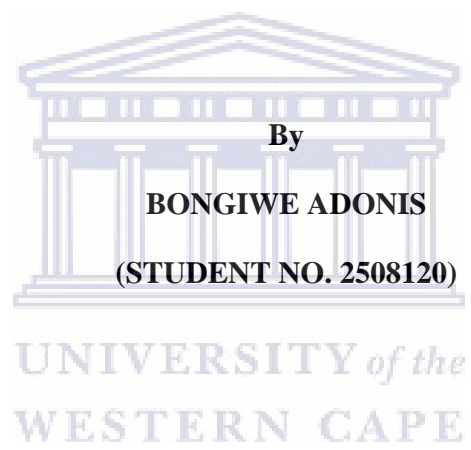


**UNIVERSITY OF THE WESTERN CAPE**

**A RESEARCH PAPER SUBMITTED TO THE FACULTY OF LAW OF THE  
UNIVERSITY OF THE WESTERN CAPE IN PARTIAL FULFILMENT OF THE  
REQUIREMENTS FOR THE DEGREE MAGISTER LEGUM – LLM**

**Transnational Criminal Justice and Crime Prevention -An International and African  
Perspective**



**Prepared under the Supervision of**

**Prof. Dr. Gerhard Werle 31**

**October 2011**

**Immunity for Serving Heads of States for  
Crimes under International Criminal Law:  
An Analysis of the ICC-Indictment against  
Omar Al Bashir**



# DECLARATION

---

I, BONGIWE ADOINS declare that “**Immunity for Serving Heads of States for Crimes under International Criminal Law: An Analysis of the ICC-Indictment against Omar Al Bashir**” is my work and that it has not been submitted for any degree or examination in any other university or institution. All sources used, referred to or quoted have been duly acknowledged.

**Bongiwe Adonis**

.....

31 October 2011



# DEDICATION

---

*To my parents, Lindiwe and Tom Adonis.*



## ACKNOWLEDGMENT

---

I would like to express my gratitude to my supervisor Prof Dr GERHARD WERLE for his supervision of this research paper, particularly in assisting and guiding me with in the formulation of the topic. I owe a special vote of thanks to Dr MORITZ VORMBAUM, for intellectually inspiring and challenging me throughout the process of this paper. It is thanks his detailed of his criticism and constructive comments that I was able to improve my work and bring about a solid end product of this academic piece. To, SOSTENESS MATERU and WINDELL NORTJIE, thank you so much for always availing yourselves to give advice, and a shoulder to lean on, and for being patient with me during process.

Most importantly, I extend my deepest gratitude to my parents, LINDIWE and TOM, for believing in me from the day one, *ndiyabulela kakulu*. To my beloved siblings: ESRA, GUGU, and KHAYA, this one is for you, for sacrificing so much for me as your baby sister. I need to express a special thanks to the families of ADONIS, MDLULWA, BUNDWINI and NOBULA for their support and contribution to my success.

A heart-felt gratitude to my loving friend, RAYMOND EYIOMEN YOSIMBOM, for being there for me, and for being a pillar of encouragement and support until the last day. To my classmates and friends, in the LLM programme, thank you for being true comrades in this academic struggle. To all my friends, who would mention if space allowed, thank you for your friendship, prayers and support as peers.

Finally, I am sincerely grateful to DAAD for providing me with financial support, without which I would not have been able to embark upon these further studies. The scholarship marked a great point in my life. The LLM programme not only exposed me to broader international cultures and languages, it also allowed me to interact with renowned researchers in the various fields of international law.

# **Immunity for Serving Heads of States for Crimes under International Criminal Law:**

## **An Analysis of the ICC-Indictment against Omar Al Bashir**

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### **ABSTRACT**

This paper analyses head of state immunity, a traditional rule of international law, in relation to the indictments by the International Criminal Court (ICC) in 2009 against the current Sudanese President Omar Hassan Ahmad Al Bashir. It can be agreed that the doctrine of immunity in international law attempts to overcome the tension between the protection of human rights and the demands of state sovereignty. The statutes and decisions of international criminal courts make it clear that no immunity for international crimes shall be attached to heads of states or to senior government officials. However, the case against the Sudanese President, where the jurisdiction of the ICC was triggered by the UN Security Council's referral of the situation in Darfur to the Court, represents the first case where a serving head of state has, in fact, been indicted before the ICC. From this case, a number of legal issues have arisen; such as the questions where the ICC's jurisdiction over an incumbent head of state, not party to the ICC Statute, is justified, and the obligations upon ICC state parties to surrender such a head of state to the requesting international criminal court. This paper gives an analysis of these questions.

## KEY WORDS

Al Bashir

Crimes against humanity

Genocide

Immunity

Internal conflict

International Criminal Court

International Obligations

State Sovereignty

United Nations Security Council

War crimes



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## LIST OF ABBREVIATIONS

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Doc.	Document
DRC	Democratic Republic of Congo
ed(s).	editor(s)
FRY	Federal Republic of Yugoslavia
HAC	Humanitarian Aid Commission
<i>Ibid.</i>	<i>Ibidem</i> (same author, same book, same page)
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
JEM	Justice and Equality Movement
NIF	National Islamic Party
NISS	National Intelligence Security Service
No.	Number
PDF	Popular Defence Force
SAF	Sudanese Armed Forces
SC	United Nations Security Council

SCSL	Special Court for Sierra Leone
SLM/A	Sudan Liberation Movement/Army
SPLM/A	Sudan People’s Liberation Movement/Army
SSLM	Southern Sudan Liberation Movement
U.S.	United States of America
UN	United Nations
UP	Umma Party
v	versus
Vol.	Volume



# MAP OF SUDAN



\*Source: UN Cartographic Section available at <http://www.un.org/Depts/Cartographic/map/profile/sudan.pdf>

# CHAPTER ONE:

## INTRODUCTION

---

### 1.1 BACKGROUND TO PROBLEM

World alert on the conflict and atrocities in Darfur, Sudan, may be greatly attributed to the increased widespread media coverage and reports by non-governmental organisations, during 2003.<sup>1</sup> In September 2004, the UN Security Council (SC) adopted Resolution 1564,<sup>2</sup> acting under Chapter VII of the UN Charter. This resolution requested, *inter alia*, for the establishment of an International Commission of Inquiry on Darfur (the Commission) by the United Nations Secretary-General.

In October 2004, the Secretary-General appointed a five member body of the Commission.<sup>3</sup> The Commission was assembled in Geneva and began its work on 25 October 2004, and submitted its report within three months of its appointment. Based upon the report of the Commission<sup>4</sup> the SC referred the situation in Darfur to the Prosecutor of the International Criminal Court (ICC),<sup>5</sup> in terms of Resolution 1593.<sup>6</sup>

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<sup>1</sup> Amnesty International Report (2003) ‘Sudan: Empty Promises? Human Rights Violations in Government-Controlled Areas’ African Report No. 54/036/2003 available at <http://www.amnesty.org/en/library/asset/AFR54/036/2003/en/1625d4b3-d6dc-11dd-ab95-a13b602c0642/afr540362003en.pdf> (accessed 24 March 2011); International Crises Group (2003) ‘Sudan: Towards an Incomplete Peace’ African Report No. 73, available at <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/sudan/073-sudan-towards-an-incomplete-peace.aspx> (accessed on 24 March 2011).

<sup>2</sup> UN Security Council Resolution S/Res/1564 (2004), 18 September 2004.

<sup>3</sup> The tasks for the Commission were set out in Article 12 of Resolution 1564 (2004), “to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties”; “to determine also whether or not acts of genocide have occurred”; and “to identify the perpetrators of such violations with a view of ensuring that those responsible are held accountable”.

<sup>4</sup> Report of the International Commission of Inquiry on Darfur to the United National Secretary-General, 25 January 2005, available at [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf) (accessed on 23 March 2011).

<sup>5</sup> See, Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, 12 July 1998, U.N. Doc A/CONF 183/9.

<sup>6</sup> UN Security Council Resolution S/Res/1593 (2005), 31 March 2005.

In July 2005, the Prosecutor of the ICC, Luis Moreno-Ocampo, decided to open investigations into the situation in Darfur.<sup>7</sup> Mr Ocampo stated, in his periodic report to the SC, that the available evidence showed a ‘widespread pattern of serious crimes, including murder, rape, the displacement of civilians, and the looting and burning of civilian property’<sup>8</sup> had occurred in the Darfur region. This was followed by a list of evidence, deposited by the Office of the Prosecutor, to the Pre-Trial Chamber I requesting summons to appear be issued in respect of two suspects.<sup>9</sup> The Court has issued two arrest warrants against Sudanese President Omar Hassan Ahmad Al Bashir (Al Bashir). The first warrant was issued in 2009<sup>10</sup> and the second warrant in 2010.<sup>11</sup>

The situation in Darfur has resulted in six cases before the ICC. Three suspects (including Al Bashir) have been issued with arrest warrants, two suspects have been summoned, and the case against one suspect has been closed.<sup>12</sup> The Darfur situation is amongst the seven situations currently before the ICC since the coming into force of the ICC Statute on 1 July 2002.<sup>13</sup>

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<sup>7</sup> See, Press Release, The Prosecutor of the ICC opens investigation in Darfur, ICC-OTP-0606-104, 6 June 2005, available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/press%20releases/otp%20the%20prosecutor%20of%20the%20icc%20opens%20investigation%20in%20darfur> [accessed on 23 March 2011].

<sup>8</sup> Detailed summaries of the crimes on which the prosecutor has gathered information and evidence can be found on the ICC’s website, available at [http://www.icc-cpi.int/cases/Darfur/s0205/s0205\\_un.html](http://www.icc-cpi.int/cases/Darfur/s0205/s0205_un.html) [accessed on 23 March 2011].

<sup>9</sup> See, Press Release, Pre-Trial Chamber I receives documents containing list of evidence in the situation in Darfur, ICC-CPI\_20070227-207 (2005) available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/press%20releases/pre-trial%20chamber%20i%20receives%20documents%20containing%20list%20of%20evidence%20in%20the%20situation%20of%20darfur> [accessed on 27 March 2011].

<sup>10</sup> *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-1, ‘Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’ (4 March 2009); *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-95, ‘Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’ (12 July 2010).

