lionel Nichols. 2015. The International Criminal Court and the End of Impunity in Kenya. Also, 'Vows to pursue Sudan over "Crimes"', BBC News, 27 September 2008; Kezio Musoke, 'Kagame tells why he is against ICC charging Bashir', *Daily Nation*, 3 August 2008.

⁴⁸ Mahmood Mamdani, How the ICC's "Responsibility to Protect" is Being Turned into An Assertion of Neocolonial Domination. Sept. 17, 2008. <http://www.pambazuka.org/en/category/features/50568> Accessed on 13 August 2018.

⁴⁹ Ibid

⁵⁰ Ibid



sovereignty, stability, and peace.⁵¹

Rowland Cole argued that Africa's relationship with the ICC has become more political than legal. He identified the following political challenges in AU-ICC relations. The first challenge is the argument that ICC-style justice crowds out possibilities for reconciliation, such as the Lord's Resistance Army in Uganda, and adding Sudan's Darfur region to the list. The second challenge is the perceived "double-standard" and U.S. exceptionalism, especially in the face of UN Security Council intervention in the inner workings of the Court through the ability to refer and defer cases pursuant to Articles 13 and 16 of the Rome Statute. The third challenge is the depredations and scars of colonialism, which have remained unaddressed in international relations between former European and African states.⁵²

Since the Security Council referred the situation in Darfur, Sudan, to the ICC in March 2005,⁵³ the Prosecutor has issued various arrest warrants arising from his investigations.⁵⁴ The latest and most significant warrant was that for incumbent Sudanese President Omar Hassan Al Bashir.⁵⁵ The Bashir warrant has proven to be highly controversial within legal and political circles, in Africa and elsewhere. Among the more contentious issues, people have debated whether an indictment unlikely to be executed in the short-term is a pragmatic prosecutorial strategy in the long-term, as well as the propriety of a Security Council deferral - as requested by AU leaders.⁵⁶ Following the Prosecutor's application for an arrest warrant for President Bashir in July 2008, the AU Peace and Security

⁵¹ AU's Peace and Security Council COMMUNIQUE OF THE 142ND MEETING OF THE PEACE AND SECURITY COUNCIL 21 July 2008 <http://www.peaceau.org/en/article/communique-of-the-142nd-meeting-of-the-peace-and-security-council> Accessed on March 03 2019.

⁵² Rowland J V Cole, 'Africa's Relationship with the International Criminal Court: More Political Than Legal.' (2013) *Melbourne Journal of International Law*, Vol 14

⁵³ S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

⁵⁴ See, e.g., Warrant for Arrest for Ahmad Harun, INT'L CRIMINAL COURT, (Apr. 27, 2007), <http://www2.icc-cpi.int/iccdocs/doc/doc279813.PDF>.

⁵⁵ See Press Release, ICC Office of the Prosecutor, ICC Issues a Warrant of Arrest of Omar Al Bashir, President of Sudan (Mar. 3, 2009), <http://www.icc-cpi.int/Menu/Go?id=16072fd9-0b88-4cdb-87b4-a24de2fld7cf&lan=en-GB>

⁵⁶ Id. (Rowland J V Cole)



Council, the primary decision-making organ for conflict resolution in Africa, immediately adopted a decision calling on the UN Security Council to deploy Article 16 of the Rome Statute to "defer the process initiated by the ICC."⁵⁷

The AU observed that while it endorses criminal accountability for gross human rights violations, given the "delicate nature" of the processes that were underway in the Sudan, the search for justice should be pursued in a way that complements, rather than impedes, efforts to secure a lasting peace in the country.⁵⁸ It emphasized that ICC jurisdiction is based on complementarity and that a prosecution in the current climate "may not be in the interest of the victims and justice" because it could lead to greater destabilization in Sudan and the region.⁵⁹ The AU sees the ICC as being on a collision course with its own peacemaking efforts. Tanzanian President Jakaya M. Kikwete, speaking for African leaders in 2008, publicly clarified that "[j]ustice has to be done. Justice must be seen to be done. What the AU is simply saying is that what is critical, what is the priority, is peace."⁶⁰ The AU has also secured the support of other regional bodies, including the League of Arab States, the Organization of Islamic Conference and the Non Aligned Movement, ostensibly to rein in the ICC. Likely because of Sudanese backroom lobbying, all those organizations had for their own reasons already, or have since, publicly joined the AU chorus singing down the wisdom of indicting President Bashir at this time.⁶¹

The situation only got worse when, in 2009, the former Libyan Leader Muammar

⁵⁷ AU's Peace and Security Council COMMUNIQUE OF THE 142ND MEETING OF THE PEACE AND SECURITY COUNCIL 21 July 2008 <http://www.peaceau.org/en/article/communique-of-the-142nd-meeting-of-the-peace-and-security-council> Accessed on March 03 2019.

⁵⁸ Jalloh, Charles Chernor, Africa and the International Criminal Court: Collision Course or Cooperation? (2012). North Carolina Central Law Review, Vol. 34, p. 203, 2012; U. of Pittsburgh Legal Studies Research Paper No. 2013-31; Florida International University Legal Studies Research Paper No. 17-41. Available at SSRN: <https://ssrn.com/abstract=2325520>

⁵⁹ Ibid

⁶⁰ Jalloh, Charles Chernor, Africa and the International Criminal Court: Collision Course or Cooperation? (2012). North Carolina Central Law Review, Vol. 34, p. 203, 2012; U. of Pittsburgh Legal Studies Research Paper No. 2013-31; Florida International University Legal Studies Research Paper No. 17-41. Available at SSRN: <https://ssrn.com/abstract=2325520>

⁶¹ Arab Leaders Back "Wanted" Bashir, BBC News (Mar. 30, 2009), <http://news.bbc.co.uk/2/hi/7971624.stm> (reporting on Arab League's expressed support of Al Bashir at its annual summit) cited in Charles 2012.



Gaddafi was named chairperson of the AU. It was during his time in that position that AU States adopted, in Sirte in July 2009, the controversial decision suspending cooperation with the ICC in respect of the arrest and surrender of the Sudanese leader. Basically, all AU Member States were instructed not to enforce the warrant.

