

**“The power of the SC to adopt and refer a resolution to the ICC prosecutor for crimes committed by presiding Head of States/Governments: with special emphasis on President Al-Beshir of the Sudan”**

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**“The power of the SC to adopt and refer a resolution to the ICC prosecutor for crimes committed by presiding Head of States/Governments: with special emphasis on President Al-Beshir of the Sudan”**

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# **Table of Content**

	<b><u>Page</u></b>
Approval .....	i
Declaration .....	ii
Acknowledgement .....	iii
Acronyms .....	iv
Abstract .....	i
 <b>CHAPTER ONE</b>	
<b>Introduction</b> .....	<b>1</b>
1.1 Background .....	1
1.2 Statement of the Problem .....	3
1.2.1 Research Questions .....	4
1.3 Literature Review .....	4
1.4 Objective of the Study .....	6
1.5 Methodology .....	6
1.6 Significance of the Study .....	6
1.7 Limitations .....	7
1.8 Scope of the study .....	7
1.9 Organization of the Paper .....	7
 <b>CHAPTER TWO</b>	
 <b>Immunities of Heads of States/Governments vs. Powers of the United Nations Security Council</b> .....	
	<b>9</b>
2.1 Immunities of Heads of States/Governments .....	9
2.1.1 Background on Heads of States/Governments .....	9

i. The non executive head of state system .....	9
ii. The parliamentary system .....	10
iii. The semi-presidential system .....	10
iv. Presidential system .....	10
2.1.2 Theories for immunities of Heads of States /Governments .....	12
2.1.2.1 The theory of sovereign immunity.....	12
2.1.2.2 The theory of non-party to the treaty .....	13
2.1.2.3 The theory of domestic jurisdiction .....	14
2.1.3 Why immunities for Heads of States/ Governments?.....	15
2.1.4 Exceptions to immunities of Heads of States/Governments.....	17
a) Interpretation of a treaty .....	17
b) Issues on human rights .....	18
c) Non-self governing territories .....	19
d) Self-Determination and Minority Rights .....	19
e) Maintenance of international peace and security.....	20
2.2 Powers of the United Nations Security Council .....	22
2.2.1 Historical back ground on the need of the United Nations Security Council .....	22
2.2.2 United Nations Security Council's composition and voting system .....	23
2.2.2.1. Its composition .....	24
2.2.2.2. The consequence of the abstention of Permanent members of the UN Security Council at decisions of non-procedural matters.....	26
2.2.3 Powers of the UN Security Council.....	29
a) Powers for the discharge of chapter VI.....	30
b) Powers for the discharge of chapter VII .....	31
c) Powers for the discharge of chapter V .....	32
2.3 The reconciliation of the immunities of Heads of States/Governments with the	

powers of the UN Security Council to adopt a resolution .....	33
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## **CHAPTER THREE**

### **Analysis on the situation of the Republic of the Sudan, Darfur and some other related issues.....38**

3.1 The unique features of the African Heads of States/Governments.....	38
a) The term of office of the Heads of States/Governments in the case of Libya .....	40
b) The term of office of the Heads of States/Governments in the case of Egypt	42
c) The term of office of the Heads of States/Governments in the case of Zimbabwe .....	44
d) The term of office of the Heads of States/Governments in the case of Ethiopia....	46
e) The term of office of the Heads of States/Governments in the case of Uganda .....	49
f) The term of office of the Heads of States/Governments in the case of Cote d'Ivoire .....	52
3.2 The current Head of State/Government of the Republic of the Sudan and the incidents during his rule.....	56
3.3 Under whose jurisdiction does the conflict in Darfur fall? .....	61
3.4 The emerging trend of exercising the power of the UN Security Council to adopt a resolution and refer it to the prosecutor for crimes committed by presiding Heads of States/Governments .....	64
3.5 The reaction of the international community on the referral of the UN SC for the situation in Darfur.....	67
3.5.1 The grounds of abstention of the members of the Security Council .....	68
i . The grounds of abstention for Algeria .....	68
grounds of abstention for Brazil.....	68
i i . The grounds of abstention for China.....	69
i i i . The grounds of abstention for the United States of America	69
3.5.2 The grounds of reaction of some organizations against the Resolution ...	72

- i. The grounds of the African Union for reacting against the Resolution 72
- ii. The grounds of the Arab League for reacting against the Resolution ..73

**CONCLUSION and RECOMMENDATIONS.....75**

**BIBLIOGRAPHY**

**APPENDICES**

*APPENDIX A.* Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, Press Release SC/8351, Resolution 1593 (2005).

*APPENDIX B.* Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), International Court of Justice, ICJ Press release 2002/042002 (14 February 2002)

*APPENDIX C.* International Criminal Court’s Arrest Warrant for Omar Al Bashir, President of the Sudan, No.: ICC-02/05-01/09 (March 4, 2009).

*APPENDIX D.* International Criminal Court’s Arrest Warrant for Muammar Gaddafi and his two sons, Security Council 6491<sup>st</sup> Meeting, Department of Public Information, News and Media Division, New York, SC/10187/Rev. 1, (26 February 2011).

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By: Medhanie Taddele

Approved by:

----- Advisor	----- Date	----- Signature
----- External Examiner	----- Date	----- Signature
----- Internal Examiner	----- Date	----- Signature

## **DECLARATION**

I, Medhanie Taddele Eshetie, declare that “The power of the SC to adopt and refer a resolution to the ICC prosecutor for crimes committed by presiding Head of States/Governments: with special emphasis on President Al-Beshir of the Sudan” is my own work, that it has not been submitted for any Degree or Examination in other University or Institute, and that all the sources that I have used or quoted have been indicated and acknowledged by complete references.

Signature-----

Date-----

This Thesis has been submitted with my approval as University Advisor

Name-----

Signature-----

Place-----

Date-----

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## ACRONYMS

AU	African Union
AUPSC	African Union Peace and Security Council
CEI	Independent Electoral Commission
ECA	Economic Commission for Africa
ECK	Kenya's Electoral Commission
EPLF	Eritrean People Liberation Front
EPRDF	Ethiopian Peoples' Revolutionary Democratic Front
EPRP	Ethiopian Peoples' revolutionary Party
GoS	Government of Sudan
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
JEM	Justice and Equality Movement
MDC	Movement for Democratic Change
ODM	Orange Democratic Movement
SLA/M	Sudan Liberation Army/Movement
TPLF	Tigrayan People Liberation Front
UN	United Nations
UNDP	United Nations Development Program
UNECOSOC	United Nations Economic and Social Council
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
ZANU-PF	Zimbabwe African National Union-Patriotic Front

## ABSTRACT

The term “global village” was coined to describe the smallness of the earth on which we live. With the invention of jet engine, telephone and telegraph, vast spaces and long distances have shrunk considerably. With the invention of internet and mobile phone, the countries of the world have been reduced to the status of neighborhood. We all now live in the same country, but different neighborhoods. What is happening in one corner of a neighborhood can be easily known in all corners. If the happening has a constructive effect, the innovators will be rewarded. Nonetheless, if the happening has a destructive effect, the perpetrators will be sanctioned. This is because what has happened at a distinct corner of the world is considered as benefiting or harming the over-all world community.

Although those who harm the world community are not few and are from different countries, the gist of the thesis is restricted to abusive Heads of States/Governments who are suspected by their actions that have a destructive effect, with a special emphasis on the situation of Darfur, Sudan. When such persons are suspected of committing international crimes, the UN Security Council adopts a resolution and refers the matter to the ICC prosecutor.<sup>1</sup>

Thus, the UN Security Council had adopted a resolution, for the first time, on the situation of Darfur, Sudan, and referred it to the ICC prosecutor. The prosecutor in turn had indicted Omar Hassan al-Bashir, the presiding Head of State of the Republic of the Sudan. After examining the case, the ICC had issued an arrest warrant.

The UN member states are duty bound to respect the decisions passed by the UN Security Council, and cooperate for its implementation.<sup>2</sup> Yet, up until today, Omar Hassan al-Bashir had travelled to many places of the member states but no country is willing to arrest and hand him over to the ICC. Of course, there are principles on immunities that shield Head of States/Governments not to be tried at other states’ courts. However, do these immunities be extended to shield them not to appear to international courts?

To come up with fruitful suggestions, relevant international treaties, customary international law, principles of international law, international court decisions and other subsidiary sources have been carefully analyzed. By so doing, it is witnessed that the UN Security Council has the power to adopt a resolution and refer it to the ICC prosecutor, although the legality and precedence is questionable, because it may offend the perpetrators’ national justice institutions. Moreover, it is assured that immunities of the Head of States/Governments do not shield them from appearing in the ICC.

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<sup>1</sup> Rome Statute of the International Criminal Court, (Rome, entered into force on 1 July 2002), Articles 13 (b) & 27 (2).

<sup>2</sup> The Charter of the United Nations, (San Francisco, 1945) Articles 24 (1) and 25.

# CHAPTER ONE

## 1. Introduction

### 1.1. Background

International Criminal Law (ICL) is one of the branches of public international law. For the implementation of this aspect of public international law, the Rome Statute has been enacted, international customary laws, general principles of laws and subsidiary sources have been considered which in turn established the International Criminal Court (ICC) to interpret and make binding decisions.

Moreover, the United Nations (UN), particularly its executive organ, the Security Council (SC), is responsible for maintaining peace and security.<sup>3</sup> In other words, ensuring prompt and effective action in maintaining peace and security is the primary responsibility of the UN Security Council.<sup>4</sup>

The UN Security Council and the ICC have similar missions towards the international community. Maintaining international peace and security, obtaining justice for victims of egregious crimes, and ending impunity are among their major goals, which express their similarity.<sup>5</sup> Hence, their working together, in order to successfully carryout their goals becomes indispensable.

Without ICC and the SC, crimes at international level would not have been minimized. Every citizen, especially state representatives, would not have become cautious not to act beyond their authority. History shows that those who trespass international law, and commit crime, did not escape from the law though in most cases, they were indicted after the time of their term of office is lapsed.

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<sup>3</sup> Charter of the United Nations, (San Francisco, 1945) Article 1 and 24.

<sup>4</sup> Ibid., Article 24.

<sup>5</sup> Jennifer Falligant, *The Prosecution of Sudanese President Al Bashir: Why a Security Council Deferral would harm the Legitimacy of the International Criminal Court*, Content downloaded/printed from HeinOnline (<http://heinonline.org>) Sat Jul 31 03:59:17 2010, 729.

The reasons behind the immunities which are given to the presiding Head of States/Governments are manifested by the theories such as the theory of sovereign immunity, theory of non-party to any statute and theory of domestic jurisdiction.

Some also argue that international community should respect the immunity of State officials when applying the principle of universal jurisdiction.

Nonetheless, when we turn our attention to the case of the Head of State of the Republic of the Sudan, it seems exceptional since primarily, the republic of the Sudan is not a party to the Rome statute, as there is an argument that ICC ought to be applicable for states which are party to the Rome Statute.<sup>6</sup> Secondly, it is for the first time in the world history that presiding Head of State to be charged and warranted for arrest at the ICC by the referral of the SC.<sup>7</sup> Of course, the SC has many powers to exercise including issuing a resolution.<sup>8</sup> However, the prosecutor had never charged presiding Head of State, by the referral of the SC, before. The following are among the questions raised and need to be answered:

- Does the Security Council have power, under the Charter of the United Nations and other related statutes of international law, in deciding to charge the presiding Heads of States/Governments?
- How would the immunities of the presiding Heads of States/Governments and the powers of the Security Council, especially, the power to adopt a resolution for charge and refer it to the prosecutor for warrant, be reconciled?
- What are the procedural requirements which the Security Council should satisfy to pass a resolution and refer to the ICC prosecutor, to arrest and try the presiding Heads of States/Governments?
- Is there a legal ground for referring the case of the presiding Head of State of the Republic of Sudan to the ICC?

Thus, the research will put more emphasis on whether or not the Security Council has the power to request the Prosecutor to charge, when it believes that there is a crime committed by any

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<sup>6</sup> The main reason for the United States of America to be abstaining from voting in favor of the Security Council Resolution in the case of Darfur is the argument on inapplicability of the Statute to non-members.

<sup>7</sup> The cases entertained by the International Criminal Court (ICC) were the cases of Uganda, Democratic Republic of Congo and Central African Republic-which were all referred to the ICC prosecutor by the relevant states' parties.

<sup>8</sup> Charter of the United Nations, (n 1), Articles 24 and 25.

presiding Head of State/Government. Furthermore, deep analysis will be done on whether or not the powers of the Security Council, especially, for adopting a resolution that requests the prosecutor to charge a suspect, basing his case on chapter VII of the Charter of the United Nations can prevail over the immunities of presiding Heads of States/Governments.

## **1.2. Statement of the problem**

Since 1945-1990's there were a lot of atrocities the world had seen. For instance, the case of Congo (1900's) and the case of Biafra (1967-1970) are among the incidents. However, there was no single moment where the UN Security Council intervened. Now, with the unprecedented opportunities of the post-cold war, there are interventions on humanitarian grounds. The cases of Somalia, Kosovo and Iraq are the good examples. There was a glaring failure to intervene in Rwanda. So far inconsistency is clear.

Intervention by the UN Security Council could be through peaceful means or military force. What comes to individuals' mind is intervention by military force. However, the wisest thing is primarily, to maintain international peace and security amicably, by peaceful means. Peaceful means are of two types. These are: a) diplomatic means through negotiation, mediation, inquiry and conciliation b) binding mechanisms including either through arbitration or referring the case to the courts. It is only after exhausting the peaceful means, that resorting to military intervention becomes legal.

Hence, where does the intervention on the issue of the Republic of the Sudan fall? Is it legitimate or questionable? It is intended to address these and related issues, using the case of the Head of State of the Republic of the Sudan as that of a more comprehensive discourse on the issue of Security Council vs. the presiding Heads of States/Governments. Herein under are among the major details of the statement of the problem.

- To explore and show whether or not the theories, such as the theory of sovereign immunity, theory of non-party to any statute and theory of domestic jurisdiction, would be reconciled with the power of the SC, to request for charging presiding Heads of States/Governments.
- To examine whether or not the SC has fulfilled the conditions necessary to pass a resolution for request of charge and arrest.

- To analyze the emerging trend of events regarding the relative powers of the Security Council and of presiding Head of States/Governments.
- To detect the consistency and precedence of the power of the UN Security Council, particularly, on adopting a resolution and requesting the Prosecutor for charging presiding Heads of States/Governments.

### **1.2.1. Research questions**

- Does the SC have power to adopt a resolution in relation to the crime committed by the presiding Heads of States/Governments and refer to the Prosecutor?
- Do the measures taken by the SC have legal basis and serve as a precedent for all member States?
- Can the immunities of presiding Heads States/Governments be reconciled and go hand-in-hand with the power of SC, especially, to issue a request for charge and arrest warrant for presiding Heads of States/Governments at any time?

## **1.3. Literature review**

There are many writers who deal with International Criminal Law (ICL). For instance one of the 2010 unpublished Master's Thesis under the topic "The legality of the Indictment of President Omar Hassan Ahmad al-Bashir by the ICC under International Law" has shown the jurisdiction of the ICC over the presiding President.<sup>9</sup> Almost all other literatures, such as the book of Antonio Cassese termed as *International Criminal law*, (2<sup>nd</sup> edn Oxford University Press, New York, 2008) and the book of Gerald Werle termed as, *Principles of International Criminal Law*, (2<sup>nd</sup> edn T.M.C. Asser Press, The Hague, Netherlands, 2005), discuss issues like principles of ICL, what international crimes are, elements of International Crime and parties to International Crime.

However, this thesis is different from the above unpublished Master's thesis since it puts more emphasis on the scope of powers of the SC to decide on immunities of Heads of States/Governments before going on to the subsequent step i.e., determining the legality of the ICC to try the case. The writer believes that what should come first is that addressing of the question of the scope of the powers of the SC to indict presidents when they commit crimes

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<sup>9</sup> Takele Enkossa, *The Legality of the Indictment of President Omar Hassan Al-Bashir by the International Criminal Court under International Law*, (Unpublished, Addis Ababa University, Addis Ababa, 2010)

while they are in power. The literatures mentioned above have also dealt with the cases that concern charged Head of States/Governments. Nonetheless, these literatures do not discuss the Head of States/Governments that have appeared in court since their term of office has not lapsed. Darfur is the first case referred by the SC to the ICC.<sup>10</sup> In other words, although there were Head of States/Governments who were indicted and appeared in the ICC for trial, their indictment was not by the referral of the UN Security Council.

Unlike to the other, this thesis is all about reaching at a solution for matters of the immunities of presiding Head of States/Governments on the one hand and that of the power of the Security Council, especially to issue a resolution that requests the Prosecutor to charge every individual, including the presiding Head of State/Government, on the other hand.

In this regard, there are two contradicting arguments:

Those who favor the immunities of presiding Head of States/Governments, advocate the importance of immunity of presiding Heads of State/Governments by putting into consideration the stability of the country and well being of the people and other citizens whom the Heads of States/Governments rule. Criminalizing, or, at least suspecting, the presiding Head of State/Government, as to these contenders, is indirectly making him/her lose trust by his/her citizens that paves a way to the breakdown of the unity of the people and de-stabilization of the country at large.

Conversely, the supporters of the power of the Security Council to adopt a resolution which requests the Prosecutor to charge every individual, including the presiding Head of State/Government, mainly base their argument on giving a lesson not only for the wrong doer but also other abusive presiding Head of States/Governments so as to safeguard humanitarian and human right violations.

The controversy is manifested in the recent practical case of Omar Hassan al-Bashir of the Republic of the Sudan. On the one hand, African Union (less South African, Botswana and

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<sup>10</sup> There is no Head of state/Government alleged of criminal responsibility before the International Criminal Court (ICC) up until 14 July 2008; however, on this day the Chief Prosecutor of the ICC, Luis Moreno Ocampo, alleged that Al-Bashir bore individual criminal responsibility for genocide, crimes against humanity and war crimes committed since 2003 in Darfur.

Uganda),<sup>11</sup> League of Arab States and non-Aligned Movement have almost opposed not only the adoption passed by the SC, but also the international criminal court's (ICC's) decision that charges the Sudanese Head of State.<sup>12</sup>

On the other hand, ICC itself, Amnesty International, Human Rights Watch and others insist that Sudan must comply with the arrest warrant of the International Criminal Court.<sup>13</sup> Their reason seems to stem from the fact of safeguarding Human Rights Law and punishing the Wrong doers whatever their status would be.

#### **1.4. Objective of the study**

The objective of the study is not to detect whether an individual or a group is criminally liable or innocent. Rather to show how to apply different theories of international law, i.e. theories on immunities of the Heads of States/Governments vs. the powers of the Security Council without any contravention. If there is a contravention, the writer will also try to show which one should prevail over the other.

#### **1.5. Methodology**

According to Article 38 of the Statute of the ICJ, the primary sources of international law are treaties, customary international law and the general principles. Hence, these sources, which have a tie with issues of this thesis will be collected, profoundly studied and critically analyzed. Moreover, writings of scholars and court decisions will be gathered, studied and analyzed as subsidiary sources.

#### **1.6. Significance of the study**

The questions raised in the study are significant not only in deterring the presiding Head of States/Governments from acting beyond their authority but also, for the Security Council to apply its powers uniformly without any discrimination which in turn paves a way for safeguard

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<sup>11</sup>African Union moves aggressively to shield Bashir from prosecution, available at <http://www.sudantribune.com/spip.php?article35786> accessed on 29 July 2010, 1.

<sup>12</sup> Omar al-Bashir-Wikipedia, the free encyclopedia, available at <http://en.wikipedia.org/wiki/Omar-al-Bashir>, downloaded on 8/16/2010.

<sup>13</sup> African Union moves aggressively to shield Bashir from prosecution, (n 9), 5.

of every citizen. Specifically, the following points are among the major factors which magnify the significance of the study:

1. There is a gap in the existing literature.
2. It is an unfinished debate.
3. Professionals and researchers may take the findings of this thesis to conduct further detail and full-fledged studies.

### **1.7. Limitations**

Some necessary documents may be confidential and will not be easily accessible. Furthermore, the concerned bodies may not be willing to give feedback as needed. Scarcity of literature and time constraint may also be another limitation since the issue at hand is current or happened for the first time very recently and thus the following considerations should be borne in mind.

### **1.8. Scope of the Study**

2. The paper would not investigate the crisis in Darfur.
3. It questions the power of the Security Council, only vis-à-vis incumbent Heads of States/Governments.
4. It addresses the issue only from the law perspective, particularly, international

### **1.9. Organization of the paper**

The thesis is organized into three chapters. The first chapter, as it is shown above, has dealt with the introduction part which encompasses background, statement of the problem, research questions, literature review, and objective of the study, methodology, significance of the study, limitations and scope of the study.

In the subsequent chapter, immunities of Head of States/Governments vs. the powers of the UN Security Council holding background on Head of State/Government, the purpose of immunities for Heads of States/Governments, and the theories for immunities of the Heads of States/Governments, background on the need to establish the UN Security Council, its composition and voting system, its power to maintain peace and security, specific powers granted for the discharge of its duties that are laid down in different chapters of the Charter of the

United Nations, and the reconciliation of the immunities of Heads of States/Governments with the powers of the Security Council will be discussed.

The last chapter, chapter three, will analyze the crimes committed by Head of State/Government of the Republic of the Sudan in Darfur, the organs which have jurisdictions to entertain the crimes committed in Darfur, the legality of the Security Council to issue arrest warrant of Omar al-Bashir by the ICC prosecutor, the previous practices of Security Council in impeaching Head of States/Governments. The effect of abstentions by the member state of the SC during the voting process is treated in this chapter. Furthermore, the unique features of the African Heads of States/Governments with special focus on the way they came to power, term of office and its consequence is also treated in this chapter.

Finally, the thesis will present conclusion and forward recommendations.

## CHAPTER TWO

# Immunities of Head of States/Governments vs. the Powers of the Security Council

## 2.1. Immunities of Head of States/Governments

### 2.1.1. Background on Head of States/Governments

A head of state is a person who serves as chief public representative of a monarchy, republic, federation, commonwealth or other kind of state.<sup>14</sup> Most of the time the role of the head of state concentrates on legitimizing the state, exercising political powers and executing functions and duties granted to him/her by the constitution of a respective country.<sup>15</sup>

In the modern French constitution, for instance, the Head of State embodies “the spirit of the nation” for the nation itself and the world at large. From that time on, many countries expect their Head of State to hold national values in a similar way.<sup>16</sup>

The world community has established various state constitutions through time in different political systems. However, the major types of Head of States can be categorized in to four.<sup>17</sup> These are:

- i. **The non executive Head of State system:** In this type, the Head of State is excluded completely from the executive function. He/she does not possess even theoretical executive powers or any role, formal or informal, within the government. This type of Head of State can be cited. It was the king of Sweden, since the passage of the modern Swedish constitution,<sup>18</sup> for instance, which had refused any of the parliamentary system Head of State functions that he had previously performed formal cabinet briefings monthly in the royal palace. Hence, this type of Head of State is not part of the issue at hand.

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<sup>14</sup> Wikipedia, the free encyclopedia.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> *This is indicated at the 1974 Instrument of Government for Sweden.*

- ii. **The parliamentary system:** Here, the Head of State may be merely the ceremonial chief executive officer of the state, with the assumption of holding executive power. This indicates that all the power belongs to the sovereign and the government acts on behalf of the majesty but not that of the parliament.<sup>19</sup> In practice, nonetheless, powers are usually only exercised by direction of a cabinet, chaired by a prime minister who is answerable to the legislature. The best example in the world is the system of Great Britain.<sup>20</sup> Therefore, the Head of State in the parliamentary systems has no relevance with the case at hand.
- iii. **The semi-presidential system:** As its name indicates, the Head of State shares exercise of power with a Head of Government. This is a combination of features of presidential and parliamentary systems, notably a requirement that the government is answerable not only to the president, but also to the legislature. The case of France in the constitution of the Fifth French Republic is the best example.<sup>21</sup> This constitution provides for a prime minister, who is chosen by the president, but who nevertheless must be able to gain support in the National Assembly. This system would be the area of discussion later on *mutatis mutandis*.
- iv. **Presidential system:** This is a system in which the Head of State and the Head of Government are the two faces of a single coin. This is because it is a single individual who is the Head of State and at the same times the Head of Government to actively exercise the executive power.<sup>22</sup> There are constitutions which provide for a Head of State in practice chief of executive, operating separately from, and independent from, the legislature. Some others like in the case of the United States of America, while not providing for collective executive answerability to the legislative, may require legislative approval for individuals prior to their assumption of cabinet office and empower the legislature to remove the Head of State from office. In this type of system, most of the power is in the hands of the Head of State and is liable for whatever violations committed. Hence, this is the core area of discussion.

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<sup>19</sup> Wikipedia, (n 1).

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Lawrence M. Friedman, *American Law*, (1<sup>st</sup> edn Indo-American Cooperative Publishing Reprint, New Delhi, India 1991) 107.

Now let us turn our attention to the Head of Government, who is the chief officer of the executive branch of a government, frequently presiding over a cabinet.<sup>23</sup> In a parliamentary system, the Head of Government is often termed as Prime Minister, President of the Government, Premier, etc and the person who holds the position of Head of Government and Head of State are different.<sup>24</sup> While in presidential republics or absolute monarchies, the Head of Government may be the same as the Head of State, who is often called a president or a monarch respectively.<sup>25</sup>

Similar to the Head of State, there are some types and titles of Head of Government. The most common title for a Head of Government is “Prime Minister”, which is used as a formal title in many states, but also informally a generic term to describe whichever office is formally the first amongst the executive “ministers” of an otherwise styled head of state, as minister-Latin for servants or subordinates.<sup>26</sup>

The Head of Government in the parliamentary system is the chief of executive who has the power of executing at almost all issues of a country. Hence, acts that are not in conformity with international law would amount to the accountability of him/her.

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<sup>23</sup> Wikipedia, (n 1).

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

## **2.1.2 Theories for immunities of presiding Heads of States /Governments**

Heads of States/Governments are the representatives of their respective countries. Every decision, action or omission, which arises from their official capacity, is done on behalf of the country. That is why the concept of state immunity, that also includes the state representatives, is treated regularly in the context of statements in which the immunity marks as a block to a jurisdiction of the state of the forum which would exist but for the doctrine of immunity, and which can be waived by the recipient state.<sup>27</sup>

Therefore, immunities would be enshrined on Heads of States/Governments to protect the sovereignty of the distinct country they represent. There are theories which safeguard immunities of Heads of States/Governments. They are discussed herein under;

### **2.1.2.1. The theory of sovereign immunity**

This is an immunity that foreign sovereigns and the governments of foreign states enjoyed from the jurisdiction of municipal courts and/or international courts.<sup>28</sup> The immunity of a distinct country stands against exclusive power of another territorial sovereign to regulate, and to enforce decisions of its organs respecting, the territory and its population.<sup>29</sup>

There are other subsets of theories under this universal theory of which some are briefly discussed below:

#### **a) The theory of independence**

All sovereign countries, including their representatives are on equal footing and none of them can be subjected to the jurisdiction of another unless otherwise they surrendered that fundamental right. According to this theory, the law is the creature of sovereignty and that as between equals there can only be consensus, not subjection.<sup>30</sup> This means the distinct sovereign foreign state should not be tried and executed by the laws, courts and executing institutions of the other state.

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<sup>27</sup> Ian Brownlie, *Principles of Public International Law*, (2<sup>nd</sup> edn Oxford University Press, London, 1973) 315.

<sup>28</sup> D. P. O'Connell, *International Law*, (2<sup>nd</sup> edn Volume Two, Stevens & Sons, London, 1970) 841.

<sup>29</sup> Ian Brownlie, (n 14), 314.

<sup>30</sup> D. P. O'Connell, (n 15), 842.

**b) The theory of dignity**

This theory contends that holding litigation between/among a distinct foreign state and individuals, whether its own citizens or aliens, is assumed to be in contrary to the former's dignity. This is an argument derived from the notion of the native superiority of the sovereign, but it has been given the added twist that allows process against a foreign state would humiliate the political relations of the state declaring jurisdiction.<sup>31</sup>

**c) The theory of comity**

What makes this theory different from the previous two theories is that it advocates for non-absolute immunity in a foreign sovereign. However, immunity, according to this theory was in reality originally conferred upon as a mere good will or comity.<sup>32</sup> For this theory, jurisdiction should not be prohibited but would be waived for the sake of friendly international relations.

*“Historically speaking, sovereigns extended as a matter of comity to other sovereigns the same jurisdictional immunity as they enjoyed themselves in their own Courts, and they did this in order to gain reciprocity for themselves.”<sup>33</sup>*

This esteemed term ‘sovereignty’ continues to be used in international legal practice; nonetheless, its reference in modern international law is quite different. International law still protects sovereignty of the people but not sovereignty of the sovereigns.<sup>34</sup>

**2.1.2.2. The theory of non-party to the treaty**

Treaties have a binding effect upon the parties to that particular treaty. There is no contention that treaties are binding upon the parties and must be regarded by the parties in good faith.<sup>35</sup> In other words, parties to treaties are legally bound to respect because there exists a customary rule of international law that declares as treaties are binding one.<sup>36</sup> Therefore, for other parties, which

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<sup>31</sup> Ibid., 842.

<sup>32</sup> Ibid., 843.

<sup>33</sup> Ibid., 843.

<sup>34</sup> Gregory H. Fox and Brad R. Roth, (eds) *Democratic Governance and International Law*, (Cambridge University Press, United Kingdom, 2000) 243.

<sup>35</sup> Vienna Convention on the Law of Treaties, (Vienna, 1969, entered into force on 27 January, 1980, Vol. 1155 UNTS No. 331.8 ILM 679 (1969)) Article 26.

<sup>36</sup> T. O. Elias, *The Modern Law of Treaties*, (Oceana Publications, Inc.-Dobbs Ferry, N. Y., 1974) 41.

are out of the treaty neither there is imposition of the obligation nor there is reservation up on rights from this treaty.<sup>37</sup>

Nonetheless, there are rules of customary law which cannot be reserved by treaty or agreement but only by the formation of a successive customary rule of contrary effect.

*“The least controversial examples of the class are Prohibition of aggression of war, the law of genocide, the principle of racial non-discrimination, crimes against humanity and the rules prohibiting trade in slaves and piracy.”*<sup>38</sup>

Hence, whether or not the states are parties to a certain treaty which holds such non-controversial matters, their observance is mandatory and would be binding not only upon the parties to it but also upon the third parties.

### **2.1.2.3. The theory of domestic jurisdiction**

This theory contends that still there are some hard cores of issues which always remain within the exclusive jurisdiction of a state. As to the proponents of this theory were this not so, there would in reality be no “sovereignty” left to the states.<sup>39</sup> Administration of tariffs, the admission of foreigners as well as the competence to legislate laws are the issues usually cited within domestic jurisdiction and are of typical examples.<sup>40</sup>

In addition, they contend that all issues that have no formal international obligations automatically should fall within the domestic jurisdiction of a state.<sup>41</sup>

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<sup>37</sup> Vienna Convention on the Law of Treaties, (n 22), Article 34.

<sup>38</sup> Ian Brownlie, (n 14), 500.

<sup>39</sup> Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations*, (Oxford University Press, Great Britain, 1963) 63.

<sup>40</sup> *Ibid.*, 63.

<sup>41</sup> *Ibid.*, 64.

### 2.1.3. Why immunities for presiding Heads of States/ Governments?

Immunities of Heads of States/Governments have a direct tie with immunities conferred upon each nation.<sup>42</sup> Heads of States/Governments are the symbols of a distinct sovereign nation. Most of the time, it is in times of political crisis, party strife, war and civil war that sovereignty is coming into picture, whether to claim it or reject it.<sup>43</sup>

Sovereignty has a couple of corresponding and mutually interrelated dimensions. The first one is sovereignty within a state and the other is out of it.<sup>44</sup> In the former, there is a sovereign power who makes supreme and ultimate law i.e., its validity is independent from the will of any other, or 'higher' authority.<sup>45</sup> In other words, there is no external body that orders the sovereign power. This power is entrusted to:

*“The state territory and its appurtenances (airspace and territorial sea), together with the government and population within its frontiers, comprise the physical and social manifestations of the primary type of international legal person, the state.”<sup>46</sup>*

The immunity, although it has other features, is primarily from the jurisdiction of the territorial courts. The reason behind this rests equally not only on the comity of the foreign nation, its organs and representatives (Heads of States/Governments and other officials), but also, on the functional need to leave them unimpeded in the pursuit of their mission.<sup>47</sup> Nonetheless, the immunity on Heads of States/Governments is only in respect of governmental activities that pertain to administrative, and does not compel it in respect of other activities which are more truly commercial.<sup>48</sup>

In the beginning, it is from the jurisdiction of some state's municipal courts that foreign sovereigns and the Heads of States/Governments enjoy immunity.<sup>49</sup> This would be transcended

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<sup>42</sup> D. P. O'Connell, (n 15), 842.