<sup>11</sup> *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-73, ‘Judgement on the Appeal of the Prosecutor against the Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’ (3 February 2010).

<sup>12</sup> See, Situation in Darfur, Sudan, ICC-02/05, available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/> [accessed on 28 July 2011].

<sup>13</sup> See, All Situations, available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/> [accessed on 25 October 2011].

## 1.2 OBJECTIVE OF STUDY

The first objective of this study is to conduct an analysis of the legal issues following the arrest warrants issued against Al Bashir by the Pre-Trial Chamber I. This will be done by taking cognisance of the factual and legal background of the case against Al Bashir before the ICC. The focus of this study will be on the attacks and counter attacks which took place within the Darfur region, and the prominent peace negotiations which gave rise to the referral of the Darfur situation to the ICC. The second objective of this study is to identify the rules of international law on immunities enjoyed by state officials. In particular, the extent to which such immunities are applicable before international fora, such as the ICC, where it issues arrest warrants against an incumbent head of state not party to the ICC Statute.



## 1.3 SIGNIFICANCE OF STUDY

The sovereignty of a state is not unfettered, it is in fact limited by many international rules such as customary law and treaty law. The doctrine of immunity, although well founded in the jurisprudence of international law, presents challenges where serious human rights violations have occurred in conflict situations, with the threat that the victim communities' interests are compromised through the award of immunity to such perpetrators. We have seen indictments against heads of state, such as those brought against Slobodan Milosević, by the International Criminal Tribunal for the former Yugoslavia (ICTY), and against Charles Taylor, by the Special Court for Sierra Leona (SCSL). However, in both cases these accused appeared before the respective tribunals as *former* heads of states. During the regime of the ICC, the indictments against Omar Al Bashir are the first of their kind, as he is a *servant* head of state.

The fact that the situation in Darfur is based on a resolution of the SC is paramount in respect of issues such as; the removal of immunity. Another problem relates the obligations upon states parties to the ICC Statute, under Article 98(1), to surrender Al Bashir to the ICC. Therefore, the question arises whether there is an obligation upon states parties to co-operate with the ICC or whether the request to surrender Al Bashir amounts to an *ultra vires* act by the ICC. The fact that the situation in Darfur is still pending before the ICC, and that Al Bashir is still at large (although he has made visits to several states since the issuance of arrest warrants against him) makes this study worth researching. Finally, this study is also topical for the purpose of exploring the application of the ICC Statute for the first time against an incumbent head of state, in respect to the ICC's mandate to end impunity and to prevent future crimes.

#### **1.4 RESEARCH METHODOLOGY**

This research is library-based. Primary sources will include relevant statutory documents, UN Reports on the situation in Darfur; Press Releases, resolutions and reports to the SC and those of the ICC, and cases. Secondary sources will consist of academic publications including, books, journal articles, legal scholar's commentary, as well as newspaper reports specifically in relation to the situation in Darfur and those addressing the issue of head of state immunity.





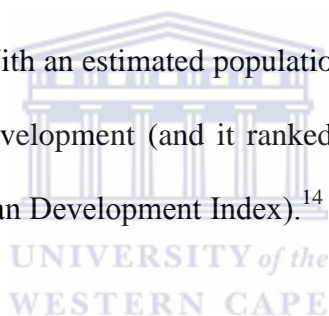
# CHAPTER TWO:

## HISTORICAL BACKGROUND OF THE DARFUR CONFLICT

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### 2.1 THE SUDAN

In order to understand the situation in Darfur, it is important to place it within its broader context. This normally entails a broad assessment of the situation into three phases of development, namely; pre-colonial, colonial, and post-colonial Sudan. However, an examination of the first two phases will not be conducted in the present study. The Sudan is situated in northeastern Africa. With an estimated population of 43 million inhabitants, Sudan is considered at Low Human Development (and it ranked 154 in the 2010 United Nations Development Programme's Human Development Index).<sup>14</sup>



After thirty-nine years of foreign control, under British-Egyptian rule, Sudan became independent on 1 January 1965.<sup>15</sup> Its colonial legacy entrenched the state apparatus in Northern Sudan.<sup>16</sup> Throughout the country development was uneven and the South was treated as a closed district, with Southerners having little voice in the running of the country.<sup>17</sup>

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<sup>14</sup> UNDP Human Development Index 2010 – 20<sup>th</sup> Anniversary Edition 'The Real Wealth of Nations Pathways to Human Development', available at [http://hdr.undp.org/en/media/HDR\\_2010\\_EN\\_Complete\\_reprint.pdf](http://hdr.undp.org/en/media/HDR_2010_EN_Complete_reprint.pdf) [accessed on 5 June 2011].

<sup>15</sup> Niblock T (1987) *Class and Power in Sudan: The Dynamics of Sudanese Politics, 1898-1985* 11; Johnson D H (2003) *The Root Causes of Sudan's Civil Wars* 21; Kabalo S A (1988) 'Economic Crisis and The Civilian, Military Interchange in The Sudan' in Mahmoud F B (ed) *Calamity in Sudan: Civilian Versus Military Rule* 21.

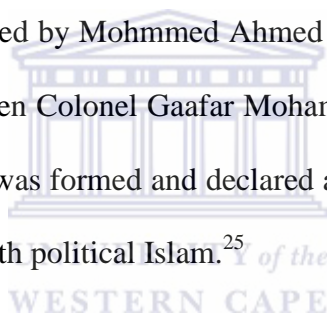
<sup>16</sup> Field S 'The Civil War in Sudan: The Role of the Oil Industry' (200) Institute for Global Dialogue Occasional Paper No. 23, 3.

<sup>17</sup> *Ibid*; Niblock T (1987) *Class and Power in Sudan: The Dynamics of Sudanese Politics, 1898-1985* 153 and 154; Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 175.

Sudan has had ten years of democracy during the periods of 1956-1958, 1965-1969, and 1985-1989, during its forty-six years under national rule.<sup>18</sup> In the remaining periods, the country has been ruled by military regimes.<sup>19</sup>

In November 1958 General Ibrahim Abboud came to power through a coup.<sup>20</sup> The military government continued a policy of Arabization and Islamization.<sup>21</sup> The continued repression by government throughout the country led to unrest and the emergence of armed rebellion in the South.<sup>22</sup> In 1964 student protests and unions strikes in Khartoum forced the military regime out of office, this period is said to mark the beginning of Sudan's first civil war.<sup>23</sup>

The 1965 coalition government, led by Mohammed Ahmed Mahjub of the Umma Party (UP), was overthrown in May 1969 when Colonel Gaafar Mohamed Al-Nimeiri took power.<sup>24</sup> The Sudanese Socialist Union (SSU) was formed and declared as the sole legitimate party, and its socialist ideology later infused with political Islam.<sup>25</sup>



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<sup>18</sup> Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 172-173.

<sup>19</sup> Ali T & Matthews R (1999) 'Civil War and Efforts in Sudan' in Ali T & Matthews R *Civil Wars in Africa* (1999) 193.

<sup>20</sup> Deng F M (1995) *War of Visions: Conflict of Identities in the Sudan* 57-58; Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 179-180.

<sup>21</sup> *Ibid.*

<sup>22</sup> Deng F M (1995) *War of Visions: Conflict of Identities in the Sudan* 57-58.

<sup>23</sup> Mansour K (1990) *The Government They Deserve: The Role of the Elite in Sudan's Political Evolution* 199. Beshir M O (1975) *The Southern Sudan: From Conflict to Peace* 49-53; Kabalo S A (1988) 'Economic Crisis and The Civilian, Military Interchange in The Sudan' in Mahmoud F B (ed) *Calamity in Sudan: Civilian Versus Military Rule* 26-28; Ali T & Matthews R (1999) 'Civil War and Efforts in Sudan' in Ali T & Matthews R *Civil Wars in Africa* 205-206; Johnson D H (2003) *The Root Causes of Sudan's Civil Wars* 30-31; Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 180.

<sup>24</sup> Woodward P (2003) *The Horn of Africa: Political and International Relations* 38-42.

<sup>25</sup> Gresh A (1989) 'The Officers and the Comrades: The Sudanese Communist Party and Nimeiri Face-to-Face, 1969-1971' 21 *International Journal of Middle East Studies* 393-394; Burr J M & Collins R O (2008) *Darfur: The Long Road to Disaster* (2ed.) 71; Beshir M O (1975) *The Southern Sudan: From Conflict to Peace* 72; Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 190.

On 27 February 1972 the so-called Addis Ababa agreement was signed between Nimeiri and the Southern Sudan Liberation Movement (SSLM), which granted the South a degree of autonomy and democracy.<sup>26</sup> African scholars have described the agreement as a landmark in the history of Sudan and as important as the Treaty of Versailles was in Europe in 1919.<sup>27</sup> After oil was discovered in the South in 1979, Nimeiri took several measures to incorporate the oil-rich areas of the South into the North, because of the nation's deepening economic crisis.<sup>28</sup> The attempt to redraw the borders between the North and South, in order to remove the oilfields from Southern jurisdiction failed, and resulted in the creation of a new province.<sup>29</sup> This was a breach of the Addis Ababa agreement.<sup>30</sup> Furthermore, in September 1983 Nimeiri introduced Islamic *Sharia* Law (the so-called September laws) by injecting religion into government policies.<sup>31</sup> The South reacted with further resistance against these steps, and eventually civil war re-launched in 1983 by the Sudan People's Liberation Movement (SPLM), displacing four million people and killing almost two million people.<sup>32</sup> After sixteen years of oppressive rule Nimeiri's regime came to an end amidst protests, over food shortage and price increases, led by the Professionals' Front.<sup>33</sup>

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<sup>26</sup> Global Security Website 'Sudan: First Civil War', available at <http://www.globalsecurity.org/military/world/war/sudan-civil-war1.htm> [accessed on 5 June 2011]; Dagne T 'Sudan: The Crisis in Darfur and Status of the North-South Peace Agreement' (2010) 18, available at <http://fpc.state.gov/documents/organization/142668.pdf> [accessed on 5 June 2011]; Woodward P (2003) *The Horn of Africa: Political and International Relations* 42-43.

<sup>27</sup> Beshir M O (1975) *The Southern Sudan: From Conflict to Peace* 107 and 122-123.