The second camp saw the criticisms raised by the first camp as ‘exaggerated assessment’.⁶² Fatou Bensouda, the chief prosecutor of ICC rejects the claim that ICC is biased against Africa. Jalloh criticized Mamadani’s position by pointing to two arguments. First, he raised the number of African states that have ratified the Rome Statute. Jalloh (2012) points to the number of African states that ratified the Rome Statute. As of October 2016, one hundred and twenty four States have become Parties to the Rome Statute and in the world Africa has generated the largest support base for the Court at thirty-four ratifying states.⁶³ The number of states constitutes over half of the continent's fifty-three countries. To contextualize these numbers, Africa is followed by 28 States from Latin American and Caribbean States, 19 from Asia-Pacific States, 18 from Eastern European states and 25 are from Western Europe and other States.⁶⁴

Second, Jalloh (2012) points to the roles African states have played in seeking the involvement of the ICC in their crises. Out of the six situations currently under formal ICC investigation by the Prosecutor, all are in Africa.⁶⁵ Of the six, three (Central African Republic (CAR), Uganda, and the Democratic Republic of Congo (DRC)) reflect the continent's wide embrace of the Court⁶⁶. The former three, all of which are contracting

⁶² Jalloh, Charles Chernor, Africa and the International Criminal Court: Collision Course or Cooperation? (2012). North Carolina Central Law Review, Vol. 34, p. 203, 2012; U. of Pittsburgh Legal Studies Research Paper No. 2013-31; Florida International University Legal Studies Research Paper No. 17-41. Available at SSRN: <https://ssrn.com/abstract=2325520>. Also refer to *Arnold Wehmhoerner 2013 Impunity for the powerful*

⁶³ For a current and complete list of States Parties, see, ICC, the States Parties to the Rome Statute, <http://www.icc-cpi.int/Menus/ASP/stateparties/>.

⁶⁴ For a current and complete list of States Parties, see, ICC, the States Parties to the Rome Statute, <http://www.icc-cpi.int/Menus/ASP/statesparties/>.

⁶⁵ See ICC, Situations and cases, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>

⁶⁶ Jalloh, Charles Chernor, Africa and the International Criminal Court: Collision Course or Cooperation? (2012). North Carolina Central Law Review, Vol. 34, p. 203, 2012; U. of Pittsburgh Legal Studies Research Paper No. 2013-31; Florida International University Legal Studies Research Paper No. 17-41.



parties, broke the ice of impunity by successively giving work to the ICC through so-called "self-referrals" of their respective situations for investigations and prosecutions.' In doing so, those nations put themselves more directly on the line to offer the first test cases to an untested court. This can be contrasted with the Sudan, which was recalcitrant and opposed to the ICC, perhaps because they were imposed on those states by the UN Security Council acting under its mandate to ensure the maintenance of international peace and security.⁶⁷

2.5 Conclusion

At the very beginning the African states has played a major role in the creation of the ICC. Before the creation of ICC, radio talk shows, interviews and seminars were conducted in countries such as Botswana and South Africa. During the Rome conference itself, several circumstances resulted in African states having a significant impact on the negotiations; for example, African delegates participating in the Rome conference had two guiding documents: the SADC principles and the Dakar declarations.

After the ICC established by the Rome Statute, and started its operation it was criticized for focused on prosecuting African states, which led to change in perceptions of African states. Because of the change on views Of AU officials the relationship of AU and ICC become rough. Some contrasting arguments are also raised regarding the AU-ICC Relations. Some argue that the ICC is a neocolonial domination while other argues that ICC is only mandated to fight impunity in every state party under its jurisdiction. As a result, the Court issues an arrest warrant to President of Sudan Omar Al Bashir. However,

Available at SSRN: <https://ssrn.com/abstract=2325520>

⁶⁷ Neither Sudan nor Libya is a Party to the Rome Statute. Although Kenya is in fact a Party, its government has expressed skepticism about the prudence of initiating ICC proceedings against the alleged perpetrators of the 2007 post-election violence including, for example, in the Dec. 22, 2010 Parliamentary resolution calling for a withdrawal from the Rome Statute. As of Apr. 8, 2011, the Kenyan government had not begun the withdrawal process. The Kenyan government did, however, file an admissibility challenge pursuant to Rome Statute Art. 19. See Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute, Situation in the Republic of Kenya, Doc. No. ICC-01/09-01/11-19 (Mar. 31, 2011), <http://www.icc-cpi.inticcdocs/doc/doc1050005.pdf>.



the issuance of this arrest warrant raised some highly controversial within legal and political circles, in Africa and elsewhere.

The AU emphasized that prosecuting of Al Bashir may not be in the interest of the victims and justice because it could lead to greater destabilization in Sudan and the region and they also says the issuance of arrest warrant of Al Bashir may contradict with the aim and Goal of AU to secure peace and security of the region.



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CHAPTER THREE

3. Basis for the Impasse in the AU-ICC Relations: the Case of Al Bashir

3.1. Background: The Darfur Crisis

The war in Darfur began in February 2003 when the Sudan Liberation Army (SLA) and Justice and Equality Movement (JEM) began fighting the government of Sudan, whom they accused of oppressing Darfur's non-Arab population. Darfur has faced many problems over land rights between Massaleet and Zaghawa communities. Because of the attack by the rebel group against the Sudan Government, the latter responded to the attack by directing armed militia, known as the *Janjaweed* to carry out the “ethnic cleansing” against Darfur’s non Arabs and this resulted in the death of many civilians.⁶⁸ “The UN has described Darfur as 'the world's worst humanitarian crisis 'and the US Congress described it as 'genocide’⁶⁹ However, all this ethnic cleansing by the government, led to the accusation of the president of Sudan, Omar al- Bashir, for war crime, crime against humanity and genocide by the ICC⁷⁰;as of 2010, 2.7 million people have fled their homes since the conflict began in the arid western region, and the UN says about 300,000 have died - mostly from disease.⁷¹ Nevertheless the number of displaced person reached 2.8 million as of 2017.⁷² In addition, the conflict in Darfur has had a spill-over effect in the neighboring countries of Chad, and Central African Republic where hundreds of thousands of refugees stream over the borders the two countries to escape violence.⁷³ The main aim of this chapter is to analyze why AU rejects the arrest warrant of President al Bashir and it also analyze the basis why AU decided to suspend its cooperation with ICC since AU contribute a lot to creation of ICC.

⁶⁸ Alex de Waal, Darfur's deep grievances defy all hopes for an easy solution (25 Jul, 2004)

<https://www.theguardian.com/society/2004/jul/25/internationalaidanddevelopment.voluntarysector>

Accessed on Jan. 10, 2018 at 9:30 Pm

⁶⁹ Ibid

⁷⁰ The Prosecutor v. Omar Hassan Ahmad Al Bashir ICC-02/05-01/09 ICC-PIDS-CIS-SUD-02-005/17_Eng Updated: 6 April 2017 <https://www.icc-cpi.int/darfur/albashir/Documents/AlBashirEng.pdf>

⁷¹ Q&A: Sudan's Darfur conflict, BBC News. last updated at 14:39 GMT, Tuesday, 23 February 2010).