<sup>43</sup> Ian Brownlie (n 14) 70.

<sup>44</sup> Ibid., 70.

<sup>45</sup> Ibid., 70.

<sup>46</sup> Ibid., 109.

<sup>47</sup> Ibid., 109.

<sup>48</sup> D. P. O'Connell, (n 15) 841.

<sup>49</sup> Ibid., 841.

even to intergovernmental entities including the International Court of Justice (ICJ), and the International Criminal Court (ICC).<sup>50</sup>

Even in the modern times, in matters which are essentially within the domestic jurisdiction, no one including the United Nations can intervene.<sup>51</sup> Even though there is a bone of contention in interpreting and exhausting “matters which are essentially within the domestic jurisdiction”, the major objective is to respect immunities of the officials, especially Heads of States/Governments of a distinct country. In other words, there is no readymade and satisfactory response on which cases should come under domestic jurisdiction and which cases should come under international jurisdiction.

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<sup>50</sup> Even in 1923, the Permanent Court of International Justice (PCIJ) rendered a judgment which is still considered to be the leading pronouncement on the concept of ‘domestic jurisdiction’. In the case of the Nationality Decrees in Tunis and Morocco, both of which were French protectorates at the time. The United Kingdom, on the other hand, invoked a treaty with France against the application of the nationality decrees to certain persons which the United Kingdom regarded as British nationals. When the United Kingdom brought the dispute before the League Council, France objected that the case concerned a matter solely within its domestic jurisdiction. The Council for its part referred this preliminary issue to the PCIJ. The PCIJ responded that matters that are solely within the domestic jurisdiction of a state are such matters which are not, in principle, regulated by international law and with respect to which states, therefore, remained sole judge.

<sup>51</sup> Charter of the United Nations, (San Francisco, 1945) Articles 2(7), 11 and 14. The last two Articles, particularly, dictate the UN General Assembly not to intervene in matters essentially within domestic jurisdiction.

#### 2.1.4. Exceptions to immunities of presiding Heads of States/Governments

One can say that consensus can easily be reached that sovereignty cannot mean complete independence or absolute power over every internal matter. A formal interpretation views sovereignty as independence within the limits of International Law.<sup>52</sup> For instance, issues such as interpretation of a treaty, matters on human and humanitarian rights, provisions regarding non-self governing territories, self-determination and minority rights as well as maintenance of international peace and security are not solely within the domestic jurisdiction.<sup>53</sup> In other words, they are also under the jurisdiction of the international law. Moreover, there was a conception that only States were the subjects of international law<sup>54</sup> that enjoy rights and incur liabilities under the international law. Nowadays, however, this concept is outdated. Matters which are out of the ambit of the domestic jurisdiction are elaborated in detail as follow:

- a) **Interpretation of a treaty-** This could not be considered as a question essentially within domestic jurisdiction of a distinct state. Rather it is a question that should be remedied by the international law since by its nature it lies within the competence of the international court.<sup>55</sup>

A matter which is governed by an international agreement can fall essentially within the domestic jurisdiction of a state in a number of cases. Two contradicting opinions have emerged.<sup>56</sup> Some states base their argument on the Nationality Decrees opinion and assented that a matter governed by an international agreement could not fall solely within the domestic jurisdiction of a party to the agreement. On the other hand, other states oppose this argument, claiming that a matter which was essentially within a states jurisdiction retained that character even when it became the object of an international obligation arising out of an international agreement since Article 2(7) of the Charter of the United Nations included matters which were essentially and not solely within the domestic jurisdiction of state. However, the latter argument does not hold water since the presence of an agreement by two or more sovereign states was sufficient to take a matter

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<sup>52</sup> Simma Bruno, (ed), *The Charter of The United nations, a Commentary*, (2<sup>nd</sup> edn Vol. 1, Oxford University Press, New York, 2002) 150.

<sup>53</sup> *Ibid.*, 159-164.

<sup>54</sup> Malcolm N. Shaw, *International Law*, (5<sup>th</sup> edn Cambridge University Press, London, 2003) 177.

<sup>55</sup> Simma Bruno, (n 39), 159.

<sup>56</sup> *Ibid.*, 159.

outside the domestic jurisdiction of a distinct state.<sup>57</sup> Even when someone detects its definition, treaty is an international agreement concluded between or among states in a written form and governed by international law, whether embodied in a single or more related instruments.<sup>58</sup> Hence, interpretation of a distinct treaty is under the ambit of the international law.

- b) **Issues on Human Rights** - Many states sustain that human rights were removed from domestic jurisdiction of states. Their reason stems from the fact of the provisions of the Charter of the United Nations.<sup>59</sup> These days' protecting human rights have become the most important work of the United Nations. In relation to this under the Vienna Declaration of the World Conference on Human Rights (1993), States also announced their commitment to promote universal respect for, and observance and protection of all human rights and fundamental freedoms.<sup>60</sup>

Moreover, according to the UN Secretary-General, human rights are a concern of the United Nations as well as of all actors on the global scene.<sup>61</sup> No one can challenge such statements since they are unquestionably true in the sense that states have enormously reduced this sphere of unhampered decision-making by agreeing to a large number of human rights declarations and treaties and by customary international human rights law. Promotion of the Universal respect for human rights is enshrined in the provisions of the Charter of the UN.<sup>62</sup> Moreover, the UN General Assembly is duty bound to 'initiate studies and make recommendations' for the purpose of 'assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'<sup>63</sup>

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<sup>57</sup> Ibid., 159.

<sup>58</sup> Vienna Convention on the Law of Treaties, (n 22), Article 2 (1) (a).

<sup>59</sup> Some Articles of the charter of the United Nations dictate for human rights to be respected by all member states and if trespassed, they are accountable internationally for what they did. The major relevant provisions that witness the intentional obligations on state members or safeguarding human rights from violation of member states are Articles 1 (3), 55c, 56 and 62 (2) of the charter of the United Nations.

<sup>60</sup> Erik Denters and Nico Schrijver, (eds), *Reflections on International Law from the Low Countries*, (Martinus Nijhoff Publishers, The Netherlands, 1998) 101.

<sup>61</sup> Simma Bruno, (n 39), 161.

<sup>62</sup> Charter of the United Nations, (n 38), article 55 (c).

<sup>63</sup> Ibid, Article 13 (1) (b).

- c) **Non-self governing territories-** Today, the challenge on provisions regarding the administration of non-self governing territories has become obsolete. This is because there are no such non-self governing territories in the world today. However, the provisions on the issue were the cause of disagreement among member states in the 1950's and prior to that. At that time, some states contended that the UN General Assembly was not entitled to administer and recommend that ECOSOC convene conferences of representatives of non-self governing territories and the like. They contended that the then administering states should exercise full sovereignty over<sup>64</sup> territories they administered even, in 1960, it was overwhelmingly held that the issue was essentially removed from the municipal level and had become the mandate of the UN.<sup>65</sup>
- d) **Self-Determination and Minority Rights-** 'All peoples have the right to self-determination.'<sup>66</sup> One of the questions that need to be answered here is as to who is to safeguard this right and whether it is a matter of domestic jurisdiction or an international concern. A number of states, especially in the earlier times, argued that the principle of self-determination rested essentially upon the national jurisdiction.<sup>67</sup>
- Other member states held that if Article 2 (7) of the Charter of the UN had an overriding effect, many provisions of the Charter would become meaningless. Moreover, they argue that self-determination is linked to the discussion on human rights which amount to its removal from the domestic jurisdiction.<sup>68</sup>

*International law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states.*<sup>69</sup>

No consensus has reached, anyway, as to the relationship between the right to self-determination and the domestic jurisdiction.

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<sup>64</sup> Simma Bruno, (n 39), 162.

<sup>65</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, has adopted by the UN General Assembly Resolution 1514 (XV), 14 December 1960 to solve the problem.

<sup>66</sup> International Covenant on Civil and Political Rights, (1966), Article 1.

<sup>67</sup> Simma Bruno, (n 39), 163.

<sup>68</sup> Ibid., 163.

<sup>69</sup> Ibid., 163

The issue on Minority rights was another controversial issue.<sup>70</sup> According to some states, there is a demarcation between minorities living within the metropolitan boundaries of a state and persons of non-self governing territory are made.<sup>71</sup>

They contended that the former is all about the realization of self-determination within the domestic jurisdiction of that distinct state. Minority rights are rights that safeguard not only national or ethnic but also religious and linguistic minorities.<sup>72</sup>

It is the International Covenant on Civil and Political Rights, which mostly mentioned the legal development on the international recognition of minority rights. One of its provision states as:

*“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”<sup>73</sup>*

Hence, the issue on minority rights is among those which are under the mandate of International Law.

**e. Maintenance of international peace and security:-** International peace and security should be maintained collectively. This is not the concern of a distinct state or groups of states. It is rather the concern of all the international community. In the earlier times, all matters were presumed to be within the jurisdiction of the distinct state, the sole exception was the second part of Article 2(7) of the charter of the UN.<sup>74</sup> In reality, nonetheless, this presumption has not acceptance.<sup>75</sup> Many instances can be cited:

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<sup>70</sup> The status of the German-speaking element in the Province of Bolzano was the scratch of the issue. The representative of Italy contended for the mere international agreement on the matter between Italy and Austria, the latter state could not ask for inclusion of the question on the UN agenda. In the contrary, Austria based her argument on the minority right since the citizens are minority German-speaking people and the explicit dictation of the GA Res. 217 c (III) had no disparity with the fate of minorities.

<sup>71</sup> Simma Bruno, (n 39), 163.

<sup>72</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Adopted by the UN General Assembly Resolution 47/135, 18 December 1992.

<sup>73</sup> International Covenant on Civil and Political Rights, (n 53), Article 27.

<sup>74</sup> Simma Bruno, (n 39), 164.

<sup>75</sup> Ibid., 164.

- Concerning the treatment of peoples of Indian origin in the Union of South Africa the General Assembly expressly referred to article 14 of the charter of the UN.<sup>76</sup>
- This reference can also be exhibited concerning the observance of human rights in the Soviet Union.<sup>77</sup>
- A report of a subcommittee of the Security Council, in the case of Spain, stated that, “Although there was no actual threat to the peace, the fact that the continuance of the particular situation was likely to endanger the maintenance of international peace removed the matter from domestic jurisdiction.”<sup>78</sup>

In the recent times, three more issues in relation to the exceptions are described; namely, internal conflicts, conflict prevention and peace keeping operations.

If this is so, immunities of Heads of States/Governments has been increasingly eroded since the domestic jurisdiction is constantly being reduced in many areas which are used to be internal are now being regulated by international law.<sup>79</sup>

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<sup>76</sup> Declaration on Treatment of Peoples of Indian origin in the Union of South Africa, Adopted by the UN General Assembly Resolution 44 (I) and 265 (III), 2 December 1950.

<sup>77</sup> Simma Bruno, (n 39), 164.

<sup>78</sup> Ibid., 164.

<sup>79</sup> Ibid., 157.

## **2.2. Powers of the United Nations Security Council**

Prior to directly dealing with the powers of the UN Security Council, it is proper to highlight its historical background why the Security Council was established, composition and the consequences of abstention of its permanent members at voting process of non-procedural matters.

### **2.2.1. Historical background on the need of the United Nations Security Council**

Just like the United Nations is the successor of the League of Nations, following the failure to accomplish its objectives, the Security Council is the successor of the Council of the League. It was in the Dumbarton Oaks, California, USA, in 1944, when drafting the Charter of the United Nations, it was envisaged that the need for an executive organ of limited membership which would be entrusted to the maintenance of international peace and security as its primary responsibility.<sup>80</sup> For this reason, as compared with the Council of the League, the Security Council is more powerful.<sup>81</sup> What was needed in the proposal was an executive organ, small in number that functions continually and able to take decisions without delay and with effectiveness so as to bring into operation the enforcement machinery of chapter VII of the Charter whenever international peace and security was threatened.<sup>82</sup>

The main objective of the United Nations is to maintain peace and security in the world. In order to attain this objective, instituting special body is indispensable. This is because the attainment of the objective needs day to day follow up and decision that would be enforceable. The major distinction between the then Council of the League and the Security Council is the former's decisions were to be reached by unanimous vote, subject to the exclusion of the vote of a party to a dispute, but were not as such, binding on member states; the rule of unanimity naturally made a recommendation for sanctions difficult to achieve in a Council plagued by great-power rivalry, and even where this could be achieved, no member was bound to apply military sanctions.<sup>83</sup> This

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<sup>80</sup> D. W. Bowett, *The Law of International Institutions*, (4<sup>th</sup> edn Universal Law Publishing, University of Cambridge, London, 2003) 19.

<sup>81</sup> *Ibid.*, 19.

<sup>82</sup> *Ibid.*, 19.

<sup>83</sup> *Ibid.*, 19.

executive organ, in other words, did not take decisions on behalf of all the members and binding upon those members. Whereas, the decisions entered into by the SC have a binding effect upon the members.<sup>84</sup> Moreover, the increased degree of centralization of the procedures for maintaining international peace and security made the SC even more essential.

The SC is given by the member states of the United Nations the responsibility for the maintenance of international peace and security and charged to carry out its duties on their behalf.<sup>85</sup> Moreover, they reached an agreement<sup>85</sup> to accept and carry out the decisions of this body in accordance with the Charter of the United Nations.<sup>86</sup>

### **2.2.2. United Nations Security Council's composition and consequences of abstention on voting**

Even within a single organization, there are organs of different composition and voting system. Some may be composed of all members and may decide on matters unanimously, or by a fifty plus one or by two thirds or by three fourths of the members present at the meeting.

For instance, if we take the case of the United Nations General Assembly (UNGA), all members of the organization would make its composition and the decisions on matters which all categorized as important are entered into decision through two thirds majority of the members present while for other questions is reached at an agreement to be decided by majority vote of the members present.<sup>87</sup> On the other hand, the composition and voting system of the United Nations Economic and Social Council (UNECOSOC), has some difference. It is composed of fifty four member states elected by the General Assembly and has a voting system of majority of the members present and voting.<sup>88</sup>

Deducing from the above instances, the composition and voting system of UN Security Council would also vary as explained below:-

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<sup>84</sup> The Charter of the United Nations, (n 38) Article 24.

<sup>85</sup> Ibid., Article 24 (1).

<sup>86</sup> Ibid., Article 25.

<sup>87</sup> The Charter of the United Nations, (n 38), Articles 9 and 18.

<sup>88</sup> Ibid., Article 61 and 67.

### 2.2.2.1. Its composition

When the Charter of the United Nations was adopted, its composition was comprised of 5 (five) permanent members alphabetically, China, France, the United Kingdom, the United States of America and the Union of Soviet Socialist Republic but only 6 (six) non-permanent members, elected by the UN General Assembly for two years. It was after twenty one years of the organization's establishment that the number of non-permanent members was increased to 10 (ten).<sup>89</sup>

*The number of non-permanent members was increased from six to ten on January 1, 1966, as a result of an amendment of the Charter; as the membership of the United Nations increased, it was considered that the membership of the Security Council (and of the Economic and Social Council) should also be increased, in order to give more states an opportunity of sitting on those two councils. There is an informal understanding that five of the non-permanent places should be filled by afro-Asian states, two by Latin American states, one by an Eastern European state, and two by western European and other states (the three states" being principally the "white" members of the commonwealth)<sup>90</sup>*

The question of increasing the number of non-permanent members had not remedied over night. It has begun from 1955, during the course of decolonization since the newly admitted Third World Members demanded for greater representation in the UN Security Council.<sup>91</sup>

Taking the demand into consideration, the UNGA adopted Resolution 1991 (XXVIII), on December 17, 1963 for adding four seats for non-permanent members.<sup>92</sup> On August 31, 1965, the amendment to the Charter of the UN came into force and Article 21 of the Charter was amended to accommodate ten non-permanent members of the Security Council.<sup>93</sup>

Even after the membership of the non-permanent increased from six to ten, the recent development witnesses that there is dissatisfaction on the part of the Third World countries for there are no adequate representation.

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<sup>89</sup> Ibid., Article 27.

<sup>90</sup> Michael Akhurst, *A Modern Introduction to International Law*, (George Allen & Unwin Ltd, Great Britain, 1970) 251-252.

<sup>91</sup> Simma Bruno, (n 39), 439.

<sup>92</sup> Ibid., 439.

<sup>93</sup> Ibid., 439.

These bodies base their argument not only on the further substantial increase in the number of member states in the organization since 1963, but also on the fact that the UN Security Council has in numerous cases shown only a limited political capacity to act for the reason of the East-West conflict and the North-South antagonism.<sup>94</sup> Two main expectations of the Third World States are:

i) a greater worthiness of the SC in their favor and ii) a more balanced regional representation.<sup>95</sup>

The proposal forwarded by a group of African, Asian and Latin American states was to increase the number of seats of non-permanent members of the SC from ten to sixteen, which amounts to the total membership of twenty one, since it did not provide for a change in the number of the permanent members.<sup>96</sup>

*“From 1979 until 1990, the question of equitable representation on and increase in the membership of the SC appeared on the agenda of every session without being debated.”<sup>97</sup>*

Two years after (i.e., in 1992) the Third World countries asked for democratization of the Security Council and for the first time they demanded the permanent membership.<sup>98</sup> As a result, the Secretary General was requested to invite member states to submit written comments on possible members of the SC.<sup>99</sup> The response of the invitees was the reform of the SC not only on the increase of number of non-permanent members but also on the inclusion of new permanent seats. Taking the response into consideration, the GA established an open-ended working group<sup>100</sup> which delivered triple reports. Especially, the last report holds issues of size and composition of the SC, decision making, including the veto, transparency and working methods, amendments of the charter, and periodic review of the charter.<sup>101</sup>

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<sup>94</sup> Ibid., 441.

<sup>95</sup> Ibid., 441.

<sup>96</sup> Ibid., 441.

<sup>97</sup> Ibid., 441.

<sup>98</sup> Ibid., 441.

<sup>99</sup> Declaration on Question of equitable representation on and increase in the membership of the Security Council, Adopted by the General Assembly, 47/62, 11 December 1992.

<sup>100</sup> Open-ended working group aimed at answering the question of the equitable representation on and increase in the membership of the Security Council and other related to the Security Council A/RES/48/26. Dec. 3, 1993.

<sup>101</sup> Simma Bruno (n 39) 441.

Since no candidates from the Third World were presented for the permanent seat, Germany and Japan were widely expected to be permanent members.

Contrary to all these efforts, the GA at last, decided not to pass any resolution on the subject of the SC's reform without the affirmative vote of two thirds of the GA members, just like all those important questions.<sup>102</sup>

#### **2.2.2.2. The consequence of the abstention of Permanent members of the UN Security Council at decisions of non-procedural matters**

Any decision passed by the Security Council is best and becomes freer from gossip when it has acquired the full participation of all the members of the Security Council. Particularly, in matters that need concurrent vote of the permanent member, when there is an abstention by one of the permanent members at the process of casting a ballot, contention would arise on the consequence. The Charter of the United Nation has provided nothing for the case in hand. The relevant provision that dictates on the voting procedure of the Security Council's decision is Article 27 (3) of this Charter.<sup>103</sup>

Hence, the relevant law that accommodates such cases when treaties do not state, is the Vienna Convention on the Law of Treaties. Before dealing with this Convention, discussion of some opinions forwarded on the interpretation of Article 27 (3) of the Charter of the United Nations is in order.

Some argue that abstention should be considered as generally admissible. Their direct saying is as follows: "*An abstention can be understood as a generally admissible, Janus-like manner of voting, which neither prevents a decision nor positively supports it.*"<sup>104</sup> Nonetheless, dividing the abstention into voluntary and obligatory, they added that it was impliedly unanimous opinion of the representatives of the to be permanent members at the San Francisco Conference that voluntary abstention of a permanent member of the Security Council should prevent a decision under Article 27 (3) of the Charter, while an obligatory abstention did not prevent a decision

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<sup>102</sup> Ibid., 442.

<sup>103</sup> The Charter of the United Nations, (n 38) Article 27 (3).

<sup>104</sup> This view was put forward by the US State Department as early as 1946.

even if a permanent member were affected.<sup>105</sup> Others who oppose this conception argue that the above opinion is in contradiction with the interpretation of treaties.<sup>106</sup>

Some others raise the legal consequences if voluntary abstention were inadmissible. Their ground of argument is column 2 of Article 27 (3) of the Charter of the UN. As to these proponents, this column would have to be interpreted at least as an exception, and thus as implying that members of the Security Council may not abstain except in the cases enumerated, but must vote in favor or against. For this reason the participants at the San Francisco Conference compared the Security Council to a criminal jury.<sup>107</sup>

According to these arguers, the assumption of Article 27 (3) of the Charter is as follows:

*“Since Article 27 (3) assumes that votes will be cast correctly, it would be necessary to establish according to general rules whether an abstention should be interpreted as an affirmative or negative vote. This in turn means that there would once again have been room for interpretation in subsequent practice. It would have been logically possible, but by no means legally mandatory in this connection, to interpret an abstention as a negative vote simply because it was formally inadmissible, and thus as an unintended exercise of the veto.”<sup>108</sup>*

They termed this as an ‘optional veto’. However, this is also not free from opposition, since such an ad hoc interpretation of ‘abstention’ would be a contradiction.

Laying down the principle of unanimity among the permanent members of the Security Council was the object and purpose of Article 27 (3) of the Charter of the UN. This is to prevent decisions from being taken against the will of them, and thus prevent a confrontation between a major power and the UN or another major power. Therefore, presuming abstentions as ‘concurring vote’ can be at par with this aim, since the permanent member did have the opportunity to cast a negative vote during the ballot.<sup>109</sup>

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<sup>105</sup> Simma Bruno (n 39), 493.

<sup>106</sup> They base their contention on Article 31 of the Vienna Convention on the Law of Treaties.

<sup>107</sup> The American delegate ‘Compared application of the veto to the requirement of unanimity among the jurors in a criminal trial.

<sup>108</sup> Simma Bruno (n 39), 494.

<sup>109</sup> Ibid., 494.

In legal doctrine, the view on abstention has been advanced that in the framework of Chapter VII of the Charter of the UN, the Security Council decisions on which permanent member abstains are ‘valid’, but not ‘legally binding.’<sup>110</sup>

*“This opinion is based on the assumption that the political basis for actions by the Security Council would otherwise be jeopardized or removed, especially if abstention were followed by inactivity on the part of permanent members. It is true that the political weight of a Security Council resolution declines as the number of abstentions by permanent members increases.”<sup>111</sup>*

In other words, if some of the permanent members keep on abstaining, the decisions entered into would be futile since those who are abstaining are reluctant on its enforcement measures. Hence, the best political remedy is to assume abstention as casting the ballot positively.

Legally speaking, nonetheless, no justification can be forwarded from the UN Charter for the distinction between validity and legally binding effects based on the consequences of the vote: the abstention is in the concurring vote, which can be reconciled with Article 27 (3) of the UN Charter from the point of view of voting principles. If formal requirements of this Article are met by the Security Council’s decision, the result of the vote can no longer have any influence on the substantive legal effect that follows from the specific Charter provisions which grant power to the Security Council.<sup>112</sup> It can also be concluded from the practice of the Security Council as follows:

*“The legal admissibility of abstentions by the permanent members of the SC is not restricted to Chapter VI. There is no danger of inactivity on the part of permanent members of the SC in a political sense. If a resolution provides for a permanent member to make contributions it is unwilling to make, it will vote against the resolution and will not merely abstain. Thus, the abstention of a permanent member of the SC does not affect the legally binding nature of the decision in the context of Chapter VII.”<sup>113</sup>*

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<sup>110</sup> Ibid., 499.

<sup>111</sup> Ibid., 499.

<sup>112</sup> Ibid., 499.

<sup>113</sup> Ibid., 499.

Therefore, it can be concluded that abstention of permanent members of the Security Council on decision of matters is impliedly casting a vote positively. Whenever the permanent member is of the position to disagree and use its veto power, it should expressly participate and say no.

### **2.2.3. Powers of the UN Security Council**

There are triple of Articles in the Charter of the UN that enumerate the functions and powers of the UN Security Council.<sup>114</sup> Each member of the UN has consented that the primary responsibility for the maintenance of international peace and security should be entrusted upon the Security Council.<sup>115</sup> Hence, the member states are the principals (the Security Council is the agent) which are bound by the purposes and principles of the UN, so that there is a presumption that it cannot act arbitrarily without any restraints.<sup>116</sup> At the same time the act of the Security Council is considered as the act of member states of the United Nations, and the latter have promised to accept and carry out the decisions of the former, if they are in accordance with the Charter of the United Nations.<sup>117</sup>

Turning attention to any decision of the Security Council, which is inconformity with the UN Charter; it should be accepted and carried out by all member states, since they previously were agreed upon.<sup>118</sup> As is stated earlier, on the one hand, there is a primary responsibility of the SC on maintaining peace and security. This term connotes not only to priority in time but also to substantive priority, i.e., main responsibility.<sup>119</sup> On the other hand, there are specific powers granted to the Security Council for the discharge of its duties in chapter VI, VII, VIII and XII.<sup>120</sup>

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<sup>114</sup> The Charter of the United Nations, (n 38) Articles 24-26.

<sup>115</sup> *Ibid.*, Article 24 (1).

<sup>116</sup> D. W. Bowett, (n 67), 33.

<sup>117</sup> *Ibid.*, 33.

<sup>118</sup> The. Charter of the United Nations, (n 38) Article 25.

<sup>119</sup> Simma Bruno (n 39), 445.

<sup>120</sup> The Charter of the United Nations under its second sentence of Article 24 (2) states about the specific powers to carry out some duties.

The power of the SC for the discharge of duties in the first three Chapters will be discussed. This is because Chapter XII has become history and obsolete for there is no point in discussing it.

#### **a) Powers for the discharge of chapter VI**

This is all about pacific settlement of disputes. There are two ways of settling International disputes amicably.<sup>121</sup>

The first one is termed as the pre-legal or diplomatic means, including negotiation, mediation, inquiry and conciliation. This means of pacific settlement of dispute, the parties “may accept or reject a proposed settlement as they see it fit.”<sup>122</sup> This means that the decision through a diplomatic means has no binding effect. If the parties are satisfied they will agree to it, otherwise they will reject it.

The second means of pacific settlement of dispute may either be through arbitration or judicial settlement.<sup>123</sup> Here, the parties to the dispute are duty bound to comply with the decision reached.<sup>124</sup>

In this area there are various means that are entrusted upon the Security Council which assist in the settlement of dispute amicably.<sup>125</sup> Disputes can be submitted to the Security Council by different organs. These are the General Assembly, the Secretary General, member States and non-member States.<sup>126</sup>

Whether on request or by its own initiation the Security Council has the power to investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.<sup>127</sup>

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<sup>121</sup> J. G. Merrills, *International Dispute Settlement*, (3<sup>rd</sup> edn Cambridge University Press, London, 1998, reprinted 200) 88.

<sup>122</sup> *Ibid.*, 88.

<sup>123</sup> *Ibid.*, 88.

<sup>124</sup> *Ibid.*, 88.

<sup>125</sup> D. W. Bowett, (n 67), 34.

<sup>126</sup> The Charter of the United Nations, (n 38) Articles 11 & 12, Article 90, Article 35 (1) and Article 35 (2) respectively.

<sup>127</sup> *Ibid.*, Article 34.

Moreover, it may recommend appropriate procedures or methods of adjustment.<sup>128</sup> In so doing, it should take into account the already adopted procedures by the disputing parties.<sup>129</sup> Notice must be taken that the powers of the Security Council, in the case of chapter VI, are to make recommendations, which are not binding on the states to which they are addressed.<sup>130</sup>

#### **b) Powers for the discharge of chapter VII**

This chapter determines how to handle the action with respect to threats to the peace, breaches of the peace and acts of aggression. The term ‘threat to the peace’ is flexible and is extended beyond the obvious case of one state threatening another. It covers situations within a state, such as civil wars, which have international consequences.<sup>131</sup> Most of the time, it is in this threat to peace that crimes, including genocide, crime against humanity and war crimes have been exhibited. These crimes are both within the ambit of domestic and international jurisdiction. They are domestic and international crimes which need international as well as local remedy.<sup>132</sup> However, the terms ‘breach of peace’ and ‘act of aggression’ only connote situations within which force has been used between/among states.<sup>133</sup>

In general, the Security Council has been entrusted to adopt not only economic sanctions but also military measures where one of the above details has been fulfilled.<sup>134</sup> Under this chapter, the Security Council has “*the sole prerogative to decide when it can order enforcement measures to be taken and the discretion as to what type of measures should be taken.*”<sup>135</sup>

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<sup>128</sup> Ibid., Article 36 (1).

<sup>129</sup> Ibid., Article 36 (2).

<sup>130</sup> The recommendation by the Security Council to the parties in the Corfu Channel dispute, that they submit their dispute to the International Court of Justice, was not regarded by the majority of the Court as creating a legal obligation (binding effect) to submit to the Court’s jurisdiction.

<sup>131</sup> In 1961, for example, the Security Council characterized civil war in the Congo as threat to the peace and more recently it has made similar characterizations with respect to the conflicts in Yugoslavia and Liberia, 1991 & 1992 respectively.

<sup>132</sup> Rome Statute of the International Criminal Court, (Rome, entered into force on 1 July 2002), Articles 6, 7 and 8 respectively.

<sup>133</sup> The best examples entertained are the Argentine invasion of Falkland Islands and the invasion of Kuwait by Iraq in 1982 & 1990 respectively.

<sup>134</sup> J. G. Merrills, (n 108), 245.

<sup>135</sup> Danesh Sarooshi, *The United Nations and the Development of Collective Security*, (Oxford University Press, Great Britain, 1999) 4.

Furthermore, in relation to maintaining peace and security, the Charter of the UN provides a regional arrangement.<sup>136</sup> One of the provisions of the Charter of the UN makes sure that nothing in this Charter would prevent the existence of regional organizations for dealing with matters in connection to international peace and security as are appropriate for such organizations, providing that the organizations are in conformity with the purposes and principles of the global nations' organization, i.e., the UN.<sup>137</sup>

Mere existence of regional organizations does not automatically ensure maintaining peace and security, by the fact of lack of authority. This is because participation without the authorization of the UN Security Council, according to Article 53 of the Charter of the UN, is not possible.<sup>138</sup> Moreover, the authorization should be preceded by notification of each and every action.

### **c) Powers for the discharge of chapter VIII**

The Security Council has a great role in the regional arrangements or agencies that aim at either resolving disputes amicably or enforcement action under this chapter. Most of the regional arrangements or agencies are established for the purpose of maintaining peace and security not only by peaceful means, including the diplomatic as well as legally binding, but also through deploying force when the situation requires to do so. Particularly, the development of pacific settlement of local dispute, through such regional arrangements or agencies, is encouraged by the Security Council.<sup>139</sup> However, all the activities of these regional arrangements or agencies should be under the direct supervision of the Security Council and the former are duty bound to make the latter fully informed on each and every activity.<sup>140</sup>

As is discussed in the above paragraph, all conflicts are encouraged to be settled peacefully. The peaceful means of resolving disputes encompass binding and non-binding mechanisms. The former mechanisms uphold arbitration and judicial settlement, while the latter are diplomatic, including negotiation, mediation, inquiry and conciliation. According to Article 52 (2) and (3) of the Charter of the UN, peaceful settlement of disputes, through regional organizations, before resorting to force.

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<sup>136</sup> The Charter of the United Nations, (n 38) Article 52.

<sup>137</sup> Malcolm N. Shaw, *International Law (6<sup>th</sup> edn Cambridge, New York, 2008)* 1273.

<sup>138</sup> The Charter of the United Nations, (n 38), Article 53.

<sup>139</sup> *Ibid.*, Article 52 (3).

<sup>140</sup> *Ibid.*, Article 54.

### **2.3. The reconciliation of immunities of Head of States/Governments with the power of the UN Security Council to adopt a resolution**

It is obvious that immunities of presiding Head of States/Governments would not be challenged since they are not only the symbols of the country, but also they are representatives of the people they lead. Challenging all the acts they perform would impair their work and hamper the fulfillment of their responsibilities properly. Nonetheless, immunities of presiding Head of States/Governments often served as a shield against any accountability vis-à-vis the actions which are prima fascia criminal and offensive to the victims. Consequently, nowadays, there are some instances that these Head of States/Governments cannot be free from accountability when they trespass some specific international rules by hiding behind these immunities.