<sup>28</sup> *Ibid.*

<sup>29</sup> Ali T & Matthews R (1999) 'Civil War and Efforts in Sudan' in Ali T & Matthews R *Civil Wars in Africa* 208-209; Field S 'The Civil War in Sudan: The Role of the Oil Industry' Institute for Global Dialogue Occasional Paper No. 23 (2000) 3; Johnson D H (2003) *The Root Causes of Sudan's Civil Wars* 45-47; Sharif H (1994) 'Re-Cycling the Past in the Sudan: An Overview of Political Decay' in Sharif H & Terje T (eds.) *Short-Cut to Decay: The Case of the Sudan* 12; Rone J (2003) *Sudan, Oil, and Human Rights* 129.

<sup>30</sup> Field S 'The Civil War in Sudan: The Role of the Oil Industry' (2000) Institute for Global Dialogue Occasional Paper No. 23, 3.

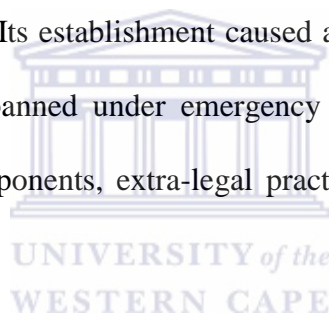
<sup>31</sup> Johnson D H (1991) 'North-South Issues' in Woodward P (ed.) *Sudan after Nimeiri* 131-137; Ali T & Matthews R (1999) 'Civil War and Efforts in Sudan' in Ali T & Matthews R *Civil Wars in Africa* 209; Johnson D H (2003) *The Root Causes of Sudan's Civil Wars* 71; Rona J (2003) *Sudan, Oil, and Human Rights* 130-132.

<sup>32</sup> El-Battahani A 'A Complex Web: Politics and Conflict in Sudan' (2006) available at <http://www.c-r.org/our-work/accord/sudan/politics-conflict.php> [accessed on 5 June 2011].

<sup>33</sup> Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 192-193.

In April 1985 a Transitional Military Council, led by General Abed Rahman Siwar Al-Dahab, was put in place to oversee Sudan into a multi-party democratic era.<sup>34</sup> The elections in 1986 led to the victory of UP leader, Sadiq Al-Mahdi, who became Prime Minister.<sup>35</sup> The elected government was soon overthrown by the leaders of the Islamist coup who cited the elected government's political ineptness and failure to stop the fighting in Darfur among the reasons for its actions.<sup>36</sup>

In June 1989 the current President of Sudan, General Omar Hassan Al-Bashir, came to power through a military coup.<sup>37</sup> The Islamist regime was led by the National Islamic Front (NIF) and established a paramilitary organ, alongside the Sudanese Armed Forces (SAF), called the Popular Defence Force (PDF).<sup>38</sup> Its establishment caused another round of conflict. Political parties and trade unions were banned under emergency laws.<sup>39</sup> Hallmarks of the regime consisted of the detention of opponents, extra-legal practices and general abuse of human rights.<sup>40</sup>



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<sup>34</sup> Sidahmed A S & Sidahmed A (2005) *Sudan: The Contemporary Middle East* 33-34; Sharif H (1994) 'Re-Cycling the Past in the Sudan: An Overview of Political Decay' in Sharif H & Terje T (eds.) *Short-Cut to Decay: The Case of the Sudan* 13; Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 193.

<sup>35</sup> Sidahmed A S & Sidahmed A (2005) *Sudan: The Contemporary Middle East* 33-34.

<sup>36</sup> Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 231.

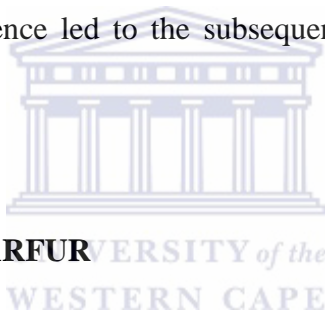
<sup>37</sup> Sharif H (1994) 'Re-Cycling the Past in the Sudan: An Overview of Political Decay' in Sharif H & Terje T (eds.) *Short-Cut to Decay: The Case of the Sudan* 17; Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 193; El-Battahani A 'A Complex Web: Politics and Conflict in Sudan' (2006).

<sup>38</sup> Salih M A M 'Understanding the Conflict in Darfur' (2005) University of Copenhagen Centre for African Studies Occasional Paper, available at [http://www.teol.ku.dk/cas/research/publications/occ\\_papers/muhamed\\_salihsamletpaper.pdf](http://www.teol.ku.dk/cas/research/publications/occ_papers/muhamed_salihsamletpaper.pdf) [accessed on 10 July 2011].

<sup>39</sup> Sharif H (1994) 'Re-Cycling the Past in the Sudan: An Overview of Political Decay' in Sharif H & Terje T (eds.) *Short-Cut to Decay: The Case of the Sudan* 17.

<sup>40</sup> *Ibid*, 18.

Successive regimes have been criticised for being manipulative administrations, using ideologies to gain support, and elites who have mastered the colonial era's divide-and-rule tactics.<sup>41</sup> This resulted in under-development, exclusion, and violent conflict in Sudan.<sup>42</sup> The failure of parliamentary systems resulted in military coups and the emergence of regional movements.<sup>43</sup> However, the political parties who ran these systems have been complimented for running reasonably fair elections which earned them more respect from the press, judiciary and trade unions.<sup>44</sup> Today the Sudan, once the largest country in Africa,<sup>45</sup> has been divided into two states. The 2005 Comprehensive Peace Agreement (CPA) brought an end to the North-South Sudan, David and Goliath style, civil war. The January 2011 Referendum, in order to determine the status of the Southern Sudan, received a majority of 98.83 per cent of participants voting for independence led to the subsequent birth of the Republic of South Sudan on 9 July 2011.<sup>46</sup>



## 2.2 THE CONFLICT IN DARFUR

Darfur is located in the western province of Sudan and borders with Libya, Chad, and the Central African Republic.<sup>47</sup> Administratively it was divided into North (El Fasher), South (Nyala) and West (El Geneina) Darfur.<sup>48</sup>

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<sup>41</sup> El-Battahani A 'A Complex Web: Politics and Conflict in Sudan' (2006).

<sup>42</sup> *Ibid.*

<sup>43</sup> Salih M A M 'Understanding the Conflict in Darfur' (2005); Ibrahim F 'Ideas on the Background of the Present Conflict in Darfur' (2004), available at [http://www.afrikafreundeskreis.de/docs/darfur\\_prof\\_ibrahim\\_5\\_04.pdf](http://www.afrikafreundeskreis.de/docs/darfur_prof_ibrahim_5_04.pdf) [accessed on 10 July 2011].

<sup>44</sup> Sidahmed A S & Sidahmed A (2005) *Sudan: The Contemporary Middle East* 35.

<sup>45</sup> Collins R D (2008) *A History of Modern Sudan* 1; Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 8.

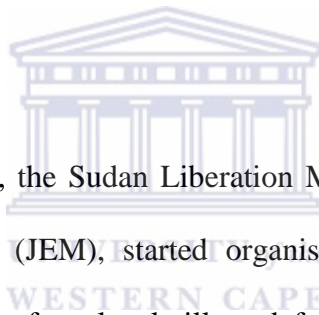
<sup>46</sup> See, United Nations Mission in the Sudan 'Independence of South Sudan' available at <http://www.un.org/en/peacekeeping/missions/unmis/referendum.shtml> [accessed on 5 August 2011]. "The referendum was initiated in 2005 through the CPA between the Government of Sudan and the SPLM, which ended a war of over twenty years. Sudanese authorities were responsible for the process, led by President Al Bashir of Sudan and President Salva Kiir Mayardit of the Southern Sudan, under the leadership of the [SC]"

<sup>47</sup> Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 8.

<sup>48</sup> Salih M A M 'Understanding the Conflict in Darfur' (2005); Ibrahim F 'Ideas on the Background of the Present Conflict in Darfur' (2004).

It is habited by tribal groups (predominantly agriculturalist and sedentary) whose distinctions are not clear-cut, and “are more a product of war than the cause of it.”<sup>49</sup> Islam is a sheared religion amongst all tribes, and although some tribes have their own languages, Arabic is commonly spoken.<sup>50</sup>

Mohamed M A Salih contends that Sudan’s independence gave rise to at least three sets of relationships with respect Darfur: “(i) the development of new alliances because of the ethnic background of political parties; (ii) the fight for resources intensified because of human and livestock population; drought; competition over land, water points and grazing resources; and (iii) the UP’s control of western Sudanese votes were increasingly challenged by Darfur-based movements.”<sup>51</sup>



The main rebel groups in Darfur, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), started organising themselves during 2001 and 2002.<sup>52</sup> Their members were drawn from local village defence groups, and essentially derived from three tribes: the Fur, the Massalit and the Zaghawa.<sup>53</sup> The SLM/A, which was formally known as the Darfur Liberation Front, focused its agenda on the people of Darfur and it later covered all of Sudan.<sup>54</sup> The agenda of the JEM was based on a type of manifesto called the Black Book of 2001 – which documents the dominance of northern tribes in Sudan’s

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<sup>49</sup> Suliman M ‘Ethnicity from Perception to Cause of Violent Conflicts: The Case of the Fur and Nuba Conflicts in Western Sudan’ (1997), available at [http://www.ifaanet.org/ethnicity\\_inversion.htm](http://www.ifaanet.org/ethnicity_inversion.htm) [accessed on 10 July 2011].

<sup>50</sup> Sharif H (1994) ‘Re-Cycling the Past in the Sudan: An Overview of Political Decay’ in Sharif H & Terje T (eds.) *Short-Cut to Decay: The Case of the Sudan* 18; Ibrahim F ‘Ideas on the Background of the Present Conflict in Darfur’ (2004).

<sup>51</sup> Salih M A M ‘Understanding the Conflict in Darfur’ (2005); Ibrahim F ‘Ideas on the Background of the Present Conflict in Darfur’ (2004).

<sup>52</sup> Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 254.