⁷² <http://worldwithoutgenocide.org/genocides-and-conflicts/darfur-genocide> accessed June 14, 2018

⁷³ ibid



3.2. Basis for AU’s rejection of arrest warrant against Al Bashir: peace before justice

Al Bashir was charged on the basis of individual criminal responsibility for committing war crimes, crimes against humanity and the crime of genocide in the Darfur region of the Sudan.⁷⁴ The accusation or issuance of arrest warrant for President Al Bashir raised a debate: politics (peace) versus justice. Some scholars argue that it has nothing to do with politics while others say it is political matter. Among those who say it is justice matter Mohammed Kadry said, “[in] principle, the story of President Al Bashir and the ICC’s indictment has nothing to do with “politics” but is mostly an issue related to “justice”, which makes a big difference. There is a crime that needs to be punished if the prosecuted is proven guilty. However, people look at what is happening in Darfur as a “national security” issue, i.e. getting rid of opponents even if illegally.”⁷⁵ There is also supportive argument that says while there are justified concerns over the impact of the global Court in Africa, arguments about neo-colonialism exaggerate the strength of the ICC.⁷⁶ Furthermore, these arguments also underestimate the ability of African governments to manipulate international justice to their own ends.⁷⁷ However, AU raises a second argument. Jean Ping, the then AU Chairperson, is quoted to have stated as “[t]he AU’s position is that we support the fight against impunity; we cannot let crime perpetrators go unpunished. But we say that peace and justice should not collide, that the need for justice should not override the need for peace.”⁷⁸

Some Africa’s leaders claim that the issuance of the Bashir arrest warrant shows that the ICC is a mechanism of neo-colonialist policy used by the West against free and independent countries.⁷⁹ On 27 May 2013, the AU has accused the International Criminal

⁷⁴ The Prosecutor v. Omar Hassan Ahmad Al Bashir ICC-02/05-01/09 ICC-PIDS-CIS-SUD-02-005/17_Eng Updated: 6 April 2017 <https://www.icc-cpi.int/darfur/albashir/Documents/AlBashirEng.pdf>

⁷⁵ Mohamed Kadry trans., Al Bashir and the International Criminal Court, FRIDE comment, (2009).

⁷⁶ The East Africa story, 2011. “The ICC is Only a Small Piece in the Justice Puzzle of Africa's Conflicts” (11th April 2011) Available at: <http://allafrica.com/stories/201104111502.html>.

⁷⁷ Ibid

⁷⁸ BBC 2009 “World Reaction-Bashir Arrest” (4th March 2009) BBC, available at: <http://news.bbc.co.uk/2/hi/africa/7923797.stm>. (Accessed on Dec.19, 2017 12:06 pm)

⁷⁹ Aljazeera. 2009. “Court Issues Bashir arrest warrant” (5th March 2009) Al Jazeera, available at: <http://www.aljazeera.com/news/africa/2009/03/20093412473776936.html>. (Accessed on Dec. 19,2017 12:55pm)



Court (ICC) of "hunting" Africans because of their race⁸⁰. In July 2008, AU's Peace and Security Council issued a communiqué opposing the indictment against Al Bashir.⁸¹ Soon afterwards, Sudanese took to the streets of the capital, Khartoum, to protest against the warrant, which the country's ruling party, the National Congress party, termed a "million man march" against the arrest warrant.⁸²

3.3. Basis for African Union's resolution to suspend cooperation with the ICC

Following the Prosecutor's application for an arrest warrant for President Al Bashir, in July 2008, the AU Peace and Security Council, the primary decision-making organ for conflict resolution in Africa, immediately adopted a decision calling on the UN Security Council to deploy Article 16 of the Rome Statute to "defer the process initiated by the ICC."⁸³ The AU-ICC relation got worse when the AU States adopted, in Sirte in July 2009, the decision suspending cooperation with the ICC in respect of the arrest and surrender of the Sudanese leader. Basically, all AU Member States were instructed not to enforce the warrant. AU has not been successful in asking its member states to withdraw from the Rome Statute, but in October 2013, the AU summit passed a resolution demanding that no head of state should be prosecuted.⁸⁴ This included the case of the Sudanese president, Omar Al Bashir.

Several arguments have been raised as the basis for the AU's decision to suspend cooperation with ICC. The first concern of the AU was that the arrest warrant against the sitting head of state was not issued at a good time; this means the timing is not right.⁸⁵

⁸⁰ BBC 2013. The AU has accused the International Criminal Court (ICC) of "hunting" Africans because of their race. May 27 2013. <https://www.bbc.com/news/world-africa-22681894> Accessed on 03 March 2019.

⁸¹ AU's Peace and Security Council COMMUNIQUE OF THE 142ND MEETING OF THE PEACE AND SECURITY COUNCIL 21 July 2008 <http://www.peaceau.org/en/article/communique-of-the-142nd-meeting-of-the-peace-and-security-council> Accessed on March 03 2019

⁸² Ibid

⁸³ AU's Peace and Security Council Resolution on Sudan President Indictment, SUDAN TRIm., Jul. 21. 2008, <http://www.sudantribune.com/AU-s-Peace-and-Security-Council,27982>.

⁸⁴ Eric Pichon, *African Union and International Criminal Court: what is at stake?*, (June 12, 2014) <http://epthinktank.eu/2014/06/12/au-icc/>

⁸⁵ See the Communiqué of the 142nd meeting of the African Union Peace and Security Council, (21 July 2008).



The argument was that securing peace should be the first priority and that with time justice will always reach those who have committed crimes. It is difficult to dismiss the AU's concern that the execution of an arrest warrant without a carefully managed transition could lead to further instability in Sudan and its nine neighboring countries⁸⁶ However, this argument seems that the African leaders are creating excuses to escape the justice or punishment for their wrong acts.

The second rationale for suspension of cooperation of AU with ICC was that: the AU questions whether the Rome statute should be binding on the non-state parties this is related to Article 98 of the Statute which talks about the waiver of immunity and to be willing to surrender.⁸⁷ At the AU ministerial meeting in November 2009, African State parties agreed that “there is need for clarity as to whether immunities enjoyed by officials of non-state parties under international law have been removed by the Rome statute or not.”⁸⁸ Article 27(2) of the Rome Statute provides: ‘Immunities or special procedural rules shall not bar the Court from attach to the official capacity of a person, whether under national or international exercising its jurisdiction over such a person’.⁸⁹ The article confirms the jurisdiction of the ICC in all situations, permitting it to exercise its authority without having to wait for a waiver of immunity.⁹⁰ Article 27(2) is, thus, an express removal of immunity. “But the big question for AU was whether the Rome Statute removed the immunities enjoyed by officials of non-state parties. This question was also one of the bases of AU to suspend the cooperation with ICC. The third basis was that the AU is disappointed with the UN Security Council’s “refusal” to acknowledge its request for a deferral under Article 16 of the Statute, which grants power to the Council to defer cases for one year.⁹¹

⁸⁶ Ibid

⁸⁷ Recommendations of the Ministerial Meeting on the Rome Statute of the International Criminal Court, (6 November 2009), Min/ICC/Legal/Rpt. (II), p.1

⁸⁸ Ibid

⁸⁹ Rome Statute of International Criminal Court, Art. 27(2).

⁹⁰ O. Triffterer, ‘Article 27: Irrelevance of Official Capacity’ in O. Triffterer (ed.) Commentary of the Rome Statute: Observers’ Notes, Article by Article (1999) 501.