The Security Council has powers for maintaining its primary responsibility, i.e. maintenance of international peace and security. Every individual, whether official or layman, is duty bound not to take measures that contravene with the rules and norms of the international law. The decisions passed by the Security Council against those who contravene against international law as per its mandate should be respected by every member states and each human being.

This issue of applying and waiving of immunity is therefore a bone of contention since these two positions seem extreme conceptions standing on poles apart. As it is discussed in the earlier sub-chapter of this thesis, presiding Head of States/Governments have immunities, since they are the symbols of the country and the representatives of their people, especially, in relation to matters that are within the domestic jurisdiction. This is all about respecting various theories such as the theory of domestic jurisdiction, theory of independent sovereignty, the theory of non-party to the treaty, most of the time reciprocally respected by each/among states.<sup>141</sup> Nonetheless, this does not mean that immunities of presiding Head of States/Governments often serve as a shield against any accountability, vis-à-vis actions that are prima fascia detrimental to citizens and other individuals.

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<sup>141</sup> Vienna Convention on Diplomatic Relations (adopted on 18, April 1961, entered into force 24, April 1964) 500 U.N.T.S.95, Article 11.

Hence, there are exceptions that the presiding Head of States/Governments do not escape by invoking immunities. The Security Council has powers that make it successful in maintaining international peace and security. To attain its objectives, it has powers for discharging duties stipulated at different chapters of the Charter of the UN. Among such duties are the cases in relation to threats to the peace, breaches of the peace and acts of aggression. Although most of the time these cases are committed within the domestic setting, they are not necessarily under the ambit of the domestic jurisdiction. Hence, the Security Council has the power to make an investigation on such issues through some arrangements and adopt a Resolution that requests the ICC Prosecutor to indict the wrong doers, including the presiding Head of States/Governments. This would become legitimate when the national courts were not willing or were not capable to handle.<sup>142</sup>

According to the Rome Statute of the International Criminal Court, the Security Council is among the bodies which have the power to adopt a resolution on international criminal cases, and refer it to the ICC prosecutor.<sup>143</sup> Nonetheless, this should be exercised consistently maintaining a uniform international standard against presiding leaders, who may be suspect in committing genocide and other international crimes at some future time. There should not be a double standard, rather there should be precedent.

If this is so, it is not difficult to reconcile. Acts that are within the domestic jurisdiction are respected under the shield of immunities. In such issues no one is allowed to dictate presiding Head of States/Governments on how to behave. Nonetheless, for those acts which are presumed to belong, not only to domestic jurisdiction but also to the international jurisdiction, the presiding Heads of States/Governments should be in conformity with the international laws. If the presiding Head of State/Government trespasses issues under the international ambit, immunities cannot serve as a protection. This would be strengthened by the provision stipulated under Article 27 (1) and (2) of the Rome Statute. This provision provides that immunities which may attach to the official capacity of a person under international law do not bar the International

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<sup>142</sup> Rome Statute of the International Criminal Court, (n 119), Article 13 (b)

<sup>143</sup> Ibid.

Criminal Court from exercising its jurisdiction over such a person, whether or not he/she is the national of the state which is party to the Statute.<sup>144</sup>

It is obvious that the arrest warrant of the Head State of the Republic of the Sudan, al-Basher, does not emanate from a distinct domestic Court rather it is an international warrant, where the word ‘international’ serves to underline that it is issued by an international body and is aimed at obtaining the arrest and transfer of the requested person to face charges before an International Criminal Court.<sup>145</sup> It should be borne in mind that under customary international law, presiding Head of States/Governments, when facing domestic charges of international crimes are still entitled to immunity from arrest and from criminal prosecution in the territory of foreign states.<sup>146</sup>

The International Court of Justice (ICJ) in the well known Arrest Warrant case had confirmed the non-applicability of foreign state’s arrest warrant over presiding Head of another state.<sup>147</sup> This case was about the mere issuance of the arrest warrant by the Belgian judicial authorities against the presiding Minister of Foreign Affairs of the Democratic Republic of Congo which, according to the ICJ, had breached the international customary rules on personal immunities accruing to that foreign official.<sup>148</sup> The Belgian judicial authorities base their jurisdiction on the 1993 Belgian law, amended in 1999, that “*gives the Belgian courts the authority to prosecute individuals accused of genocide, crimes against humanity, and war crimes, regardless of a crime’s connection to Belgium or the accused’s presence on Belgian soil. The law also explicitly prohibits immunity, making it the world’s broadest statute conferring universal jurisdiction*”<sup>149</sup>

However, as it is explained in the preceding paragraph, this jurisdiction had not acquired acceptance and had rejected by the ICJ.

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<sup>144</sup> Paola Gaeta, *Does President Al Bashir Enjoy Immunity from Arrest?* 322, Downloaded from <http://ijci.oxfordjournals>. Org at Addis Ababa University Libraries on May 15, 2010.

<sup>145</sup> Ibid., 318.

<sup>146</sup> Ibid., 317.

<sup>147</sup> Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), International Court of Justice, 14 February 2002.

<sup>148</sup> Ibid.

<sup>149</sup> Dustin N. Sharp, *Prosecutions, Development, and Justice: The Trial of Hissain Habre’*, Harvard Human Rights Journal, 2 of 34, accessed at August 22, 2011.

For the same reason, the Senegalese Chamber d'accusation, the criminal appeals court, responded to the former Chad president, Hissain Habré's request for dismissal of complaint, claiming lack of jurisdiction.<sup>150</sup>

Here is the summary of the case. Habré assumed power from 1982 up until 1990, in a bloody coup d'état. During his reign, the country was “*marked by paranoia, clanism, severe political repression, and genocide,*”<sup>151</sup> witnessing the torture and death of 40,000 civilians.<sup>152</sup> However, after eight years of ruling, he was deposed by the coup and fled to Senegal. Although he sought to lead a peaceful life among the Senegalese upper class and forgotten by the history as well as the world, almost accidental convergence of factors served to bring him within the crosshairs of an international Non Governmental Organizations (NGOs) swarm. These NGOs and the family members of the victims assumed jurisdiction of Senegalese courts on the “*Convention Against Torture, which Senegal had signed in 1986 and ratified in 1987.*”<sup>153</sup> The Convention vests the member states to either extradite or to punish the perpetrators without taking the nationality into consideration, so that he was indicted by the Senegal court in 2000, on charges of torture and crimes against humanity.<sup>154</sup> Although a Senegalese court had indicted Hissain Habré on torture charges and placed him under virtual house arrest, an appeals court had annulled the indictment since it believed that it had no jurisdiction over the Head of State of another country.<sup>155</sup>

This is a clear illustration for the immunity of Heads of States/Governments not to be tried at other states' courts.

However, this does not mean that the Heads of States/Governments are immune from the International Courts. Thanks to the London Charter and the Nuremburg Trial's verdict for they recognized the principle of individual responsibility under international courts, whether lay or official, for crimes committed which fall within the ambit of international law, if the national courts did not entertain by any reason.<sup>156</sup>

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<sup>150</sup> Ibid., 18 of 34.

<sup>151</sup> Ibid., 15 of 34.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid., 18 of 34.

<sup>154</sup> Human Rights Watch, *Chad: the victims of Hisséne Habré Still Awaiting Justice*, 12 July 2005, A1710, available at: <http://www.unhcr.org/refworld/docid/45cb11b62.html> [accessed 15 August 2011], 2 of 39.

<sup>155</sup> Ibid.

<sup>156</sup> Gerald Werle, *Principles of International Criminal Law*, (T.M.C Asser Press, The Hague, Netherlands, 2005) 118.

Moreover, international crimes such as crime against humanity, war crimes and genocide have attained jus cogens since States had accepted their international recognition during the cases of Nuremberg trial, Tokyo trial, ICTY, ICTR etc. What the member states of the Rome Statute have made a consensus is just to have a permanent court instead of instituting ad-hoc tribunals whenever crimes are committed.<sup>157</sup>

Hence, whether the State of the perpetrator is a member of the International Criminal Court or not, if he is suspected of these crimes, she/he will appear at the ICC and it is legal for the Security Council to institute a committee that investigates, basing the report to issue a Resolution and to refer to the Prosecutor of the ICC to deal with, if there is a prima facie.

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<sup>157</sup> *ibid.*

## **CHAPTER THREE**

### **Analysis on the situation of the Republic of the Sudan, Darfur and some other related issues**

#### **3.1. The unique features of the African Heads of States/Governments**

The main point of the thesis is to deal with the power of the SC to pass a resolution and refer it to the ICC for the crimes committed by the presiding Head of States/Governments. Although the emphasis in this thesis is on the Sudan, the main point raised is equally applicable to those African Head of States/Governments who stay in power for a long time. Many Head of States/Governments who stay long in power commit international crimes. They resist by all means in their power anyone who tries to remove them from power.

It is true that a few Head of States/Governments do not stay in power for a long time; most of them are deposed from power by their own people. Unfortunately many Head of States/Governments, including those who commit atrocities against their own people stay in power for a long time. Moreover, there are countries that do not have laws that bestow basic human rights on their citizens.<sup>158</sup> In some of these countries, democratic elections are regularly held, but invariably the ruling parties always win. Most of these countries have very good constitutional laws, which limit the duration of power both of parliament and the leaders. Moreover, individual citizens have such basic rights as to elect or to be elected. However, all the above mentioned rights are put aside by the ruling party. This act of indifference to the wishes of the people, in most cases leads to bloodshed.<sup>159</sup>

Ruling for a long period of time seems not to be a healthy sign. Most of the time, it paves a way to civil war, rebellion or coup d'état. It is in these situations, especially, during civil wars, those crimes against humanity, war crimes and genocide would be committed.<sup>160</sup> These crimes are committed not only by the subordinates of the leaders, but also by the leaders themselves. These

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<sup>158</sup>The case of Ethiopia in the Derg regime up until 1986 and the case of Eritrea for the last twenty years are the practical realities.

<sup>159</sup>The 2005 Ethiopian tragic consequence of election process, the recent case of Ivory Coast and the recent case of Nigeria are the best illustrations for this incidence.

<sup>160</sup> Antonio Cassese, *International Criminal Law*, (2<sup>nd</sup> edn Oxford University Press, New York, 2008) 102.

crimes do not come under the jurisdiction of the local court, but also under the jurisdiction of international court. It is difficult for the local courts to make the wrong doing incumbent Head of States/Governments to appear to court. Hence, they become internationally liable for their wrong doing and their country becomes vulnerable to rough relations with the international community.

Herein under are the history and terms of office of some selected African Heads of States/Governments.

### **a) The term of office of the Head of States/Governments in the case of Libya**

King Idris I was the first and only king of Libya, ruling from 1951 to 1969.<sup>161</sup> This means he was ruling for more than 17 years. His reign ended on September 1969, when he was deposed by a coup d'état launched by a group of Libyan army officers, under the leadership of Muammar al-Gaddafi.<sup>162</sup> Had coup d'état not deposed him; no one would have forecasted when the term of his office would end. Following the coup, he was put on trial in absentia, in the "Libyan People's Court", and was sentenced to death, after two years of trial.

The man who succeeded the king was Muammar al-Gaddafi, who was the longest ruling leader, not only in Africa but also in the Arab World.<sup>163</sup> He has ruled Libya for 42 years and was refusing to resign, even when the 2011 popular uprising against his ruling continues. Since he did not respect and listen to his own people, almost all the international community stood against him.<sup>164</sup>

The situation of Libya goes to worse day by day. Many innocent lives were lost every day. The sole responsibility for this atrocity was Muammar Gaddafi's.

The popular uprising has radically changed to civil war and the rebel group, by the support of the UN, struggled against the government of Libya. After almost six months of war, the rebel group has won.

At last, the rebel group, now the Libya's National Transition Council (NTC), has captured all regions of the country, and although the whereabouts of the Libyan Head of State was unknown, up until October 20, 2011, he was since captured and killed.<sup>165</sup> It is not still clear who the killer is, and the world community, particularly, the UN Security Council, has asked NTC to investigate and find out the killer.

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<sup>161</sup> <File:///Idris> of Libya-Wikipedia, the free encyclopedia.htm, 1 & 2 of 7, accessed at May 14, 2011.

<sup>162</sup> Ibid, 2 of 7.

<sup>163</sup> [File:///Who is Muammar Gaddafi OLIFABA\\_COM.htm](File:///Who is Muammar Gaddafi OLIFABA_COM.htm), 1 of 6, accessed at May 13, 2011.

<sup>164</sup> Ibid., 2 of 6.

<sup>165</sup> The Prime Minister of the Libya's National Transitional Council (NTC) has announced the death of Gaddafi after he was captured. The reason of his death, according to the Prime Minister, is the fact of fire opened between his loyal soldiers and the NTC fighters.

Had he not died, he would have faced the international prosecution, for his commission of crimes that are internationally condemned.

Here, the UN Security Council has, primarily, inclined to resolve the situation of Libya through military force. The reason for this option seems to be that the non-cooperation and non-respect of the member states do not want to extradite Omar Hassan Al-Bashir to the ICC in the situation of Darfur, Sudan. Of course, the situation in Libya got worse day by day, and there was a fear by the UN that gross atrocities may be committed. Hence, to avert such calamities, it passed resolution like no-fly zone and giving protection to civilians in every way they could.<sup>166</sup>

Later on, however, hand in hand with deploying military forces to kneel down the regime of Muammar al-Gaddafi, the UN Security Council has passed a resolution on the situation of Libya, and referred it to the ICC in prosecution.<sup>167</sup> The ICC, by its turn, issued on June 28, 2011, arrest warrants, not only for Muammar Gaddafi, but also for his son Saif al-Islam, and his brother-in-law Abdullah al-Senussi accusing them to crimes against humanity. The crimes include political murders and persecution, committed from February 15, 2011 onwards, by the Libyan authorities.”<sup>168</sup>

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<sup>166</sup> Security Council 6491<sup>st</sup> Meeting, Department of Public Information, News and Media Division, New York, SC/10187/Rev. 1, 1

<sup>167</sup> Ibid.

<sup>168</sup> UN Watch, International Criminal Court issues arrest warrant for Gaddafi, file://F:\ International Criminal Court issues arrest warrant for Gaddafi at View from Geneva.htm, 1 of 2 accessed at June 29, 2011.

## **b) The term of office of the Heads of States/Governments in the case of Egypt**

Gamal Abdel Nasser was the second President of Egypt, and the first President of the United Arab Republic. His term of office started from 23 June 1956 and ended on 28 September 1970.<sup>169</sup> This means he ruled Egypt for not less than 15 years. He was the most beloved leader, not only in his home land, but also in the Arab world at large. Among his performances, that made him so popular, were the nationalization of Suez Canal and promotion of Pan-Arabism.<sup>170</sup>

Following the Israeli conquest of the entire Sinai Peninsula, and the Gaza Strip, from Egypt, the West Bank from Jordan, and the Golan Heights from Syria, by June 10, 1967, Nasser announced his resignation, ceding all presidential powers to his Vice President. However, since many cried in open sympathy with his position, he retracted his decision the next day.<sup>171</sup>

Nasser suffered a heart attack and passed away on 28 September 1970. Following the announcement of his death, his homeland, as well as the Arab World, was in a state of shock.<sup>172</sup>

Contrary to almost all his good name, however, his opponents accused him of being a dictator who committed numerous human rights violations, frustrated democratic progress, and led a repressive administration that imprisoned thousands of Egyptians who opposed him. These oppositions arose from communists and members of the Muslim brotherhood.<sup>173</sup>

From this it can be deduced that, although there were a few good leaders, like Nasser, as the term of their office exceeded over a long period, it is natural for the people to look for change.

Anwar El-Sadat succeeded Nasser, first by becoming an interim President, and then, by official election, as President, on 5 October, 1970.<sup>174</sup> Anwar El-Sadat promised at his nomination as follows:

*“I have come to you along the pass of Gamal Abdel Nasser and I believe that your nomination of me to assume the responsibility of the presidency as a nomination for me to continue the path of Nasser.”*

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<sup>169</sup> <File:///C:/Gamal> Abdel Nasser-Wikipedia, the free encyclopedia.htm, 1 of 38, accessed at May 14, 2011.

<sup>170</sup> Ibid., 13 & 15 of 38.

<sup>171</sup> Ibid., 23 of 38.

<sup>172</sup> Ibid., 26 of 38.

<sup>173</sup> Ibid., 28 of 38.

<sup>174</sup> Ibid., 28 of 38.

Later on, however, Sadat worked hard to come out of Nasser's shadow. The departure from Nasserist policies becomes far more pronounced and far reaching that accounted for the anger of a large segment of Egyptian society who saw the attempt as an assault on their national feeling and political views.<sup>175</sup> As a result, he was assassinated.

On 14 October 1981, Sadat was succeeded by Hosni Mubarak. The latter served, as the fourth President of Egypt up until 2011 for more than thirty years.<sup>176</sup> After these many years, however, Mubarak was ousted in 2011 Egyptian revolution.<sup>177</sup> On 11 February 2011, his official resignation was announced, and a couple of months later, a prosecutor ordered that this former President, and both his sons to be detained, for 15 days, for questioning about allegations of corruption and abuse of power.<sup>178</sup>

The term of office of Head of States /Governments of Egypt, stated above, ends by the reasons of natural death, or assassination, or demonstrations. Almost all were reluctant to hand over their power peacefully.

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<sup>175</sup> Ibid., 29 of 38.

<sup>176</sup> File//F: \Hosni Mubarak-Wikipedia, the free encyclopedia.htm, 1 of 19, accessed at May 13, 2011.

<sup>177</sup> Ibid., 3 of 19.

<sup>178</sup> Ibid., 3 of 19.

### c) The term of office of the Head of States/Governments in the case of Zimbabwe

Robert Mugabe is the second President of Zimbabwe, and assumed office on 31 December, 1987. Before his presidency, he was the first Prime Minister of the country for eight years.<sup>179</sup> Hence, being at the top of the country's political ladder, he almost served for over thirty years and is still continuing to serve.

In 1987, the system of governance of the country abolished the position of Prime Minister and Mugabe assumed the new office of executive president, gaining additional powers in the process.<sup>180</sup> Mugabe was re-elected not only in 1990, but also in 1996, that seem fairly, but the re-elections of 2002 and, especially of 2008 were disfigured by allegations of election fraud, and intimidation.<sup>181</sup> This shows that staying, for long period, in office, is not supported, though the leader may be wise, democratic and has a good reputation.

What was the general election of 2008 like? Mugabe's election campaign was launched on his birthday, in a small town, on the border with South Africa, on 23 February 2008. He denounced not only the opposition movement for democratic change (MDC), but also Simba Makoni's candidacy. He stated that the latter had no support from the majority. Tsvangirira entered race for the sole purpose of pleasing his Western backers in exchange for money.<sup>182</sup>

Within seven days, Makoni launched his campaign for the presidency, and began to accuse Mugabe of purchasing votes from the electorate.<sup>183</sup>

The Presidential elections were held on 29 March 2008, together with the Parliamentary elections.<sup>184</sup> Four days after the election, the election commission of the country announced that Mugabe and his party, known as Zimbabwe African National Union-Patriotic Front (ZANU-PF), had lost control of parliament to the main opposition party, the MDC and he released the results. According to unofficial polling, ZANU-PF and MDC took 94 seats and 96 seats respectively.<sup>185</sup> As a result, Zimbabwean government forces began cracking down on the main opposition party,

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<sup>179</sup> File://F:\Robert Mugabe-Wikipedia, the free encyclopedia.htm, 1 of 35, accessed, accessed at May 13, 2011.

<sup>180</sup> Ibid., 7 of 35.

<sup>181</sup> Ibid., 7 of 35.

<sup>182</sup> Ibid., 12 of 35.

<sup>183</sup> Ibid., 12 of 35.

<sup>184</sup> Ibid., 13 of 35.

<sup>185</sup> Ibid., 13 of 35.

and arrested at least two foreign journalists, who were covering the disputed presidential election.<sup>186</sup>

Next day, the presidential elections were conducted; Mugabe called a meeting of his top security officials, concerning the elections' results. According to some Mass Medias, he was prepared to admit defeat.<sup>187</sup> However, he was advised by the military chief to remain in the race and the official results for the presidential elections would be delayed for five weeks.<sup>188</sup>

As is stated in preceding paragraph, Mugabe had lost in the first round, getting 43.2% of the vote but Tsvangirai collected 47.9% of the vote. However, since the needed +50% is not fulfilled, a presidential run-off became indispensable.<sup>189</sup>

Amazingly, the results were reversed after run-off ballots and were announced that Mugabe had managed to collect 85.5% while his opponent, Tsvangirai got only 9.3%.<sup>190</sup>

Mugabe is still leading the country and no one can tell when his term of office will end. Either death will remove the 87 year old Mugabe or people would revolt against the government just like what had happened in Algeria, Egypt, and Libya, or international community would instigate a coup d'état. This is also left for the time to decide.

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<sup>186</sup> Ibid., 13 of 35.

<sup>187</sup> Ibid., 13 of 35.

<sup>188</sup> Ibid., 13 of 35.

<sup>189</sup> Ibid., 13 of 35.

<sup>190</sup> Ibid., 13 of 35.

#### **d) The term of office of the Head of States/Governments in the case of Ethiopia**

Mengistu Haile Mariam was a military officer who became the most prominent officer of the Derg. The communist military junta that was led by Mengistu ruled Ethiopia from 1974 to 1986, without having a Constitution. He ruled the country as the President of the People's Democratic Republic of Ethiopia, from 1987 to 1991.<sup>191</sup>

It was in 1974 that Emperor Haile Selassie's regime lost public confidence following a famine in the Wolo province, which led to the Ethiopian revolution.<sup>192</sup> Consequently, a committee of low ranking officers and enlisted soldiers led by Atnafu Abate took over power. That time Mengistu was one of the lesser officials, representing the Third Division. Mengistu became member of Derg because his commander considered him a trouble-maker and wanted to get rid of him.<sup>193</sup> Using the chance, he became the most influential member of the Derg, although he wanted to act through more known military officers such as his former mentor, General Aman Andom, and later Teferi Benti.<sup>194</sup>

As soon as the Derg took over power, under the leadership of Mengistu, he ordered the execution of 61 ex-officials of the imperial government, on 23 November 1974, without any trial.<sup>195</sup> Mengistu also oversaw the Ethiopian Red Terror of 1977 to 1978 which has claimed the lives of more than fifty thousand people. At that time, he shouted in a public speech "death to counterrevolutionaries! Death to the EPRP!" and smashed three bottleful of what appeared to be blood, to the ground, to show what the revolution would do to its enemies. Following the public speech, thousands of young men and women were found dead in the streets of the capital and other cities.<sup>196</sup>

However, the strength of the military was gradually eroded. Humiliating defeats were taking place here and there.<sup>197</sup>

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<sup>191</sup> F:/F:\Mengistu Haile Mariam-Wikipedia, the free encyclopedia.htm, 2 of 13, accessed at May 13, 2011.

<sup>192</sup> Ibid., 3 of 13.

<sup>193</sup> Ibid., 3 of 13.

<sup>194</sup> Ibid., 3 of 13.

<sup>195</sup> Ibid., 3 of 13.

<sup>196</sup> Ibid., 4 of 13.

<sup>197</sup> The battle of Afabet in March 1989 done by Derg with EPLF followed by the crushing defeat at shire less than a year later by TPLF are the best examples.

The incident amounted to an attempt of a coup by the Derg senior military officials but was not successful.<sup>198</sup>

The power of Derg ended in May 1991, when the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) forces advanced on the capital city, from all sides, and Mengistu fled the country, and was granted asylum in Zimbabwe.<sup>199</sup>

Thanks to the people of Ethiopia, the term of office of Mengistu was only about 17 years, when EPRDF took over power. With all this strong military staff, sophisticated weapons, and insatiable appetite to rule, no one thought that the Derg's life would be as short as 17 years to be.

Unfortunately, just like most of African Head of States/Governments, Mengistu could not escape from trial in absentia, by Ethiopia's High Court. He was indicted for genocide and crime against humanity and sentenced to death.<sup>200</sup>

The successor party of the Derg is the EPRDF, and the successor of Mengistu is President of the Transitional Government Meles Zenawi. His Premiership has been the decisive on the course that the country took.

According to Meles, the victory of EPRDF in a civil war is a triumph for the thousands of TPLF fighters, who were killed, and for the millions of Ethiopians, who were victims of the country's biggest famine during the preceding regime. An estimated 1.5 million Ethiopians died of famine and the Red Terror.<sup>201</sup> For the victory of the EPRDF, the Arab League and the Western Nations played a great role.<sup>202</sup> There were some who thought that the United States had a lion's share in strengthening the position of EPRDF rebels which helped seize power in Ethiopia. For this reason many angry demonstrators, in the capital city, protested against Herman Cohen, the U.S. State Department's Chief of African affairs, who attended a Conference at which the transitional Government was agreed upon. Those demonstrators viewed his visit as legitimizing the EPRDF.<sup>203</sup>

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<sup>198</sup> Ibid., 6 of 13.

<sup>199</sup> Ibid., 6 of 13.

<sup>200</sup> Ibid., 6 of 13.

<sup>201</sup> <File:///A:\Meles> Zenawi-Wikipedia, the free encyclopedia.htm, 5 of 37, accessed at May 17, 2011.

<sup>202</sup> Ibid., 5 of 37.

<sup>203</sup> Ibid., 5 of 37: A New York Times editorial had also commented in 1991 the same idea as to this issue.

The success of EPRDF was welcomed as a relief from Derg. However, this does not mean that it was free from opposition. There was a strong anti-EPRDF sentiment in many areas, especially in the capital city and by Ethiopian abroad.<sup>204</sup>

Meles and his party ruled, and still ruling, Ethiopia beginning from 1991 onwards. During the EPRDF rule, three elections had taken place but, officially, no opposition party had succeeded in getting the majority seat in parliament, and no party from opposition parties had ruled the country.

Meles had encountered the real challenge for the first time in 2005 elections. Although his party had been declared winner and stayed on power for another term, these elections have been the most contested, and the most controversial in 'Ethiopian short democratic history'.<sup>205</sup> Some opposition parties are arguing that the election was stolen by the ruling party.<sup>206</sup>

Relatively, the Premier and his party had tried to lay down the foundation of democratic institutions, and the rule of law in the country. But most of the opposition parties and international human rights organizations accused the merciless action and human rights violations of the EPRDF. Those who suffered the most were members of the opposition parties. Moreover, the opposition parties criticized the system of EPRDF as not being free from impartiality, some institutions like, the Electoral Board, military and even the judiciary, are among those cited as not being free from discrimination.<sup>207</sup>

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<sup>204</sup> Ibid., 5 & 6 of 37.

<sup>205</sup> Ibid., 6 of 37.

<sup>206</sup> Ibid., 6 of 37.

<sup>207</sup> Ibid., 6 of 37.

### e) The term of office of the Head of States/Governments in the case of Uganda

Following the Uganda's independence, Sir Edward Mutesa became the new nation's first President, while Milton Obote became the Prime Minister. Idi Amin was the supporter of the latter and he rose in the ranks.<sup>208</sup>

Amin was sent to Israel as a paratrooper. From that time on wards, he had been a good friend with the Israelis.<sup>209</sup>

After a financial humiliation, in which Obote and Amin were accused of smuggling, in 1966. In the face of growing opposition from king Mutesa, Obote "suspends the constitution, arrested half his cabinet, and installed himself as President for life." Amin played a great role in driving Mutesa out the palace and forcing him into exile.<sup>210</sup>

As a reward, Amin was promoted to major general, and was appointed chief of the army and air force. As Amin began to build a support base in the army, his relations with Obote had started to cool.<sup>211</sup>

In 1971, with the help of the Israel and the consent of the British, Amin staged a coup and accused Obote and his regime of corruption, economic mismanagement, suppressing democracy and failing to maintain law and order.<sup>212</sup>

The Ugandans initially, supported the coup, since Amin promised that Obote's secret police would be abolished, all political prisoners to be freed, economic reforms will be introduced and civilian rule would be returned quickly. However, promises were broken and no elections were held during Amin's reign.<sup>213</sup>

Amin was accused not only of mass killings of officers and troops, but also of being loyal to Obote. Amin expelled uncountable numbers of Indians and Pakistanis, with the objective of making Uganda "a black man's country". He also murdered between 100,000 and 500,000

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<sup>208</sup> File://F: Idi Amin Killer file.htm, 2of 8, first published 20 February 2001 reviewed 14 march 2007; updated 2 may 2007 accessed at May 13, 2011.

<sup>209</sup> Ibid., 2 of 8.

<sup>210</sup> Ibid., 2 of 8.

<sup>211</sup> Ibid., 2 of 8.

<sup>212</sup> Ibid., 2 of 8.

<sup>213</sup> Ibid., 3 of 8.

members of rival tribes, from a variety of professions. He declared himself President for life, forcing white residents of Kampala, to carry him on a throne, then kneel down before him, and recite an oath of loyalty.<sup>214</sup>

Because of his cruelty, the international community, particularly, Great Britain, Israel and Tanzania facilitated his deposition.<sup>215</sup>

In 1979, Amin fled to Libya when the Tanzanian forces took Kampala.<sup>216</sup> Had this not happened, the cruelty of Amin's would have claimed the lives of many innocent people.

Although Obote returned to power, in Uganda, following a general election, one year after the flight of Amin, his second administration was as violent as Amin's and he was once again ousted, in July 1985.<sup>217</sup>

Milton Obote was succeeded by President Yoweri Museveni. This man assumed office on 25 January, 1986, and is still leading the country.<sup>218</sup>

Museveni, in his fourth years' as interim President, needs to avoid repeating the mistakes that are characterized by corruption, factionalism and an inability to restore order.<sup>219</sup>

From 1996 up to now, four elections for Presidency have been held. Museveni had participated in all and won.<sup>220</sup> As a Head of State, he is among the relatively better leaders on the continent. He is mentioned not only for the restoration of security and economic normality of the country, but also for his amazing effort to fight poverty and HIV/AIDS.<sup>221</sup> As a system, what other countries of the continent should learn from Uganda is that the 1995 Ugandan Constitution provides only for a two-term limit for the President, the Prime Minister, and the Parliament.<sup>222</sup> This was a great step forward towards true democracy. Nonetheless, the second term elections were full of controversy. Here under was the case:

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<sup>214</sup> Ibid., 4 of 8.

<sup>215</sup> Ibid., 4 of 8.

<sup>216</sup> Ibid., 6 of 8.

<sup>217</sup> Ibid., 6 of 8.

<sup>218</sup> <File:///F:/Yoweri> Museveni-Wikipedia, the free encyclopedia.htm, 1 of 25, accessed at May 13, 2011.

<sup>219</sup> Ibid., 7 of 25.

<sup>220</sup> Ibid., 7 of 25.

<sup>221</sup> Ibid., 15 of 25.

<sup>222</sup> Ibid., 15 of 25.

*There was much recrimination and bitterness during the 2001 presidential elections campaign, and incidents of violence occurred following the announcement of the results-which were won by Museveni. Besingye challenged the election results in the Supreme Court of Uganda. Two of the five judges concluded that there were such illegalities in the elections, and that the results should be rejected. The other three judges decided that the illegalities did not affect the result of the election in a substantial manner, but stated that “there was evidence that in a significant number of polling stations there was cheating” and that in some areas of the country, “the principle of free and fair election was compromised.”<sup>223</sup>*

Although, the constitution unequivocally limits the term of Presidential rule to two terms, supporters of Museveni began a campaign to loosen Constitutional limits on the Presidential term to allow Museveni to stand for election again in 2006.<sup>224</sup>

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<sup>223</sup> Ibid., 15 of 25.

<sup>224</sup> Ibid., 15 of 25.

**f) The term of office of the Head of States/Governments in the case of Cote d'Ivoire**

Laurent Koudou Gbagbo served, as the fourth President of the country, from 2000 until his arrest, in April 2011.<sup>225</sup> Arrest for Gbagbo is not a new thing since he was imprisoned in the early 1970s, but also in the early 1990's.<sup>226</sup> Gbagbo succeeded to Presidency from Robert Guei, head of the military junta, because the latter barred other leading politicians from running against Gbagbo, in the October 2000 Presidential election.<sup>227</sup>

At a time when Cote d'Ivoire was preparing to elect a President, the candidates' for Presidency were Mr. Laurent Gbagbo and Mr. Allasane Ouattara. After balloting, it was announced that the results would be released within 48 hours. The Independent Electoral Commission (CEI), was given until Wednesday mid-night, to make its announcements, before it is turned over for decision to the Supreme Court. On Tuesday, nonetheless, one supporter of Mr. Gbagbo physically snatched the papers of the provisional results out of the commission spokesman's hands and tore them up in front of the crowd, claiming the results were not valid. Ouattara alleged Gbagbo was attempting to seize power by preventing the results from being read. By doing so, the CEI's constitutional right had expired and forbidden from making any further announcements on state media.<sup>228</sup> Following this incident over one hundred and seventy people were killed, and many displaced. For fear of war many fled across the borders, especially, to Nigeria.