<sup>53</sup> *Ibid.*

<sup>54</sup> See, Press Release, Commentary by SLM/A, 14 March 2003, available at <http://www.sudan.net/news/press/postedr/214.shtml> [accessed on 11 July 2011].

government – and sought to prove the disparities in the distribution of power and wealth.<sup>55</sup> Both rebel groups cited socio-economic and political marginalisation of Darfur and its people as reason for their opposition to the Khartoum government.<sup>56</sup> The Darfur conflict began as a civil war (1987-1989) between local militia, each with ethnic identity.<sup>57</sup> It is suggested that the government only became involved after 1989, following its failed initiatives to address the basic causes of the conflict.<sup>58</sup> In March 2003 the insurgents attacked government installations in Kutum, Tine and El Fashir, by destroying military aircraft, killing soldiers and police, and looting government weaponry in order to strengthen their position.<sup>59</sup>

As a result of military deficit in Darfur the government of Sudan called upon local tribes to assist, alongside the PDF, in the fight against the rebels.<sup>60</sup> Mostly Arab (from the Misseriya and Rizeigat) nomadic tribes responded to the government's call.<sup>61</sup> Reports indicated that foreigners, primarily from Chad and Libya, also responded to this call and that the government of Sudan was prepared to recruit them.<sup>62</sup> These new recruits became known by the civilian population as the “Janjaweed”.

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<sup>55</sup> Wallis W ‘Black Book History’ *Sudan Tribune: The Financial Times*, 21 August 2004, available at <http://www.sudantribune.com/The-Black-Book-history-or-Darfur-s,4868> [accessed on 11 July 2011].

<sup>56</sup> Ibrahim F ‘Ideas on the Background of the Present Conflict in Darfur’ (2004).

<sup>57</sup> Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 232 and 259.

<sup>58</sup> *Ibid.*

<sup>59</sup> International Crisis Group ‘Sudan’s Other Wars’ 25 June 2003, available at [http://www.thenubian.net/ICG\\_Nubian\\_5062003.pdf](http://www.thenubian.net/ICG_Nubian_5062003.pdf) [accessed 13 July 2011]; International Crisis Group ‘Darfur Rising: Sudan’s New Crisis’, ICG African Report No. 76, 25 March 2004, available at <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/sudan/Darfur%20Rising%20Sudans%20New%20Crisis.pdf> [accessed on 13 July 2011]; Burr J M & Collins R O (2008) *Darfur: The Long Road to Disaster* (2ed.) 285; Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 255.

<sup>60</sup> Salih M A M ‘Understanding the Conflict in Darfur’ (2005); Burr J M & Collins R O (2008) *Darfur: The Long Road to Disaster* (2ed.) 285; Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 258. “By 1999 there were reportedly 80,000 regular troops in the Sudanese armed forces, 3,500 NIF commissioned army officers, and 150,000 in the PDF.”

<sup>61</sup> Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 254-255.

<sup>62</sup> Ibrahim F ‘Ideas on the Background of the Present Conflict in Darfur’ (2004).

The term *janjaweed* is defined as:

“[A] generic term to describe Arab militias acting, under the authority, with the support, complicity or tolerance of the Sudanese State authorities, and who benefit from impunity for their actions”.<sup>63</sup>

As already been pointed out, that the *janjaweed* were enlisted by the Sudanese government as a counterinsurgency force due to a lack of its own military resources.

Towards the end of 2003, the *janjaweed* shifted the focus of their campaign away from the rebels and targeted civilians.<sup>64</sup> A typical assault on a village was initiated by helicopter bombings, this was followed by the *janjaweed* entering the villages on foot or camels and horses or pickups to loot, rape, and kill civilians.<sup>65</sup> Villages were often burned down to prevent return.<sup>66</sup>

World alert to the conflict in Darfur may be greatly attributed to the increased widespread media coverage and reports by non-governmental organisations during 2003.<sup>67</sup> Political response gained momentum in 2004 when US Secretary of States Colin Powell declared the violence in Darfur as genocide for the first time.<sup>68</sup>

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<sup>63</sup> Salih M A M ‘Understanding the Conflict in Darfur’ (2005).

<sup>64</sup> Ekengard A ‘The African Union Mission in Sudan (AMIS): Experiences and Lessons Learned’ FOI Swedish Defence Research Agency Report (2008), available at <http://www.foi.se/upload/projects/Africa/foir2559.pdf> [accessed on 14 July 2011].

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> See, Sudanese Human Rights Organisation (2004) ‘Report on the situation of Human Rights in Sudan, 1 October 2003 – 31 January 2004’, available at <http://www.shro-cairo.org/reports.htm> [accessed on 11 July 2011]; Amnesty International Report ‘Sudan: Empty Promises? Human Rights Violations in Government-Controlled Areas’ (2003); Smith J and Walker B (2004) ‘Darfur: Management of a Genocidal Crisis’ AEGIS Report 201/04, available at [http://www.wagingpeace.info/documents/Darfur\\_Summary\\_Report.pdf](http://www.wagingpeace.info/documents/Darfur_Summary_Report.pdf) [accessed on 11 July 2011]; International Crises Group (2003) ‘Sudan: Towards an Incomplete Peace’ Africa Report No. 73; Human Rights Watch (2004) ‘Sudan, Darfur in Flames: Atrocities in western Sudan’ Vol. 16, No. 5 (a), available at <http://www.hrw.org/sites/default/files/reports/sudan0404.pdf> [accessed on 11 July 2011]; Human Rights Watch (2004) ‘Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan’ Vol 16, No. 6 (a), available at <http://www.hrw.org/sites/default/files/reports/sudan0504full.pdf> [accessed on 11 July 2011].

<sup>68</sup> See, Genocide Watch ‘Genocide Emergency: Darfur, Sudan’ (2004), available at <http://www.genocidewatch.org/aboutgenocide/12waystodenygenocide.html> [accessed on 1 August 2011].



The SC condemned the attacks in the Darfur region<sup>69</sup> together with the call to save Darfur.<sup>70</sup> The World Health Organisation estimated 118,142 dead between September 2003 and January 2005.<sup>71</sup> Another estimate was that of John Holmes, under Secretary-General for Humanitarian Affairs, it suggested 200,000 people dead as a result of the combined effect of the conflict.<sup>72</sup> In November 2004 the Office of the United Nations High Commission for Refugees (UNHCR) reported 203,051 internally displaced persons from Darfur in 11 camps along the border of Sudan and others living as refugees in eastern Chad.<sup>73</sup> In contrast, the Commissioner-General of the Government Humanitarian Aid Commission indicated that there were 1, 65 million internally displaced persons in 81 camps and safe area during the beginning of the same month.<sup>74</sup>

It is worthy to note that, as early as August 2003, efforts were made to find a political solution to end the conflict. On 3 September 2003, in Abéché, with the backing of President Idriss Déby of Chad, the government representatives and the SLM/A signed a Ceasefire Agreement which envisaged cessation of hostilities for a renewable 45-day period.<sup>75</sup> Subsequent rounds of talks took place and on the 8 April 2004 the government of Sudan and

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<sup>69</sup> UN Security Council Resolution S/RES/1556 (2004), 30 July 2004.

<sup>70</sup> See, Save Darfur Coalition, available at [www.savedarfur.org/faith](http://www.savedarfur.org/faith) [accessed on 13 July 2011]; Save Darfur Coalition 'Unity Statement', available at [www.savedarfur.org/pages/unity\\_statement](http://www.savedarfur.org/pages/unity_statement) [accessed on 13 July 2011]; National Council of Churches 'The 2004 Unity Statement and Call to Action', available at [www.nccusa.org/news/04savedarfur-coalition.html](http://www.nccusa.org/news/04savedarfur-coalition.html) [accessed on 13 July 2011].

<sup>71</sup> See, World Health Organisation 'Retrospective Mortality Survey: Among the Internally Displaced Population, Greater Darfur Sudan' (2005), available at [http://www.emro.who.int/sudan/pdf/CMS%20Darfur%202005%20final%20report\\_11%2010%2005.pdf](http://www.emro.who.int/sudan/pdf/CMS%20Darfur%202005%20final%20report_11%2010%2005.pdf) [accessed on 11 July 2011].

<sup>72</sup> See, Deteriorating Security Threats to Plunge Darfur into 'Chaos', under UN Secretary-General (OCHA) available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1088217> [accessed on 11 July 2011].

<sup>73</sup> See, United Nations High Commission for Refugees 'The Darfur Crisis and Chad Mediation', available at <http://www.unhcr.ch/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=MEDIA&401159eca&page=publ> [accessed on 13 July 2011].

<sup>74</sup> See, Darfur Humanitarian Profile, No 8 (2004), available at <http://unsudanig.org> [accessed on 13 July 2011].

<sup>75</sup> African Union Peace and Security Council Fifth Session (2004) 'Report of the Chairperson of the Commission on the Situation in the Sudan', available at <http://www.africanunion.org/Reports/13%20April%20Report%20Chairperson%20-%20%20Sudan.pdf> [accessed on 20 July 2011].

the SLM/A and the JEM signed a Humanitarian Ceasefire Agreement.<sup>76</sup> On the 28 May 2004 the parties signed an agreement on ceasefire modalities.<sup>77</sup>

The African Union (AU) became actively involved in mediating peace talks which took place in Addis Ababa, Ethiopia and in Abuja, Nigeria. The mission in Darfur was the AU's second and largest and most complex initiative.<sup>78</sup> On the 9 November 2004, the government representatives, the SLM/A and the JEM signed two Protocols, one on the Improvement of the Humanitarian Situation<sup>79</sup> and the other on the Enhancement of the Security Situation<sup>80</sup> in Darfur.

Apart from the political negotiations, the AU played a key role through the African Mission in Sudan. However, the scope of its mandate was limited to monitoring the ceasefire through the establishment of the AU Ceasefire Commission in Darfur, including the deployment of monitors.<sup>81</sup> The African Mission in Sudan faced several operational challenges<sup>82</sup> which led to

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<sup>76</sup> International Crisis Group (2004) 'Sudan: Now or Never in Darfur', ICG African Report No. 80, available at <http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/sudan/Sudan%20Now%20or%20Never%20in%20Darfur.pdf> [accessed on 13 July 2011].