⁹¹ *Decision of the Second Meeting of State Parties to the Rome Statute of the International Criminal Court*, Assembly/AU/Draft/3 Dec (XIV). Para. 8, p. 2.



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3.4. Conclusion

In this chapter I have presented and discussed the basis for ICC warrant for the arrest of Al Bashir and the AU's reaction to it by severing cooperation with the Court.

There is a crisis in Darfur regarding the Human Rights Violation currently. This crisis were started some years back over land rights between Maasaleet and Zaghwa Communities and as a result of this problem Sudan government attacked by the rebel group. At this time the government responded to the attack by directing armed Militia known as the Janjawed to carry out the ethnic cleansing against Darfur's non-Arab that result the death of many civilians and human right violations. Even the conflict affects some neighboring countries like Chad and Central African Republic.

The ethnic cleansing by the militia of the government lead to the accusation of the president Omar Al Bashir of the Sudan for War Crime and Crime Against Humanity. Since Sudan is not party to the Rome Statute, the United Nation Security Council refer the case to the ICC and the then Prosecutor of ICC issued the arrest warrant against the president. However, in Sudan, the ruling National Congress Party opposed the application.

At the National and International Levels, in the declaration that was adopted regarding the mandate of the ICC, states recognized that the role of ICC is mainly ending up the impunity and to punish who commit the violation of human Rights under the jurisdiction of the Court. The Rome statute clearly states that the Court can prosecute the head of states even those who are immune from being prosecuted under their National or Regional laws. Regarding the Head of States of non-state parties who commit or participate in serious human rights violations, the Statute gives the mandate to make deferral for the United Nations Security Council. So, even though President Omar Al Bashir is the Head of State that is non State Party to the Rome Statute, since the SC refer the case to the Court and give the mandate to entertain the Case of the ethnic Cleansing in Darfur, the court's issuance of arrest warrant against the president is a correct and teaching act.



CHAPTER FOUR

4. Trends of human right violation in Darfur since 2009

4.1. Introduction

This chapter has two main points. The first part focuses on the violation of human rights in Darfur since 2009. The second part explains the role (contribution and attribution) of AU decision on the direction of the change of the human rights situation in Darfur since 2009. The main purpose of this chapter is to explain or to discuss the situation of serious human right violations in Darfur, Sudan since AU decided to leave the ICC.

4.2. The Trends in serious human right violation in Darfur since 2009

Four years after Sudan's ruling party and the southern rebels signed the 2005 Comprehensive Peace Agreement (CPA) ending twenty-one years of civil war; Sudanese civilians in Darfur are still enduring human rights violation and insecurity.⁹² The government of Sudan's force was fighting with rebel movement groups in Darfur and many civilians were suffered from this conflict in Darfur that cause death and displacement.⁹³

Military deployments like auxiliary forces such as border guards were kept in Darfur in order to fight the rebel movement groups.⁹⁴

Around 40 thousand civilians were displaced as a result of fight took place between the Sadness government forces and the rebel group called Justice and Equality Movement(JEM) in early 2009 in South Darfur⁹⁵ During this conflict the Government forces were taking indiscriminate forces both through aerial and ground attack against the civilians that they think the civilians have relation with the rebel groups and caused injuries and also in May this aerial bombing continued taking place on civilians. The fight also continued after some rest during winter in September in Northern Darfur and again caused civilians death and injuries.⁹⁶ As a result of the displacement some

⁹² Human rights watch, world report 2010,pp 169

⁹³ Human rights watch report 2010: pp 170

⁹⁴ ibid

⁹⁵ ibid

⁹⁶ ibid



displaced women and girls in village of Darfur were experienced sexual abuses at the hand of government militias, rebel groups and other allied forces that participated in the fight.⁹⁷ Many cases were documented by UN Human rights monitors in between April and June 2009, 21 cases involving 54 victims were documented among those 54 victims 13 of them were minors under 18, surprisingly the attackers were described as persons wearing military uniforms. Again in December 2011 and early 2011 attack took place in North and South Darfur on civilians and more than 70,000 were displaced largely from ethnic Zaghawa and Fur communities with perceived links to rebel groups and the fighting followed a break between the government and Minni Minawi, the only major Sudan Liberation Army (SLA) rebel leader to have signed the 2006 Darfur Peace Agreement.⁹⁸

During government offensives in Darfur in 2014-2015, the Rapid Support Forces (RSF), which are composed of Sudanese Armed Forces (SAF) and aligned forces, led massive attacks on hundreds of villages, burning and destroying homes, and committing serious abuses, including rape and killings that may be crimes against humanity.⁹⁹ The RSF led two counterinsurgency campaigns in the long-embattled region of Darfur in 2014 and 2015 in which its forces repeatedly attacked villages, burned and looted homes, beating, raping and executing villagers.¹⁰⁰ The RSF received support in the air and on the ground from the Sudanese Armed Forces (SAF) and other government-backed militia groups, including a variety of proxy militias, commonly known as Janjaweed.¹⁰¹

The first campaign named “Operation Decisive Summer” took place primarily in South Darfur and North Darfur between late February and early May 2014 and the second, “Operation Decisive Summer II,” took place primarily in and around Jebel Marra, the mountainous region located primarily in Central Darfur, between early January 2015 and the onset of the rainy season in June 2015.¹⁰²

⁹⁷ Human rights watch report 2012. Pp 123

⁹⁸ *ibid*

⁹⁹ Human Rights Watch, Human Rights Benchmarks in Sudan

¹⁰⁰ *ibid*

¹⁰¹ *ibid*

¹⁰² *ibid*



Based on research conducted between May 2014 and July 2015, this UN report describes serious violations of international human rights and humanitarian law perpetrated by the RSF and other Sudanese government forces during the two RSF-led counterinsurgency campaigns in Darfur. Human Rights Watch interviewed more than 151 survivors and witnesses of abuses in Darfur who fled Sudan to Chad and South Sudan, 16 who were interviewed inside Darfur and an additional 45 victims and witnesses in Darfur by telephone.¹⁰³

Human Rights Watch found that the RSF committed a wide range of horrific abuses, including the forced displacement of entire communities; the destruction of wells, food stores and other infrastructure necessary for sustaining life in a harsh desert environment; and the plunder of the collective wealth of families, such as livestock. Among the most egregious abuses against civilians were torture, extrajudicial killings and mass rapes and also many civilians were killed by the RSF when they refused to leave their homes or give up their livestock, or when they tried to stop RSF fighters from raping them or members of their family.¹⁰⁴ The RSF violations of international humanitarian law amount to war crimes. The mass rape and killings and other abuses appear part of widespread and systematic attacks on civilian populations that may constitute crimes against humanity. Crimes against humanity are serious offenses, including murder, torture and rape, committed as part of a widespread or systematic attack on a civilian population.¹⁰⁵ As Human Rights Watch research has found, the RSF committed rape in numerous towns and villages over an extended period of time, making them widespread. First-hand accounts of orders from commanders to commit crimes and the RSF's repeated use of abusive practices indicate that they were systematic.¹⁰⁶