It was Mr. Allasane Ouattara, who is internationally recognized as the President of the country.<sup>229</sup> However, Mr. Laurent Gbagbo declared that he is the winner of the election and is continuing to lead the country. This led to a terrible civil war, but after a short period, Gbagbo was arrested by the Republican Army of Cote d'Ivoire. Gbagbo, who led his country to the verge of civil war, handed over to the custody of the ICC early on Wednesday morning, November 30, 2011, in a pioneering extradition that could spell an end to a decade of

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<sup>225</sup> <File:///F:/Laurent> Gbagbo-Wikipedia, the free encyclopedia.htm, 2 of 9, accessed at May 18, 2011.

<sup>226</sup> Ibid., 2 of 9.

<sup>227</sup> Ibid., 2 of 9.

<sup>228</sup> Tom Plummer, '[Return](#) to the Coup d'état Status Quo: Elections in Cote D'Ivoire' a Peace of Conflict says, December 3, 2010 at 11:52 am <http://www//blog.start2think.de/>, accessed at December 31, 2010.

<sup>229</sup> A day after the deadline the President of the Independent Electoral Commission, Mr. Youssouf Bakayoko had just announced on the international France 24 channel that Ouattara had won with 54.1% of the vote.

bloodshed and rebellion in Cote d'Ivoire.<sup>230</sup> This shows us that there will be no handing over of power in peace, in Africa.

To sum up, of course, there are some Head of States/Governments, in Africa, who have good reputation and who are relatively democrats but as time goes by their capacity for leading their countries declines. Hence, handing over their leadership to the young generation becomes imperative, not only for the people and the country, but also for themselves. There are democratic leaders all over the world, at least who are at par with these African leaders or more democrats, nonetheless, their tenure does not exceed two times.

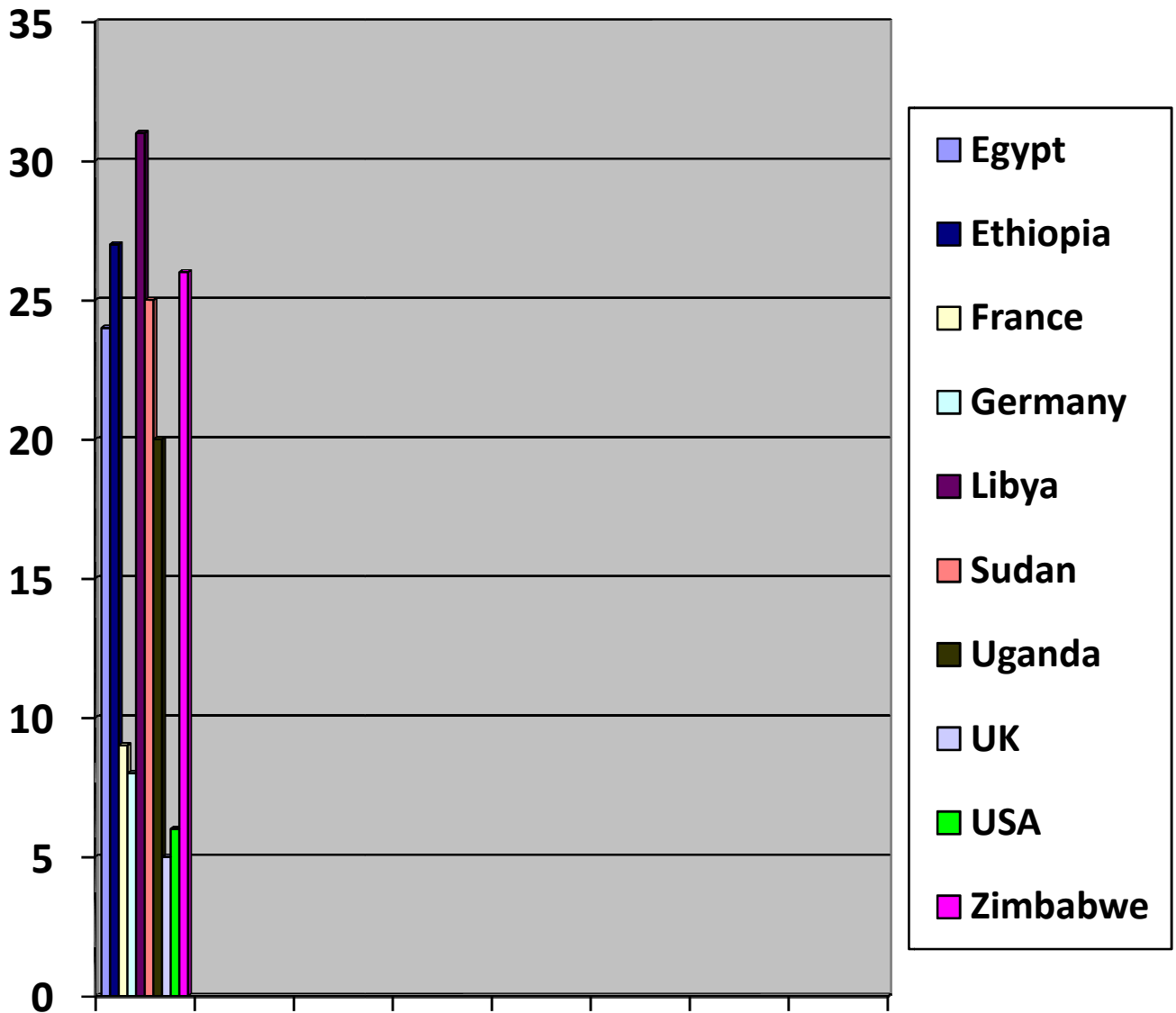
The trend of staying for a long period of time, in office should be broken, because its disadvantages highly outweigh the advantages. For a very long period of time, children of this continent are always mentioned for starvation, disease, mass killings and for their backwardness. There may be some connection between these problems and the way that the continent is ruled. If so, the way that the countries of Africa are ruled should be changed.

Think of the Head of States/Governments of the United States of America, the Head of Governments of United Kingdom, and some other Westerns countries, leading their countries and people for more than twenty years. This seems madness even to dream it. Hence, African leaders should follow the example of the countries mentioned above.

The following chart shows the duration of the term of office for African Head of States/Governments and that of other countries.

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<sup>230</sup> Julius Cavendish, Former Ivory Coast President Laurent Gbagbo Extradited to Hague (VIDEO), The Christian Science Monitor, 1, November 30, 2011.



Source: Encarta Premium DVD 2009

Comparison on sample of the average term of office of a single African Head of State/Government with those of Western countries

As is shown in the chart, the difference of the average term of a single African Head of State/Government and the Head of State/Government of the Western countries is very visible. For instance, in a century's time, the Head of States/Governments that lead the USA are about 15, whereas the number of Head of States/Governments that lead in every country in the continent of Africa would not be more than 4. There is no contention that the Head of States/Governments of the former, are more democrat, especially, for their nationals, than the latter. However, no one would allow them to lead more than the years enumerated under the chart.

Therefore, the experience of the Western countries is a very big lesson to African countries. As the term of office and the tenure of the Head of States/Governments is fixed, there is no reason for the people to resort to unlawful measures, such as civil war, coup d'état and uprising. This, in turn, has a positive effect on the decrease of the crimes committed by the Head of States/Governments.

It is difficult to think of the African leaders living peacefully in their homeland, after their term of office. The reason stems from their harsh ruling, when they were presiding Head of States /Governments, expressed by revenge or fear of the successors not to be re-snatched power. This paves a way for these leaders to refuse handing over of power without fighting tooth and nail. For fulfilling their desire to stay in power for a long period, they commit crimes that are condemned by international community.

It would be better not to conduct election in most countries of the continent; since it is always accompanied by deaths of thousands of citizens, destruction of assets and displacement of hundreds of thousands, from their homes. To overcome these problems, democratic foundations should be anchored, which are expressed by neutralize the military, a neutral Electoral Board, independent judiciary, and faithful political parties.

Although the case of the Sudan is similar to the above mentioned countries' Head of States/Governments, there are additional problems that have attracted the international community to typically entertain to look at the question of the republic of Sudan afresh.

### **3.2. The current Head of State/Government of the Republic of the Sudan and the incidents during his rule**

The case of the existing Head of State/Government of the Sudan is the core issue of the thesis. Hence, it is relevant to discuss who this gentleman is and what has happened during his rule.

Omar Hassan Ahmad, al-Bashir was born in January 1, 1944, in the north of Khartoum, in the village of Hosh Bannaga, and his origin is from an Arab tribe, in North of Sudan.<sup>231</sup> He received his primary education in this village and completed his secondary education at the capital city of the Sudan when his family moved there.<sup>232</sup> In 1960, he joined the Sudanese Army, not only studying at the Egyptian Military academy in Cairo, but also graduated from the Sudan Military Academy in Khartoum, in 1966.<sup>233</sup> He did not strive more for gaining ranks and became a paratrooper soon. In addition, during the October war of 1973, against Israel, he served in the Egyptian Army.<sup>234</sup>

In 1989, he assumed power, when he was a brigadier, in the Sudanese army, led a group of officers in a bloodless military coup that deposed the government of Prime Minister Sadiq al-Mahdi. It can be concluded that his attaining of power was not friendly with law and the people of Sudan did not consent. From that time on, he leads the country as a President of Sudan and the Head of the National Congress Party.<sup>235</sup>

During his rule, civil war had raged between the northern and southern halves of the country for about a couple of decades between the northern Arab tribes and native southern African tribes.<sup>236</sup> This civil war is termed as the ‘Second Sudanese Civil War’ since there was a prior war before the Presidency of al-Bashir,<sup>237</sup> and soon effectively developed into a struggle between the Sudan People’s Liberation Army and al-Bashir’s government.<sup>238</sup> The displacement of millions of Southerners, starvation, and deprivation of education and health care, with almost two million

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<sup>231</sup> [http://en.Wikipedia.org/wiki/Omar-\\_al-Bashir](http://en.Wikipedia.org/wiki/Omar-_al-Bashir), Omar al-Bashir-Wikipedia, the free encyclopedia, 2 of 11, accessed at August 16, 2010.

<sup>232</sup> *Ibid.*, 2 of 11.

<sup>233</sup> *Ibid.*, 2 of 11.

<sup>234</sup> *Ibid.*, 2 of 11.

<sup>235</sup> *Ibid.*, 1 of 11.

<sup>236</sup> *Ibid.*, 4 of 11.

<sup>237</sup> *Ibid.*, 4 of 11.

<sup>238</sup> *Ibid.*, 4 of 11.

casualties, were the results of this war.<sup>239</sup> Consequently, various international sanctions were placed on the government of al-Bashir.<sup>240</sup> This pressurized the government of al-Bashir to make efforts to end the conflict and allow humanitarian and international workers to deliver relief to the Southern regions of the Sudan.<sup>241</sup> Much progress was made throughout 2003 and the peace was consolidated with the official signing, by both sides, of the Nairobi Comprehensive Peace Agreement, January 9, 2005, granting Southern Sudan autonomy for six years, to be followed by a referendum about independence.<sup>242</sup>

Although it is by the pressure of the international community, the government of al-Basher has taken a remarkable step to end this Second Sudanese civil war, one of the longest running and deadliest wars of the 20<sup>th</sup> century, by granting the above limited autonomy to Southern Sudan.<sup>243</sup>

However, this government did not allow the formation of political parties and introduced an Islamic legal code in the country.<sup>244</sup> In the Republic of the Sudan, there are many citizens, who have a religion which is different from Muslim. Hence, imposing the Islamic legal code, i.e. Sharia law, would mean favoring some section of society while disregarding others and this will be contravention of international human rights laws. Had the government of al-Bashir learned from the end of the Second Sudanese War, it would have solved the present conflicts amicably.

Although the problem of Southern Sudan has been settled, (this is because of the separation of the Southern Sudan from the Mother Sudan) there has been a violent conflict in Darfur, which has resulted in great loss of lives ranging from 200,000 to 400,000.<sup>245</sup> Several violent struggles between the Janjaweed militia and rebel groups, such as the Sudanese Liberation Army/Movement (SLA/M), and the Justice and Equality Movement (JEM), in the form of guerrilla warfare, in the Darfur region is still active during his term of office.<sup>246</sup>

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<sup>239</sup> Ibid., 4 of 11.

<sup>240</sup> Ibid., 4 of 11.

<sup>241</sup> Ibid., 4 of 11.

<sup>242</sup> Ibid., 4 of 11.

<sup>243</sup> Ibid., 1 of 11.

<sup>244</sup> Ibid., 2 of 11.

<sup>245</sup> <File:///F:/Omar> al-Bashir-Wikipedia, the free encyclopedia.htm, 2 of 13, accessed at May 18, 2011.

<sup>246</sup> Ibid., 2 of 13.

Moreover, this civil war has displaced, not only 2.5 million people, but also resulted in bad diplomatic relationship between the Sudan and the neighboring Chad.<sup>247</sup>

The ethnic groups who are attacked by the Government of Sudan (GoS) are Masalit, Fur and Zaghawa. On top of the attack other crimes such as rape, murder and torture are of daily occurrences.<sup>248</sup>

The major reason for the conflict is believed to be ethnic rather than religious. The ethnic cleansing of non-Afro-Arab population, by the Janjaweed militia, has reportedly reached about 300,000 dead. The Sudanese government, however, has denied this, saying the numbers of people who are killed in the conflict are less than 10,000.<sup>249</sup> The disparity in number does not matter, what matters is the seriousness of the conflict and admission of the belief having a serious conflict. Although the government of al-Bashir has admitted the crisis in Darfur, it did nothing to minimize the crisis.

Instead the government has been accused of suppressing information not only by arresting, but also by murdering witnesses since 2004, and tampering with evidence, such as covering up mass graves.<sup>250</sup>

The catastrophic humanitarian crisis has reached enormous proportion. The government has no plan for solving the problem. Many people are displaced from their homes suffering great privation.<sup>251</sup>

In mid-2004, the humanitarian crisis in Darfur was expressly linked to international peace and security, in the UN Security Council Resolution.<sup>252</sup> This paves a way for the Security Council, following a report from the Commission of Inquiry, to decide that the situation in Darfur ought to be referred to the International Criminal Court.<sup>253</sup>

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<sup>247</sup> Ibid., 2 of 13.

<sup>248</sup> Ibid., 2 of 13.

<sup>249</sup> [http://en.Wikipedia.org/wiki/Omar-\\_al-Bashir](http://en.Wikipedia.org/wiki/Omar-_al-Bashir), (n 74), 5 of 11.

<sup>250</sup> Ibid., 5 of 11.

<sup>251</sup> <File://F\Crisis in Darfur-International Crisis Group.htm>, 8 of 15, accessed at May 17, 2011.

<sup>252</sup> SC Re. 1556, July 30, 2004.

<sup>253</sup> Robert Cryer, The Definitions of International Crimes in the Al Bashir Arrest Warrant Decision, 283-284, downloaded from <http://jicj.oxfordjournals.org> at Addis Ababa University Libraries on May 15, 2010.

The crimes committed during Al-Bashir's rule that which are considered as war crimes, were as follows. Hundreds of attacks on villages and the attendant circumstances that paved to his suspect were the unlawful attacks on civilians and embezzlement.<sup>254</sup> These crimes were committed during the armed conflicts in the western territory of the Republic of the Sudan, when there was protracted armed conflict between the government of al-Bashir and the rebels, termed the Sudan Liberation Army/Movement (SLA/M), Justice and Equality Movement (JEM). This means the crimes were committed in the context of an armed conflict that is at par with the provisions of the Rome Statute.<sup>255</sup>

In relation to crimes against humanity; extermination, forcible transfer, torture and rape committed within a short period of time, not only widespread but also systematic, have been committed during the rule of al-Bashir murder.<sup>256</sup> Hence, it would be determined that there were reasonable grounds to suspect the head of State of the Republic of Sudan to commit these crimes knowingly or negligently.

The crimes would fulfill the requirements stipulated under the provisions of the Rome Statute<sup>257</sup> and there is nothing wrong with respect to the SC to refer the Resolution to the Prosecutor.

The third crime which the ICC has jurisdiction over is genocide. The commission of this crime in Darfur is controversial. For instance, the UN Commission of Inquiry has found out that certain government representatives have acted with genocidal intent. However, according to this body, there was not sufficient evidence to prove that the Sudanese governmental has policy to commit genocide.<sup>258</sup> Whereas the Prosecutor believed that there was an indication of the intent of the government of al-Bashir committing genocide.<sup>259</sup> He based his argument on three counts. These are *killings, causing bodily harm and deliberately inflicting conditions which are harmful life, calculated to bring about the destruction of the Fur, Masalit and Zaghawa groups.*<sup>260</sup> Moreover, the Pre-Trial Chamber had rejected this charge due to the insufficiency of evidence and later on,

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<sup>254</sup> Ibid., 284.

<sup>255</sup> Rome Statute of the International Criminal Court, (Rome, entered into force on 1 July 2002), Article 8 (2)(e) and (f).

<sup>256</sup> Robert Cryer, (n 96) 286.

<sup>257</sup> Rome Statute of the International Criminal Court, (n 98) Article 7.

<sup>258</sup> Report of the Commission of Inquiry on Darfur to the Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, UN Doc. S/2005/60, 1 February 2005, 520 and 518.

<sup>259</sup> Robert Cryer, (n 96) 289.

<sup>260</sup> Ibid., 289.

after a lengthy appeal by the Prosecutor, held that there was indeed sufficient evidence for charges of genocide to be brought, and issued a second warrant containing three separate counts.<sup>261</sup>

All the above atrocities have been committed during the rule of Omar Hassan Ahmad Al Bashir, who is the de jure and de facto president of the state of the Republic of Sudan, since 16 October, 1993, and commander-in-chief of the Sudanese Armed Forces.<sup>262</sup> This had amounted to a certainty on Al Bashir's coordination of the design and implementation of the counter-insurgency campaign because at least all branches of the machinery of the State of the Republic of the Sudan were under his control, which had become the weapons to secure the implementation of the counter-insurgency campaign.<sup>263</sup>

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<sup>261</sup> [http://en.Wikipedia.org/wiki/Omar-\\_al-Bashir](http://en.Wikipedia.org/wiki/Omar-_al-Bashir), (n 74), 1 of 11.

<sup>262</sup> Manisuli Ssenyonjo, *The International Criminal Court and the Warrant of Arrest for Sudan's President al-Bashir: A Crucial Step Towards challenging Impunity or a Political Decision?*, Martinus Nijhoff publishers, Nordic Journal of International Law 78 (2009), 397.

<sup>263</sup> Michael P. Scharf, *Introductory Note to the International Criminal Court's arrest Warrant for Omar Al Bashir, President of the Sudan*, Content downloaded/printed from HeinOnline (<http://heinonline.Org>) Sat Jul 31 03:56:32 2010, 463.

### 3.3. Under whose jurisdiction does the conflict in Darfur fall?

Prior to sorting out the responsible organs for handling the issue at hand, it is advisable to highlight what the causes of the conflict are, and the types of the crimes committed, so on.

The Darfur region is one among the 8 regions of the Republic of the Sudan. It is situated in the Western part of the country, which covers an area of, approximately, one fifth of the country having about six million inhabitants.<sup>264</sup>

The conflict, in this region, dates back to some eight years, when the Sudan Liberation Army/Movement (SLA/M), and Justice and Equality Movement (JEM) began to attack the government of the Sudan.<sup>265</sup> These rebels are a combination of either the Fur and Masalit group, or the Zaghawa group, situated at different places of the region.<sup>266</sup>

As a result, the government of the Republic of the Sudan attacked all the people in Darfur without any discrimination. The attack was widespread, and affected, at least hundreds of thousands of individuals, and took place across large swathes of the territory of the Darfur region.<sup>267</sup> These attacks amounted to the suspect crimes condemned by the UN as crimes against humanity, war crimes and genocide.<sup>268</sup>

No one could believe that these horrific acts have happened in the 21<sup>st</sup> century. However, these have been committed during the reign of Omar Hassan al-Bashir of the Sudan.

The acts did not take place once but rather many times between 2003 and 2008. In the years stated, no organ was willing to intervene, although the AU stated that it tried its best to resolve the conflict politically and diplomatically, other than the UN Security Council and the ICC, even

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<sup>264</sup> Takele Enkossa, *The Legality of the Indictment of President Omar Hassan Al-Bashir by the International Criminal Court under International Law*, (Unpublished, Addis Ababa University, Addis Ababa, 2010) 59.

<sup>265</sup> [http://www.globalsolutions.org/issues/sudans\\_president\\_omar\\_hassan\\_al\\_bashir\\_indicted...Sudan's](http://www.globalsolutions.org/issues/sudans_president_omar_hassan_al_bashir_indicted...Sudan's) President Omar Hassan al-Bashir indicted by the ICC: What's Next? Global Sol..., 1 of 3.

<sup>266</sup> *Ibid.*, 1 of 3.

<sup>267</sup> International Criminal Court Pre-Trial Chamber I, Situation in Darfur, Sudan in the case of the Prosecutor v. Omar Hassan Ahmad al-Bashir (Omar al-Bashir), Public Document Warrant of arrest for Omar Hassan Ahmad al-Bashir, No. ICC-02/05-01/09, 4 March, 2009, 5 of 8.

<sup>268</sup> Antonio Cassese, *International Criminal Law*, (2<sup>nd</sup> edn Oxford University Press, New York, 2008) 102.

the latter has been set up to bring perpetrators of international crimes to justice<sup>269</sup>, unless it complements the jurisdiction of national courts.<sup>270</sup> This means it only handles cases when national courts are not willing or not able to prosecute.

Of course, as is stated above, there were others who may have had jurisdiction over the case at hand. For instance, other than the national courts of the Republic of the Sudan, the African Union Peace and Security Council, plus the African Court of Justice, although the latter is not yet functional, or any other ad hoc tribunal can handle the case, since there is a legal ground for the jurisdiction.<sup>271</sup> Even the Charter of the United Nations encourages regional organizations, such as African Union, to settle such conflicts, by peaceful means, either by non-binding or binding mechanisms.<sup>272</sup>

The case at hand is the issue that should be remedied by referring the case, for a judicial settlement. Nonetheless, although the African Union (AU) had tried to find a resolution, in the ways it believed appropriate it did not bear fruitful. As a result the UN, especially, its organ the SC, should not wait, by crossing its hands, until the crisis became more aggravated. This is because a clear majority of delegations, participated at the Rome Conference, supported the power of the SC to initiate proceedings of the ICC. The provision of the Rome Statute thereby acknowledges the enforcement the powers of the Council, acting under Chapter VII of the Charter of the UN, to refer a situation to the prosecutor, in which one or more of the crimes falling within the jurisdiction of the ICC appears to have been committed.<sup>273</sup> After the ICC indicted the Head of State of the Republic of the Sudan, African Union requested for deferring the case, by the mere reason of its ongoing works on the case of Darfur crisis.<sup>274</sup> However, no concrete results have been registered.

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<sup>269</sup> Jennifer Falligant, *The Prosecution of Sudanese President Al Bashir: Why a Security Council Deferral would harm the Legitimacy of the International Criminal Court*, Content downloaded/printed from HeinOnline (<http://heinonline.org>) Sat Jul 31 03:59:17 2010, 730.

<sup>270</sup> *Ibid.*, 732.

<sup>271</sup> Protocol Relating to the Establishment of the Peace and Security Council of the African Union, (Adopted by the 1<sup>st</sup> Ordinary Session of the Assembly of the African Union, Durban, 9 July, 2002) Article 16.

<sup>272</sup> The Charter of the United Nations, (San Francisco, 1945) Article 52.

<sup>273</sup> Roy S. Lee, (ed), Lionel Yee, *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, (Kluwer Law International, The Hague, The Netherlands, 1999, 147.

<sup>274</sup> African Union Assembly of Heads of States and Governments passed a decision on the application by the International Criminal Court for the indictment of the President of the Republic of Sudan to defer the case since it believes that it had/has done and will do its best to settle.

With respect to the situation of Darfur, the ICC had previously sanctioned the Issuance of an Arrest Warrant for several Sudanese nationals, located in Sudan. The Sudanese government, however, has not only refused to comply with these arrest warrants, but also has not implemented appropriate domestic mechanisms.<sup>275</sup> Therefore, the international community, through the ICC, is duty bound to intervene, since the state of the Republic of the Sudan fails to fulfill its responsibilities, as a sovereign. According to the ICC prosecutor Luis Moreno-Ocampo “there is no sovereign right to commit genocide or crimes against humanity”.<sup>276</sup> This means the principle of sovereignty is not a shield for all the responsibilities which were borne by the representatives of a distinct sovereign country.

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<sup>275</sup> Michael P. Scharf, (n 106) 463.

<sup>276</sup> Jennifer Falligant, (n 112), 733.

### **3.4. The emerging trend of exercising the power of the UN Security Council to adopt a resolution and refer it to the prosecutor for crimes committed by presiding Heads of States/Governments**

The primary purpose of the UN Security Council is to maintain international peace and security.<sup>277</sup> There are two means of intervention designed to achieve this purpose. The first one is to maintain international peace and security by peaceful means. The means included in this category are either diplomatic means or judicial settlement. Peaceful means should first be exhausted, but if this means of maintaining international peace and security fails economic sanctions and then military force should be used.<sup>278</sup>

However, the practice shows us that intervention by the UN Security Council favored military force and it was also selective, according to some arguers. The cases of Kosovo, Somalia and Iraq were the best evidences for the military intervention. This means of intervention is not advisable and is in contravention with the Charter of the UN, if the peaceful means was not primarily exhausted. Although the aim of the military intervention is to kneel down the perpetrators who do not change their behavior, by peaceful means, most of the time it has a negative effect on civilians and it devastates the development of the country at large.

With respect to some arguers, even the military intervention was not applied without discrimination. They base their argument on the atrocities of some perpetrators such as the case of the recent Kenyan conflict in December 27, 2007, the election fraud and the situation of the Yemeni uprising. In these and some other incidents, the UN Security Council had opted for silence although there seems to be grounds for intervention.

For instance, in the case of the Kenyan election, the polls had predicted the Orange Democratic Movement (ODM) to win, a party led by Mr. Raila Odinga, which is supported by three of Kenya's largest tribes.<sup>279</sup> Although these expectations were fulfilled with the parliamentary elections, it was expected that the presiding President, Mwai Kibaki, would strive to hold onto

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<sup>277</sup> The Charter of the United Nations, (n 115) Article 1 (1)

<sup>278</sup> Ibid., Articles 41 and 42.

<sup>279</sup> Mba Chidi Nmaju, *Violence in Kenya: Any Role for the ICC in the Quest for Accountability?*, *African Journals of Legal Studies*, 2009, 80.

power at any costs. As it was feared, Kibaki was evidently unwilling to hand over the presidency.<sup>280</sup> Three days after election, Kenya's Electoral Commission (ECK) had declared Kibaki winner of elections, though the chairman of this commission admitted the irregularities and claimed he was pressured into announcing the results.<sup>281</sup> Following the incidence, violence protest against the government and Kibaki, broke out and it "rapidly transformed into an intertribal conflict."<sup>282</sup> To control the violation of the post election, the government of Kenya had used non-proportional forces that would be decided for attaining international crimes. If crimes committed fall under the international ambit, the perpetrators ought to be prosecuted by Kenya or by the ICC, after making sure that Kenya is unable or unwilling to prosecute.<sup>283</sup> In the post-election conflict, 1000 individuals were killed, and 500 displaced, that showed the apparent serious crimes committed in Kenya.<sup>284</sup> However, it is determined that Kenya was/is unwilling to prosecute the crime.

With all these crimes, the UN Security Council was also so passive and did not send some investigators to supply a feedback, on whether or not the government of Kenya has perpetrated crimes, which fall under the international crime, so that it helped to decide adopting a resolution and referring it to the ICC prosecutor. Of course the ICC has moved the Kenyan situation forward to March 8, 2011, by issuing summonses for half a dozen of individuals, accused of crimes against humanity, during Kenya's post-election violence, in 2007-2008, to appear for initial proceedings in The Hague on April 7.<sup>285</sup> Nonetheless, it was an investigation opened by the prosecutor using his *proprio muto* powers, under article 15 of the Rome Statute, which allows him to act on his own initiative.<sup>286</sup>

Similarly, since mid-January 2011, Yemeni protesters in the streets of the capital city of the country demanded a change in government, though the protests in the south of the country were more aggressive.<sup>287</sup> Many demonstrations, accompanied by bloodshed, had been conducted in

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<sup>280</sup> Ibid.

<sup>281</sup> Ibid.

<sup>282</sup> Ibid.

<sup>283</sup> Ibid.

<sup>284</sup> Ibid., 82.

<sup>285</sup> Human Rights Watch, ICC: Justice Advances in Kenya Case, <file:///icc-justice-advances-kenya-case.htm>, 1 of 5 March 9, 2011.

<sup>286</sup> Ibid., 4 of 5.

<sup>287</sup> Wikipedia, the free encyclopedia, Timeline of the 2011 Yemeni uprising, 6 of 75.

different parts of the country up until this time.<sup>288</sup> However, the UN Security Council is reluctant to interference.

Nowadays, nonetheless, there is an inclination to intervene in a way peaceful, i.e. by referring the wrong doers to international courts. The good examples are cases referred to the prosecutor including the situation of Darfur, Sudan, the situation of Libya, although the latter was preceded by a military intervention and the recent draft resolution for the situation of Syrian uprising, although this also seems too late.

In relation to the Libyan situation, the UN Security Council unanimously adopted a resolution 1970 (2011) under Article 41 of the Charter of the UN, chapter VII. Through this resolution, the SC not only authorized all member states to seize and dispose of military-related material banned by the text, but also *“it called on all member states to facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance in Libya and expressed its readiness to consider taking additional appropriate measures as necessary to achieve that.”*<sup>289</sup>

Moreover, it referred the situation in Libya to the ICC that makes it the second referral after the situation of Darfur and the first to be passed unanimously.<sup>290</sup>

Even in the situation of Syria, though it is at a draft stage, the UN Security Council is on its way to take some corrective measures by adopting a resolution and referring it to the ICC.

This is a good step forward if it is consistently applied and accompanied with the UN member states' cooperation.

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<sup>288</sup> Ibid.

<sup>289</sup> Security Council 6491<sup>st</sup> Meeting, (n 10), 1.

<sup>290</sup> Marko Milanovic, security Council adopts Resolution 1970 (2011) with respect to Libya, EJIL Analysis, EJIL Reports, Feb. 27, 2011, 1

### **3.5. The reaction of the international community on the referral of the UN SC for the situation in Darfur**

Although it is not a reaction as such, primarily the writer would like to hear discussions on the matter by members of the Security Council. When the Security Council decided to refer the situation prevailing in Darfur, since 1, July, 2002, to the Prosecutor of the International Criminal Court (ICC) basing itself on Chapter VII of the Charter of the UN, the resolution was adopted by vote of 11 in favor, with 4 abstentions, i.e. 2 non-permanent and other 2 permanent members.<sup>291</sup>

Even though the abstention, as it is discussed earlier in detail, has no negative effect and is presumed as an affirmative vote, with the decision entered into, it is better to understand the grounds of the abstention.

Furthermore, there are many bodies of the international community which reacted either in favor of or against the resolution. However, it is only restricted to highlight their grounds for the differences.

This is because; primarily, those who support the resolution are relatively many. Secondly, they base their argument on the Charter of the UN, the Rome Statute and customary international law for their support.

Hence, the writer begins with introducing the members who abstained and the grounds for their abstention, in the first sub-chapter, and the reaction of some who were against the resolution in the subsequent sub-chapter.

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<sup>291</sup> Press Release SC/8351, Security Council 5158<sup>th</sup> Meeting (Night), 1.

### 3.5.1. The grounds of abstention for the members of the Security Council

Some members of the Security Council, Algeria, Brazil, China and the United States of America have opted for abstention. The grounds for abstention of one member are different from the other. Hence, it is better to deal with them separately.