<sup>77</sup> *Ibid.*

<sup>78</sup> O'Neill G W and Cassis V 'Protecting Two Million Internally Displaced: The Successes and Shortcomings of the African Union in Darfur' (2005) University of Bern Project on Internal Displacement Occasional Paper, available at [http://ocha-gwapps1.unog.ch/rw/RWFiles2005.nsf/fb9a3459e0c5a152c1257205004f1c3e/c1257243004e0cf2c1257344004f376b/\\$FILE/bi-sdn-11nov.pdf](http://ocha-gwapps1.unog.ch/rw/RWFiles2005.nsf/fb9a3459e0c5a152c1257205004f1c3e/c1257243004e0cf2c1257344004f376b/$FILE/bi-sdn-11nov.pdf) [accessed on 16 July 2011].

<sup>79</sup> Protocol between the Government of Sudan, the Sudan Liberation Movement/Army and the Justice and Equality Movement on the Improvement of the Humanitarian Situation in Darfur, Abuja, 9 November 2004.

<sup>80</sup> Protocol between the Government of Sudan, the Sudan Liberation Movement/Army and the Justice and Equality Movement on the Enhancement of the Security Situation in Darfur in accordance with the N'djamena Agreement, Abuja, 9 November 2004.

<sup>81</sup> O'Neill G W and Cassis V 'Protecting Two Million Internally Displaced: The Successes and Shortcomings of the African Union in Darfur' (2005).

<sup>82</sup> A list of challenges faced by peacekeeping forces is drawn by, O'Neill G W and Cassis V 'Protecting Two Million Internally Displaced: The Successes and Shortcomings of the African Union in Darfur' (2005).

its close liaison with the United Nations Mission in Sudan in terms of the SC Resolution 1564.<sup>83</sup>

Despite the efforts of political negotiations and the adaptation of protocols, violations in the Darfur region continued between the rebels and the government forces and its militia, leading up to intervention by the SC in 2005. The alarming death toll in the Sudan conflict is and the number of its victims are said to exceed those of the Balkans, Rwanda, Somalia, Sierra Leona, and Chechnya conflicts combined.<sup>84</sup> Overall, the assumption is that *all* the deaths, whether ‘direct’ or ‘indirect’, are a result of violence from a single source: the government of Sudan.<sup>85</sup>



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<sup>83</sup> See, UN Security Council Resolution S/RES/1564 (2004).

<sup>84</sup> Melville D ‘Restoring Peace and Democracy in Sudan: Limited Choices for African Leadership’ (2002) Institute for Global Dialogue Occasional Paper No. 34.

<sup>85</sup> Mamdani M (2009) *Saviours and Survivors: Darfur, Politics, and the War on Terror* 272.

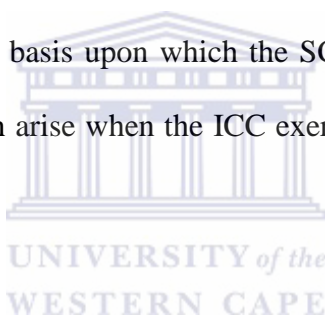
## **CHAPTER THREE:**

### **ISSUES RELATING TO SECURITY COUNCIL REFERRAL, JURISDICTION AND ARREST WARRANTS AGAINST AL BASHIR**

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#### **3.1 SECURITY COUNCIL REFERRAL OF THE DARFUR SITUATION**

Not surprisingly, the powers of the SC to refer a situation to the ICC has been heavily criticised by both ICC states parties and academics. This section of the chapter deals with these issues by discussing: (i) the factual background against which the Darfur situation was referred to the ICC, (ii) the legal basis upon which the SC may exercise these powers, and (iii) the legal consequences which arise when the ICC exercises jurisdiction over a situation, owing to the referral by the SC.



##### **3.1.1 Security Council Resolution referring the situation in Darfur**

It is important to note that the SC, in its resolution 1556, emphasized the need to bring to justice the leaders and their associates who incited and carried out human rights and international humanitarian law violations in Darfur.<sup>86</sup> The parties to the conflict also insisted on the principle of accountability, in that they “[stressed] the need to restore and uphold the rule of law, including investigating all cases of human rights violations and bringing to justice those responsible, in line with the AU’s expressed commitment to fight impunity.”<sup>87</sup>

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<sup>86</sup> See, S/RES/1556 (2004), para. 6.

<sup>87</sup> See, Preamble 7 of the Protocol on the Improvement of the Humanitarian Situation in Darfur.

In September 2004 the SC, pursuant to Resolution 1564, requested the UN Secretary-General to establish the International Commission of Inquiry on Darfur (the Commission).<sup>88</sup> A month later the Secretary-General appointed a five member body of the Commission.<sup>89</sup> The tasks of the Commission were:

“to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties”; “to determine also whether or not acts of genocide have occurred”; and “to identify the perpetrators of such violations with a view of ensuring that those responsible are held accountable”.<sup>90</sup>

In February 2005, three months after completing its mandate, the Commission submitted its report to the SC.<sup>91</sup> In its report the Commission found that the attacks by government forces and the *janjaweed* on civilians (mostly belonging to the Fur, Masaalit and Zaghawa tribes) amounted to “large – scale war crimes,” and that the mass killing of civilians by government forces and the *janjaweed* were piloted in “both a widespread and systematic manner,” therefore, likely to amount to a crime against humanity.<sup>92</sup> The Commission established that “rape and other forms of sexual violence committed by the *janjaweed* and Government soldiers in Darfur was widespread and systematic and may thus well amount to a crime against humanity”, and that this applied to the crime of sexual slavery.<sup>93</sup> More importantly, the Commission noted that while the rebel groups were responsible for attacks on civilians, which amounted to war crimes, it found no evidence suggesting that these attacks were widespread or systematic.<sup>94</sup>

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<sup>88</sup> See, S/RES/1564 (2004), para. 12.

<sup>89</sup> The members of the Commission were Mr Antonio Cassese as Chairman, from Italy; Mr Mohammed Fayek, from Egypt; Ms Hina Jilano, from Pakistan; Mr Dumisani Ntsebeza, from South Africa; and Ms Theresa Striggner-Scott, from Ghana, see Press Release, Secretary-General Establishes International Commission of Inquiry for Darfur SG/A/890 (2004), available at <http://www.un.org/News/Press/docs/2004/sga890.doc.htm> [accessed on 20 July 2011].

<sup>90</sup> See, S/RES/1564 (2004), para. 12.

<sup>91</sup> Report of the International Commission of Inquiry on Darfur, para. 9.

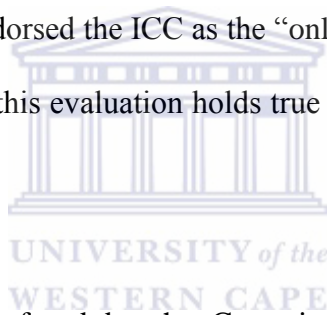
<sup>92</sup> *Ibid*, paras. 267 and 293.

<sup>93</sup> *Ibid*, para. 360.

<sup>94</sup> *Ibid*, para. 268.

Of great significance is the Commission's finding with regard to mechanisms for ensuring accountability for the crimes committed in Darfur. The Commission was of the opinion that the "Sudanese courts are unable and unwilling to prosecute and try the alleged offenders [and that] [o]ther mechanisms are needed to do justice."<sup>95</sup> Max Du Plessis correctly stated that this is no small finding, because it denies the Sudanese government the opportunity to rely upon the complementarity principle contained in the ICC Statute to avert that it is willing to prosecute the offenders.<sup>96</sup>

The Commission finally recommended for the referral of the Darfur situation to the ICC by the SC in order "to protect the civilians of Darfur and end the rampant impunity...prevailing there."<sup>97</sup> In addition to this, it endorsed the ICC as the "only credible way of bringing alleged perpetrators to justice."<sup>98</sup> Indeed this evaluation holds true today, owing to Sudan's failure to prosecute the offenders itself.



One of the practical limitations faced by the Commission may be discerned from the language of its founding instrument, namely Resolution 1564. First, its mandate was only in regard to the situation in Darfur, thereby excluding the conflict in the south and other regions of Sudan. Secondly, the time-frame of its investigations were only in respect of events from the beginning of 2003 up to the completion of its mandate. This proposition was impractical, taking into cognisance that the conflict in the Darfur was intrinsically intertwined with conflicts throughout the country, therefore, could not be viewed in isolation.

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<sup>95</sup> *Ibid*, para. 568.

<sup>96</sup> Du Plessis M 'The International Court that Africa Wants' (2010) 56.

<sup>97</sup> Report of the International Commission of Inquiry on Darfur, para. 569.

<sup>98</sup> *Ibid*, para. 573.

Two months after receiving the Commission's report, the SC, acting under Chapter VII of the UN Charter, referred the Darfur situation since the 1 July 2002 to the ICC and urged all states to co-operate with the Court.<sup>99</sup> The resolution invited the ICC and AU to discuss the practicalities of proceedings relating to the conflict,<sup>100</sup> while also emphasising the importance of healing and reconciliation, for example, through the creation of truth and/or reconciliation commissions.<sup>101</sup>

The resolution was adopted by eleven votes to none against and four abstentions by Algeria, Brazil, China and the United States.<sup>102</sup> The Algerian representative preferred an AU solution to this delicate problem, because it could provide peace and satisfy the need for justice.<sup>103</sup> The Chinese representative disagreed with the referral to the ICC without the consent of Sudan and preferred that the perpetrators to be tried in Sudan.<sup>104</sup> The United States (U.S.) representative express her delegations long-standing objections and concerns regarding the ICC's jurisdiction over national of non-party states, however, it believed that a hybrid tribunal in Africa would have been a better mechanism in order to end the climate of impunity in Darfur.<sup>105</sup> Brazil agreed with the resolution but objected to paragraph 6, which recognised the ICC's exclusive jurisdiction.<sup>106</sup>

One of the issues concerning the SC's referral power is that it can enhance the ICC's jurisdictional reach to situations involving non-party states.<sup>107</sup>

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<sup>99</sup> See, S/RES/1593 (2005).

<sup>100</sup> *Ibid.*, paras. 3 and 4.

<sup>101</sup> *Ibid.*, para. 5.

<sup>102</sup> See, Press Release, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court SC/8351 (2005), available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> [accessed 18 September 2011].

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> See paragraph 3.1.3 below.

U.S Ambassador Anne W Patterson, during her explanation of the U.S. vote, remarked on paragraph 6 of the resolution, which reads as follows:

“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[.]”