All states in Darfur were under varying states of emergency. Between December 2015 and September, there were 1,626 cases of criminality and banditry, which included 384

¹⁰³ ibid
¹⁰⁴ ibid
¹⁰⁵ ibid
¹⁰⁶ ibid



killings.¹⁰⁷ The attacks included rape, armed robbery, abduction, ambush, livestock theft, assault/harassment, arson, and burglary and were allegedly carried out primarily by Arab militias, but also by government forces, unknown assailants, and rebel elements.¹⁰⁸

Security in Darfur continued to deteriorate due to the rise in criminal activity and intercommunal conflict. The independent expert on the situation of human rights in Sudan noted with concern that, during the year, the size and scale of intercommunal clashes over cattle rustling and control of natural resources in Eastern Darfur had been unprecedented, as were the sophisticated firearms used by the combatants.¹⁰⁹

From January to December, United Nations Hybrid Mission in Darfur (UNAMID) documented 100 cases involving 222 victims of conflict-related sexual violence compared with 80 cases and 105 victims in 2015 and the victims included minors comprising 119 girls and one boy, whose ages ranged between eight and 17 years old.¹¹⁰

UNAMID received the cases from all five Darfur states. Underreporting remained prevalent, however, and UNAMID reported the figures were not representative of the reality on the ground.¹¹¹

On January 14, 2016 the government launched an intensive aerial and ground offensive against Sudan Liberation Army-Abdul Wahid (SLA/AW) strongholds in the Jebel Marra area of Darfur. This operation displaced more than 44,700 persons by January 31, according to the UN Office for the Coordination of Humanitarian Affairs (OCHA).¹¹² In February the government established in Darfur a sub-office of the National Human Rights Commission to enhance the commission's capacity to monitor human rights in Darfur. Meanwhile, ground forces comprising Rapid Support Forces (RSF) and Border Guards carried out attacks against more than 50 villages in an attempt to dislodge the armed opposition, The Rapid Support Forces (al-Quwat al-Da'm al-Sari'in Arabic, or

¹⁰⁷ Country Reports on Human Rights Practices for 2016 United States Department of State • Bureau of Democracy, Human Rights and Labor.

¹⁰⁸ *ibid*

¹⁰⁹ Country Reports on Human Rights Practices for 2016 United States Department of State • Bureau of Democracy, Human Rights and Labor Page 29

¹¹⁰ Country Reports on Human Rights Practices for 2016 United States Department of State • Bureau of Democracy, Human Rights and Labor.

¹¹¹ *Ibid* page 57

¹¹² UN Office for the Coordination of Humanitarian Affairs report.



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RSF) is a Sudanese government force under the command of the National Intelligence and Security Services (NISS).¹¹³ The RSF was created in mid-2013 to militarily defeat rebel-armed groups throughout Sudan.¹¹⁴

Attacks on villages often included killing and beating of civilians; sexual and gender-based violence; forced displacement; looting and burning entire villages; destroying food stores and other infrastructure necessary for sustaining life; and attacks on humanitarian targets, including humanitarian facilities and peacekeepers. In September, Amnesty International issued a report alleging that, through September the government engaged in scorched-earth tactics and used chemical weapons in Jebel Mara, Darfur.¹¹⁵ UN monitors were unable to verify the alleged use of chemical weapons, due in part to lack of access to Jebel Marra, including by rebel commanders loyal to Abdel Wahid. By year's end the Organization for the Prohibition of Chemical Weapons (OPCW) had not been presented with sufficient corroborating evidence to conclude chemical weapons had been used.¹¹⁶

After all these attacks against civilians of Darfur, the government or other International organs like UN or even the AU did nothing to prevent the Serious Human Right Violations because of various reasons such as lack of access to those villages. But, those victims (actually right bearers) in Darfur have the right to live in their home land and not to be attacked by government rebels or other outsider military forces according to international laws and regional laws. Sudanese Government or International or Regional organs had a responsibility to stop such attacks and they had a responsibility to prevent such grave human right violations against Sudanese civilians and also to bring the wrong doers before the law in order to punish them. Here I personally criticize AU strongly for not preventing or at least decreasing the attacks against such civilians since one of the reasons they stated to withdraw from ICC is opposing the issuance of arrest warrant against Sudan president because, if the president is arrested the peace and security in the war-torn region will deteriorate and the civilians will be in danger. AU should have taken

¹¹³ Human rights watch, (men with no mercy)

¹¹⁴ ibid

¹¹⁵ Human Right Watch Report.

¹¹⁶ ibid



all necessary actions to stop the human right violations against civilians and prevent the violations.

As I mentioned under chapter three of this thesis among the reasons AU decided to withdraw from ICC, one of the reason is that the decision of ICC issuing arrest warrant to Omar AL Bashir was against the aim of AU that targeted to stablish peace and security in the region. However AU did not establish peace and security in Darfur or prevent serious human rights violations that has been took place is (in) the area. The attack was continuously taking place, serious human rights violations were also not stopped even after AU decided to suspend its cooperation with ICC. So, for me, since AU failed to ensure security of civilians, deciding to withdraw from the organ (ICC) that is supposed to punish criminals is not sound. The wrong doers must be punished according to international law by the organ that has power, such as the ICC.

4.3. The Role of AU's resolution of 2009 in the serious human rights violations since 2009

In July 2009, in Sirte, Au adopted a decision suspending cooperation with the ICC in respect of the arrest and surrender of Al Bashir. Since international actors were not able to provide swift and strong response to the atrocities in Darfur, the African Union stepped in and attempted to mediate the conflict between Janjaweed and government forces on one side, and JEM and SLA on the other.

With a ceasefire commission, (CFC); peacekeeping mission, African Union Mission In Sudan (AMIS); Darfur peace agreement, (DPA), the African States has tried to stabilize the Darfur region of Sudan. The African Union through AMIS has done much to provide security in Darfur, particularly in areas where it had troop presence and then AMIS has come a long way since it was established. For these efforts, the AU needs to be commended for stepping into Darfur when international community commitment was not forthcoming.¹¹⁷ It is to the credit of the AU that it has managed to pull together a mission that has provided a semblance of order and stability with little and belated international

¹¹⁷ Arvid Ekengard The African Union Mission in SUDAN (AMIS) Experiences and Lessons Learned, 2006.



assistance. However, with a continued deteriorating security situation since early 2006, the incapability of AMIS to curtail the crisis in Darfur has become clearly visible.¹¹⁸ Nothing shows AMIS inability to manage the situation than the fact that its troops and personnel have become a prominent target of attacks from parties to the conflict,¹¹⁹ such attacks while altering the security dynamics also erodes the credibility of AMIS among Darfurians facing increasing insecurity.