- i. **The grounds of abstention for Algeria-**to begin with, this member has no objection disregarding immunity for the sake of maintaining international peace and security. Moreover, it has agreed that above conception is more vital in the case of Darfur is more important than community to the Sudanese President.<sup>292</sup> In short alleviating the suffering of multitude is more important than immunity, from justice, for one person.<sup>293</sup> Thus, the above notion was made clear by Algeria as:

*“T[the African Union was best placed to carry out so delicate an undertaking because it could provide peace, while also satisfying the need for justice...a[A]t the eruption of the Darfur conflict, it had been none other than the African Union that had deployed its soldiers and begun negotiating the various complex issues involved. What was true of the Sudan was true all over Africa, and Algeria regretted that for the sake of compromise at any cost those who defended the principle of universal justice had, in fact, confirmed that even in the Council there could be a double standard.”*<sup>294</sup>

- ii. **The grounds of abstention for Brazil-** Brazil has no problem with the resolution, although she had been unable to join those who had voted in favor. She also made sure that she is ready to cooperate fully, with the International Criminal Court (ICC), as fully as possible. However, she emphasized the need for checks and balances to prevent politically motivated prosecutions.<sup>295</sup>

There is no hesitation on the part of Brazil that ICC is the only suitable institution that should handle the case of Darfur. Nonetheless, Brazil expressed the fears regarding the limits to the authority of the Security Council as an international agency, and expressed

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<sup>292</sup> Ibid., 3.

<sup>293</sup> Ibid., 3.

<sup>294</sup> Abdallah Baali, delegate of Algeria at Security Council 5158<sup>th</sup> Meeting.

<sup>295</sup> Press Release SC/8351, (n 134), 6.

that she had regularly maintained that position, since the negotiations on the Rome Statute.<sup>296</sup>

**iii. The grounds of abstention for China-**by reminding her consistent follow-up and political support for the situation in Darfur, she astonishingly expressed that she deplored deeply the violations of international humanitarian law and human rights law. Moreover, she stressed her belief that the perpetrators should appear before justice.<sup>297</sup> Nonetheless, according to her, finding the most appropriate way to handle the issue should be to respond to the important question that needs proper answer. China proposed that the perpetrators stand trial in their homeland, in Sudanese courts. In other words, for China, the appropriate thing is letting the issue be adjudicated where the perpetrators were found and where the violations were committed, rather than referring them to other international body.<sup>298</sup> Another position of China is that without the Sudanese government's consent, the referral to the ICC should not be made. In addition, she has raised the issue of non-membership to the Rome Statute and her reservations, regarding some of its provisions.<sup>299</sup> These are the grounds that made her abstain from the Security Council's authorization of the referral.

**iv. The grounds of abstention for the United States of America-**according to the United States of America, those who are responsible for the crimes and atrocities that had occurred in Darfur and ending the climate of impunity, should be brought to justice.<sup>300</sup> Since there is no compromise for violators of international humanitarian laws and human rights laws, justice must be served in Darfur. However, the United States of America believed the issues be handled by the mixed team of Africans.<sup>301</sup>

The basic argument for the United States of America to abstain from the vote has to do with the non-membership to the Rome Statute. On behalf of her country the delegate contended as follows:

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<sup>296</sup> Ibid., 6.

<sup>297</sup> Ibid., 5.

<sup>298</sup> Ibid., 5.

<sup>299</sup> Ibid., 5.

<sup>300</sup> Ibid., 3.

<sup>301</sup> Ibid., 3.

*“The United States continued to fundamentally object to the view that the court should be able to exercise jurisdiction over the nationals including government officials, of states not party to the Rome Statute.”*<sup>302</sup>

However, her decision not to oppose the resolution stems from the fact of the need for the international community to work together, in order to end the climate of impunity in the Sudan, and because the resolution provided protection from investigation or prosecution for her nationals and members of the armed forces of non-state parties.<sup>303</sup>

US has promised to continue the contribution to the peace keeping and related humanitarian efforts in the Sudan. This was expressed by her delegate...

*“The United States was and would be an important contributor to the peacekeeping and related humanitarian efforts in the Sudan, she said. The language providing protection for the United States and other contributing States was precedent-setting, as it clearly acknowledged the concerns of States not party to the Rome Statute and recognized that persons from those States should not be vulnerable to investigation or prosecution by the Court...”*<sup>304</sup>

In conclusion, the delegate expressed her pleasure that all expenses incurred in connection with the referral that would be borne by the United Nations.

All human beings on this planet whether their country’s legal system is at infancy stage or developed, whether it is “democratic” or not, whether they are powerful or not, they should be treated equal. The ICC should treat them without any discrimination. Supposing two persons commit the same crime that is considered to be international crime, and also let us say one of the alleged criminals is of an American Nationality and the other is of Ethiopian Nationality. The ICC will without hesitation, warrant the Ethiopian national to appear to trial, but it will definitely set aside that of the US national. The reason for this is that it is believed that the American court is as just and impartial as the ICC

This resolution 1593 (2005), that was adopted by the SC, would not become a resolution if members of the SC had not agreed to set aside the nationals of the United States of America from

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<sup>302</sup> Anne Woods Patterson, delegate of the United States of America at Security Council 5158<sup>th</sup> Meeting.

<sup>303</sup> Press Release SC/8351, (n 134), 3.

<sup>304</sup> Ibid., 3.

investigation or prosecution. Under the resolution, the following clear conception has been stated:

*The resolution provided clear protection for United States persons. No United States person supporting operations in the Sudan would be subject to investigation or prosecution because of this resolution. That did not mean that there would be immunity for American citizens that acted in violation of the law. The United States would continue to discipline its own people when appropriate.*<sup>305</sup>

According to the above quotation, even if citizen of the United States commit an international crime, which has attained jus cogens and should be tried by the International Criminal Court (ICC), it is agreed that the act is out of the jurisdiction of the ICC and it is up to the United States of America to take measures against her own citizens to discipline them.

This is, according to the writer, an indication of a double standard. The writer is afraid that this case will establish precedence for perpetrators of international crimes, in the future. Lack of unanimity among SC members on such important case as Darfur is a matter for worry.

The agreement of the members of the SC to set aside the national of the US while asking every national of the other countries, whether party or non-party to the Rome Statute is not convincing. This is a historical mistake made by the SC and the writer does not agree with it.

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<sup>305</sup> Sc Res. 1593 (2005) 4.

### 3.5.2. The grounds of reaction of some organizations against the resolution

Some bodies were not comfortable with the adoption of the resolution. The most mentioned are the African Union and the Arab League. The two bodies opposed the resolution, but for different reasons. It is better to discuss them differently:

- i. **The grounds of the African Union reacting against the resolution**-it is in the 12<sup>th</sup> ordinary session of the Assembly of the Head of States/Governments held in Addis Ababa, Ethiopia from 1 to 3 February, 2009 that the African Union (AU) in which the issue of the indictment of the Head of State of the Sudan was raised for the first time.<sup>306</sup>

The decision undertaken at this Assembly was on the application by the International Criminal Court (ICC) Prosecutor for the indictment of the President of the Republic of the Sudan.<sup>307</sup>

After thorough discussion, AU has noted that the approval of the Application for warrant of arrest against the Head of State of the Sudan would seriously undermine the ongoing efforts made by the AU. As a result, it recommends the UNSC to defer the case pursuant to Article 16 of the ICC Statute.

Had the SC weighted for the outcome of the AU's deliberation the present differences between AU and SC would not have arisen.<sup>308</sup> Although this is AU's argument, the SC pass the resolution as a result of the dilatory AU's deliberation. That is to say had AU came up with a concrete result of its mediation between the two opposing parties in the Sudan, the SC believes that the difference between the SC and the AU would not have risen. It is clear who is at fault between the AU and the SC. The AU took two more years to find solution for Darfur, but failed. The SC could defer the matter for one year only, and that time has long passed.

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<sup>306</sup> African Union (Assembly of Heads of States/Governments) (Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan) (AU, Addis Ababa, 2009) AU/Doc. 221 (XII) available at <http://www.africa.union.org> , accessed on 13 May, 2011.

<sup>307</sup> Ibid.

<sup>308</sup> Rome Statute of the International Criminal Court, (n 98) Article 16.

- ii. **The grounds of the Arab League for reacting against the resolution**-the reaction began on July 19, 2008 when the Arab League held an emergency conference at the level of Foreign Ministers, representing each member in Cairo, Egypt, in response to the request of the Republic of the Sudan.<sup>309</sup> By rejecting the International Criminal Court's decision, they proposed their own opinion for crimes committed in Darfur. Their proposal was the prosecution of the perpetrators, if any, by either the Attorneys of the Arab League or African Union referring to the Sudanese laws.<sup>310</sup>

By the same token the Arab League Heads of States/Governments made sure that they rejected the International Criminal Court's decision to issue a warrant for al-Bashir's arrest. They condemned the Security Council's double standard for those which are allies of the powerful and those who are not. The Syrian President Assad stressed that the primary targets should have been those who committed massacres and atrocities in Palestine, Iraq and Lebanon<sup>311</sup>

Legally speaking, there is no concrete ground for rejecting the indictment against the Head of State of the Republic of Sudan.

To sum up, the term of office and the tenure of Head of States/Governments, especially, those of the African countries should be limited, because they are the ones that commit international crimes. As the term of office is not limited tenure becomes long and the leaders refuse to give up power. The Head of States/Governments can take action on those who stand against them, which amounts to international crimes. Hence, limiting the term of office has a positive effect on minimizing the risks of committing international crimes on the part of Head of States/Government.

Turning attention to the situation of the Darfur, Sudan, there was a clear indication of violations of international law beginning from 2003 onwards. Since then, not only hundreds of thousands of

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<sup>309</sup> Green, 'Controversy in the Arab World over ICC Indictment of Sudan President al-Bashir (July 24, 2008) available at <http://www.sudan.net/news/posted/16146.htm1>, accessed on 23 May 2011.

<sup>310</sup> Ibid.

<sup>311</sup> Arab leaders back 'wanted' Bashir, available at <file:///F:\BBC> News-Arab leaders back 'wanted' Bashir.htm, accessed on 23 May 2011.

people have died, but also about two million people have been relocated.<sup>312</sup> The government of the Republic of the Sudan has a lion share for the atrocities and the UN Security Council has evidenced that President Omar Hassan Al Bashir “masterminded and implemented a plan to destroy” the Fur, Masalit and Zaghawa ethnic groups.<sup>313</sup> Even before rushing to pass a resolution on the situation of Darfur, the UN Security Council and the ICC had waited up until the national courts and the national enforcers of the Republic of the Sudan took action on criminals. However, no national organ was ready to make the perpetrators appear in the national courts.

Hence, it is legitimate for the UN Security Council to pass a resolution for the situation of Darfur, and to refer it to the ICC prosecutor in order to maintain international peace and security. Its legitimacy stems from the provisions of international law, particularly, Article 13 (b) of the Rome Statute and Articles 24 & 25 of the Charter of the UN.

If this is so, member states of the UN are duty bound to respect the decisions of the UN Security Council, and cooperate for its implementation. In relation to the situation of Darfur, those member states, which did not support the resolution passed by the UN Security Council, and did not cooperate in its implementation were/are in contravention with the international law.

This has a negative impact, not only on the part of the guilty leaders, but also on the UN Security Council. The non-respect and non-cooperation of the member states would make the formers to be encouraged to continue their offensive action and make the latter to resort to military intervention, prior to exhausting the peaceful means. What has happened in the situation of Libya is a good example.

In the writer’s opinion, had the arrest warrant of President Omar Hassan Al-Bashir, of the Republic of the Sudan implemented by the member states of the UN, the UN Security Council would have been encouraged to continue passing a resolution on the future situations, including the situation of Libya, and referring it to the ICC prosecutor. Nonetheless, since the reality is to the negative, the UN Security Council has opted to resolve the situation of Libya, primarily, by military intervention.

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<sup>312</sup> Jennifer Falligant (n 112), 727.

<sup>313</sup> *Ibid.*, 728.

## CONCLUSION AND RECOMMENDATIONS

The Head of States/Governments have made a covenant not to intervene in one another's affairs, when operating and leading their people. This means a foreign State's official, including the Head of State/Government, cannot be held accountable, for what she/he has done during the term of office. In other words, Head of States/Governments are still immune with respect to State vs. State relationship and foreign intervention is highly condemned.<sup>314</sup> Matters within the jurisdiction of a single State are under the domain of that state. No one can have a say in such matters. Some scholar expressed this as follows:

*“...subjects such as tariffs or admission of aliens-typical examples of matters of domestic jurisdiction-although according to international law...incontestably within the domestic jurisdiction of the State, need not, having regard to their international repercussions, be essentially matters of domestic jurisdiction.”*<sup>315</sup>

However, this conception prevailed at the time when there were no international organizations, which work at international level, particularly, aiming at maintaining international peace and security. Nowadays, there are some special rules at the international level that are applicable to all human beings, whether officials or lay, without any discrimination.

In other words, although there is still respect for sovereignty, the concept is much more changed from sovereignty of sovereign to sovereignty of the people.<sup>316</sup>

Thus, for the sake of attaining international peace and security, and respect of sovereignty of the people, some crimes such as crimes against humanity, genocide and war crimes, even though committed within the territory of a distinct State, they are the concerns of the international community. Hence, primarily, when these crimes are committed by the State officials, including the Head of States/Governments, both indirectly and directly, plus when the host state did not take action, then international institutions like the UNSC, and the ICC are duty bound to come up

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<sup>314</sup> Vienna Convention on Diplomatic Relations (adopted on 18, April 1961, entered into force 24, April 1964) 500 U.N.T.S.95, Article 11.

<sup>315</sup> L. Oppenheim, *International Law*, (8<sup>th</sup> edn London, 1955) 377.

<sup>316</sup> Gregory H. Fox and Brad R. Roth, (eds) *Democratic Governance and International Law*, (Cambridge University Press, United Kingdom, 2000) 243.

with a remedy, as soon as possible, since the perpetrators are accountable to the international community.

International crimes, most of the time, are committed within the distinct country either when there is civil war, popular uprising, coup d'état, or other violent form of disturbance. These incidents are common in the continent of Africa. The reasons may stem from the backwardness of the people, the greediness of their leaders, for power, culturally, the non-compliance with modern system of administering, manifested by poor democratic system, absence of impartiality of military and electoral institutions, infancy of justice administration, and so on.

Unless the continent solves these difficulties, the problems would continue and the Head of States/Governments will repeatedly commit the crimes that will make them accountable at the international arena. This is because the people, almost all the Head of States/Governments are not accustomed to peaceful transition of power.

This is what has happened in Darfur, Sudan. The people of Darfur are not comfortable with the leaders of the Republic of the Sudan. These people have many questions that the government of the Republic of the Sudan did not, still does not and will not be address peacefully. Hence, the people of Darfur opted for the civil war, and the government of the Republic of the Sudan tried to stop the uprising. In so doing, many lives of some distinct groups of people have perished; women have been raped and citizens deported, without their consent, which made the international community to believe that there may be crimes committed with direct/indirect order of the Head of the State of the Republic of the Sudan.

This has paved a way for the UNSC to send investigators to the area and later for the UNSC to pass a Resolution, and refer it to the Prosecutor of the ICC to deal with. The measure taken by the UNSC is not contrary to law and there is nothing wrong with it.<sup>317</sup> Even though the Republic of Sudan is not party to the Rome Statute, as a member of the United Nations, the country is duty bound to comply with the Resolutions of the Security Council, adopted under Chapter VII of the

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<sup>317</sup> Rome Statute of the International Criminal Court, (Rome, entered into force on 1 July 2002), Articles 13 (b) & 27 (2).

Charter of the United Nations. So do other countries, whether or not they are parties to the Rome Statute.<sup>318</sup>

In addition, these crimes have attained the jus cogens, since the international community had recognized it in the cases at the Nuremberg Trial, ICTR, ICTY, and some others, even before the Rome Statute has adopted.

One should bear in mind that, appearing at the Court (Pre-trial Chamber) does not mean automatically punishment. If the Head of State of the Sudan has convinced the Court that he is innocent, the charges will be dropped, and he will be released.

In the writers view, due attention should be given to the following recommendations.

- ✓ The states of Africa, should strive for achieving democracy, by fair and free competition in elections, genuine multi-party system, neutral electoral board, and military, loyal to the constitution, and independent judiciary, which in turn reduces the international crimes.
- ✓ Immunities of Head of States/Governments should not shield offending leaders, especially, of those who have committed gross violations of humanitarian and human rights.
- ✓ The power of the SC, to make an investigation on crimes of genocide, and other international crimes, adopt a Resolution that requests the Prosecutor to indict the wrong doers, including the Heads of States/Governments, should be applied consistently maintaining a uniform international standard against all, including presiding Head of States/Governments, who may be suspected of committing these international crimes in the future. There should not be a double standard. There should be fair standard for all who are suspected of committing these crimes.
- ✓ The Rome Statute should apply to all perpetrators, whether or not they are the nationals of the State, or whether or not a State has, relatively, good legal system, if locally no measure had been taken.

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<sup>318</sup> The Charter of the United Nations, (San Francisco, 1945) Articles 24 (1) and 25.

- ✓ Member States of the UN and regional organizations should respect the decisions of the UN Security Council, and cooperate with it in its efforts to implement international human rights laws.

# BIBLIOGRAPHY

## A. Books

1. Antonio Cassese, *International Criminal Law*, (2<sup>nd</sup> edn Oxford University Press, New York, 2008)
2. Danesh Sarooshi, *The United Nations and the Development of Collective Security*, (Oxford University Press, Great Britain, 1999)
3. D. P. O'Connell, *International Law*, (2<sup>nd</sup> edn Volume Two Stevens & Sons, London, 1970)
4. D. W. Bowett, *The Law of International Institutions*, (4<sup>th</sup> edn Universal Law Publishing, University of Cambridge, London, 2003)
5. Erik Denters and Nico Schrijver, (eds), *Reflections on International Law from the Low Countries*, (Martinus Nijhoff Publishers, The Netherlands, 1998)
6. Gerald Werle, *Principles of International Criminal Law*, (2<sup>nd</sup> edn T.M.C Asser Press, The Hague, Netherlands, 2005)
7. Gregory H. Fox and Brad R. Roth, (eds), *Democratic Governance and International Law* (Cambridge university press, United Kingdom, 2000)
8. Ian Brownlie, *Principles of Public International Law*, (Oxford, university press, New York, 2003)
9. J. G. Merills, *International Dispute Settlement*, (3<sup>rd</sup> edn Cambridge University Press, 1998, reprinted 2000)
10. Lawrence M. Friedman, *American Law*, (1<sup>st</sup> edn Indo-American Cooperative Publishing reprint, New Delhi, India, 1991)
11. L. Oppenheim, *International Law*, (8<sup>th</sup> edn London, 1955)
12. Malcolm N. Shaw, *International Law*, (5<sup>th</sup> edn Cambridge University Press, 2003)
13. Malcolm N. Shaw, *International Law*, (6<sup>th</sup> edn Cambridge University Press, 2008)
14. Michael Akehurst, *A Modern Introduction to International Law*, (George Allen and Unwin LTD, Great Britain, 1970)

15. Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations*, (Oxford University Press, Great Britain, 1963)
16. Roy S. Lee, (ed), Lionel Yee, *the International Criminal Court: The making of the Rome Statute Issues, Negotiations, Results*, (Kluwer Law International, the Hague, the Netherlands, 1999)
17. Simma Bruno, (ed), *The Charter of the United Nations, A Commentary*, (2<sup>nd</sup> edn, Vol. 1, Oxford University Press, New York, 2002)
18. Takele Enkossa, *The Legality of the Indictment of President Omar Hassan Ahmed Al-Bashir by the ICC under International Law*, (Addis Ababa University, (Unpublished), Addis Ababa, 2010)
19. T. O. Elias, *The Modern Law of treaties*, (Oceana Publications, Inc.-Dobbs Ferry, N. Y., 1974)

## **B. International Instruments**

1. International Covenant on Civil and Political Rights, (16 December, 1966, entered into force on 23 March, 1976)
2. Protocol Relating to the Establishment of the Peace and Security Council of the African Union, (Adopted by the 1<sup>st</sup> Ordinary Session of the Assembly of the African Union, Durban, 9 July, 2002)
3. Rome Statute of the International Criminal Court, (Rome, entered into force on 1 July 2002)
4. The Charter of the United Nations, (San Francisco, 1945)
5. UN Watch, International Criminal Court issues arrest warrant for Gaddafi, file://F:\International Criminal Court issues arrest warrant for Gaddafi at View from Geneva.htm, accessed at June 29, 2011.
6. Vienna Convention on the Law of Treaties, (adopted on 1969, entered into force on 27 January, 1980, Vol. 1155 UNTS No. 331.8 ILM 679(1969)
7. Vienna Convention on Diplomatic Relations (adopted on 18, April 1961, entered into force 24, April 1964) 500 U.N.T.S.95

## C. Journal Articles

1. Dustin N. Sharp, *Prosecutions, Development, and Justice: The Trial of Hissein Habre*, Harvard Human Rights Journal, accessed at August 22, 2011.
2. Jennifer Falligant, *The Prosecution of Sudanese President Al Bashir: Why a Security Council Deferral would harm the Legitimacy of the International Criminal Court*, Content downloaded/printed from HeinOnline (<http://heinonline.org>) Sat Jul 31 03:59:17 2010.
3. Julius Cavendish, *Former Ivory Coast President Laurent Gbagbo Extradited to Hague (VIDEO)*, The Christian Science Monitor, November 30, 2011.
4. Manisuli Ssenyonjo, *The International Criminal Court and the Warrant of Arrest for Sudan's President al-Bashir: A Crucial Step Towards challenging Impunity or a Political Decision?*, Martinus Nijhoff publishers, Nordic Journal of International Law 78 (2009).
5. Marko Milanovic, *security Council adopts Resolution 1970 (2011) with respect to Libya*, EJIL Analysis, EJIL Reports, Feb. 27, 2011
6. Mba Chidi Nmaju, *Violence in Kenya: Any Role for the ICC in the Quest for Accountability?*, *African Journals of Legal Studies*, 2009
7. Michael P. Scharf, *Introductory Note to the International Criminal Court's arrest Warrant for Omar Al Bashir, President of the Sudan*, Content downloaded/printed from HeinOnline (<http://heinonline.org>) Sat Jul 31 03:56:32 2010.
8. Paola Gaeta, *Does President Al Bashir Enjoy Immunity from Arrest?*, downloaded from <http://jicj.oxfordjournals.org> at Addis Ababa University Libraries on May 15, 2010
9. Robert Cryer, *The Definitions of International Crimes in the Al Bashir Arrest Warrant Decision*, downloaded from <http://jicj.oxfordjournals.org> at Addis Ababa University Libraries on May 15, 2010.

## D. Website Materials

1. African Union (Assembly of Heads of States/Governments) (Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan) (AU, Addis Ababa, 2009) AU/Doc. 221 (XII) available at <http://www.africa.union.org> , accessed on 13 May, 2011.
2. African Union moves aggressively to shield Bashir from prosecution, available at <http://www.sudantribune.com/spip.php?article35786> accessed on 29 July 2010
3. Arab leaders back ‘wanted’ Bashir, available at <file://F:\BBC> News-Arab leaders back ‘wanted’ Bashir.htm, accessed on 23 May 2011.
4. <File://C:/Documents and Settings/CBB BDD/ Documents/AL Jazeera English-middle...>accessed at May 24, 2010
5. <File://FCrisis in Darfur-International Crisis Group.htm>, accessed at May 17, 2011
6. <File://F:\Gamal> Abdel Nasser-Wikipedia, the free encyclopedia.htm, accessed at May 14, 2011
7. <File://F:\Hosni> Mubarak-Wikipedia, the free encyclopedia.htm, accessed at May 13, 2011
8. <File://F:\Idi> Amin killer file.htm, accessed at May 13, 2011
9. <File://F:\Idris> of Libya-Wikipedia, the free encyclopedia.htm, accessed at May 14, 2011
10. <File://F:\Laurent> Gbagbo-Wikipedia, the free encyclopedia.htm, accessed at May 13, 2011
11. <File://F:\Meles> Zenawi-Wikipedia, the free encyclopedia.htm, accessed at May 17, 2011
12. <File://F:\Mengistu> Haile Mariam-Wikipedia, the free encyclopedia.htm, accessed at May 13, 2011

13. [File://F:\Omar](#) al-Bashir-Wikipedia, the free encyclopedia.htm, accessed at May 18, 2011
14. [File://F:\Robert](#) Mugabe-Wikipedia, the free encyclopedia.htm, accessed at May 13, 2011
15. [File://F:\Who](#) is Moammar Gaddafi OLIFAFI\_COM.htm, accessed at May 13, 2011
16. [File://F:\Yoweri](#) Museveni-Wikipedia, the free encyclopedia.htm, accessed at May 13, 2011
17. Green, 'Controversy in the Arab World over ICC Indictment of Sudan President al-Bashir (July 24, 2008) available at <http://www.sudan.net/news/posted/16146.htm1>, accessed on 23 May 2011..
18. Human Rights Watch, Chad: *the victims of Hisséne Habré Still Awaiting Justice*, 12 July 2005, A1710, available at: <http://www.unhcr.org/refworld/docid/45cb11b62.html> [accessed 15 August 2011],
19. Human Rights Watch, ICC: Justice Advances in Kenya Case, [file://icc-justice-advances-kenya-case.htm](#), 1 of 5 March 9, 2011
20. <http://en.wikipedia.org/wiki/Omar> al-Bashir, accessed at August 16, 2010
21. [http://www.globalsolutions.org/issues/sudans\\_president\\_omar\\_hassan\\_al\\_bashir\\_indicted...Sudan's](http://www.globalsolutions.org/issues/sudans_president_omar_hassan_al_bashir_indicted...Sudan's) President Omar Hassan al-Bashir indicted by the ICC: What's Next? Global Sol...
22. Omar al-Bashir-Wikipedia, the free encyclopedia, available at <http://en.wikipedia.org/wiki/Omar-al-Bashir>, accessed at August 16, 2010
23. Tom Plummer, '[Return](#) to the Coup d'état Status Quo: Elections in Cote D'Ivoire' a Peace of Conflict says, December 3, 2010 at 11:52 am <http://www//blog.start2think.de/>, accessed at December 31, 2010.
24. Wikipedia, the free encyclopedia, Timeline of the 2011 Yemeni uprising.
25. Wikipedia, the free encyclopedia.

## **E. Resolutions**

1. Declaration on Treatment of Peoples of Indian origin in the Union of South Africa, Adopted by the UN General Assembly Resolution 44 (I) and 265 (III), 2 December 1950.
2. Declaration on Question of equitable representation on and increase in the membership of the Security Council, Adopted by the General Assembly, 47/62, 11 December 1992.
3. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Adopted by the UN General Assembly Resolution 47/135, 18 December 1992.
4. Declaration on the Granting of Independence to Colonial Countries and Peoples, has adopted by the UN General Assembly Resolution 1514 (XV), 14 December 1960.
5. Report of the Commission of Inquiry on Darfur to the Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, UN Doc. S/2005/60, 1 February 2005.
6. Open-ended working group aimed at answering the question of the equitable representation on and increase in the membership of the Security Council and other related to the Security Council A/RES/48/26. Dec. 3, 1993.
7. Security Council 6491<sup>st</sup> Meeting, Department of Public Information, News and Media Division, New York, SC/10187/Rev. 1.

# ***APPENDICES***

# APPENDIX A

## Press Release

**SC/8351**

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Security Council  
5158<sup>th</sup> Meeting (Night)

**SECURITY COUNCIL REFERS SITUATION IN DARFUR, SUDAN, TO  
PROSECUTOR**

**OF INTERNATIONAL CRIMINAL COURT**

**Resolution 1593 (2005) Adopted by Vote of 11 in Favor  
To None Against, with 4 Abstentions (Algeria, Brazil, China, United States)**

Acting under Chapter VII of the United Nations Charter, the Security Council decided this evening to refer the situation prevailing in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court.

Adopting resolution 1593 (2005) by a vote of 11 in favor, none against with 4 abstentions (Algeria, Brazil, China, United States), the Council decided also that the Government of the Sudan and all other parties to the conflict in Darfur would cooperate fully with the Court and Prosecutor, providing them with any necessary assistance.

The Council decided further that nationals, current or former officials or personnel from a contributing State outside the Sudan which was not a party to the Rome Statute would be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in the Sudan authorized by the Council or the African Union, unless such exclusive jurisdiction had been expressly waived by that contributing State.

Inviting the Court and the African Union to discuss practical arrangements that would facilitate the Court's work, including the possibility of conducting proceedings in the region, the Council encouraged the Court, in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur. It also emphasized the need to promote healing and reconciliation, as well as the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace.

Speaking in explanation of position after the vote were the representatives of the United States, Algeria, China, Denmark, Philippines, Japan, United Kingdom, Argentina, France, Greece, United Republic of Tanzania, Romania, Russian Federation, Benin and Brazil.

The representative of the Sudan also addressed the Council.

The meeting began at 10:40 p.m. and ended at 11:55 p.m.

#### Council Resolution

Security Council resolution 1593 (2005) reads, as follows:

*“The Security Council,*

*“Taking note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60),*

“*Recalling* article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

“*Also recalling* articles 75 and 79 of the Rome Statute and encouraging States to contribute to the ICC Trust Fund for Victims,

“*Taking note* of the existence of agreements referred to in Article 98-2 of the Rome Statute,

“*Determining* that the situation in Sudan continues to constitute a threat to international peace and security,

“*Acting* under Chapter VII of the Charter of the United Nations,

“1. *Decides* to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;

“2. *Decides* that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;

“3. *Invites* the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;

“4. *Also encourages* the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur;

“5. *Also emphasizes* the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace, with African Union and international support as necessary;

“6. *Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;

“7. *Recognizes* that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;

“8. *Invites* the Prosecutor to address the Council within three months of the date of adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;

“9. *Decides* to remain seized of the matter.”

#### Action on Text

The draft resolution was adopted by a vote of 11 in favour with 4 abstentions (Algeria, Brazil, China, United States).

Following the vote, ANNE WOODS PATTERSON (United States) said her country strongly supported bringing to justice those responsible for the crimes and atrocities that had

occurred in Darfur and ending the climate of impunity there. Violators of international humanitarian law and human rights law must be held accountable. Justice must be served in Darfur. By adopting today's resolution, the international community had established an accountability mechanism for the perpetrators of crimes and atrocities in Darfur. The resolution would refer the situation in Darfur to the International Criminal Court (ICC) for investigation and prosecution.

While the United States believed that a better mechanism would have been a hybrid tribunal in Africa, it was important that the international community spoke with one voice in order to help promote effective accountability. The United States continued to fundamentally object to the view that the Court should be able to exercise jurisdiction over the nationals, including government officials, of States not party to the Rome Statute. Because it did not agree to a Council referral of the situation in Darfur to the Court, her country had abstained on the vote. She decided not to oppose the resolution because of the need for the international community to work together in order to end the climate of impunity in the Sudan, and because the resolution provided protection from investigation or prosecution for United States nationals and members of the armed forces of non-State parties.

The United States was and would be an important contributor to the peacekeeping and related humanitarian efforts in the Sudan, she said. The language providing protection for the United States and other contributing States was precedent-setting, as it clearly acknowledged the concerns of States not party to the Rome Statute and recognized that persons from those States should not be vulnerable to investigation or prosecution by the Court, absent consent by those States or a referral by the Council. In the future, she believed that, absent consent of the State involved, any investigations or prosecutions of nationals of non-party States should come only pursuant to a decision by the Council.

Although her delegation had abstained on the Council referral to the Court, it had not dropped, and indeed continued to maintain, its long-standing and firm objections and concerns regarding the Court, she continued. The Rome Statute was flawed and did not have sufficient protection from the possibility of politicized prosecutions. Non-parties had no obligations in

connection with that treaty, unless otherwise decided by the Council, upon which members of the Organization had conferred primary responsibility for the maintenance of international peace and security.

She was pleased that the resolution recognized that none of the expenses incurred in connection with the referral would be borne by the United Nations, and that instead such costs would be borne by the parties to the Rome Statute and those that contributed voluntarily. That principle was extremely important. Any effort to retrench on that principle by the United Nations or other organizations to which the United States contributed could result in its withholding funding or taking other action in response.

The Council included, at her country's request, a provision that exempted persons of non-party States in the Sudan from the ICC prosecution. Persons from countries not party who were supporting the United Nations' or African Union's efforts should not be placed in jeopardy. The resolution provided clear protection for United States persons. No United States person supporting operations in the Sudan would be subject to investigation or prosecution because of this resolution. That did not mean that there would be immunity for American citizens that acted in violation of the law. The United States would continue to discipline its own people when appropriate.

ABDALLAH BAALI (Algeria) said his country believed strongly in the crucial importance of combating impunity if peace and stability were to take root -- a need that was even more vital in the case of Darfur, where relations between various communities had been destroyed over the years. It was, therefore, important that the fight against impunity had the equal goal of re-establishing harmony among the peoples of Darfur while serving the cause of peace.

He said that any international démarche towards those ends must be reinforced in a way that guaranteed a fair and transparent trial process; brought justice for the victims by restoring their rights and providing reparations for their moral and material suffering; contributed towards national reconciliation, a political settlement of the crisis and the consolidation of peace and

stability throughout the Sudan; and promoted the support of all Sudanese in that process, including, in particular, securing the cooperation of the Government.