She opined that the language of these paragraphs provides protection to the U.S and other states and as such is precedent-setting by acknowledging the concerns of states not party to the ICC Statute and recognising that persons from these states should not be susceptible to investigation or prosecution by the ICC.<sup>108</sup> Therefore, according to Patterson, in the future where there is no consent by the state involved, any investigation or prosecution by the ICC over nationals of non-party states may “only” be envisaged where there is a decision by the SC.<sup>109</sup> Another important remark was that the U.S was satisfied that the resolution recognized that the UN will not bear any of the expenses incurred in connection with the referral.<sup>110</sup> This position is not surprising as it is conceivable that a state not party to the ICC Statute would not desire to make financial contributions with respect to investigations and prosecutions before a Court which it does not endorse.

John Crook observes that the President Bush’s administration had long pressed for strong international response to the brutal attacks on civilians in Darfur and western Sudan, it was

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<sup>108</sup> See, U.S. Mission to the United Nations Press Release No. 061(05) ‘Explanation of Vote by Ambassador Anne W. Patterson, Acting U.S. Representative to the United Nations, on the Sudan Accountability Resolution, in the Security Council’ (2005), available at [http://www.archive.usun.state.gov/press\\_releases/20050331\\_055.html](http://www.archive.usun.state.gov/press_releases/20050331_055.html) [accessed 18 September 2011].

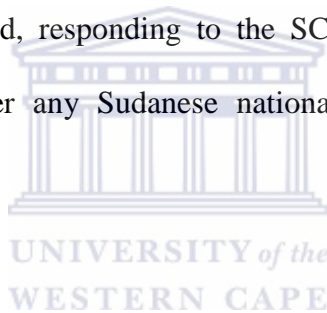
<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*, S/RES/1593 (2005) para. 7 states the following: “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[.]”



the first country to publicly characterise the events as genocide, and it was instrumental in the creation of the Commission of Inquiry to investigate the events in Darfur.<sup>111</sup>

However, the U.S. vigorously opposed the ICC contending that the Court could bring unwarranted and politically motivated charges against U.S. troops and officials.<sup>112</sup> Crook suggests that this is why in late January 2005, before the submission of the Commission's report to the SC, the U.S. proposed creating a new court at the headquarters of the existing ICTR in Arusha, Tanzania, to be jointly administered by the UN and AU.<sup>113</sup> According to newspaper reports, the U.S. proposal was met with strong resistance from SC members, most of which supported the Council's referral to the ICC (Britain, France, and Denmark).<sup>114</sup> In addition to this, Al Bashir stated, responding to the SC referral, in a broadcast that his government would not surrender any Sudanese nationals to be tried in courts outside Sudan.<sup>115</sup>



### 3.1.2 Legal basis

The ICC established under the ICC Statute<sup>116</sup> is the first 'permanent' international court with the power to try *individuals* [my emphasis] accused of serious crimes of international concern.<sup>117</sup> Proceedings before the ICC may be invoked by one of the three so-called trigger

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<sup>111</sup> Crook J R (2005) 'U.S. Proposes New Regional Court to Hear Charges Involving Darfur, Others Urge ICC' Vol. 99 No. 2 *The American Journal of International Law* 501.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*, 502.

<sup>114</sup> See, Hoge W 'U.S. Lobbies U.N on Darfur and International Court' *New York Times*, 29 January 2005 at A5, available at <http://query.nytimes.com/gst/fullpage.html?res=9C06E6D9143BF93AA15752C0A9639C8B63> [accessed on 18 September 2011]; Lynch C 'U.S., Europe Debate Venue for Darfur Trials, E.U. Wants ICC to Try War Crimes Cases' *Washington Post*, 21 January 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A24673-2005Jan20.html> [accessed 18 September 2011].

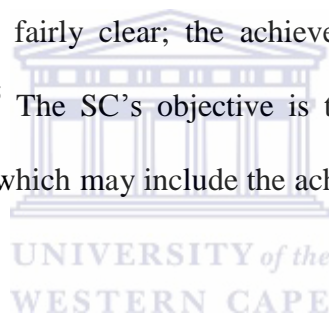
<sup>115</sup> See, Reuters 'Sudanese President Vows to Defy U.N. Vote' *Washington Post*, 3 April 2005, at A30, available at <http://www.washingtonpost.com/wp-dyn/articles/A22014-2005Apr2.html> [accessed on 18 September 2011].

<sup>116</sup> The court is established under Article 1 of the ICC Statute.

<sup>117</sup> ICC Statute, Article 1.

mechanisms.<sup>118</sup> Article 13(b) of the ICC Statute grants the SC express power to refer cases to the Prosecutor of the ICC in a “situation in which one or many of such crimes within the jurisdiction of the Court appears to have been committed.” However, as Berman suggests, the effectiveness of the ICC will to a large extent depend upon its relationship with the SC.<sup>119</sup>

Two sources of law govern this relationship. First is the UN-ICC Relationship Agreement,<sup>120</sup> and the second is the constituent treaties of the UN and the ICC, namely; the UN Charter and the ICC Statute respectively.<sup>121</sup> However, the ICC is not a UN organ.<sup>122</sup> This relationship is complicated because the Court’s decisions may involve issues of high political sensitivity.<sup>123</sup> Further tension may develop due to differing mandates which the two institutions seek to achieve.<sup>124</sup> The ICC mandate is fairly clear; the achievement of justice by means of an international criminal process.<sup>125</sup> The SC’s objective is the maintenance or restoration of international peace and security, which may include the achievement of justice in a particular case.<sup>126</sup>



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<sup>118</sup> Cassese A (2008) *International Criminal Law* (2ed.) 344 and 396; Werle G (2009) *Principles of International Criminal Law* (2ed.) 91.

<sup>119</sup> Quoted in Sarooshi D ‘The Peace and Justice Paradox: The International Criminal Court and the UN Security Council’ in McGoldrick D, Rowe P, Donnelly E (eds.) *The Permanent International Criminal Court* (2004) 95.

<sup>120</sup> ICC Statute, Article 2; See, Report of the Preparatory Commission for the International Criminal Court (continued) Preparatory Commission for the International Criminal Court PCNICC/2001/1/Add1, 8 January 2002; See, Press Release, Agreement between the International Criminal Court and the United Nations, ICC-CPI-20041004-78, available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/agreement%20between%20the%20international%20criminal%20court%20and%20the%20united%20nations?lan=en-GB> [accessed on 1 September 2011].

<sup>121</sup> Sarooshi D in McGoldrick D, Rowe P, Donnelly E (eds.) *The Permanent International Criminal Court* (2004) 96.

<sup>122</sup> McGoldrick D ‘Criminal Trials before International Tribunals: Legality and Legitimacy’ in McGoldrick D, Rowe P, Donnelly E (eds.) *The Permanent International Criminal Court* (2004) 97.

<sup>123</sup> *Ibid.*, 95.

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

<sup>125</sup> *Ibid.*, 96.

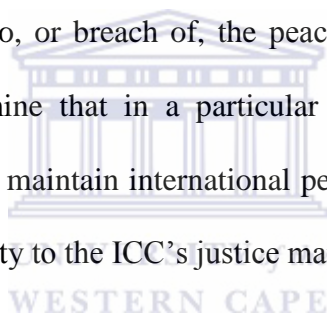
<sup>126</sup> *Ibid.*

However, as pointed out by Max du Plessis with respect to the mandate of the ICC, “there is no irrebuttable presumption in favour of prosecutions” under the ICC Statute.<sup>127</sup>

### 3.1.3 Controversial issues relating to the Security Council’s referral powers

Some observations may be made in respect to the legal issues that flow from this controversial exercise of jurisdiction by the ICC.

First, a referral by the SC must be within the context of a Chapter VII resolution.<sup>128</sup> An adoption of a Chapter VII resolution requires the SC to make an Article 39 determination that a situation constitutes a “threat to, or breach of, the peace or an act of aggression.”<sup>129</sup> Put differently, the SC must determine that in a particular situation it is necessary to take measures which would restore or maintain international peace and security.<sup>130</sup> This links the SC’s mandate of peace and security to the ICC’s justice mandate.<sup>131</sup>



Secondly, it seems that this mechanism grants the ICC jurisdiction regardless of the perpetrators nationality and location of the crime, therefore, it particularly caters for crimes committed on the territory of UN non-member states.<sup>132</sup> Therefore, the SC’s referral power can enhance the jurisdictional reach of the ICC to situations involving non-party states, a jurisdiction that would not exist had it not been for such a referral.<sup>133</sup>

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<sup>127</sup> Du Plessis M ‘The International Criminal Court that Africa Wants’ (2010) 55.

<sup>128</sup> White N and Cryer R ‘The ICC and the Security Council: An Uncomfortable Relationship’ in Doria J, Gasser H P, Bassiouni C (eds.) *The Legal Regime of the International Criminal Court* (2009) 461.

<sup>129</sup> The Charter of the United Nations, 26 June 1945.

<sup>130</sup> White N and Cryer R ‘The ICC and the Security Council: An Uncomfortable Relationship’ in Doria J, Gasser H P, Bassiouni C (eds.) *The Legal Regime of the International Criminal Court* (2009) 461.

<sup>131</sup> Simma B (2002) *The Charter of the United Nations: A Commentary* (2ed.) 726-727.

<sup>132</sup> Werle G (2009) *Principles of International Criminal Law* (2ed.) 84-85.

<sup>133</sup> Sarooshi D in McGoldrick D, Rowe P, Donnelly E (eds.) *The Permanent International Criminal Court* (2004) 98.

Thirdly, the jurisdiction exercised by the ICC in terms of Article 13(1) is its own and not some jurisdiction which has been transferred to the Court by the SC.<sup>134</sup> This observation is accurate because the SC does not possess any criminal jurisdiction of its own which it could pass to the ICC.<sup>135</sup>

Finally, the SC's referral competence is limited in respect of a 'situation' only and not an individual case. Whereas the trigger mechanism by the Prosecutor of the ICC is more narrower in terms of a 'specific crime' hence its referral may not be the result of an investigation of a general 'situation'.<sup>136</sup> This position may be seen as reflecting the general concern by the ICC states parties to not give the Prosecutor wide powers, while also to not allow the SC to refer an individual case of criminal activity.<sup>137</sup> However, the SC is not prohibited from deciding, under the UN Charter, to refer a particular case of criminal activity to the ICC in order to maintain peace.<sup>138</sup>

In the final analysis, it should be highlighted that the ICC Statute accords no special treatment to a SC referral as opposed to the other two ways in which a case may be brought before the Court.<sup>139</sup> Therefore, a referral by the SC does not necessarily mean that there will be actual prosecution of a case by the Prosecutor, due to the independence and impartiality enjoyed by ICC organs.<sup>140</sup> In this regard, the Prosecutor has discretion when deciding whether to proceed

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<sup>134</sup> White N and Cryer R 'The ICC and the Security Council: An Uncomfortable Relationship' in Doria J, Gasser H P, Bassiouni C (eds.) *The Legal Regime of the International Criminal Court* (2009) 461.

