

Omar Al Bashir and the International Criminal Court:

Putting an End to Injustice

By

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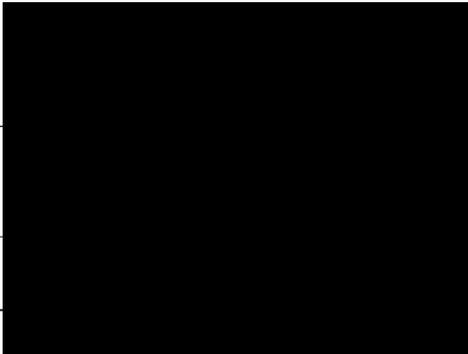
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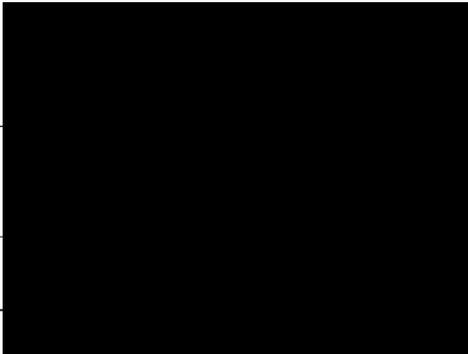
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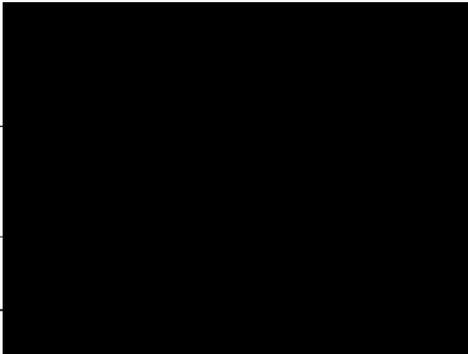
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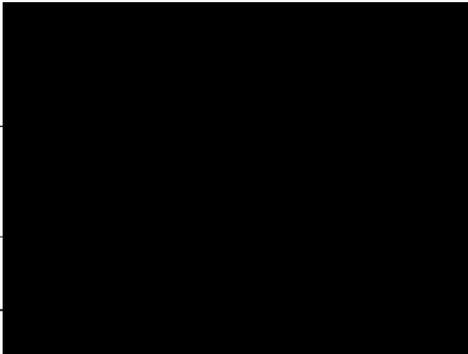
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To the people of Sudan who
have suffered the most and to the people who are working to put an end to injustice and
impunity.

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Abstract

The International Criminal Court's arrest warrant of 4 March 2009 against Omar Hassan Al Bashir made the president of Sudan the first seated president to be indicted by the ICC in history. The ICC held Al Bashir accountable for crimes against humanity, as well as war crimes committed in the Darfur region. This case study is examined to highlight how state sovereignty is changing in today's globalized world, and to underscore the role played by international institutions in domestic politics. The thesis examines the role of the ICC in the prosecution of Al Bashir from the perspective of the realist/internationalist debate. It debates the legality of the arrest warrant given that Sudan is not a party state to the ICC and that Al Bashir is a seated president. The thesis then analyzes United Nation Security Council Resolution 1593 that transferred Darfur's case to the ICC, UN Chapter VII, the Rome Statute, the Geneva Convention on Genocide, and the Vienna Convention to make the case against the immunity of a seated president. The responses to the ICC indictment by Sudan as well as international and regional actors, namely United States of America, Russia, China, the European Union (EU), the African Union (AU) and the League of Arab States (LAS) are also observed briefly. The thesis closes by arguing that that there can be no peace in Sudan without indicting Al Bashir. Peace and reconciliation cannot be achieved without justice.

Table of Content

Acknowledgment	VI
Abstract	VII
Table of Content	VIII
List of Annexes	X
Chapter 1 Introduction	1
1.1 Introduction	1
1.2 Research Questions	2
1.3 Case Selection	3
1.4 Methodology	4
1.5 Map of the Thesis	5
Chapter 2 The Institutional vs. Realist Debate and the ICC	7
2.1 Introduction	7
2.2 The Role of International Institutions	8
2.3 Realists/Neo-realists vs. Institutionalists/Neo-Institutionalists	10
2.4 Putting Faith in Institutionalism	12
2.5 Case Study: The ICC and the Arrest Warrant of Omar Al Bashir	14
2.6 ICC vs. Sudan	17
2.7 Conclusion	21
Chapter 3 Situating the ICC in the Context of the Conflict in Sudan	23
3.1 Introduction	23
3.2 A History of Conflict	23
3.3 The Conflict in Darfur	30
3.4 The Referendum and its Implications	32
3.5 The Role of the UN Security Council	33
3.6 The Role of Oil in the Conflict	35
3.7 ICC Indictment and its Repercussions	38