Because of those factors, the African Union was best placed to carry out so delicate an undertaking because it could provide peace, while also satisfying the need for justice, he said. President Olusegun Obasanjo had made a proposal, on behalf of the African Union, based on the need to secure peace without sacrificing the need for justice. Regrettably, for the sake of reconciliation, the Council had neither considered that proposal nor assessed its potential to enable its members to combat impunity. One could not claim to support the African Union while brushing aside its proposals without deigning even to consider them. At the eruption of the Darfur conflict, it had been none other than the African Union that had deployed its soldiers and begun negotiating the various complex issues involved. What was true of the Sudan was true all over Africa, and Algeria regretted that for the sake of compromise at any cost those who defended the principle of universal justice had, in fact, confirmed that even in the Council there could be a double standard.

WANG GUANGYA (China), explaining his delegation's abstention, said that China had followed the situation in Darfur closely and supported a political solution. Like the rest of the international community, China deplored deeply the violations of international humanitarian law and human rights law and believed that the perpetrators must be brought to justice. The question before the Council was what the most appropriate way to do so was. While ensuring justice, it was important to sustain the hard-won gains of the North-South peace process.

He said his country would have preferred that the perpetrators stand trial in Sudanese courts, which had recently taken action against people involved in human rights violations in Darfur. China did not favor the referral to the International Criminal Court without the consent of the Sudanese Government. In addition, China, which was not a party to the Rome Statute, had major reservations regarding some of its provisions and had found it difficult to endorse the Council authorization of that referral.

ELLEN MARGRETHE LØJ (Denmark) said that it had been two months since the Council had received the report of the Commission of Inquiry, which had strongly recommended referring the situation in Darfur to the ICC. The Court had the mandate, capacity and funding necessary to ensure swift and effective prosecution. She was encouraged that the Council had voted to adopt a resolution to bring an internationally recognized follow-up to the crimes in Darfur. She recognized the difficulty of some delegations to accept the text and appreciated the flexibility shown.

Denmark had only been able to support the text after some alterations were made, she said. Regarding the formulation on existing agreements referred to in article 98-2 of the Rome Statute, she noted that that reference was purely factual and referred to the existence of such agreements. Thus, the reference was in no way impinging on the Rome Statute. The result was a valid compromise leading to the first referral of a situation to the ICC. She looked forward to the Court taking the first steps to ending the culture of impunity in Darfur.

LAURO BAJA (Philippines) noted that today's was the third resolution borne out of the Council's consideration of Darfur. He had voted for the resolution in response to the urgency and gravity of the crimes, which the Council and the international community were obliged to address. Any failure of action two months after the presentation of the report would have reduced the Council to irrelevance in ending impunity and protecting human rights and international humanitarian law.

He shared the concerns of some regarding the manner in which the resolution was arrived at. Once again, veto threats prevented the expression of a clear and robust signal from the Council. That was why calls for Council reform were growing louder with each passing day. He also believed that the ICC was a fatality in the resolution. Did the Council have the prerogative to mandate the jurisdiction of the Court?

KENZO OSHIMA (Japan) said he had voted in favor of the resolution because impunity for serious violations of human rights and crimes against humanity must not be allowed. Japan supported in principle the referral to the International Criminal Court within the appropriate

time-frame, although it was not a party to the Rome Statute and would have much preferred more agreement among Council members.

EMYR JONES PARRY (United Kingdom) said that by tonight's vote the Council had acted to ensure accountability for the crimes committed in Darfur. The United Kingdom hoped to send a salutary warning to other parties who may be tempted to commit similar human rights violations. The United Kingdom welcomed the adoption of the two other resolutions on the Sudan this week and called for a redoubling of efforts on behalf of peace and justice for the people of Darfur, and the Sudan as a whole, who had suffered enough. The three resolutions were a substantial contribution towards that end.

CÉSAR MAYORAL (Argentina) said he had voted in support of the resolution on the basis of the report to the Council by the High Commissioner for Human Rights, who stated clearly what had been crimes against humanity in Darfur. The legal context for dealing with such violations was the ICC. He understood that the ICC would be the proper place to combat impunity. The resolution gave strong support to the Court and demonstrated significant progress within the United Nations to ensure the functioning of an international system for human rights, for which the Court was an essential tool.

He noted that it was the first time the Council had referred to the Court a situation involving crimes over which the Court had jurisdiction. It was a crucial precedent. The letter and spirit of the Rome Statute must be respected, taking into account the legitimate concerns of States. Accordingly, he regretted that the Council had to adopt a text that provided an exemption to the Court, and hoped that that would not become normal practice. The exemption referred to in operative paragraph 6 only applied to those States not party to the Rome Statute.

JEAN-MARC DE LA SABLIERE (France) said the events in Darfur were deeply troubling, and the greatest concern was the plight of the people there. The Secretary-General's reports had provided a detailed picture of those atrocities. The Council had a duty to take action. Its policy must include three elements. The first was the need to assist the African Union to strengthen its mandate for protection and monitoring. The Council had done that by adopting

resolution 1590 last week. Then, there was the need to exert pressure on the warring parties to fulfill their obligations and achieve a political settlement. The Council did that by adopting resolution 1591 a few days ago. Finally, it was necessary to put an end to impunity. That was what the Council had done today.

The Commission's report recommended the referral of the situation in Darfur to the ICC, he said. The Secretary-General and the High Commissioner for Human Rights had asked the Council to urgently provide a positive outcome following that recommendation. Referring the issue to the ICC was the only solution. It was necessary to do right by the victims, and doing so would prevent those violations from continuing. That was why France had been the initiator of the resolution and voted in its favor. He was gratified by the adoption of this historic resolution, by which the Council, for the first time, referred a situation to the ICC.

Thus, the Council had sent a strong message to all those in Darfur who had committed or were tempted to commit atrocious crimes, and to the victims. The international community would not allow those crimes to remain unpunished. It also marked a turning point and sent a message farther than Darfur. His delegation had been ready to acknowledge immunity from the ICC for nationals from States not party to the Rome Statute. He reaffirmed his confidence in the ICC and hoped that those clauses concerning immunity from the Court would be dropped very soon.

ADAMANTIOS TH. VASSILAKIS (Greece) stressed that impunity must not be allowed to go unpunished and that was why his country had turned to the International Criminal Court. It would have preferred a text that did not make exceptions, but it was better than one that allowed violations to go unpunished. The text strengthened the Council's authority, as well as that of the International Criminal Court, which would have the possibility of showing its competence. The three recently adopted resolutions on Darfur would assist in restoring peace in the Sudan.

AUGUSTINE MAHIGA (United Republic of Tanzania) said that every new delay in the adoption of the resolution represented a failure to serve the interests of justice, and his delegation regretted that the text took on matters that did not concern the Council. It did not permit any

avoidance of the International Criminal Court's authority, and the United Republic of Tanzania hoped that the international community would not abandon the people of the Sudan, particularly those of Darfur.

MIHNEA IOAN MOTOC (Romania) said that text spoke for itself in showing the way the Council could come together to address serious issues. The adoption of resolution 1593 was a stand against impunity and an expression of confidence in the ICC to handle complex cases, like the one the Council was referring to it today. At the end of the day, the Council had sent a message that there was no way that anyone anywhere could get away without retribution for grave crimes. By deciding to refer Darfur to the ICC, the Council had enhanced its conflict prevention and resolution capabilities. Upholding the ICC by adopting the resolution would be to no avail unless States remained supportive of the Court as it exercised its prerogatives.

ANDREY DENISOV (Russian Federation) said that Council members had reaffirmed that the struggle against impunity was one of the elements of long-term stability in Darfur. All those responsible for grave crimes must be punished, as pointed out in the report of the Commission of Inquiry. The resolution adopted today would promote an effective solution to the fight against impunity.

JOEL ADECHI (Benin) said the vote was a major event in the context of the international community's attempts to ensure there was no impunity for violations of international humanitarian law in the past decade. Benin had voted in favor of the resolution because it was party to the Rome Statute and also because the worsening of the situation in Darfur meant that the Council must take action to end the suffering of the civilians, ending impunity by providing impartial justice. Benin had also voted in favour out of respect for human dignity and the right to life. The African Union recognized that the international community had a responsibility to protect civilians when they were not protected by their own governments. The resolution must help them to achieve their legitimate dream of an end to their suffering and enable them to look ahead to the future with serenity.

Council President RONALDO MOTA SARDENBERG (Brazil), speaking in his national capacity, said his country was in favor of the resolution, but had been unable to join those who had voted in favor. However, Brazil was ready to cooperate fully with the International Criminal Court whenever necessary. The Court provided all the necessary checks and balances to prevent politically motivated prosecutions, and any fears to the contrary were both unwarranted and unhelpful.

However, there were limits to the responsibilities of the Council vis-à-vis international instruments, and Brazil had consistently maintained that position since the negotiations on the Rome Statute. But the Court remained the only suitable institution to deal with the violations in the Sudan. Brazil had been unable to support operative paragraph 6, which recognized exclusive jurisdiction. It would not strengthen the role of the International Criminal Court.

ELFATIH MOHAMED AHMED ERWA (Sudan) said that, once more, the Council had persisted in adopting unwise decisions against his country, which only served to further complicate the situation on the ground. The positions over the ICC were well known. The Darfur question had been exploited in light of those positions. It was a paradox that the language in which the resolution was negotiated was the same language that had buffeted the Council before on another African question. The resolution adopted was full of exemptions. He reminded the Council that the Sudan was also not party to the ICC, making implementation of the resolution fraught with procedural impediments. As long as the Council believed that the scales of justice were based on exceptions and exploitation of crises in developing countries and bargaining among major Powers, it did not settle the question of accountability in Darfur, but exposed the fact that the ICC was intended for developing and weak countries and was a tool to exercise cultural superiority.

The Council, by adopting the resolution, had once again ridden roughshod over the African position, he said. The initiative by Nigeria, as chair of the African Union, had not even been the subject of consideration. Also, the Council had adopted the resolution at a time when the Sudanese judiciary had gone a long way in holding trials, and was capable of ensuring accountability. Some here wanted to activate the ICC and exploit the situation in Darfur.

Accountability was a long process that could not be achieved overnight. The Council was continuing to use a policy of double standards, and sending the message that exemptions were only for major Powers. The resolution would only serve to weaken prospects for settlement and further complicate the already complex situation.

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## **APPENDIX B**

### **INTERNATIONAL COURT OF JUSTICE**

**YEAR 2002**

**2002**

**14 February**

**General List**

**No. 121**

**14 February 2002**

**CASE CONCERNING THE ARREST WARRANT OF 11 APRIL 2000 (DEMOCRATIC REPUBLIC OF THE CONGO v. BELGIUM)**

Facts of the case ¾ Issue by a Belgian investigating magistrate of “an international arrest warrant in absentia” against the incumbent Minister for Foreign Affairs of the Congo, alleging grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto and crimes against humanity ¾ International circulation of arrest warrant through Interpol ¾ Person concerned subsequently ceasing to hold office as Minister for Foreign Affairs.

First objection of Belgium ¾ Jurisdiction of the Court ¾ Statute of the Court, Article 36, paragraph 2 ¾ Existence of a “legal dispute” between the Parties at the time of filing of the Application instituting proceedings ¾ Events subsequent to the filing of the Application do not deprive the Court of jurisdiction.

Second objection of Belgium ¾ Mootness ¾ Fact that the person concerned had ceased to hold office as Minister for Foreign Affairs does not put an end to the dispute between the Parties and does not deprive the Application of its object.

Third objection of Belgium ¾ Admissibility ¾ Facts underlying the Application instituting proceedings not changed in a way that transformed the dispute originally brought before the Court into another which is different in character.

Fourth objection of Belgium ¾ Admissibility ¾ Congo not acting in the context of protection of one of its nationals ¾ Inapplicability of rules relating to exhaustion of local remedies.

Subsidiary argument of Belgium ¾ Non ultra petita rule ¾ Claim in Application instituting proceedings that Belgium's claim to exercise a universal jurisdiction in issuing the arrest warrant is contrary to international law ¾ Claim not made in final submissions of the Congo ¾ Court unable to rule on that question in the operative part of its Judgment but not prevented from dealing with certain aspects of the question in the reasoning of its Judgment.

Immunity from criminal jurisdiction in other States and also inviolability of an incumbent Minister for Foreign Affairs ¾ Vienna Convention on Diplomatic Relations of 18 April 1961, preamble, Article 32 ¾ Vienna Convention on Consular Relations of 24 April 1963 ¾ New York Convention on Special Missions of 8 December 1969, Article 21, paragraph 2 ¾ customary international law rules ¾ Nature of the functions exercised by a Minister for Foreign Affairs ¾ Functions such that, throughout the duration of his or her office, a Minister for Foreign Affairs when abroad enjoys full immunity from criminal jurisdiction and inviolability ¾ No distinction in this context between acts performed in an "official" capacity and those claimed to have been performed in a "private capacity".

No exception to immunity from criminal jurisdiction and inviolability where an incumbent Minister for Foreign Affairs suspected of having committed war crimes or crimes against humanity ¾ Distinction between jurisdiction of national courts and jurisdictional immunities ¾ Distinction between immunity from jurisdiction and impunity.

Issuing of arrest warrant intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs ¾ Mere issuing of warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs ¾ Purpose of the international circulation of the

arrest warrant to establish a legal basis for the arrest of Minister for Foreign Affairs abroad and his subsequent extradition to Belgium ¾ International circulation of the warrant a failure to respect the immunity and inviolability of Minister for Foreign Affairs.

Remedies sought by the Congo ¾ Finding by the Court of international responsibility of Belgium making good the moral injury complained of by the Congo ¾ Belgium required by means of its own choosing to cancel the warrant in question and so inform the authorities to whom it was circulated.

## **JUDGMENT**

*Present: President* GUILLAUME; *Vice-President* SHI; *Judges* ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK, AL-KHASAWNEH, BUERGENTHAL; *Judges ad hoc* BULA-BULA, VAN DEN WYNGAERT; *Registrar* COUVREUR.

In the case concerning the arrest warrant of 11 April 2000, between the Democratic Republic of the Congo, represented by H.E. Mr. Jacques Masangu-a-Mwanza, Ambassador Extraordinary and Plenipotentiary of the Democratic Republic of the Congo to the Kingdom of the Netherlands, as Agent;

H.E. Mr. Ngele Masudi, Minister of Justice and Keeper of the Seals, Maître Kosisaka Kombe, Legal Adviser to the Presidency of the Republic, Mr. François Rigaux, Professor Emeritus at the Catholic University of Louvain, Ms Monique Chemillier-Gendreau, Professor at the University of Paris VII (Denis Diderot), Mr. Pierre d'Argent, Chargé de cours, Catholic University of Louvain, Mr. Moka N'Golo, Bâtonnier, Mr. Djeina Wembou, Professor at the University of Abidjan, as Counsel and Advocates; Mr. Mazyambo Makengo, Legal Adviser to the Ministry of Justice, as Counsellor, and the Kingdom of Belgium, represented by Mr. Jan Devadder, Director-General, Legal Matters, Ministry of Foreign Affairs, as Agent;

Mr. Eric David, Professor of Public International Law, *Université libre de Bruxelles*, Mr. Daniel Bethlehem, Barrister, Bar of England and Wales, Fellow of Clare Hall and Deputy Director of the Lauterpacht Research Centre for International Law, University of Cambridge, as Counsel and Advocates;

H.E. Baron Olivier Gillès de Pélichy, Permanent Representative of the Kingdom of Belgium to the Organization for the Prohibition of Chemical Weapons, responsible for relations with the International Court of Justice, Mr. Claude Debrulle, Director-General, Criminal Legislation and Human Rights, Ministry of Justice, Mr. Pierre Morlet, Advocate-General, Brussels *Cour d'Appel*, Mr. Wouter Detavernier, Deputy Counsellor, Directorate-General Legal Matters, Ministry of Foreign Affairs, Mr. Rodney Neufeld, Research Associate, Lauterpacht Research Centre for International Law, University of Cambridge, Mr. Tom Vanderhaeghe, Assistant at the *Université libre de Bruxelles*,

THE COURT, composed as above, after deliberation, *delivers the following Judgment*:

1. On 17 October 2000 the Democratic Republic of the Congo (hereinafter referred to as “the Congo”) filed in the Registry of the Court an Application instituting proceedings against the Kingdom of Belgium (hereinafter referred to as “Belgium”) in respect of a dispute concerning an “international arrest warrant issued on 11 April 2000 by a Belgian investigating judge . . . against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi”.

In that Application the Congo contended that Belgium had violated the “principle that a State may not exercise its authority on the territory of another State”, the “principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations”, as well as “the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations”.

In order to found the Court’s jurisdiction the Congo invoked in the aforementioned Application the fact that “Belgium ha[d] accepted the jurisdiction of the Court and, in so far as may be required, the [aforementioned] Application signifie[d] acceptance of that jurisdiction by the Democratic Republic of the Congo”.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was forthwith communicated to the Government of Belgium by the Registrar; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case; the Congo chose Mr. Sayeman Bula-Bula, and Belgium Ms Christine Van den Wyngaert.

4. On 17 October 2000, the day on which the Application was filed, the Government of the Congo also filed in the Registry of the Court a request for the indication of a provisional measure based on Article 41 of the Statute of the Court. At the hearings on that request, Belgium, for its part, asked that the case be removed from the List.

By Order of 8 December 2000 the Court, on the one hand, rejected Belgium's request that the case be removed from the List and, on the other, held that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. In the same Order, the Court also held that "it [was] desirable that the issues before the Court should be determined as soon as possible" and that "it [was] therefore appropriate to ensure that a decision on the Congo's Application be reached with all expedition".

5. By Order of 13 December 2000, the President of the Court, taking account of the agreement of the Parties as expressed at a meeting held with their Agents on 8 December 2000, fixed time-limits for the filing of a Memorial by the Congo and of a Counter-Memorial by Belgium, addressing both issues of jurisdiction and admissibility and the merits. By Orders of 14 March 2001 and 12 April 2001, these time-limits, taking account of the reasons given by the Congo and the agreement of the Parties, were successively extended. The Memorial of the Congo was filed on 16 May 2001 within the time-limit thus finally prescribed.

6. By Order of 27 June 2001, the Court, on the one hand, rejected a request by Belgium for authorization, in derogation from the previous Orders of the President of the Court, to submit preliminary objections involving suspension of the proceedings on the merits and, on the other, extended the time-limit prescribed in the Order of 12 April 2001 for the filing by Belgium of a Counter-Memorial addressing both questions of jurisdiction and admissibility and the merits.

The Counter-Memorial of Belgium was filed on 28 September 2001 within the time-limit thus extended.

7. Pursuant to Article 53, paragraph 2, of the Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made available to the public at the opening of the oral proceedings.

8. Public hearings were held from 15 to 19 October 2001, at which the Court heard the oral arguments and replies of:

*For the Congo:* H.E. Mr. Jacques Masangu-a-Mwanza, H.E. Mr. Ngele Masudi, Maître Kosisaka Kombe, Mr. François Rigaux, Ms Monique Chemillier-Gendreau, Mr. Pierre d'Argent.

*For Belgium:* Mr. Jan Devadder, Mr. Daniel Bethlehem, Mr. Eric David.

9. At the hearings, Members of the Court put questions to Belgium, to which replies were given orally or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. The Congo provided its written comments on the reply that was given in writing to one of these questions, pursuant to Article 72 of the Rules of Court.

10. In its Application, the Congo formulated the decision requested in the following terms: "The Court is requested to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000 by a Belgian investigating judge, Mr. Vandermeersch, of the Brussels *tribunal de première instance* against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaye Yerodia Ndombasi, seeking his provisional detention pending a request for extradition to Belgium for alleged crimes constituting 'serious violations of international humanitarian law', that warrant having been circulated by the judge to all States, including the Democratic Republic of the Congo, which received it on 12 July 2000."

11. In the course of the written proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of the Congo, in the Memorial:*

“In light of the facts and arguments set out above, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

1. By issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the DRC of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers;

2. A formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the DRC;

3. The violation of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 precludes any State, including Belgium, from executing it;

4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that, following the Court’s Judgment, Belgium renounces its request for their co-operation in executing the unlawful warrant.” *On behalf of the Government of Belgium*, in the Counter-Memorial:

“For the reasons stated in Part II of this Counter-Memorial, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the preceding submission, the Court concludes that it does have jurisdiction in this case and that the application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the application.”

12. At the oral proceedings, the following submissions were presented by the Parties: *On behalf of the Government of the Congo*,

“In light of the facts and arguments set out during the written and oral proceedings, the Government of the Democratic Republic of the Congo requests the Court to adjudge and declare that:

1. By issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute

inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States;

2. A formal finding by the Court of the unlawfulness of that act constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;

3. The violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;

4. Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant.”

*On behalf of the Government of Belgium,*

“For the reasons stated in the Counter-Memorial of Belgium and in its oral submissions, Belgium requests the Court, as a preliminary matter, to adjudge and declare that the Court lacks jurisdiction in this case and/or that the Application by the Democratic Republic of the Congo against Belgium is inadmissible.

If, contrary to the submissions of Belgium with regard to the Court’s jurisdiction and the admissibility of the Application, the Court concludes that it does have jurisdiction in this case and that the Application by the Democratic Republic of the Congo is admissible, Belgium requests the Court to reject the submissions of the Democratic Republic of the Congo on the merits of the case and to dismiss the Application.”

13. On 11 April 2000 an investigating judge of the Brussels *tribunal de première instance* issued “an international arrest warrant *in absentia*” against Mr. Abdulaye Yerodia Ndombasi, charging him, as perpetrator or co-perpetrator, with offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity. At the time when the arrest warrant was issued Mr. Yerodia was the Minister for Foreign Affairs of the Congo.

14. The arrest warrant was transmitted to the Congo on 7 June 2000, being received by the Congolese authorities on 12 July 2000. According to Belgium, the warrant was at the same time transmitted to the International Criminal Police Organization (Interpol), an organization whose

function is to enhance and facilitate cross-border criminal police co-operation worldwide; through the latter, it was circulated internationally.

15. In the arrest warrant, Mr. Yerodia is accused of having made various speeches inciting racial hatred during the month of August 1998. The crimes with which Mr. Yerodia was charged were punishable in Belgium under the Law of 16 June 1993 “concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto”, as amended by the Law of 19 February 1999 “concerning the Punishment of Serious Violations of International Humanitarian Law” (hereinafter referred to as the “Belgian Law”).

Article 7 of the Belgian Law provides that “The Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever’s they may have been committed”. In the present case, according to Belgium, the complaints that initiated the proceedings as a result of which the arrest warrant was issued emanated from 12 individuals all resident in Belgium, five of whom were of Belgian nationality. It is not contested by Belgium, however, that the alleged acts to which the arrest warrant relates were committed outside Belgian territory that Mr. Yerodia was not a Belgian national at the time of those acts, and that Mr. Yerodia was not in Belgian territory at the time that the arrest warrant was issued and circulated. That no Belgian nationals were victims of the violence that was said to have resulted from Mr. Yerodia’s alleged offences was also uncontested.

Article 5, paragraph 3, of the Belgian Law further provides that “[i]mmunity attaching to the official capacity of a person shall not prevent the application of the present Law”.

16. At the hearings, Belgium further claimed that it offered “to entrust the case to the competent authorities [of the Congo] for enquiry and possible prosecution”, and referred to a certain number of steps which it claimed to have taken in this regard from September 2000, that is, before the filing of the Application instituting proceedings. The Congo for its part stated the following: “We have scant information concerning the form [of these Belgian proposals].” It added that “these proposals . . . appear to have been made very belatedly, namely *after* an arrest warrant against Mr. Yerodia had been issued.”

17. On 17 October 2000, the Congo filed in the Registry an Application instituting the present proceedings (see paragraph 1 above), in which the Court was requested “to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000”. The Congo relied in its Application on two separate legal grounds. First, it claimed that “[t]he *universal jurisdiction* that the Belgian State attributes to itself under Article 7 of the Law in question” constituted a

“[v]iolation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations”.

Secondly, it claimed that “[t]he non-recognition, on the basis of Article 5 . . . of the Belgian Law, of the immunity of a Minister for Foreign Affairs in office” constituted a “[v]iolation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State, as recognized by the jurisprudence of the Court and following from Article 41, paragraph 2, of the Vienna Convention of 18 April 1961 on Diplomatic Relations”.

18. On the same day that it filed its Application instituting proceedings, the Congo submitted a request to the Court for the indication of a provisional measure under Article 41 of the Statute of the Court. During the hearings devoted to consideration of that request, the Court was informed that in November 2000 a ministerial reshuffle had taken place in the Congo, following which Mr. Yerodia had ceased to hold office as Minister for Foreign Affairs and had been entrusted with the portfolio of Minister of Education. Belgium accordingly claimed that the Congo’s Application had become moot and asked the Court, as has already been recalled, to remove the case from the List. By Order of 8 December 2000, the Court rejected both Belgium’s submissions to that effect and also the Congo’s request for the indication of provisional measures (see paragraph 4 above).

19. From mid-April 2001, with the formation of a new Government in the Congo, Mr. Yerodia ceased to hold the post of Minister of Education. He no longer holds any ministerial office today.

20. On 12 September 2001, the Belgian National Central Bureau of Interpol requested the Interpol General Secretariat to issue a Red Notice in respect of Mr. Yerodia. Such notices

concern individuals whose arrest is requested with a view to extradition. On 19 October 2001, at the public sittings held to hear the oral arguments of the Parties in the case, Belgium informed the Court that Interpol had responded on 27 September 2001 with a request for additional information, and that no Red Notice had yet been circulated.

21. Although the Application of the Congo originally advanced two separate legal grounds (see paragraph 17 above), the submissions of the Congo in its Memorial and the final submissions which it presented at the end of the oral proceedings refer only to a violation “in regard to the . . . Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers” (see paragraphs 11 and 12 above)

22. In their written pleadings, and in oral argument, the Parties addressed issues of jurisdiction and admissibility as well as the merits (see paragraphs 5 and 6 above). In this connection, Belgium raised certain objections which the Court will begin by addressing.

23. The first objection presented by Belgium reads as follows:

“That, in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], there is no longer a ‘legal dispute’ between the Parties within the meaning of this term in the Optional Clause Declarations of the Parties and that the Court accordingly lacks jurisdiction in this case.”

24. Belgium does not deny that such a legal dispute existed between the Parties at the time when the Congo filed its Application instituting proceedings, and that the Court was properly seised by that Application. However, it contends that the question is not whether a legal dispute existed at that time, but whether a legal dispute exists at the present time. Belgium refers in this respect *inter alia* to the *Northern Cameroons* case, in which the Court found that it “may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties” (*I.C.J. Reports 1963*, pp. 33-34), as well as to the *Nuclear Tests* cases (*Australia v. France*) and

(*New Zealand v. France*), in which the Court stated the following: “The Court, as a court of law, is called upon to resolve existing disputes between States . . . The dispute brought before it must therefore continue to exist at the time when the Court makes its decision” (*I.C.J. Reports 1974*, pp. 270-271, para. 55; p. 476, para. 58). Belgium argues that the position of Mr. Yerodia as Minister for Foreign Affairs was central to the Congo’s Application instituting proceedings, and emphasizes that there has now been a change of circumstances at the very heart of the case, in view of the fact that Mr. Yerodia was relieved of his position as Minister for Foreign Affairs in November 2000 and that, since 15 April 2001, he has occupied no position in the Government of the Congo (see paragraphs 18 and 19 above). According to Belgium, while there may still be a difference of opinion between the Parties on the scope and content of international law governing the immunities of a Minister for Foreign Affairs, that difference of opinion has now become a matter of abstract, rather than of practical, concern. The result, in Belgium’s view, is that the case has become an attempt by the Congo to “[seek] an advisory opinion from the Court”, and no longer a “concrete case” involving an “actual controversy” between the Parties, and that the Court accordingly lacks jurisdiction in the case.

25. The Congo rejects this objection of Belgium. It contends that there is indeed a legal dispute between the Parties, in that the Congo claims that the arrest warrant was issued in violation of the immunity of its Minister for Foreign Affairs, that that warrant was unlawful *ab initio*, and that this legal defect persists despite the subsequent changes in the position occupied by the individual concerned, while Belgium maintains that the issue and circulation of the arrest warrant were not contrary to international law. The Congo adds that the termination of Mr. Yerodia’s official duties in no way operated to efface the wrongful act and the injury that flowed from it, for which the Congo continues to seek redress.

26. The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events. Such events might lead to a finding that an application has subsequently become moot and to a decision not to proceed to judgment on the merits, but they cannot deprive the Court of jurisdiction (see *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122; *Right*

*of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957, p. 142; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 23-24, para. 38; and Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 129, para. 37).*

27. Article 36, paragraph 2, of the Statute of the Court provides:

“The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- (a) The interpretation of a treaty;
- (b) Any question of international law;
- (c) The existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) The nature or extent of the reparation to be made for the breach of an international obligation.”

On 17 October 2000, the date that the Congo’s Application instituting these proceedings was filed, each of the Parties was bound by a declaration of acceptance of compulsory jurisdiction, filed in accordance with the above provision: Belgium by a declaration of 17 June 1958 and the Congo by a declaration of 8 February 1989. Those declarations contained no reservation applicable to the present case.

Moreover, it is not contested by the Parties that at the material time there was a legal dispute between them concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the warrant was unlawful. Such a dispute was clearly a legal dispute within the meaning of the Court’s jurisprudence, namely “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons” in which “the claim of one party is positively opposed by the other” (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 17,*

para. 22; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 122-123, para. 21).

28. The Court accordingly concludes that at the time that it was seised of the case it had jurisdiction to deal with it, and that it still has such jurisdiction. Belgium's first objection must therefore be rejected.

29. The second objection presented by Belgium is the following:

“That in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case.”

30. Belgium also relies in support of this objection on the *Northern Cameroons* case, in which the Court considered that it would not be a proper discharge of its duties to proceed further in a case in which any judgment that the Court might pronounce would be “without object” (*I.C.J. Reports 1963*, p. 38), and on the *Nuclear Tests* cases, in which the Court saw “no reason to allow the continuance of proceedings which it knows are bound to be fruitless” (*I.C.J. Reports 1974*, p. 271, para. 58; p. 477, para. 61). Belgium maintains that the declarations requested by the Congo in its first and second submissions would clearly fall within the principles enunciated by the Court in those cases, since a judgment of the Court on the merits in this case could only be directed towards the clarification of the law in this area for the future, or be designed to reinforce the position of one or other Party. It relies in support of this argument on the fact that the Congo does not allege any material injury and is not seeking compensatory damages. It adds that the issue and transmission of the arrest warrant were not predicated on the ministerial status of the person concerned, that he is no longer a minister, and that the case is accordingly now devoid of object.

31. The Congo contests this argument of Belgium, and emphasizes that the aim of the Congo to have the disputed arrest warrant annulled and to obtain redress for the moral injury suffered

remains unachieved at the point in time when the Court is called upon to decide the dispute. According to the Congo, in order for the case to have become devoid of object during the proceedings, the cause of the violation of the right would have had to disappear, and the redress sought would have to have been obtained.

32. The Court has already affirmed on a number of occasions that events occurring subsequent to the filing of an application may render the application without object such that the Court is not called upon to give a decision thereon (see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 26, para. 46; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, *Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 131, para. 45).

However, it considers that this is not such a case. The change which has occurred in the situation of Mr. Yerodia has not in fact put an end to the dispute between the Parties and has not deprived the Application of its object. The Congo argues that the arrest warrant issued by the Belgian judicial authorities against Mr. Yerodia was and remains unlawful. It asks the Court to hold that the warrant is unlawful, thus providing redress for the moral injury which the warrant allegedly caused to it. The Congo also continues to seek the cancellation of the warrant. For its part, Belgium contends that it did not act in violation of international law and it disputes the Congo's submissions. In the view of the Court, it follows from the foregoing that the Application of the Congo is not now without object and that accordingly the case is not moot. Belgium's second objection must accordingly be rejected.

33. The third Belgian objection is put as follows:

“That the case as it now stands is materially different to that set out in the [Congo]’s Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible.”

34. According to Belgium, it would be contrary to legal security and the sound administration of justice for an applicant State to continue proceedings in circumstances in which the factual

dimension on which the Application was based has changed fundamentally, since the respondent State would in those circumstances be uncertain, until the very last moment, of the substance of the claims against it. Belgium argues that the prejudice suffered by the respondent State in this situation is analogous to the situation in which an applicant State formulates new claims during the course of the proceedings. It refers to the jurisprudence of the Court holding inadmissible new claims formulated during the course of the proceedings which, had they been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (see *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment*, *I.C.J. Reports 1998*, pp. 447-448, para. 29). In the circumstances, Belgium contends that, if the Congo wishes to maintain its claims, it should be required to initiate proceedings afresh or, at the very least, apply to the Court for permission to amend its initial Application.