<sup>135</sup> Cryer R (1998) 'Commentary on the Rome Statute for an International Criminal Court: A Cadenza for the Song of the Who Died in Vain?' Vol. 3 No. 2 *Journal of Conflict and Security Law* 278-279.

<sup>136</sup> Sarooshi D in McGoldrick D, Rowe, Donnelly (eds.) *The Permanent International Criminal Court* (2004) 97.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*, 98.

<sup>140</sup> ICC Statute, Article 42.

with an investigation or prosecution in a particular case.<sup>141</sup> This competence applies even in respect of a referral by the SC.<sup>142</sup>

While the SC may want to ensure the effectiveness of its determination, for example, by creating *ad hoc* tribunals, such a practice would undermine the establishment of the ICC.<sup>143</sup> Moreover, a referral to the ICC could be financially feasible and more appropriate in other situations. This argument was raised by the Commission when it considered in favour for a referral of the Darfur situation to the ICC.<sup>144</sup>

## 3.2 JURISDICTIONAL ISSUES

### 3.2.1 The jurisdiction of the ICC over nationals of non-party states



The ICC Statute provides for three circumstances in terms of which the Court may exercise jurisdiction over nationals of non-party states. First, the ICC may found jurisdiction over such individuals in situations referred to the ICC Prosecutor by the SC.<sup>145</sup> Secondly, where such individuals have committed a crime on the territory of a state which is party to the ICC Statute or has otherwise accepted the jurisdiction of the Court in respect to that crime.<sup>146</sup> Thirdly, where the non-party state has given consent to the ICC's jurisdiction in a particular case.<sup>147</sup>

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<sup>141</sup> ICC Statute, Article 53(1) and (2).

<sup>142</sup> Sarooshi D in McGoldrick D, Rowe P, Donnelly E (eds.) *The Permanent International Criminal Court* (2004) 99

<sup>143</sup> Sarooshi D (1996) 'The Legal Framework Governing United Nations Subsidiary Organs' Vol. 67 No. 1 *British Yearbook of International Law* 418-478.

<sup>144</sup> See, Report of the Commission of Inquiry on Darfur, para. 574-582.

<sup>145</sup> ICC Statute, Article 13.

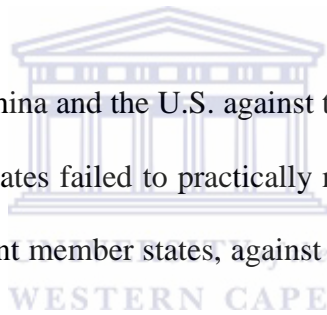
<sup>146</sup> ICC Statute, Article 12(2)(a) and (3).

<sup>147</sup> *Ibid.*

Notably, in the first two circumstances the consent of the state of nationality is a requirement in the exercise of jurisdiction by the ICC.<sup>148</sup>

The U.S. has vigorously argued that the exercise of jurisdiction over nationals of non-parties without the consent of the non-party state would be contrary to international law.<sup>149</sup> This argument is described as the “principal American legal objection” to the ICC.<sup>150</sup> David J Scheffer suggests a basis for the U.S. position is that it is “untenable to expose the largest deployed military force in the world...to the jurisdiction of a criminal court that the U.S. government has not yet joined and whose authority over American citizens the U.S. does not yet recognise.””

The long standing views of the China and the U.S. against the jurisdiction of the ICC are well known. Be this as it may, both states failed to practically manifest their views by exercising their veto power, as UN permanent member states, against the referral of the Darfur situation to the ICC.<sup>151</sup>



### **3.2.2 Delegations of criminal jurisdiction to international courts: principles and precedents**

The question that arises here: is whether states may lawfully delegate criminal jurisdiction to international fora such as the ICC?

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<sup>148</sup> Akande D (2003) ‘The Jurisdiction of the International Criminal Court over Nations of Non-Parties: Legal Basis and Limitations’ Vol. 1 Issue 3 *Journal of International Criminal Justice* 619.

<sup>149</sup> See United States’ State Department Fact Sheet on the International Criminal Court, available at <http://www.state.gov/s/wci/rls/fs/2002/9978.htm> [accessed on 18 September 2011].

<sup>150</sup> *Ibid.*

<sup>151</sup> See, paragraph 3.1.1 above.

Madeline Morris argues that a delegation to an international criminal tribunal would be impermissible because the consequences are fundamentally different when carried out by an international court as opposed to a national court.<sup>152</sup> Dapo Akande expands on this point by stating that the prestige of international courts and the embarrassment from their adverse decision are reasons why states may not wish to have cases involving their nationals or interests heard by international courts, however, this does not of itself mean that they have no legal competence to act.<sup>153</sup>

*(a) The Nuremberg Tribunal*

Michael Scharf opines that the Nuremberg Tribunal, established to prosecute the Nazi leaders after World War II, was a collective exercise of universal jurisdiction by a treaty-based international court and as such constitutes a precedent for the ICC.<sup>154</sup> However, Morris argues that while the Tribunal is an example of a delegation of criminal jurisdiction by states to an international tribunal, the Allied States were exercising sovereign powers in Germany at the time and, therefore, the Tribunal was founded upon the consent of the state of nationality.<sup>155</sup> These arguments reflect a lack of consensus as to whether the Nuremberg Tribunal may be relied upon as precedent-setting for a delegation of criminal jurisdiction to an international tribunal without the state of nationality's consent.<sup>156</sup>

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<sup>152</sup> Morris M (2001) 'High Crimes and Misconceptions: The ICC and Non-Party States' Vol. 64 No. 1 *Law and Contemporary Problems* 29-47, at 30 she says that "[s]tates would have reason to be more concerned about the political impact of adjudications before an international court than before an individual State's courts'."

<sup>153</sup> Akande D (2003) 'The Jurisdiction of the International Criminal Court over Nations of Non-Parties: Legal Basis and Limitations' 625.

<sup>154</sup> Scharf M (2001) 'The ICC's Jurisdiction over Nationals of Non-Party States: A Critiques of the U.S. Position' 64 *Law & Contemporary Problems* 103-106.

<sup>155</sup> Morris M (2001) 'High Crimes and Misconceptions: The ICC and Non-Party States' 37-42.

<sup>156</sup> Akande D (2003) 'The Jurisdiction of the International Criminal Court over Nations of Non-Parties: Legal Basis and Limitations' 628.

*(b) The International Criminal Tribunals for the Former Yugoslavia and for Rwanda*

The International Criminal Tribunal for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) were created by SC resolutions under Article 25 of the UN Charter.<sup>157</sup> When the SC acts in terms of Chapter VII of the UN Charter, it exercises powers delegated to it by member states collectively.<sup>158</sup> Therefore, the ICTY and the ICTR are examples of delegation of criminal jurisdiction by states to international tribunals.<sup>159</sup>

The question of the Tribunals authority over nationals of non-members was raised in 1999, when the ICTY issued indictments for the then Presidents of the Former Republic of Yugoslavia (FRY), Slobodan Milosević and four other senior officials in relation to the crimes committed in Kosovo.<sup>160</sup> In *Prosecutor v Milutinović, Ojdanić, Sainović* an ICTY Trial Chamber held that despite the decisions of the UN organs, the FRY was at all material times a UN member.<sup>161</sup> There are three reasons why the exercise of jurisdiction by the ICTY over FRY nationals provides precedence for the exercise of jurisdiction by an international tribunal that is treaty-based over nationals of a state that was not party to that treaty and without the consent of that state.<sup>162</sup>

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<sup>157</sup> UN Security Council Resolution S/RES/827 (1993), and UN Security Council Resolution S/RES/955 (1994), respectively establish the ICTY and the ICTR.

<sup>158</sup> Sarooshi D (2000) *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* 25-32.

<sup>159</sup> Scharf M (2001) 'The ICC's Jurisdiction over Nationals of Non-Party States: A Critiques of the U.S. Position' 108.

<sup>160</sup> *Prosecutor v Milosević, Milutinović, Sainović, Ojdanić & Stojiljkovi*, Case No. IT-99-37-I, 29 June 2001. This was the time during which the SC (SC Res. 777 (1992) and UN General Assembly (GA Res. 47/1 (1992) decided that the FRY could not automatically assume the membership of the Socialist Federal Republic of Yugoslavia (SFRY) in the UN and needed to apply for new membership.

<sup>161</sup> *Prosecutor v Milutinović, Ojdanić, Sainović*, Case No. IT-99-37-PT, 6 May 2003.

<sup>162</sup> Akande D (2003) 'The Jurisdiction of the International Criminal Court over Nations of Non-Parties: Legal Basis and Limitations' 629.



First, the FRY was not a member of the UN after the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), therefore, the FRY was not a UN member between 1992 and 2000.<sup>163</sup> Secondly, in its decision the Chamber stated that “a crime committed by any person, whatever his nationality, in a country that is part of the SFRY, is triable by the Tribunal.”<sup>164</sup> Thirdly, many states, including the U.S., that supported the ICTY’s jurisdiction over FRY nationals,<sup>165</sup> did not regard the FRY as a UN member.<sup>166</sup> These arguments seem to support the SC’s competence to provide for jurisdiction over nationals who commit crimes on the territory of a state that was a UN member.<sup>167</sup> Therefore, similar to the position of the ICC, as long as there is territorial jurisdiction, the question of nationality is irrelevant.<sup>168</sup>

(c) *The Special Court for Sierra Leone*

The Special Court for Sierra Leone (SCSL) was created under a treaty between the UN and Sierra Leone for the prosecution of individuals who committed serious international crimes in Sierra Leone.<sup>169</sup> The jurisdiction of the Court is not limited to nationals of Sierra Leone. In fact the Court indicted a non-national: the former head of state of Liberia, Charles Taylor, for his participation in armed conflict in Sierra Leone.<sup>170</sup> Although Liberia has instituted proceedings before the International Court of Justice (ICJ), arguing that the indictment and arrest warrants do not respect the immunity enjoyed by heads of states, it has not argued that

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<sup>163</sup> *Prosecutor v Milutinović, Ojdanić, Sainović*, para 38 and 71.