3.8 Conclusion.....	42
Chapter 4 The Prosecution of Omar Hassan Ahmad Al Bashir: Legal or not?	44
4.1 Introduction	44
4.2 The ICC and the Rome Statute.....	45
4.3 Prosecuting a National of a Non-Party State: The Arrest Warrant of Al Bashir....	46
4.4 Chapter VII Resolution 1593	48
4.5 Immunity or the Absence of Immunity for Government Officials	51
4.6 Bringing Al Bashir to Court	55
4.7 Overcoming the Obstacles	56
4.8 Conclusion.....	58
Chapter 5 Conclusion: Justice, Reconciliation and Peace in Sudan	59
5.1 Summing up the Argument	59
5.2 Justice, Reconciliation and Peace in Sudan.....	59
5.3 Conflict Settlement and Conflict Resolution	60
5.4 Reconciliation and Justice	63
5.5 Toward Peace in Sudan	66
Bibliography	70
Abbreviations	77

List of Annexes

Annex 1

United Nations Security Council Resolution 1593 (2005): On Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan. S/RES/1593 (2005), 2005.

Annex 2

Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, March 4, 2009.

Chapter 1

Introduction

1.1 Introduction

Sudan's history is that of coup d'états, conflict between the North and the South, as well as in Darfur. It is an ethnic conflict at the surface but in reality a conflict over power and resource sharing. The International Criminal Court (ICC) indicted recently Omar Hassan Al Bashir, the President of the Republic of Sudan, for war crimes and crimes against humanity. The Minister of State for Humanitarian Affairs in Sudan, Ahmad Muhammad Harun, the alleged leader of the Janjaweed Militia, Ali Muhammad Ali Abd-Al-Rahman, also known as Ali Kushayb, and the chairman and general coordinator of military operations of the United Resistance Front, Bahr Idriss Abu Garda were also charged for similar crimes. This thesis focuses on the impact of the ICC indictments on Sudan. It attempts to answer the following questions: is the ICC indictment of Sudan's president legal? What role do international institutions such as the ICC play in the international system? This thesis thus examines the ICC trial of Al Bashir, who has been in power for the last twenty years. It studies its effect on Sudan and whether the ICC can challenge the sovereignty of such a state. Will this bring it closer to a lasting peace?

1.2 Research Questions

Sudan's case was referred to the ICC through the United Nations Security Council Resolution 1593 (UNSCR) under Chapter VII. In an attempt to undermine the ICC's credibility this referral is often charged of being politicized. This thesis is going to tackle questions such as: since Sudan did not sign the Rome Statute and is not a state party to the ICC, is the resolution forceful on it? What does the resolution require? What are the implications of United Nations (UN) Chapter VII, and what are Sudan's obligations towards the ICC indictment? Resolution 1593 Chapter VII did not indict Al Bashir, nor did it mention any individuals, it only referred the case of Darfur to the ICC. The warrant of arrest came at a later stage. However, is it legal that a warrant of arrest be issued to a seated president, what about diplomatic immunity? Does international law support such immunity? What is more important justice or stability?

In order to answer these questions, I present a brief history of Sudan to explain how the country plunged into civil wars and how its president became involved in war crimes and violence that made it urgent for the international community to intervene. I examine Chapter VII of the UN Charter and the authority it has on all UN member states, as well as the UNSCR 1593 which referred Sudan's case to the ICC. Subsequently, I study the ICC's jurisdiction, the implications of its indictments and what it entails to sign the Rome Statute, specifically Article 27 of the Rome Statute that states that not even chief of states have any immunity before the Court. I also further prove the legality of indicting Al Bashir by studying Article IV of the Geneva Convention on

Genocide that confirms that chief of states do not have immunity and that they could be subject to a warrant of arrest as well as convicted.

As aforementioned, that the UN Security Council (UNSC) refers a case to the ICC has never happened before and no matter how authoritative a Chapter VII resolution, nonetheless many limitations remain to be challenged in the Statute and the Court's jurisdiction; what are some of these limitations? Moreover, and from a theoretical perspective, how does the Realist/ Liberal institutionalist debate situate the ICC and the Sudanese case study? The latter question is very important as I tackle the theoretical literature and how it applies to my case. In order to answer it I examine on one hand the arguments of the realists, neo-realists and offensive realists who consider the rules of international institutions not to be effective without the support of other systems. On the other hand, I look closely at the institutionalists' viewpoint, which gives a greater role to institutions and what they actually embody. The ICC being the main example of an institution and the indictment of Al Bashir being the main case study, I argue that so far it succeeded in pressuring Al Bashir. I will show how it affected his decisions as well as Sudan's behavior and choices.