35. In response, the Congo denies that there has been a substantial amendment of the terms of its Application, and insists that it has presented no new claim, whether of substance or of form, that would have transformed the subject-matter of the dispute. The Congo maintains that it has done nothing through the various stages in the proceedings but “condense and refine” its claims, as do most States that appear before the Court, and that it is simply making use of the right of parties to amend their submissions until the end of the oral proceedings.

36. The Court notes that, in accordance with settled jurisprudence; it “cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character” (*Société Commerciale de Belgique, Judgment*, 1939, *P.C.I.J., Series A/B, No. 78*, p. 173; cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 1984*, p. 427, para. 80; see also *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 1992*, pp. 264-267, in particular paras. 69 and 70). However, the Court considers that in the present case the facts underlying the Application have not changed in a way that produced such a transformation in the dispute brought before it. The question submitted to the Court for decision remains whether the issue and circulation of the arrest warrant by the Belgian judicial authorities against a person who was at that time the Minister for Foreign Affairs of the Congo were contrary to international

law. The Congo's final submissions arise "directly out of the question which is the subject-matter of that Application" (*Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72; see also *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 36).

In these circumstances, the Court considers that Belgium cannot validly maintain that the dispute brought before the Court was transformed in a way that affected its ability to prepare its defence, or that the requirements of the sound administration of justice were infringed. Belgium's third objection must accordingly be rejected.

37. The fourth Belgian objection reads as follows:

"That, in the light of the new circumstances concerning Mr. Yerodia Ndombasi, the case has assumed the character of an action of diplomatic protection but one in which the individual being protected has failed to exhaust local remedies, and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible."

38. In this respect, Belgium accepts that, when the case was first instituted, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name in respect of the alleged violation by Belgium of the immunity of the Congo's Foreign Minister. However, according to Belgium, the case was radically transformed after the Application was filed, namely on 15 April 2001, when Mr. Yerodia ceased to be a member of the Congolese Government.

Belgium maintains that two of the requests made of the Court in the Congo's final submissions in practice now concern the legal effect of an arrest warrant issued against a private citizen of the Congo, and that these issues fall within the realm of an action of diplomatic protection. It adds that the individual concerned has not exhausted all available remedies under Belgian law, a necessary condition before the Congo can espouse the cause of one of its nationals in international proceedings.

39. The Congo, on the other hand, denies that this is an action for diplomatic protection. It maintains that it is bringing these proceedings in the name of the Congolese State, on account of the violation of the immunity of its Minister for Foreign Affairs. The Congo further denies the availability of remedies under Belgian law. It points out in this regard that it is only when the

Crown Prosecutor has become seised of the case file and makes submissions to the *Chambre du conseil* that the accused can defend himself before the *Chambre* and seek to have the charge dismissed.

40. The Court notes that the Congo has never sought to invoke before it Mr. Yerodia's personal rights. It considers that, despite the change in professional situation of Mr. Yerodia, the character of the dispute submitted to the Court by means of the Application has not changed: the dispute still concerns the lawfulness of the arrest warrant issued on 11 April 2000 against a person who was at the time Minister for Foreign Affairs of the Congo, and the question whether the rights of the Congo have or have not been violated by that warrant. As the Congo is not acting in the context of protection of one of its nationals, Belgium cannot rely upon the rules relating to the exhaustion of local remedies.

In any event, the Court recalls that an objection based on non-exhaustion of local remedies relates to the admissibility of the application (see *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 26; *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 42, para. 49). Under settled jurisprudence, the critical date for determining the admissibility of an application is the date on which it is filed (see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 25-26, paras. 43-44; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-43).

Belgium accepts that, on the date on which the Congo filed the Application instituting proceedings, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name.

Belgium's fourth objection must accordingly be rejected.

41. As a subsidiary argument, Belgium further contends that "[i]n the event that the Court decides that it does have jurisdiction in this case and that the application is admissible, . . . the *non ultra petita* rule operates to limit the jurisdiction of the Court to those issues that are the

subject of the [Congo]’s final submissions”. Belgium points out that, while the Congo initially advanced a twofold argument, based, on the one hand, on the Belgian judge’s lack of jurisdiction, and, on the other, on the immunity from jurisdiction enjoyed by its Minister for Foreign Affairs, the Congo no longer claims in its final submissions that Belgium wrongly conferred upon itself universal jurisdiction *in absentia*. According to Belgium, the Congo now confines itself to arguing that the arrest warrant of 11 April 2000 was unlawful because it violated the immunity from jurisdiction of its Minister for Foreign Affairs, and that the Court consequently cannot rule on the issue of universal jurisdiction in any decision it renders on the merits of the case.

42. The Congo, for its part, states that its interest in bringing these proceedings is to obtain a finding by the Court that it has been the victim of an internationally wrongful act, the question whether this case involves the “exercise of an excessive universal jurisdiction” being in this connection only a secondary consideration. The Congo asserts that any consideration by the Court of the issues of international law raised by universal jurisdiction would be undertaken not at the request of the Congo but, rather, by virtue of the defence strategy adopted by Belgium, which appears to maintain that the exercise of such jurisdiction can “represent a valid counterweight to the observance of immunities”.

43. The Court would recall the well-established principle that “it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions” (*Asylum, Judgment, I.C.J. Reports 1950*, p. 402). While the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case the Court may not rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable.

44. The Court concludes from the foregoing that it has jurisdiction to entertain the Congo's Application, that the Application is not without object and that accordingly the case is not moot, and that the Application is admissible. Thus, the Court now turns to the merits of the case.

45. As indicated above (see paragraphs 41 to 43 above), in its Application instituting these proceedings, the Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium's claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.

46. As a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction. However, in the present case, and in view of the final form of the Congo's submissions, the Court will address first the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo.

47. The Congo maintains that, during his or her term of office, a Minister for Foreign Affairs of a sovereign State is entitled to inviolability and to immunity from criminal process being "absolute or complete", that is to say, they are subject to no exception. Accordingly, the Congo contends that no criminal prosecution may be brought against a Minister for Foreign Affairs in a foreign court as long as he or she remains in office, and that any finding of criminal responsibility by a domestic court in a foreign country, or any act of investigation undertaken with a view to bringing him or her to court, would contravene the principle of immunity from jurisdiction. According to the Congo, the basis of such criminal immunity is purely functional, and immunity is accorded under customary international law simply in order to enable the foreign State representative enjoying such immunity to perform his or her functions freely and without let or hindrance. The Congo adds that the immunity thus accorded to Ministers for Foreign Affairs

when in office covers *all* their acts, including any committed before they took office, and that it is irrelevant whether the acts done whilst in office may be characterized or not as “official acts”.

48. The Congo states further that it does not deny the existence of a principle of international criminal law, deriving from the decisions of the Nuremberg and Tokyo international military tribunals, that the accused’s official capacity at the time of the acts cannot, before any court, whether domestic or international, constitute a “ground of exemption from his criminal responsibility or a ground for mitigation of sentence”. The Congo then stresses that the fact that immunity might bar prosecution before a specific court or over a specific period does not mean that the same prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account. It concludes that immunity does not mean impunity.

49. Belgium maintains for its part that, while Ministers for Foreign Affairs in office generally enjoy an immunity from jurisdiction before the courts of a foreign State, such immunity applies only to acts carried out in the course of their official functions, and cannot protect such persons in respect of private acts or when they are acting otherwise than in the performance of their official functions.

50. Belgium further states that, in the circumstances of the present case, Mr. Yerodia enjoyed no immunity at the time when he is alleged to have committed the acts of which he is accused, and that there is no evidence that he was then acting in any official capacity. It observes that the arrest warrant was issued against Mr. Yerodia personally.

51. The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal. For the purposes of the present case, it is only the immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that fall for the Court to consider.

52. A certain number of treaty instruments were cited by the Parties in this regard. These included, first, the Vienna Convention on Diplomatic Relations of 18 April 1961, which states in its preamble that the purpose of diplomatic privileges and immunities is “to ensure the efficient performance of the functions of diplomatic missions as representing States”. It provides in Article 32 that only the sending State may waive such immunity. On these points, the Vienna Convention on Diplomatic Relations, to which both the Congo and Belgium are parties, reflects customary international law. The same applies to the corresponding provisions of the Vienna Convention on Consular Relations of 24 April 1963, to which the Congo and Belgium are also parties.

The Congo and Belgium further cite the New York Convention on Special Missions of 8 December 1969, to which they are not, however, parties. They recall that under Article 21, paragraph 2, of that Convention:

“The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy in the receiving State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law.”

These conventions provide useful guidance on certain aspects of the question of immunities.

They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case.

53. In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs.

He or she is in charge of his or her Government’s diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by

virtue of that office, has full powers to act on behalf of the State (see, e.g., Art. 7, para. 2 (a), of the 1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating with representatives of other States. The Court further observes that a Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office. He or she does not have to present letters of credence: to the contrary, it is generally the Minister who determines the authority to be conferred upon diplomatic agents and countersigns their letters of credence. Finally, it is to the Minister for Foreign Affairs that *chargés d'affaires* are accredited.

54. The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

55. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity, and those claimed to have been performed in a "private capacity", or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an "official" visit or a "private" visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the arrest relates to alleged acts performed

in an “official” capacity or a “private” capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions.

56. The Court will now address Belgium’s argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. In support of this position, Belgium refers in its Counter-Memorial to various legal instruments creating international criminal tribunals, to examples from national legislation, and to the jurisprudence of national and international courts. Belgium begins by pointing out that certain provisions of the instruments creating international criminal tribunals’ state expressly that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction.

Belgium also places emphasis on certain decisions of national courts, and in particular on the judgments rendered on 24 March 1999 by the House of Lords in the United Kingdom and on 13 March 2001 by the Court of Cassation in France in the *Pinochet* and *Qaddafi* cases respectively, in which it contends that an exception to the immunity rule was accepted in the case of serious crimes under international law. Thus, according to Belgium, the *Pinochet* decision recognizes an exception to the immunity rule when Lord Millett stated that “[i]nternational law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose”, or when Lord Phillips of Worth Matravers said that “no established rule of international law requires state immunity *rationae materiae* to be accorded in respect of prosecution for an international crime”.

As to the French Court of Cassation, Belgium contends that, in holding that, “under international law as it currently stands, the crime alleged [acts of terrorism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State”, the Court explicitly recognized the existence of such exceptions.

57. The Congo, for its part, states that, under international law as it currently stands, there is no basis for asserting that there is any exception to the principle of absolute immunity from criminal

process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law.

In support of this contention, the Congo refers to State practice, giving particular consideration in this regard to the *Pinochet* and *Qaddafi* cases, and concluding that such practice does not correspond to that which Belgium claims but, on the contrary, confirms the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs.

Thus, in the *Pinochet* case, the Congo cites Lord Browne-Wilkinson's statement that "[t]his immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions . . .". According to the Congo, the French Court of Cassation adopted the same position in its *Qaddafi* judgment, in affirming that "international custom bars the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties concerned, before the criminal courts of a foreign State".

As regards the instruments creating international criminal tribunals and the latter's jurisprudence, these, in the Congo's view, concern only those tribunals, and no inference can be drawn from them in regard to criminal proceedings before national courts against persons enjoying immunity under international law.

58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do

not enable it to conclude that any such an exception exists in customary international law in regard to national courts.

Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above.

In view of the foregoing, the Court accordingly cannot accept Belgium's argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

62. Given the conclusions it has reached above concerning the nature and scope of the rules governing the immunity from criminal jurisdiction enjoyed by incumbent Ministers for Foreign Affairs, the Court must now consider whether in the present case the issue of the arrest warrant of 11 April 2000 and its international circulation violated those rules. The Court recalls in this regard that the Congo requests it, in its first final submission, to adjudge and declare that:

"[B]y issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States."

63. In support of this submission, the Congo maintains that the arrest warrant of 11 April 2000 as such represents a “coercive legal act” which violates the Congo’s immunity and sovereign rights, inasmuch as it seeks to “subject to an organ of domestic criminal jurisdiction a member of a foreign government who is in principle beyond its reach” and is fully enforceable without special formality in Belgium.

The Congo considers that the mere issuance of the warrant thus constituted a coercive measure taken against the person of Mr. Yerodia, even if it was not executed.

64. As regards the international circulation of the said arrest warrant, this, in the Congo’s view, not only involved further violations of the rules referred to above, but also aggravated the moral injury which it suffered as a result of the opprobrium “thus cast upon one of the most prominent members of its Government”. The Congo further argues that such circulation was a fundamental infringement of its sovereign rights in that it significantly restricted the full and free exercise, by its Minister for Foreign Affairs, of the international negotiation and representation functions entrusted to him by the Congo’s former President. In the Congo’s view, Belgium “[thus] manifests an intention to have the individual concerned arrested at the place where he is to be found, with a view to procuring his extradition”. The Congo emphasizes moreover that it is necessary to avoid any confusion between the arguments concerning the legal effect of the arrest warrant abroad and the question of any responsibility of the foreign authorities giving effect to it. It points out in this regard that no State has acted on the arrest warrant, and that accordingly “no further consideration need be given to the specific responsibility which a State executing it might incur, or to the way in which that responsibility should be related” to that of the Belgian State. The Congo observes that, in such circumstances, “there [would be] a direct causal relationship between the arrest warrant issued in Belgium and any act of enforcement carried out elsewhere”.

65. Belgium rejects the Congo’s argument on the ground that “the character of the arrest warrant of 11 April 2000 is such that it has neither infringed the sovereignty of, nor created any obligation for, the [Congo]”.

With regard to the legal effects under Belgian law of the arrest warrant of 11 April 2000, Belgium contends that the clear purpose of the warrant was to procure that, if found in Belgium,

Mr. Yerodia would be detained by the relevant Belgian authorities with a view to his prosecution for war crimes and crimes against humanity. According to Belgium, the Belgian investigating judge did, however, draw an explicit distinction in the warrant between, on the one hand, immunity from jurisdiction and, on the other hand, immunity from enforcement as regards representatives of foreign States who visit Belgium on the basis of an official invitation, making it clear that such persons would be immune from enforcement of an arrest warrant in Belgium. Belgium further contends that, in its effect, the disputed arrest warrant is national in character, since it requires the arrest of Mr. Yerodia if he is found in Belgium but it does not have this effect outside Belgium.

66. In respect of the legal effects of the arrest warrant outside Belgium, Belgium maintains that the warrant does not create any obligation for the authorities of any other State to arrest Mr. Yerodia in the absence of some further step by Belgium completing or validating the arrest warrant (such as a request for the provisional detention of Mr. Yerodia), or the issuing of an arrest warrant by the appropriate authorities in the State concerned following a request to do so, or the issuing of an Interpol Red Notice. Accordingly, outside Belgium, while the purpose of the warrant was admittedly “to establish a legal basis for the arrest of Mr. Yerodia . . . and his subsequent extradition to Belgium”, the warrant had no legal effect unless it was validated or completed by some prior act “requiring the arrest of Mr. Yerodia by the relevant authorities in a third State”. Belgium further argues that “[i]f a State had executed the arrest warrant, it might infringe Mr. [Yerodia’s] criminal immunity”, but that “the Party directly responsible for that infringement would have been that State and not Belgium”.

67. The Court will first recall that the “international arrest warrant in absentia”, issued on 11 April 2000 by an investigating judge of the Brussels *Tribunal de première instance*, is directed against Mr. Yerodia, stating that he is “currently Minister for Foreign Affairs of the Democratic Republic of the Congo, having his business address at the Ministry of Foreign Affairs in Kinshasa”.

The warrant states that Mr. Yerodia is charged with being “the perpetrator or co-perpetrator” of: “—Crimes under international law constituting grave breaches causing harm by act or omission to persons and property protected by the Conventions signed at Geneva on 12 August 1949 and

by Additional Protocols I and II to those Conventions (Article 1, paragraph 3, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law) — Crimes against humanity (Article 1, paragraph 2, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law).”

The warrant refers to “various speeches inciting racial hatred” and to “particularly virulent remarks” allegedly made by Mr. Yerodia during “public addresses reported by the media” on 4 August and 27 August 1998. It adds:

“These speeches allegedly had the effect of inciting the population to attack Tutsi residents of Kinshasa: there were dragnet searches, manhunts (the Tutsi enemy) and lynchings.

The speeches inciting racial hatred thus are said to have resulted in several hundred deaths, the internment of Tutsis, summary executions, arbitrary arrests and unfair trials.”

68. The warrant further states that “the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement”. The investigating judge does, however, observe in the warrant that “the rule concerning the absence of immunity under humanitarian law would appear . . . to require some qualification in respect of immunity from enforcement” and explains as follows:

“Pursuant to the general principle of fairness in judicial proceedings, immunity from enforcement must, in our view, be accorded to all State representatives welcomed as such onto the territory of Belgium (on ‘official visits’). Welcoming such foreign dignitaries as official representatives of sovereign States involves not only relations between individuals but also relations between States. This implies that such welcome includes an undertaking by the host State and its various components to refrain from taking any coercive measures against its guest and the invitation cannot become a pretext for ensnaring the individual concerned in what would then have to be labelled a trap. In the contrary case, failure to respect this undertaking could give rise to the host State’s international responsibility.”

69. The arrest warrant concludes with the following order: “We instruct and order all bailiffs and agents of public authority who may be so required to execute this arrest warrant and to conduct the accused to the detention centre in Forest;

We order the warden of the prison to receive the accused and to keep him (her) in custody in the detention centre pursuant to this arrest warrant;

We require all those exercising public authority to whom this warrant shall be shown to lend all assistance in executing it.”

70. The Court notes that the *issuance*, as such, of the disputed arrest warrant represents an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity.

The fact that the warrant is enforceable is clearly apparent from the order given to “all bailiffs and agents of public authority . . . to execute this arrest warrant” (see paragraph 69 above) and from the assertion in the warrant that “the position of Minister for Foreign Affairs currently held by the accused does not entail immunity from jurisdiction and enforcement”. The Court notes that the warrant did admittedly make an exception for the case of an official visit by Mr. Yerodia to Belgium, and that Mr. Yerodia never suffered arrest in Belgium. The Court is bound, however, to find that, given the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo’s incumbent Minister for Foreign Affairs. The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

71. The Court also notes that Belgium admits that the purpose of the international *circulation* of the disputed arrest warrant was “to establish a legal basis for the arrest of Mr. Yerodia . . . abroad and his subsequent extradition to Belgium”. The Respondent maintains, however, that the enforcement of the warrant in third States was “dependent on some further preliminary steps having been taken” and that, given the “inchoate” quality of the warrant as regards third States, there was no “infringe[ment of] the sovereignty of the [Congo]”. It further points out that no Interpol Red Notice was requested until 12 September 2001, when Mr. Yerodia no longer held ministerial office.

The Court cannot subscribe to this view. As in the case of the warrant’s issue, its international circulation from June 2000 by the Belgian authorities, given its nature and purpose, effectively

infringed Mr. Yerodia's immunity as the Congo's incumbent Minister for Foreign Affairs and was furthermore liable to affect the Congo's conduct of its international relations.

Since Mr. Yerodia was called upon in that capacity to undertake travel in the performance of his duties, the mere international circulation of the warrant, even in the absence of "further steps" by Belgium, could have resulted, in particular, in his arrest while abroad. The Court observes in this respect that Belgium itself cites information to the effect that Mr. Yerodia, "on applying for a visa to go to two countries, [apparently] learned that he ran the risk of being arrested as a result of the arrest warrant issued against him by Belgium", adding that "[t]his, moreover, is what the [Congo] . . . hints when it writes that the arrest warrant 'sometimes forced Minister Yerodia to travel by roundabout routes'". Accordingly, the Court concludes that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

72. The Court will now address the issue of the remedies sought by the Congo on account of Belgium's violation of the above-mentioned rules of international law. In its second, third and fourth submissions, the Congo request the Court to adjudge and declare that:

"A formal finding by the Court of the unlawfulness of [the issue and international circulation of the arrest warrant] constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo;

The violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it; Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant."

73. In support of those submissions, the Congo asserts that the termination of the official duties of Mr. Yerodia in no way operated to efface the wrongful act and the injury flowing from it, which continues to exist. It argues that the warrant is unlawful *ab initio*, that "[i]t is

fundamentally flawed” and that it cannot therefore have any legal effect today. It points out that the purpose of its request is reparation for the injury caused, requiring the restoration of the situation which would in all probability have existed if the said act had not been committed. It states that, inasmuch as the wrongful act consisted in an internal legal instrument, only the “withdrawal” and “cancellation” of the latter can provide appropriate reparation.

The Congo further emphasizes that in no way is it asking the Court itself to withdraw or cancel the warrant, nor to determine the means whereby Belgium is to comply with its decision. It explains that the withdrawal and cancellation of the warrant, by the means that Belgium deems most suitable, “are not means of enforcement of the judgment of the Court but the requested measure of legal reparation/restitution itself”. The Congo maintains that the Court is consequently only being requested to declare that Belgium, by way of reparation for the injury to the rights of the Congo, be required to withdraw and cancel this warrant by the means of its choice.

74. Belgium for its part maintains that a finding by the Court that the immunity enjoyed by Mr. Yerodia as Minister for Foreign Affairs had been violated would in no way entail an obligation to cancel the arrest warrant. It points out that the arrest warrant is still operative and that “there is no suggestion that it presently infringes the immunity of the Congo’s Minister for Foreign Affairs”.

Belgium considers that what the Congo is in reality asking of the Court in its third and fourth final submissions is that the Court should direct Belgium as to the method by which it should give effect to a judgment of the Court finding that the warrant had infringed the immunity of the Congo’s Minister for Foreign Affairs.

75. The Court has already concluded (see paragraphs 70 and 71) that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium’s international responsibility.

The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo.

76. However, as the Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the *Factory at Chorzów*:

“[t]he essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed” (*P.C.I.J., Series A, No. 17*, p. 47).

In the present case, “the situation which would, in all probability, have existed if [the illegal act] had not been committed” cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated.

77. The Court sees no need for any further remedy: in particular, the Court cannot, in a judgment ruling on a dispute between the Congo and Belgium, indicate what that judgment’s implications might be for third States, and the Court cannot therefore accept the Congo’s submissions on this point.

78. For these reasons, THE COURT,

(1) (A) by fifteen votes to one, *Rejects* the objections of the Kingdom of Belgium relating to jurisdiction, mootness and admissibility;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges ad hoc* Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(B) By fifteen votes to one,

*Finds* that it has jurisdiction to entertain the Application filed by the Democratic Republic of the Congo on 17 October 2000;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges ad hoc* Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(C) By fifteen votes to one,

*Finds* that the Application of the Democratic Republic of the Congo is not without object and that accordingly the case is not moot;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges ad hoc* Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(D) By fifteen votes to one,

*Finds* that the Application of the Democratic Republic of the Congo is admissible;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; *Judges ad hoc* Bula-Bula, Van den Wyngaert;

AGAINST: *Judge* Oda;

(2) By thirteen votes to three,

*Finds* that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal; *Judge ad hoc* Bula-Bula;

AGAINST: *Judges* Oda, Al-Khasawneh; *Judge ad hoc* Van den Wyngaert;

(3) By ten votes to six,

*Finds* that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated;

IN FAVOUR: *President* Guillaume; *Vice-President* Shi; *Judges* Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek; *Judge ad hoc* Bula-Bula;  
AGAINST: *Judges* Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal; *Judge ad hoc* Van den Wyngaert.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fourteenth day of February, two thousand and two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Democratic Republic of the Congo and the Government of the Kingdom of Belgium, respectively.

*(Signed)* Gilbert GUILLAUME, President.

*(Signed)* Philippe COUVREUR, Registrar.

President GUILLAUME appends a separate opinion to the Judgment of the Court; Judge ODA appends a dissenting opinion to the Judgment of the Court; Judge RANJEVA appends a declaration to the Judgment of the Court; Judge KOROMA appends a separate opinion to the Judgment of the Court; Judges HIGGINS, KOOIJMANS and BUERGENTHAL append a joint separate opinion to the Judgment of the Court; Judge REZEK appends a separate opinion to the Judgment of the Court; Judge AL-KHASAWNEH appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* BULA-BULA appends a separate opinion to the Judgment of the Court; Judge *ad hoc* VAN DEN WYNGAERT appends a dissenting opinion to the Judgment of the Court.

*(Initialed)* G.G.

*(Initialed)* Ph.C.

# APPENDIX C

## Security Council

SC/10187/Rev.1\*\*

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Department of Public Information • News and Media Division • New York

Security Council  
6491<sup>st</sup> Meeting\* (PM)

### **IN SWIFT, DECISIVE ACTION, SECURITY COUNCIL IMPOSES TOUGH MEASURES ON LIBYAN**

### **REGIME, ADOPTING RESOLUTION 1970 IN WAKE OF CRACKDOWN ON PROTESTERS**

#### **Situation Referred to International Criminal Court;**

#### **Secretary-General Expresses Hope Message ‘Heard and Heeded’ in Libya**

Deploring what it called “the gross and systematic violation of human rights” in strife-torn Libya, the Security Council this evening demanded an end to the violence and decided to refer the situation to the International Criminal Court while imposing an arms embargo on the country and a travel ban and assets freeze on the family of Muammar Al-Qadhafi and certain Government officials.

Unanimously adopting resolution 1970 (2011) under Article 41 of the Charter’s Chapter VII, the Council authorized all Member States to seize and dispose of military-related materiel banned by the text. It called on all Member States to facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance in Libya and expressed its readiness to consider taking additional appropriate measures as necessary to achieve that.

Through the text, the Council also decided to establish a new committee to monitor sanctions, to liaison with Member States on compliance and to respond to violations and to

designate the individuals subject to the targeted measures. Individuals and entities immediately subjected to the targeted sanctions were listed in an Annex to the resolution.

Regarding its referral of the situation in Libya since 15 February 2011 to the Prosecutor of the International Criminal Court, the Council recognized that States not party to the Rome Statute that established the Court had no obligations to it, but urged all States and concerned organizations to cooperate fully with the Court's Prosecutor.

The Council affirmed it would keep the actions of the Libyan authorities under continuous review and would be prepared to strengthen, modify, suspend or lift the prescribed measures in light of compliance or non-compliance with the resolution.

Following the adoption of the text, Secretary-General Ban Ki-moon welcomed the Council's "decisive" action. "While it cannot, by itself, end the violence and the repression, it is a vital step — a clear expression of the will of a united community of nations," he said.

He expressed hope that the message that "gross violations of basic human rights will not be tolerated and that those responsible for grave crimes will be held accountable" would be "heard and heeded" by the Libyan regime and that it would bring hope and relief to those still at risk. He looked for similar action from the General Assembly and the international community as a whole, and warned that even bolder steps might be necessary.

In their explanations of vote, Council members welcomed the unanimity of the action and expressed solidarity with the people of Libya, hoping that their "swift and decisive" intervention would help bring them relief. Many expressed hope that the resolution was a strong step in affirming the responsibility of States to protect their people as well as the legitimate role of the Council to step in when they failed to meet that responsibility.

With the referral of the situation to the International Criminal Court, France's representative hoped the vote would open a new era in commitment to the protection of populations. Further to that goal, Brazil's representative expressed strong reservations to the provision in the resolution allowing for exemptions from jurisdiction of nationals from non-States parties, saying those were not helpful to advance the cause of justice and accountability.

Noting that five Council members were not parties to the Rome Statute that set up the International Criminal Court, including India, that country's representative said he would have preferred a "calibrated approach" to the issue. However, he was convinced that the referral

would help to bring about the end of violence and he heeded the call of the Secretary-General on the issue, while stressing the importance of the provisions in the resolution regarding non-States parties to the Statute.

Some speakers, such as the representatives of Lebanon and the Russian Federation, stressed the importance of affirming the sovereignty and territorial integrity of Libya. The Chinese representative said he had supported the resolution taking into account the special circumstances in Libya.

Speaking last, Libya's representative said that the Council's action represented moral support for his people and was a signal that an end must be put to the fascist regime in Tripoli. He launched an appeal to all the officers of the Libyan armed forces to support their own people, and welcomed the referral to the International Criminal Court, as well as the decision not to impose sanctions on those who might abandon Mr. Al-Qadhafi in the end.

Also speaking this evening were the representatives of the United Kingdom, South Africa, Nigeria, United States, Colombia, Portugal, Germany, and Bosnia and Herzegovina and Gabon.

The meeting was opened at 8:10 p.m. and closed at 8:55 p.m.

#### Resolution

The full text of resolution 1970 (2011) reads as follows:

*"The Security Council,*

*"Expressing grave concern at the situation in the Libyan Arab Jamahiriya and condemning the violence and use of force against civilians,*

*"Deploring the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government,*

*"Welcoming the condemnation by the Arab League, the African Union, and the Secretary General of the Organization of the Islamic Conference of the serious violations of human rights and international humanitarian law that are being committed in the Libyan Arab Jamahiriya,*

*"Taking note of the letter to the President of the Security Council from the Permanent Representative of the Libyan Arab Jamahiriya dated 26 February 2011,*

“*Welcoming* the Human Rights Council resolution A/HRC/S-15/2 of 25 February 2011, including the decision to urgently dispatch an independent international commission of inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, to establish the facts and circumstances of such violations and of the crimes perpetrated, and where possible identify those responsible,

“*Considering* that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity,

“*Expressing concern* at the plight of refugees forced to flee the violence in the Libyan Arab Jamahiriya,

“*Expressing concern also* at the reports of shortages of medical supplies to treat the wounded,

“*Recalling* the Libyan authorities’ responsibility to protect its population,

“*Underlining* the need to respect the freedoms of peaceful assembly and of expression, including freedom of the media,

“*Stressing* the need to hold to account those responsible for attacks, including by forces under their control, on civilians,

“*Recalling* article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

“*Expressing concern* for the safety of foreign nationals and their rights in the Libyan Arab Jamahiriya,

“*Reaffirming* its strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya.