In line with the decision adopted by the Peace and Security Council (PSC) at its 142nd meeting held on 21 July 2008, calling for the formation of an AU High Level Panel on Darfur (AUPD), with several eminent African personalities appointed as members of the AUPD. The PSC decision was subsequently endorsed by the 12th Ordinary Session of the Assembly of the Union held from 1 to 3 February 2009.¹²⁰

The AUPD, which is chaired by former President Thabo Mbeki of South Africa, was mandated to examine the situation in Darfur in depth and submitted recommendations on the best effective and comprehensive way to address the issues of accountability and combating impunity, on the one hand and peace and reconciliation, on the other.¹²¹ In this context, the AUPD convened its inaugural meeting in Addis Ababa on 18 and 19 March 2009 and this Inaugural meeting was followed by wide consultations both the Sudanese and international stakeholders.¹²² The panel began its work in March 2009 and completed its assignment in September 2009. The panel's report is the outcome of four missions to Sudan undertaken by the Panel, amounting to forty days spent in the country, during which time it met with more than 2,700 representative individuals in Darfur and about 400 in Khartoum and visited Juba and additionally the Panel also visited the countries of the region and had discussions with representatives of the international community as a whole.¹²³

¹¹⁸ Ibid.

¹¹⁹ ibid

¹²⁰ Assembly of the African Union, twelfth ordinary session at Addis Ababa, Feb. 1-3 2009. Assembly/AU/Dec. 222(XII).

¹²¹ Report of the African Union High-Level Panel on Darfur (AUPD)), 29 October 2009.

¹²² Ibid.

¹²³ ibid



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African Union Security Council, at its 207th meeting held on 29 October 2009, in Abuja, Nigeria, at the level of Heads of State and Government, endorsed the Report of the African Union High-Level Panel on Darfur (AUPD) and the Recommendations contained therein, and requested the establishment an AU High-Level Implementation Panel for Sudan (AUHIP), comprised of former Presidents Thabo Mbeki, Pierre Buyoya and Abdulsalami Abubakar, to assist in the implementation of all aspects of the AUPD Recommendations, as well as in the implementation of the Comprehensive Peace Agreement (CPA) and other related processes, as part of the democratic transformation of the Sudan.¹²⁴ The African Union's High-Level Implementation Panel for Sudan and South Sudan continued to mediate peace talks for Southern Kordofan, Blue Nile, and Darfur with little success.¹²⁵

Initially, the AU provided the needed rapid response when Western and international commitment was not forthcoming, however, the organization lacked the capacity, resources and ultimately the political will to hold the parties accountable to their commitments as contained in the various agreements they have endorsed. More glaringly the AU mission lacks the capability to improve significantly the security situation in Darfur worsening security situation throughout the region.¹²⁶

The apparent failure of the African Union mission to curtail the crisis in Darfur, epitomized by the worsening security situation has necessitated the call for the United Nations to take-over the AU mission, the logic behind the call was that the UN given its experience and resource base will be able to succeed where the African Union has failed.¹²⁷ Informed by the prevailing political and security situation in Darfur, the United Nations Security Council in July 2007 authorized the deployment of a joint African Union-United Nations Hybrid Mission in Darfur, UNAMID.¹²⁸ Given its mandate, resource base and logistic capabilities, the African Union-United Nations Hybrid Mission

¹²⁴ *ibid*

¹²⁵ AU High Level Panel on Darfur 2009. Meeting of AU high level meeting <https://reliefweb.int/report/sudan/750th-meeting-au-peace-and-security-council-activities-au-high-level-implementation> Accessed on August 3 2018.

¹²⁶ Human Rights Watch, 2006, p.35-36; Saka, 2006, p.138-139

¹²⁷ African Union-United Nations Hybrid Mission in Darfur, UNAMID 2011.

¹²⁸ Saka Luqman1, 2012. From AMIS to UNAMID: The African Union, the United Nations and the Challenges of Sustainable Peace in Darfur, Sudan



in Darfur, UNAMID has demonstrate proactive ability to protect its personnel, bases and equipment and greater capacity in providing necessary security for the safe delivery of humanitarian assistance and protection of civilians in Darfur.¹²⁹ Much as the deployment of UNAMID mission has brought semblance of security, there continue to exist challenges that are undermining security and militating against the achievement of durable peace in Darfur.¹³⁰ Discussion about UNAMID is important to show failure of the AU's own effort and the calling for help of UNAMID>

Unlike AMIS it predecessor, UNAMID civilians protection responsibilities, which represents the core of the mission mandate is not only broad (military patrol and civilian community policing) but it is also more proactive.¹³¹ Given the mission force strength, the logistic and financial resources within it reach and the robust of the mission's civilian protection mandate it is no surprise that UNAMID has been more proactive and successful in enhancing the safe provision of humanitarian assistance and in facilitating secured humanitarian access throughout Darfur.¹³² Towards the realization of it mission's mandate and operation task UNAMID force conducts around 160 patrols on a daily basis.¹³³

This represents an affirmation of the mission's attempt to increase its robustness, often in the face of numerous bureaucratic and/or armed obstructions and also UNAMID has and continued to strive to do everything in its power to protect civilians in Darfur, facilitate humanitarian aid operation to all areas, regardless of who controls them, and to help provide an environment in which peace can take root.¹³⁴

The United Nations through its active support for the African Union-United Nations Mission in Darfur continue to encourage political negotiation and the peace process in Darfur.¹³⁵ UNAMID continue to work at intensifying diplomatic and political efforts aimed at bringing groups' that are non-signatory to the Darfur Peace Agreement (DPA)

¹²⁹ *ibid*

¹³⁰ *ibid*

¹³¹ <https://unamid.unmissions.org/about-unamid-0> accessed on April, 22.

¹³² Saka Luqman1,*; Omede A. J1. From AMIS to UNAMID: The African Union, the United Nations and the Challenges of Sustainable Peace in Darfur, Sudan

¹³³ *ibid*

¹³⁴ *ibid*

¹³⁵ http://www.un.org/News/dh/infocus/sudan/fact_sheet.pdf. Accessed on April 22.



of 2006 into the peace process. As part of its contribution in pushing the political process in Darfur, UNAMID actively collaborate with stakeholders involved in the organization of the All Darfur Stakeholders' Conference held in Doha, Qatar, between 27 and 31 May 2011.¹³⁶

UNAMID was involved in the facilitation of the signature of the agreement between the Government of Sudan and the Liberation and Justice Movement on the adoption of the Doha Document for Peace in Darfur, DDPD and continue to reiterate the importance of political settlement on the basis of the DPA and DDPD.¹³⁷ UNAMID failed to fully utilize and maximize its force strength, logistic capabilities and resources at its disposal to protect civilians in Darfur as would have been expected. The position of the United Nations Security Council in its most recent resolution on Darfur aptly underscores this failure and the Council in resolution 2003 of 29 July 2011 stated that UNAMID need to make full use of its mandate and capabilities, giving priority in decisions about the use of available capacity and resources. First, the protection of civilians across Darfur, including through proactive deployment and patrols in areas at high risk of conflict, securing IDP camps and adjacent areas, and in implementing a mission-wide early warning strategy and capacity; and secondly ensuring safe, timely and unhindered humanitarian access, and the safety and security of humanitarian personnel and humanitarian activities, so as to facilitate the unimpeded delivery of humanitarian assistance throughout Darfur.¹³⁸ Although UNAMID's mandate includes reporting on human rights abuses, the mission has failed to release any detailed documentation about abuses against civilians during either of the RSF-led counterinsurgency campaigns. Sudan has routinely denied UNAMID access to conflict-affected areas so they can effectuate their mandate to protect civilians and monitor human rights.¹³⁹ It has denied visas to incoming staff, and closed the human rights section's liaison office in Khartoum; al-Bashir has ordered the mission to adopt an exit strategy.¹⁴⁰

¹³⁶ https://peacemaker.un.org/sites/peacemaker.un.org/files/SD_121022_DeclarationGoSJEM.pdf.