<sup>164</sup> *Ibid.*

<sup>165</sup> Akande D (2003) ‘The Jurisdiction of the International Criminal Court over Nations of Non-Parties: Legal Basis and Limitations’ 630.

<sup>166</sup> *Ibid.*

<sup>167</sup> *ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> See, The Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone of 16 January 2002, available at <http://www.sierra-leone.org/specialcourt-statute.html> [accessed on 18 September 2011]. The Statute of the Special Court is annexed to this agreement.

<sup>170</sup> *Prosecutor v Charles Ghankay Taylor*, Case No. SCSL-03-01-I-001, 7 March 2003.

the Sierra Leone is not able to delegate its criminal jurisdiction to an international court.<sup>171</sup> On the contrary the Court has received strong support the U.S. and the international community<sup>172</sup> and is a significant example of what the US contends that parties to the ICC cannot lawfully do.<sup>173</sup>

These cases provide historical precedent on the practice of states delegating their criminal jurisdiction over non-nationals to international tribunals, in circumstances where the state of nationality's consent was not sought. This principle finds equal application to the ICC. Where states have acted collectively, by lawfully delegating their criminal jurisdiction to the Court, in order to protect the interests of the international community.

### **3.2.3 Limitations on ICC jurisdiction over nationals of non-party states**



It has already been established that the ICC has jurisdiction over nationals of non-party state, despite this fact, the ICC Statute limits the Court's jurisdiction in specific circumstances.

First, state officials may not rely on international law immunities in order to escape the jurisdiction of the ICC in terms of Article 27 of the ICC Statute. This provision is limited by Article 98(1), in that states parties to the ICC Statute are prevented from arresting and surrendering officials of non-party states to the ICC. This limitation is discussed in more detail in paragraphs 4.2.2 and 4.3.1.

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<sup>171</sup> *Ibid.*

<sup>172</sup> See, UN Security Council Resolution S/RES/1315, 14 August 2000; U.S. State Department 'Press Statement' (2002), available at <http://www.state.gov/r/pa/prs/ps/2002/7348.htm> [accessed 19 September 2011].

<sup>173</sup> Akande D (2003) 'The Jurisdiction of the International Criminal Court over Nations of Non-Parties: Legal Basis and Limitations' 632.

Secondly, certain treaties may prevent the surrender of a non-party national, who is present on the territory of an ICC state party, to the ICC.<sup>174</sup> Article 98(2) allows states parties, on whose territory a person wanted by the ICC is present, to fulfil their obligations under international agreements preventing the transfer of such person to the ICC.

Thirdly, the Prosecutor of the ICC may not commence or proceed with an investigation or prosecution where the SC has requested a deferral of a situation.<sup>175</sup> This provision was inserted as a means of providing limited political control over the work of the Prosecutor, as it was acknowledged that there may be circumstances where the exercise of jurisdiction by the ICC would interfere with on-going conflict resolution by the SC.<sup>176</sup>

Fourthly, the complementarity provisions of the ICC Statute serve to limit its jurisdiction, in that, the ICC may not exercise its jurisdiction in cases where a state is willing to, or has genuinely and in good faith, investigated or prosecuted a person in respect of the same crime before the Court.<sup>177</sup> Therefore, the jurisdiction of the ICC is supplementary to that of national courts and it may not be exercised where such national courts function properly.<sup>178</sup> How does this principle apply to cases involving non-party states such as Sudan? Article 17 of the ICC Statute makes reference to a “State which has jurisdiction over” the case, this would include non-party states because they may have jurisdiction according to the traditional principles of jurisdiction; nationality or territoriality.<sup>179</sup> On this basis it becomes clear that Sudan missed

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<sup>174</sup> Akande D (2003) ‘The Jurisdiction of the International Criminal Court over Nations of Non-Parties: Legal Basis and Limitations’ 642.

<sup>175</sup> ICC Statute, Article 16.

<sup>176</sup> Arsanjani M (1999) ‘The Rome Statute of the International Criminal Court’ 93 *American Journal of International Law* 26-27.

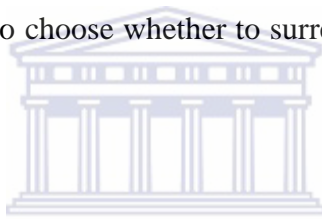
<sup>177</sup> ICC Statute, Article 17 and 20.

<sup>178</sup> ICC Statute, Preamble para. 10 and Article 1; Werle G (2009) *Principles of International Criminal Law* (2ed.) 83; Holmes J T ‘Complementarity: National Courts versus the ICC’ in Cassese A, Gaete P, Jones J R W (eds.) *The Rome Statute of the International Criminal Court Vol. 1* (2001) 667.

<sup>179</sup> Du Plessis M ‘The International Criminal Court that Africa Wants’ (2010) 59.

the opportunity of frustrating the exercise of jurisdiction by the ICC by asserting both willingness and ability to prosecute its nationals under its domestic judicial system.

Finally, the ICC's competence to exercise jurisdiction over nationals of non-party states arises in cases of extradition obligations. States parties to the ICC Statute have an obligation to arrest and surrender persons on their territory to ICC when such a request is made by the Court.<sup>180</sup> Where there are competing requests for extradition between a non-party state (in respect of its national) and the ICC, the state party with custody is only obliged to give priority to the ICC surrender request if there is no extradite treaty with the non-party state.<sup>181</sup> If there is no extradition treaty requiring the surrender of the accused to the non-party state, then the state party has the right to choose whether to surrender the national to the ICC or to the non-party state.<sup>182</sup>



While the exercise of jurisdiction by the ICC over nationals of non-party states may be considered as politically unacceptable by non-party states (like Sudan), it is a desirable way of ending the culture of impunity where there has been violations of international human rights and international humanitarian law, as we have seen unfold in the Darfur region.

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<sup>180</sup> ICC Statute, Article 89.

<sup>181</sup> ICC Statute, Article 90(4).

<sup>182</sup> ICC Statute, Article 90(6).

### 3.3 ARREST WARRANTS AGAINST AL BASHIR

Based upon the report of the Commission the SC referred the situation in Darfur to the ICC Prosecutor, in terms of resolution 1593,<sup>183</sup> which was subsequently welcomed by the Secretary-General, Kofi Annan.<sup>184</sup> Prior to opening investigations the Prosecutor considered multiple sources of information in his analysis, including the report of the Commission.<sup>185</sup> After a thorough analysis of this information, the Prosecutor concluded that the statutory requirements for initiating an investigation were satisfied, and thereafter opened investigations into the situation in Darfur on 1 June 2005.<sup>186</sup>

On 14 July 2008, the Prosecutor filed an *ex parte* application under Article 58 of the ICC Statute (the Prosecution Application), to Pre-Trial Chamber I, requesting the issuance of an arrest warrant against Al Bashir.<sup>187</sup> The Prosecution Application were for Al Bashir's "alleged criminal responsibility in the commission of genocide, crimes against humanity and war crimes against members of the Fur, Masalit and Zaghawa groups in Darfur from 31 March 2003 to 14 July 2008."<sup>188</sup> In his application, the Prosecutor also submitted that issuing a summons to appear could have been a viable alternative had Al Bashir shown a willingness to appear before the Court.<sup>189</sup>

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<sup>183</sup> See, S/Res/1593, para. 1.

<sup>184</sup> See, Press Release, Secretary-General Welcomes Adoption of Security Council Resolution Referring Situation in Darfur, Sudan, To International Criminal Court Prosecutor, SG/SM/9797AFR/1123 (2005), available at <http://www.un.org/NEWS/Press/docs/2005/sgsm9797.doc.htm> [accessed on 25 March 2011].

<sup>185</sup> See, Press Release, The Prosecutor of the ICC opens investigation in Darfur, ICC-OTP-0606-104, 1 June (2005).

<sup>186</sup> *Ibid.*

<sup>187</sup> Public redacted version of the Prosecutor's Application under Article 58, ICC-02/05-157-AnxA, 14 July 2008.

<sup>188</sup> The Prosecution Application, para. 413.

<sup>189</sup> The Prosecution Application, para. 414.

### 3.3.1 First arrest warrant issued by Pre-Trial Chamber I

#### (a) Jurisdiction of the Court

The Pre-Trial Chamber I maintained that it has jurisdiction *ratione materiae* insofar as the conduct “gives rise to genocide, crimes against humanity and war crimes.”<sup>190</sup> In relation to the jurisdiction *ratione personae*, the Chamber considered that the case fell within its jurisdiction, insofar as the Darfur situation was referred to it by the SC acting pursuant to Article 13(b) of the ICC Statute.<sup>191</sup> This was despite of the fact that the case “refer[ed] to criminal liability of a State that is not party to the Statute, for crimes which were allegedly committed in the territory of a State not party to the Statute.”<sup>192</sup>

#### (b) Admissibility Test

The Chamber noted that the Prosecution Application did not raise any issues of admissibility, except to highlight that there were no investigations or prosecutions being conducted against Al Bashir for any of the crimes at national level.<sup>193</sup> The Chamber declined to use its discretionary *proprio motu* power to determine the admissibility of the case against Al Bashir because: (i) the application was confidential; and (ii) there was no manifest factor which provoked it to exercise its discretion under Article 19(1) of the ICC Statute.<sup>194</sup>

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<sup>190</sup> *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-3, ‘Decision on the Prosecutor’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir’ (4 March 2009). In particular, those provided for in Articles 6(a), (b) and (c), 7(1)(a), (b), (d), (f) and (g) and 8(2)(e)(i) and (v) of the Rome Statute; The Prosecution Application, paras. 9, 240 and 355.

<sup>191</sup> *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-3, 14.

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*, 18; The Prosecution Application, para. 3.

<sup>194</sup> *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09-3, 18.











































