“*Mindful* of its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations,

“*Acting* under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41,

“1. *Demands* an immediate end to the violence and calls for steps to fulfill the legitimate demands of the population;

“2. *Urges* the Libyan authorities to:

(a) Act with the utmost restraint, respect human rights and international humanitarian law, and allow immediate access for international human rights monitors;

(b) Ensure the safety of all foreign nationals and their assets and facilitate the departure of those wishing to leave the country;

(c) Ensure the safe passage of humanitarian and medical supplies, and humanitarian agencies and workers, into the country; and

(d) Immediately lift restrictions on all forms of media;

“3. *Requests* all Member States, to the extent possible, to cooperate in the evacuation of those foreign nationals wishing to leave the country;

*ICC referral*

“4. *Decides* to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court;

“5. *Decides* that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor;

“6. *Decides* that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State;

“7. *Invites* the Prosecutor to address the Security Council within two months of the adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;

“8. *Recognizes* that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;

### *Arms embargo*

“9. *Decides* that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related materiel, including the provision of armed mercenary personnel whether or not originating in their territories, and decides further that this measure shall not apply to:

(a) Supplies of non-lethal military equipment intended solely for humanitarian or protective use, and related technical assistance or training, as approved in advance by the Committee established pursuant to paragraph 24 below;

(b) Protective clothing, including flak jackets and military helmets, temporarily exported to the Libyan Arab Jamahiriya by United Nations personnel, representatives of the media and humanitarian and development works and associated personnel, for their personal use only; or

(c) Other sales or supply of arms and related materiel, or provision of assistance or personnel, as approved in advance by the Committee;

“10. *Decides* that the Libyan Arab Jamahiriya shall cease the export of all arms and related materiel and that all Member States shall prohibit the procurement of such items from the Libyan Arab Jamahiriya by their nationals, or using their flagged vessels or aircraft, and whether or not originating in the territory of the Libyan Arab Jamahiriya;

“11. *Calls upon* all States, in particular States neighboring the Libyan Arab Jamahiriya, to inspect, in accordance with their national authorities and legislation and consistent with international law, in particular the law of the sea and relevant international civil aviation agreements, all cargo to and from the Libyan Arab Jamahiriya, in their territory, including seaports and airports, if the State concerned has information that provides reasonable grounds to believe the cargo contains items the supply, sale, transfer, or export of which is prohibited by

paragraphs 9 or 10 of this resolution for the purpose of ensuring strict implementation of those provisions;

“12. *Decides* to authorize all Member States to, and that all Member States shall, upon discovery of items prohibited by paragraph 9 or 10 of this resolution, seize and dispose (such as through destruction, rendering inoperable, storage or transferring to a State other than the originating or destination States for disposal) items the supply, sale, transfer or export of which is prohibited by paragraph 9 or 10 of this resolution and decides further that all Member States shall cooperate in such efforts;

“13. *Requires* any Member State when it undertakes an inspection pursuant to paragraph 11 above, to submit promptly an initial written report to the Committee containing, in particular, explanation of the grounds for the inspections, the results of such inspections, and whether or not cooperation was provided, and, if prohibited items for transfer are found, further requires such Member States to submit to the Committee, at a later stage, a subsequent written report containing relevant details on the inspection, seizure, and disposal, and relevant details of the transfer, including a description of the items, their origin and intended destination, if this information is not in the initial report;

“14. *Encourages* Member States to take steps to strongly discourage their nationals from travelling to the Libyan Arab Jamahiriya to participate in activities on behalf of the Libyan authorities that could reasonably contribute to the violation of human rights;

#### *Travel ban*

“15. *Decides* that all Member States shall take the necessary measures to prevent the entry into or transit through their territories of individuals listed in Annex I of this resolution or designated by the Committee established pursuant to paragraph 24 below, provided that nothing in this paragraph shall oblige a State to refuse its own nationals entry into its territory;

“16. *Decides* that the measures imposed by paragraph 15 above shall not apply:

(a) Where the Committee determines on a case-by-case basis that such travel is justified on the grounds of humanitarian need, including religious obligation;

(b) Where entry or transit is necessary for the fulfillment of a judicial process;

(c) Where the Committee determines on a case-by-case basis that an exemption would further the objectives of peace and national reconciliation in the Libyan Arab Jamahiriya and stability in the region; or

(d) Where a State determines on a case-by-case basis that such entry or transit is required to advance peace and stability in the Libyan Arab Jamahiriya and the States subsequently notifies the Committee within forty-eight hours after making such a determination;

*Asset freeze*

“17. *Decides* that all Member States shall freeze without delay all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the individuals or entities listed in Annex II of this resolution or designated by the Committee established pursuant to paragraph 24 below, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, and decides further that all Member States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the individuals or entities listed in Annex II of this resolution or individuals designated by the Committee;

“18. Expresses its intention to ensure that assets frozen pursuant to paragraph 17 shall at a later stage be made available to and for the benefit of the people of the Libyan Arab Jamahiriya;

“19. *Decides* that the measures imposed by paragraph 17 above do not apply to funds, other financial assets or economic resources that have been determined by relevant Member States:

(a) To be necessary for basic expenses, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services in accordance with national laws, or fees or service charges, in accordance with national laws, for routine holding or maintenance of frozen funds, other financial assets and economic resources, after notification by the relevant State to the Committee of the intention to authorize, where appropriate, access to such funds, other financial assets or economic resources and in the absence of a negative decision by the Committee within five working days of such notification;

(b) To be necessary for extraordinary expenses, provided that such determination has been notified by the relevant State or Member States to the Committee and has been approved by the Committee; or

(c) To be the subject of a judicial, administrative or arbitral lien or judgment, in which case the funds, other financial assets and economic resources may be used to satisfy that lien or judgment provided that the lien or judgment was entered into prior to the date of the present resolution, is not for the benefit of a person or entity designated pursuant to paragraph 17 above, and has been notified by the relevant State or Member States to the Committee;

“20. Decides that Member States may permit the addition to the accounts frozen pursuant to the provisions of paragraph 17 above of interests or other earnings due on those accounts or payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to the provisions of this resolution, provided that any such interest, other earnings and payments continue to be subject to these provisions and are frozen;

“21. *Decides* that the measures in paragraph 17 above shall not prevent a designated person or entity from making payment due under a contract entered into prior to the listing of such a person or entity, provided that the relevant States have determined that the payment is not directly or indirectly received by a person or entity designated pursuant to paragraph 17 above, and after notification by the relevant States to the Committee of the intention to make or receive such payments or to authorize, where appropriate, the unfreezing of funds, other financial assets or economic resources for this purpose, 10 working days prior to such authorization;

*Designation criteria*

“22. Decides that the measures contained in paragraphs 15 and 17 shall apply to the individuals and entities designated by the Committee, pursuant to paragraph 24 (b) and (c), respectively;

(a) Involved in or complicit in ordering, controlling, or otherwise directing, the commission of serious human rights abuses against persons in the Libyan Arab Jamahiriya, including by being involved in or complicit in planning, commanding, ordering or conducting attacks, in violation of international law, including aerial bombardments, on civilian populations and facilities; or

(b) Acting for or on behalf of or at the direction of individuals or entities identified in subparagraph (a).

“23. Strongly *encourages* Member States to submit to the Committee names of individuals who meet the criteria set out in paragraph 22 above;

#### *New Sanctions Committee*

“24. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council consisting of all the members of the Council (herein "the Committee"), to undertake the following tasks:

(a) To monitor implementation of the measures imposed in paragraphs 9, 10, 15, and 17;

(b) To designate those individuals subject to the measures imposed by paragraphs 15 and to consider requests for exemptions in accordance with paragraph 16 above;

(c) To designate those individuals subject to the measures imposed by paragraph 17 above and to consider requests for exemptions in accordance with paragraphs 19 and 20 above;

(d) To establish such guidelines as may be necessary to facilitate the implementation of the measures imposed above;

(e) To report within thirty days to the Security Council on its work for the first report and thereafter to report as deemed necessary by the Committee;

(f) To encourage a dialogue between the Committee and interested Member States, in particular those in the region, including by inviting representatives of such States to meet with the Committee to discuss implementation of the measures;

(g) To seek from all States whatever information it may consider useful regarding the actions taken by them to implement effectively the measures imposed above;

(h) To examine and take appropriate action on information regarding alleged violations or non-compliance with the measures contained in this resolution;

“25. *Calls upon* all Member States to report to the Committee within 120 days of the adoption of this resolution on the steps they have taken with a view to implementing effectively paragraphs 9, 10, 15 and 17 above;

#### *Humanitarian assistance*

“26. *Calls upon* all Member States, working together and acting in cooperation with the Secretary General, to facilitate and support the return of humanitarian agencies and make

available humanitarian and related assistance in the Libyan Arab Jamahiriya, and requests the States concerned to keep the Security Council regularly informed on the progress of actions undertaken pursuant to this paragraph, and expresses its readiness to consider taking additional appropriate measures, as necessary, to achieve this;

#### *Commitment to review*

“27. *Affirms* that it shall keep the Libyan authorities’ actions under continuous review and that it shall be prepared to review the appropriateness of the measures contained in this resolution, including the strengthening, modification, suspension or lifting of the measures, as may be needed at any time in light of the Libyan authorities’ compliance with relevant provisions of this resolution;

“28. Decides to remain actively seized of the matter.”

#### **Annex I**

##### **Travel ban**

1. Al-Baghdadi, Dr Abdulqader Mohammed  
Passport number: B010574. Date of birth: 01/07/1950.  
Head of the Liaison Office of the Revolutionary Committees. Revolutionary Committees involved in violence against demonstrators.
2. Dibri, Abdulqader Yusef  
Date of birth: 1946. Place of birth: Houn, Libya.  
Head of Muammar Qadhafi’s personal security. Responsibility for regime security. History of directing violence against dissidents.
3. Dorda, Abu Zayd Umar  
Director, External Security Organisation. Regime loyalist. Head of external intelligence agency.
4. Jabir, Major General Abu Bakr Yunis  
Date of birth: 1952. Place of birth: Jalo, Libya.  
Defence Minister. Overall responsibility for actions of armed forces.
5. Matuq, Matuq Mohammed  
Date of birth: 1956. Place of birth: Khoms.

Secretary for Utilities. Senior member of regime. Involvement with Revolutionary Committees. Past history of involvement in suppression of dissent and violence.

6. Qadhaf Al-dam, Sayyid Mohammed

Date of birth: 1948. Place of birth: Sirte, Libya.

Cousin of Muammar Qadhafi. In the 1980s, Sayyid was involved in the dissident assassination campaign and allegedly responsible for several deaths in Europe. He is also thought to have been involved in arms procurement.

7. Qadhafi, Aisha Muammar

Date of birth: 1978. Place of birth: Tripoli, Libya.

Daughter of Muammar Qadhafi. Closeness of association with regime.

8. Qadhafi, Hannibal Muammar

Passport number: B/002210. Date of birth: 20/09/1975. Place of birth: Tripoli, Libya. Son of Muammar Qadhafi. Closeness of association with regime.

9. Qadhafi, Khamis Muammar

Date of birth: 1978. Place of birth: Tripoli, Libya.

Son of Muammar Qadhafi. Closeness of association with regime. Command of military units involved in repression of demonstrations.

10. Qadhafi, Mohammed Muammar

Date of birth: 1970. Place of birth: Tripoli, Libya.

Son of Muammar Qadhafi. Closeness of association with regime.

11. Qadhafi, Muammar Mohammed Abu Minyar

Date of birth: 1942. Place of birth: Sirte, Libya.

Leader of the Revolution, Supreme Commander of Armed Forces. Responsibility for ordering repression of demonstrations, human rights abuses.

12. Qadhafi, Mutassim

Date of birth: 1976. Place of birth: Tripoli, Libya.

National Security Adviser. Son of Muammar Qadhafi. Closeness of association with regime.

13. Qadhafi, Saadi

Passport number: 014797. Date of birth: 25/05/1973. Place of birth: Tripoli, Libya.

Commander Special Forces. Son of Muammar Qadhafi. Closeness of association with regime. Command of military units involved in repression of demonstrations.

14. Qadhafi, Saif al-Arab

Date of birth: 1982. Place of birth: Tripoli, Libya.

Son of Muammar Qadhafi. Closeness of association with regime.

15. Qadhafi, Saif al-Islam

Passport number: B014995. Date of birth: 25/06/1972. Place of birth: Tripoli, Libya.

Director, Qadhafi Foundation. Son of Muammar Qadhafi. Closeness of association with regime. Inflammatory public statements encouraging violence against demonstrators.

16. Al-Senussi, Colonel Abdullah

Date of birth: 1949. Place of birth: Sudan.

Director Military Intelligence. Military Intelligence involvement in suppression of demonstrations. Past history includes suspicion of involvement in Abu Selim prison massacre. Convicted in absentia for bombing of UTA flight. Brother-in-law of Muammar Qadhafi.

## **Annex II**

### **Asset freeze**

1. Qadhafi, Aisha Muammar

Date of birth: 1978. Place of birth: Tripoli, Libya.

Daughter of Muammar Qadhafi. Closeness of association with regime.

2. Qadhafi, Hannibal Muammar

Passport number: B/002210. Date of birth: 20/09/1975. Place of birth: Tripoli, Libya. Son of Muammar Qadhafi. Closeness of association with regime.

3. Qadhafi, Khamis Muammar

Date of birth: 1978. Place of birth: Tripoli, Libya.

Son of Muammar Qadhafi. Closeness of association with regime. Command of military units involved in repression of demonstrations.

4. Qadhafi, Muammar Mohammed Abu Minyar

Date of birth: 1942. Place of birth: Sirte, Libya.

Leader of the Revolution, Supreme Commander of Armed Forces. Responsibility for ordering repression of demonstrations, human rights abuses.

5. Qadhafi, Mutassim

Date of birth: 1976. Place of birth: Tripoli, Libya.

National Security Adviser. Son of Muammar Qadhafi. Closeness of association with regime.

6. Qadhafi, Saif al-Islam

Passport number: B014995. Date of birth: 25/06/1972. Place of birth: Tripoli, Libya.

Director, Qadhafi Foundation. Son of Muammar Qadhafi. Closeness of association with regime. Inflammatory public statements encouraging violence against demonstrators.

Statements

MARK LYALL GRANT (United Kingdom) welcomed the adoption, noting that his country was gravely concerned over the violence and had condemned the actions of the Libyan leadership. The text, he said, was a powerful signal of the determination of the international community to stand with the Libyan people as they charted their future.

HAREEP SINGH PURI (India) hoped that calm and stability were restored without further violence and called for measures to ensure the safety of the Indian population in Libya, as well as those attempting to leave. Noting that five Council members were not parties to the Rome Statute, including India, he said he would have preferred a “calibrated approach” to the issue. However, he was convinced that the referral of the situation to the International Criminal Court would help to bring about the end of violence, and he heeded the call of the Secretary-General on the issue. He, therefore, had voted in favor of the resolution, while stressing the importance of its provisions regarding non-States parties to the Rome Statute.

BASO SANGQU (South Africa) said his country was deeply concerned about the situation in Libya. The resolution adopted by the Security Council sent a clear and unambiguous message to Libya to stop the indiscriminate use of force in that country, and the measures it contained could contribute to the long-term objective of bringing peace and stability to the nation.

U. JOY OGWU (Nigeria) said that she was deeply concerned about the inflammatory rhetoric and loss of life occurring in Libya. As many had been calling for swift action, it was fitting that the Council had taken decisive action today. Nigeria supported the resolution and its “comprehensive” targeted sanctions. It was convinced that the text would deter individuals from supporting the regime and would provide for the protection of civilians and respect for international humanitarian and human rights law. The delegation believed that the resolution would swiftly address the ongoing violence.

SUSAN RICE (United States) welcomed the fact that the Council had spoken with one voice this evening; in a clear warning to the Libyan Government that it must stop the killing. Calling the text a strong resolution, she said that this was about people’s ability to shape their own future. Their rights were not negotiable and could not be denied.

NAWAF SALAM (Lebanon), noting the denunciation by the League of Arab States of the crimes committed against Libyan civilians, said he concurred with its opinion, as well as its support for the right of Libyan citizens to express their opinion. That was why he had voted in favor of the resolution. He stressed the importance of reaffirming the territorial unity of Libya and expressed deep sorrow over the lives lost.

VITALY CHURKIN (Russian Federation) said he supported the resolution because of his country’s deep concern over the situation, its sorrow over the lives lost and its condemnation of the Libyan Government’s actions. He opposed counterproductive interventions, but he said that the purpose of the resolution was to end the violence and to preserve the united sovereign State of Libya with its territorial integrity. Security for foreign citizens, including Russian citizens, must be ensured.

LI BAODONG (China) said that China was very much concerned about the situation in Libya. The greatest urgency was to cease the violence, to end the bloodshed and civilian casualties, and to resolve the crisis through peaceful means, such as dialogue. The safety and interest of the foreign nationals in Libya must be assured. Taking into account the special circumstances in Libya, the Chinese delegation had voted in favor of the resolution.

NÉSTOR OSORIO (Colombia) said the Colombian Government was pleased with the resolution, which had emerged as a result of a “timely process of consultation”, in tune with the sense of urgency demanded by the international community. The resolution sent the “direct and solid message” that the violence in Libya must cease and that those responsible for it must

answer for their crimes. Moreover, the decision to refer the situation to the International Criminal Court was an appropriate one. Colombia clearly rejected the calls for violence from official sectors in Libya, and condemned the violation of basic rights and freedoms of that country's citizens, including the right to life and to peaceful assembly. Colombia had co-sponsored yesterday's Human Rights Council resolution on the situation. Libya must find a way to respond legitimately to its people's demands, and the international community must remain united to bring an end to the violence there.

JOSÉ FILIPE MORAES CABRAL (Portugal) welcomed the unanimous adoption of the resolution, which he said sent a clear, united message against the crimes being committed against civilians in Libya. He expressed deep concern over the plight of refugees and other humanitarian issues, including the safety of foreigners. Impunity would not be tolerated and serious crimes would be prosecuted.

GÉRARD ARAUD (France) welcomed the fact that the Council had unanimously answered yesterday's appeal by the Libyan representative. The referral of the matter to the International Criminal Court might ensure that those responsible for the crimes were brought to justice. The Court had once again showed the rationale for its existence. The resolution recalled the accountability of each State for the protection of its population and the role of the international community when that responsibility was not met. He hoped the vote would open a new era for the international community as a whole.

PETER WITTIG (Germany) welcomed what he called the Council's swift, decisive, united and strong message that the violation of the rights of the Libyan people would not be tolerated. The referral to the International Criminal Court demonstrated the determination not to allow impunity. It should be clear to all that the Council would continue to follow the situation closely.

IVAN BARBALIĆ (Bosnia and Herzegovina) said that in the current situation time was of the essence, and that the Security Council had to react "unanimously and urgently" to end the violence and prevent further escalation of the situation in Libya. His delegation had closely followed the popular movement in Libya, and was appalled at the "unacceptable level of violence" targeted at civilians there. Bosnia and Herzegovina condemned in the strongest possible terms the violence and loss of life, and therefore fully supported the decision to refer those responsible to the International Criminal Court. He called for an immediate stop to the

violence. Worried about the outflow of refugees and the high number of internally displaced persons there, he called on international organizations to provide humanitarian aid and services to those affected by the violence.

ALFRED ALEXIS MOUNGARA MOUSSOTSI (Gabon) said that the situation existing in Libya over the last two weeks required an answer and a “strong, clear message” from the Security Council. Gabon had decided to add its voice to the resolution, not only to end the violence, but also to advise the Libyan regime of the consequences of its actions. Gabon was also ready to support other measures that the Council might adopt in support of the Libyan people and their right to life and free speech.

MARIA LUIZA RIBEIRO VIOTTI (Brazil) said that her delegation was deeply disturbed by the dramatic situation in Libya. The measures adopted today were meant to halt the violence, ensure the protection of civilians and promote respect for international law. The resolution was a “clear signal” of the Council’s readiness to respond to the situation in a manner consistent with its responsibilities. Brazil was a long-standing supporter of the integrity and universalization of the Rome Statute, and opposed the exemption from jurisdiction of nationals of those countries not parties to it. Brazil, therefore, expressed its strong reservation to the resolution’s operative paragraph 6, and reiterated its firm conviction that initiatives aimed at establishing those exemptions were not helpful to advance the cause of justice and accountability.

IBRAHIM DABBASHI (Libya) expressed his condolences to the martyrs who had fallen under the repression of the Libyan regime, and thanked Council Members for their unanimous action, which represented moral support for his people, who were resisting the attacks. The resolution would be a signal that an end must be put to the fascist regime in Tripoli.

He launched an appeal to all the officers of the Libyan armed forces to support their own people and renounce their support for Muammar Al-Qadhafi, whom he called “criminal” and whom he said was prepared to go to extremes to keep up the repression. He appealed also to the Libyan people to keep up their struggle to restore the State to the people. He welcomed, in addition, the referral of the situation to the International Criminal Court and the fact that sanctions were not being imposed on those who might abandon Mr. Al-Qadhafi in the end.

BAN KI-MOON, United Nations Secretary-General, welcomed the resolution. “While it cannot, by itself, end the violence and the repression, it is a vital step — a clear expression of the will of a united community of nations,” he said. Calling the events in Libya “clear-cut violations of all norms governing international behavior and serious transgressions of international human rights and humanitarian law”, he said it was of great importance that the Council was determined to reach consensus and uphold its responsibilities.

He hoped that the strong message that “gross violations of basic human rights will not be tolerated and that those responsible for grave crimes will be held accountable” would be heeded by the regime in Libya and that it would bring hope and relief to those still at risk. The sanctions were a necessary step to speed the transition to a new system of governance that had the people’s consent and participation.

He pledged to monitor the situation closely and remain in touch with world and regional leaders to support swift and concrete action. Expressing solidarity with the Libyan people in coping with the humanitarian impacts, he hoped that the new future for which they yearned would soon be theirs. Commending the Council for its decisive action, he looked for similar determination from the General Assembly and the Human Rights Council.

“Today’s measures are tough. In the coming days even bolder action may be necessary,” he said.

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\* The 6490<sup>th</sup> Meeting was closed.

\*\* Reissued to revise second paragraph.

# APPENDIX D

**Cour  
Pénale  
Internationale  
International  
Criminal  
Court**

Original: English No.: ICC-02/05-01/09  
Date: 4 March 2009

## **PRE-TRIAL CHAMBER I**

Before: **Judge Akua Kuenyehia, Presiding Judge  
Judge Anita Usacka  
Judge Sylvia Steiner**

**SITUATION IN DAFÜR, SUDAN  
IN THE CASE OF  
THE PROSECUTOR v. OMAR HASSAN AHMAD AL BASHIR ("OMAR AL  
BASHIR")**

**Public Document**

**Warrant of Arrest for Omar Hassan Ahmad Al Bashir**

**No. ICC-02/05-01/09 1/8 4 March 2009**

**ICC-02/05-01/09-1 04-03-2009 1/8 SL PT**

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

**The Office of the Prosecutor**

**Counsel for the Defence**

**Mr Luis Moreno Ocampo, Prosecutor**

**Mr Essa Faal, Senior Trial Lawyer**

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for**

**Participation/Reparation**

The Office of Public Counsel for

Victims

The Office of Public Counsel for the

Defence

States' Representatives Amicus Curiae

**REGISTRY**

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit Detention Section

Victims Participation and Reparations Other  
Section

No. ICC-02/05-01/09 2/8 4 March 2009

ICC-02/05-01/09-1 04-03-2009 2/8 SL PT

PRE-TRIAL CHAMBER I of the International Criminal Court ("the Chamber" and "the Court" respectively);

HAVING EXAMINED the "Prosecution's Application under Article 58" ("the Prosecution Application"), filed by the Prosecution on 14 July 2008 in the record of the situation in Darfur, Sudan ("the Darfur situation") requesting the issuance of a warrant for the arrest of Omar Hassan Ahmad Al Bashir (hereinafter referred to as "Omar Al Bashir") for genocide, crimes against humanity and war crimes;<sup>1</sup>

HAVING EXAMINED the supporting material and other information submitted by the Prosecution;<sup>2</sup>

NOTING the "Decision on the Prosecution's Request for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir"<sup>3</sup> in which the Chamber held that it was satisfied that there are reasonable grounds to believe that Omar Al Bashir is criminally responsible under article 25(3)(a) of the Statute as an indirect perpetrator, or as an indirect co-perpetrator,<sup>4</sup> for war crimes and crimes against humanity and that his arrest appears to be necessary under article 58(1)(b) of the Rome Statute ("the Statute");

NOTING articles 19 and 58 of the Statute;

CONSIDERING that, on the basis of the material provided by the Prosecution in support of the Prosecution Application and without prejudice to any subsequent determination that may be made under article 19 of the Statute, the case against Omar Al Bashir falls within the jurisdiction of the Court;

<sup>1</sup> ICC-02/05-151-US-Exp; ICC-02/05-151-US-Exp-Anxsl-89; Corrigendum ICC-02/05-151-US-Exp-Corr and Corrigendum ICC-02/05-151-US-Exp-Corr-Anxsl & 2; and Public redacted version ICC-02/05-157 and ICC-02/05-157-AnxA.

<sup>2</sup> ICC-02/05-161 and ICC-02/05-161-Conf-AnxA-J; ICC-02/05-179 and ICC-02/05-179-Conf-Exp-Anxsl-5; ICC-02/05-183-US-Exp and ICC-02/05-183-Conf-Exp-AnxA-E.

<sup>3</sup> ICC-02/05-01/09-1.

<sup>4</sup> See Partly Dissenting Opinion of Judge Anita Usacka to the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", Part IV.

No. ICC-02/05-01/09 3/8 4 March 2009

ICC-02/05-01/09-1 04-03-2009 3/8 SL PT

CONSIDERING that, on the basis of the material provided by the Prosecution in support of the Prosecution Application, there is no ostensible cause or self-evident factor to impel the Chamber to exercise its discretion under article 19(1) of the Statute to determine at this stage the admissibility of the case against Omar Al Bashir;

CONSIDERING that there are reasonable grounds to believe that from March 2003 to at least 14 July 2008, a protracted armed conflict not of an international character within the meaning of article 8(2) (f) of the Statute existed in Darfur between the Government of Sudan ("the GoS") and several organised armed groups, in particular the Sudanese Liberation Movement/Army ("the SLM/A") and the Justice and Equality Movement ("the JEM");

CONSIDERING that there are reasonable grounds to believe: (i) that soon after the attack on El Fasher airport in April 2003, the GoS issued a general call for the mobilisation of the Janjaweed Militia in response to the activities of the SLM/A, the JEM and other armed opposition groups in Darfur, and thereafter conducted, through GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the National Intelligence and Security Service ("the NISS") and the Humanitarian Aid Commission ("the HAC"), a counterinsurgency campaign throughout the Darfur region against the said armed opposition groups; and (ii) that the counter-insurgency campaign continued until the date of the filing of the Prosecution Application on 14 July 2008;

CONSIDERING that there are reasonable grounds to believe: (i) that a core component of the GoS counter-insurgency campaign was the unlawful attack on that part of the civilian population of Darfur - belonging largely to the Fur, Masalit and Zaghawa groups<sup>5</sup> - perceived by the GoS as being close to the SLM/A, the JEM and the other armed groups opposing the GoS in the ongoing armed conflict in Darfur; and (ii) that, as part of this core component of the counter-insurgency campaign, GoS

<sup>5</sup> See Partly Dissenting Opinion of Judge Anita Uäacka to the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", Part III. B.

No. ICC-02/05-01/09 4/8 4 March 2009

ICC-02/05-01/09-1 04-03-2009 4/8 SL PT

forces systematically committed acts of pillaging after the seizure of the towns and villages that were subject to their attacks;<sup>6</sup>

CONSIDERING, therefore, that there are reasonable grounds to believe that from

soon after the April 2003 attack in El Fasher airport until 14 July 2008, war crimes within the meaning of articles 8(2)(e)(i) and 8(2)(e)(v) of the Statute were committed by GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC, as part of the abovementioned GoS counter-insurgency campaign;

CONSIDERING, further, that there are reasonable grounds to believe that, insofar as it was a core component of the GoS counter-insurgency campaign, there was a GoS policy to unlawfully attack that part of the civilian population of Darfur - belonging largely to the Fur, Masalit and Zaghawa groups - perceived by the GoS as being close to the SLM/A, the JEM and other armed groups opposing the GoS in the ongoing armed conflict in Darfur;

CONSIDERING that there are reasonable grounds to believe that the unlawful attack on the above-mentioned part of the civilian population of Darfur was (i) widespread, as it affected, at least, hundreds of thousands of individuals and took place across large swathes of the territory of the Darfur region; and (ii) systematic, as the acts of violence involved followed, to a considerable extent, a similar pattern;

CONSIDERING that there are reasonable grounds to believe that, as part of the GoS's unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces subjected, throughout the

<sup>6</sup>Including in inter alia (i) the first attack on Kodoom on or about 15 August 2003; (ii) the second attack on Kodoom on or about 31 August 2003; (iii) the attack on Bindisi on or about 15 August 2003; (iv) the aerial attack on Mukjar between August and September 2003; (v) the attack on Arawala on or about 10 December 2003; (vi) the attack on Shattaya town and its surrounding villages (including Kailek) in February 2004; (vii) the attack on Muhajenya on or about 8 October 2007; (viii) the attacks on Saraf Jidad on 7, 12 and 24 January 2008; (ix) the attack on Silea on 8 February 2008; (x) the attack on Sirba on 8 February 2008; and (xi) the attack on Abu Suruj on 8 February 2008; (xii) the attack to Jebel Moon between 18 and 22 February 2008.

No. ICC-02/05-01/09 5/8 4 March 2009

ICC-02/05-01/09-1 04-03-2009 5/8 SL PT

Darfur region, thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of murder and extermination;<sup>7</sup>

CONSIDERING that there are also reasonable grounds to believe that, as part of the GoS's unlawful attack on the above-mentioned part of the civilian population of Darfur and with knowledge of such attack, GoS forces subjected, throughout the Darfur region, (i) hundreds of thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of forcible transfer;<sup>8</sup> (ii) thousands of civilian women, belonging primarily to these groups, to acts of rape;<sup>9</sup> and (iii) civilians, belonging primarily to the same groups, to acts of torture;<sup>10</sup>

CONSIDERING therefore that there are reasonable grounds to believe that, from soon after the April 2003 attack on El Fasher airport until 14 July 2008, GoS forces, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC, committed crimes against humanity consisting of murder, extermination, forcible transfer, torture and rape, within the meaning of articles 7(1)(a), (b), (d), (f) and (g) respectively of the Statute, throughout the Darfur region;

CONSIDERING that there are reasonable grounds to believe that Omar Al Bashir

has been the de jure and de facto President of the State of Sudan and Commander-in-

<sup>7</sup> Including in inter alia (i) the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur between August and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur between November 2005 and September 2006; (iv) the town of Muhajeriya in the Yasin locality in South Darfur on or about 8 October 2007; (v) the towns of Saraf Jidad, Abu Suruj, Sirba, Jebel Moon and Silea towns in Kulbus locality in West Darfur between January and February 2008; and (vi) Shegeg Karo and al-Ain areas in May 2008.

<sup>8</sup> Including in inter alia (i) the towns of Kodoom, Bindisi, Mukjar and Arawala and surrounding villages in Wadi Salih, Mukjar and Garsila-Deleig localities in West Darfur between August and December 2003; (ii) the towns of Shattaya and Kailek in South Darfur in February and March 2004; (iii) between 89 and 92 mainly Zaghawa, Masalit and Misseriya Jebel towns and villages in Buram Locality in South Darfur between November 2005 and September 2006; (iv) the town of Muhajeriya in the Yasin locality in South Darfur on or about 8 October 2007; and (v) the towns of Saraf Jidad, Abu Suruj, Sirba, Jebel Moon and Silea towns in Kulbus locality in West Darfur between January and February 2008.

<sup>9</sup> Including in inter alia (i) the towns of Bindisi and Arawala in West Darfur between August and December 2003; (ii) the town of Kailek in South Darfur in February and March 2004; and (iii) the towns of Sirba and Silea in Kulbus locality in West Darfur between January and February 2008.

<sup>10</sup> Including in inter alia: (i) the town of Mukjar in West Darfur in August 2003; (ii) the town of Kailek in South Darfur in March 2004; and (iii) the town of Jebel Moon in Kulbus locality in West Darfur in February 2008.

No. ICC-02/05-01/09 6/8 4 March 2009

ICC-02/05-01/09-1 04-03-2009 6/8 SL PT

Chief of the Sudanese Armed Forces from March 2003 to 14 July 2008, and that, in that position, he played an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation of the abovementioned

GoS counter-insurgency campaign;

CONSIDERING, further, that the Chamber finds, in the alternative, that there are reasonable grounds to believe: (i) that the role of Omar Al Bashir went beyond coordinating the design and implementation of the common plan; (ii) that he was in full control of all branches of the "apparatus" of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC; and (iii) that he used such control to secure the implementation of the common plan;

CONSIDERING that, for the above reasons, there are reasonable grounds to believe that Omar Al Bashir is criminally responsible as an indirect perpetrator, or as an indirect co-perpetrator,<sup>11</sup> under article 25(3)(a) of the Statute, for:

- i. intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities as a war crime, within the meaning of article 8(2)(e)(i) of the Statute;
- ii. pillage as a war crime, within the meaning of article 8(2)(e)(v) of the Statute;
- iii. murder as a crime against humanity, within the meaning of article 7(1)(a) of the Statute;
- iv. extermination as a crime against humanity, within the meaning of article 7(1)(b) of the Statute;
- v. forcible transfer as a crime against humanity, within the meaning of article 7(1)(d) of the Statute;

<sup>11</sup> See Partly Dissenting Opinion of Judge Anita USacka to the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", Part IV.

No. ICC-02/05-01/09 7/8 4 March 2009

ICC-02/05-01/09-1 04-03-2009 7/8 SL PT

vi. torture as a crime against humanity, within the meaning of article 7(1)(f) of the Statute; and

vii. rape as a crime against humanity, within the meaning of article 7(1)(g) of the Statute;

CONSIDERING that, under article 58(1) of the Statute, the arrest of Omar Al Bashir appears necessary at this stage to ensure (i) that he will appear before the Court; (ii) that he will not obstruct or endanger the ongoing investigation into the crimes for which he is allegedly responsible under the Statute; and (iii) that he will not continue with the commission of the above-mentioned crimes;

FOR THESE REASONS,

HEREBY ISSUES:

A WARRANT OF ARREST for OMAR AL BASHIR, a male, who is a national of the State of Sudan, born on 1 January 1944 in Hoshe Bannaga, Shendi Governorate, in the Sudan, member of the Jaàli tribe of Northern Sudan, President of the Republic of the Sudan since his appointment by the RCC-NS on 16 October 1993 and elected as such successively since 1 April 1996 and whose name is also spelt Omar al-Bashir, Omer Hassan Ahmed El Bashire, Omar al-Bashir, Omar al-Beshir, Omar el-Bashir, Omer Albasheer, Omar Elbashir and Omar Hassan Ahmad el-Beshir.

Done in English, Arabic and French, the English version being authoritative.

Judge Akua Kuenyehia

Presiding Judge

Judge Anita Usarka

Dated this Wednesday, 4 March 2009

At The Hague, The Netherlands

No. ICC-02/05-01/09

Judge Sylvia Steiner

8/8 4 March 2009