¹³⁷ *ibid.*

¹³⁸ United Nations Security Council resolution 2003 of 29 July 2011

¹³⁹ Human rights watch, human right bench marks in Sudan

¹⁴⁰ *ibid.*



Besides this, other issues have contributed to undermine the security of Darfurian, UNAMID's personnel and stalled the realization of durable peace in Darfur. One such challenge is the problem of fractionalization and the apparent lack of cooperation among the rebel movements. The splintering of the rebel movements that followed in the wake of the signing of the 2006 Darfur Peace Agreement in Abuja has made the realization of a lasting peace in Darfur to become elusive.¹⁴¹ Contrary to expectation, the DPA ended any semblance of unity within or between the SLM/A and the JEM when major factions refused to sign the agreement citing major shortcomings the most critical been the lack of ownership by parties to the peace process.¹⁴² Since then, the once strong rebel movement has fragmented into several factions, This splintering is not in the spirit of the peace efforts and has largely worked to undermine the enforcement of ceasefire and peace agreement.¹⁴³

The fractionalization of rebel movements on its part have reinforced mistrust among parties to the conflict in Darfur, resulting in constant breaches of the ceasefire agreement and increasing attacks between parties and against civilians.¹⁴⁴ An indication of the continued precarious security situation was the attack suffered by UNAMID military patrol on Sunday 6 November 2011 in which a peacekeeper was killed and two other seriously injured moreover, the attack comes less than one month after three UNAMID peacekeepers were killed in an ambush in North Darfur and is the latest in a series of hostile actions directed at UNAMID personnel, as well as humanitarian aid workers.¹⁴⁵

Showing the depth of its worry the United Nations Security Council in its resolution 2003 of July 2011 notes thus: The Council express deep concern at the deteriorating security situation in some parts of Darfur, including ceasefire violations, attacks by rebel groups, aerial bombardment by the Government of Sudan, inter-tribal fighting, attacks on

¹⁴¹ Hassan, H.A (2010). Dimensions of the Darfur Crisis and Its Consequences: An Arab perspectives. African Security Review.

¹⁴² Oluwadare, A. Darfur: A Complicated Peace Process? Journal of Alternative Perspectives in the Social Sciences, (2011). P. 210-202.

¹⁴³ Saka Luqman; Omede A. J From AMIS to UNAMID: The African Union, the United Nations and the Challenges of Sustainable Peace in Darfur, Sudan.

¹⁴⁴ UN News Centre, November 6, 2011

¹⁴⁵ *ibid*



humanitarian personnel and peacekeepers, which have restricted humanitarian access to conflict areas where vulnerable civilian populations reside, as contained in the Secretary General report and also the Council calls on all parties to cease hostilities, including all acts of violence committed against civilians, and urgently facilitate unhindered humanitarian access.¹⁴⁶

Worried by the security situation, the Council reminded parties to the conflict that there can be no military solution to the conflict in Darfur, and that an inclusive political settlement is essential to re-establishing peace.¹⁴⁷ The Council also expressed its concern at the return to hostilities between the Government of Sudan and the Sudan Liberation Army, Minni Minawi faction (SLA/MM), and the ongoing hostilities between the Government of Sudan and the Sudan Liberation Army, Abdul Wahid faction (SLA/AW), and the Justice and Equality Movement (JEM).¹⁴⁸

The Council view was an affirmation of the fact that the security situation in Darfur remains tenuous as parties to the conflict in Darfur continue to conduct deadly attacks against each other positions as well as target civilians, humanitarian aid workers and UNAMID personnel.¹⁴⁹ As much as UNAMID has striven to give effect to the actualization of its mission's mandate and operational tasks the security situation in Darfur remains in a state of flux and the peace process in limbo. Rather than been view essentially as failure on the part of UNAMID, the situation in Darfur is largely an indication of the complexity of peacekeeping and the challenge of negotiating sustainable peace in the context of an intractable conflict.¹⁵⁰ Meanwhile, parallel negotiations between the government and other opposition movements continued primarily under auspices of the African Union High-level Implementation Panel.¹⁵¹

The African Union-United Nations Mission in Darfur continues to encourage political negotiation and the peace process in Darfur. UNAMID continue to work at intensifying

¹⁴⁶ United Nation Security Council Report 2011.

¹⁴⁷ Ibid.

¹⁴⁸ ibid p.3

¹⁴⁹ African Union High- Level Implementation Panel for Sudan (AUHIP). A.J

¹⁵⁰ Saka Luqman; Omede: From AMIS to UNAMID: The African Union, the United Nations and the Challenges of Sustainable Peace in Darfur, Sudan.

¹⁵¹ African Union High- Level Implementation Panel for Sudan (AUHIP). A.J



diplomatic and political efforts aimed at bringing groups' that are non-signatory to the Darfur Peace Agreement of 2006 into the peace process.¹⁵² As part of its contribution in pushing the political process in Darfur, UNAMID actively collaborated with stakeholders involved in the organization of the All Darfur Stakeholders' Conference held in Doha, Qatar, between 27 and 31 May 2011.¹⁵³ UNAMID was involved in the facilitation of the signature of the agreement between the Government of Sudan and the Liberation and Justice Movement on the adoption of the Doha Document for Peace in Darfur, DDPD and continue to reiterate the importance of political settlement on the basis of the DPA and DDPD.¹⁵⁴

From 19 to 23 November 2015, the AU High-Level Implementation Panel mediated peace talks in Addis Ababa between the government of Sudan and two Darfur rebel groups, the SLA-Minni Minnawi (SLA-MM) and the Justice and Equality Movement (JEM).¹⁵⁵ The talks ended unsuccessfully, as the government reiterated its position that the Doha Document for Peace in Darfur (DDPD) should be the basis for the negotiations while the SLA-MM and the JEM rejected this approach, as members of the Sudan Revolutionary Front (SRF), a broad coalition of rebel groups in Sudan, the SLA-MM and the JEM have instead advocated an inclusive national dialogue process leading to meaningful democratic reform. Parallel talks between the Sudanese government and the Sudan People's Liberation Movement-North (SPLM-N), a rebel group based in South Kordofan and Blue Nile states, also ended without success.¹⁵⁶

It is clear that among the several reasons why AU decided to withdraw from ICC, one of the reason is that ICC issuing arrest warrant against Omar AL Bashir was against the aim of AU to establish peace and security in the region. However AU did not establish peace and security in Darfur or prevent serious human rights violations. The attacks on civilians

¹⁵² Saka Luqman; Omede A. J: From AMIS to UNAMID: The African Union, the United Nations and the Challenges of Sustainable Peace in Darfur, Sudan.

¹⁵³ *ibid*

¹⁵⁴ *ibid*

¹⁵⁵ AU High-Level Implementation Panel mediated peace talks in Addis Ababa From 19 to 23 November 2015.

¹⁵⁶ Security Council Report; January 2016 monthly forecast.



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and serious human rights violations were not stopped even after AU decided to suspend its cooperation with ICC. So, it is the conclusion of this thesis that AU decision did NOT reduce human rights violations in Darfur.



CHAPTER FIVE

5. Conclusions and Recommendation

5.1. Conclusion

The Rome Statute gave the mandate for the ICC with the mission to investigate, prosecute and try individuals accused of the crime of genocide, crimes against humanity, war crimes and, since the 2010 revision (subject to ratification after 2017) the crime of aggression.

The available body of literature points to the argument that Africa was involved in and supported the creation of the ICC. An extensive body of research shows that African states contributed extensively to the preparations leading up to, during and after the diplomatic conference in Rome at which the Rome Statute of the ICC was finalized.

After the ICC started its operations, which was asymmetrically focused on African continent, the views of AU officials and member states towards ICC changed. The ICC instituted many case against African state leaders. Among the warrants that were issued to the African leaders, the most significant warrant was that for incumbent Sudanese President Omar Hassan Al Bashir, concerning the crisis in Darfur.

The war in Darfur began in February 2003 when the Sudan Liberation Army (SLA) and Justice and Equality Movement (JEM) began fighting the government of Sudan, whom they accused of oppressing Darfur's non-Arab population. Because of the attack by the rebel group against the Sudan government, the latter responded to the attack by directing armed militia, known as the Janjaweed to carry out the “ethnic cleansing” against Darfur’s non Arabs and this resulted in the death of hundreds of thousands civilians

Following the crisis, the United Nations Security Council (SC) gave the ICC jurisdiction over the situation in Darfur in 2005. Subsequently the then ICC prosecutor applied to obtain an arrest warrant against the Sudanese president, Al Bashir in July 2008. On March 4, 2009 the ICC Pre-Trial Chamber ordered the arrest warrant for a sitting



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president, AL Bashir, president of the Sudan. The warrants of the arrest for Omar Al Bashir lists ten counts on the basis of his individual criminal responsibility under article 25(3)(a) of the Rome Statute. The accusation or issuance of arrest warrant for President Al Bashir raised a debate, politics (peace) versus justice.

Following the Prosecutor's application for an arrest warrant for President Bashir, in July 2008, the AU Peace and Security Council, the primary decision-making organ for conflict resolution in Africa, immediately adopted a decision calling on the UN Security Council to deploy Article 16 of the Rome Statute to defer the process initiated by the ICC, which, was not done. This contributed to an impasse in AU-ICC relations.

After the arrest warrant that was issued to the president Omar Al Bashir, the AU-ICC relation got worse when the AU States adopted, in Sirte in July 2009, the decision suspending cooperation with the ICC in respect of the arrest and surrender of the Sudanese leader. Basically, all AU Member States agreed not to enforce the warrant.

Several arguments have been raised concerning the basis for the AU's decision to suspend cooperation with ICC. The first concern of the AU was that the arrest warrant against the sitting head of state was not issued on good time; this means the timing is not good. The second rationale for suspension of cooperation of AU with ICC was that: the AU questions whether the Rome statute should be binding on the non-state parties. The third basis was that the AU is disappointed with the UN Security Council's "refusal" to acknowledge its request for a deferral under Article 16 of the Statute, which grants power to the Council to defer cases for one year.

Despite AU's decision and the rationale for such decision, the conflict in Darfur, continued to involve government-backed militia forces and rebel movements that have caused civilian deaths, injuries, and displacement. To take as an example in early 2009 fighting between government forces and Justice and Equality Movement (JEM) rebels in Muhajeri, South Darfur, displace more than 40,000 civilians. And also, in December 2010 and early 2011 a surge in government-led attacks on populated areas in North and South Darfur killed and injured scores of civilians, destroyed property, and displaced



more than 70,000 people, largely from ethnic Zaghawa and Fur communities with perceived links to rebel groups and the fighting followed a break between the government and Minni Minawi, the only major Sudan Liberation Army (SLA) rebel leader to have signed the 2006 Darfur Peace Agreement.

Parallel talks between the Sudanese government and the Sudan People's Liberation Movement-North (SPLM-N), a rebel group based in South Kordofan and Blue Nile states, also ended without success. AU and the United Nation tried to control the crises in Darfur, and the serious human rights violations that followed, through many ways but they were unsuccessful. For instance, Initially the AU provided the needed rapid response when Western and international commitment through African Union Mission In Sudan (AMIS) was not forthcoming, however, the organization lacked the capacity, resources and ultimately the political will to hold the parties accountable to their commitments as contained in the various agreements they have endorsed. More glaringly the AU mission lacks the capability to improve significantly the security situation in Darfur worsening security situation throughout the region.

In conclusion, the human right violation in Darfur continued even after 2009. AU has tried to end or at least decrease the human right violation in Darfur through different mechanisms. However, their efforts were not a full success, and as a result the trend of human right violation in Darfur has shown an increase and the security situation in the study area is still in danger especially for civilians.



5.2. Recommendations

- ❖ Making peace-keeping missions work to prevent human rights violations:
 - The AU and the UN should collaborate (continue collaboration) to prevent further violations of Human Rights in Darfur, Sudan for instance through scaling up and reinforcing Peace keeping mission in the region. The AU has to strength the peace and security in Darfur by strengthening organs that keep peace and security both financially and by giving them protection from any attack by other organs, especially where there is human right violation in order to at least decrease the human right violation. UN have to strength the peace and security in Darfur and give International protection for those who are on duty to prevent human right violations in Darfur
 - Protection for peacekeeping missions: There must be penalties on government actors, militias and rebel forces who attacked the peacekeeping mission forces.
- ❖ Giving a chance for inclusive political settlement: Since lasting peace and security, and prevention of human rights violation, depend on political consensus among warring parties, the UN should assist the AU's effort to organize peace talks and conferences among warring parties and communities. This necessitates that the AU and UN make the Darfur situation their top priority agenda and open for discussion the situation in Darfur and seek solutions for it.
- ❖ Bringing criminals to courts: Imposing serious punishment on those who violate the human rights including government officials by bringing them before courts (AU level courts, designed for such purposes by the AU) and also national (Sudanese Courts) to punish violators of human rights.



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