What is more important in Sudan stability or justice? Is it the right timing for the ICC to be seeking justice? And what are the national, regional and international implications of the ICC's indictments of Al Bashir? To answer these two last questions, I study what conflict theory states about stability versus justice and when does conflict theory consider a conflict ripe enough to introduce justice.

1.3 Case Selection

This thesis focuses on the ICC, a permanent tribunal and international institution with the authority to judge individuals for genocide, crimes against humanity, war crimes. I selected the ICC indictment of Al Bashir as a case study because he is the first seated president to be indicted in history and it is the first time that the UNSC refers a case to the ICC under Chapter VII. My thesis examines the latter's jurisdiction and the limits of its authority in regard to the arrest warrant of Al Bashir. The case study demonstrates the existent challenge in the interaction between states and international institutions and whether it is worth risking the country's stability at the expense of achieving justice.¹

1.4 Methodology

Sudan has very strict media laws and has only one national television station and one government owned newspaper. The rest have either been banned or shut down. Some newspapers have gone underground but rarely make it to the outside world. Thus, my research is mostly based on the regional and western media. I consider this to be a limitation for my research, since the information available is mostly gathered from the government of Sudan, or the outside world which has no firsthand knowledge of what is really happening on the ground, especially after Al Bashir expelled most of the humanitarian aid organizations. In addition, there are only few studies on the most recent political developments in Sudan. Consequently, I have opted to use a wide range of information/data and resources to fill this gap. I will be using books, journals,

¹ Carr, *International Relations Between the Two World Wars, 1919-1939*, 153.

periodicals, website for international/regional and national organizations and centers as sources such as the UN, the International Crisis Group, Carnegie Endowment, Open Democracy, Darfur Now, and Enough Project among many others. I have also interviewed a presidential special attaché to Al Bashir, Dr. Mansour Khaled. Other individuals include Dr. Amin Mekki Medani, who is the President of the Sudan Human Rights Organization and the Director of Penal Reform International.

1.5 Map of the Thesis

The first chapter introduces the focus of my thesis and describes the situation of Sudan, Al Bashir and the ICC. A brief history of Sudan describes how the ICC became involved in investigating the crimes committed in Darfur as well as indicting Al Bashir. Chapter II advances the literature review, in which Sudan's case is situated in its theoretical context, i.e. the Realist/Liberal Institutional debate. Taking the case of Sudan as a sovereign independent state and the ICC as an example of an international institution, this chapter tries to demonstrate the challenge that exists between these two entities. Chapter III situates my case study in a larger context which is the one of ethnic conflicts. Sudan has endured twenty years of civil war and the tensions are still very real today. Many fear a return to war especially that the conflict has not been resolved; and the parties in conflict have barely reached a settlement. Chapter IV sets out the legal foundations for the ICC indictment. Starting with the UNSCR 1593 under Chapter VII of the UN Charter, this chapter shows the legality of the indictment and refers to Article 4 of the Geneva Convention to disprove the immunity of government officials,

specifically Al Bashir. Finally, chapter V concludes the thesis by putting forward the question of stability versus justice, whether enforcing justice or maintaining stability in Sudan is more important. Sudan, regional actors and International actors have very different views regarding this question. This last chapter explores the repercussions that this indictment had on the region, taking mainly the African Union (AU) and the League of Arab States' (LAS) response to the indictment. It examines the reactions of Sudan, the region and the international community to the warrant of arrest of Al Bashir.

Chapter 2

The Institutional vs. Realist Debate and the ICC

2.1 Introduction

In the aftermath of World War II, the world witnessed the birth of many international institutions. The UN, Bretton Woods, General Agreement on Tariffs and Trade (GATT) or what is known today as the World Trade Organization (WTO), and North Atlantic Treaty Organization (NATO) are among them. The United States of America (USA) played an instrumental role in the birth of these institutions, as the new institutional order served its own security and economic interests.

This chapter examines the realist/institutionalist as well as the neo-realist/neo-institutionalist debates. These theories have been dominant in international relations for the last decade and a half, especially with the advent of the Iraq War and the Afghanistan War. Realists believe that rules, which institutions set, are only effective inside the walls of these institutions and that they only last as long as other systems support them.² States are thus the principal and main actors on the international scene. Neo-realists also consider states to be the main actors;³ however, they concede that the international system does have an impact on those states and that states should always secure themselves economically as well as militarily. Institutionalists, on the other hand, give institutions a much greater role, arguing that they influence state actions

² Ibid., 60.

³ Morgenthau, *Politics Among Nations*, 117.

significantly. It then discusses the ICC as a key international institution that was established for justice as a last resort, neither for economical gain nor for a military purpose.

2.2 The Role of International Institutions

States do not appreciate the interference of international institutions in their internal politics and sovereignty. International institutions were built after World War II to secure Western economic and military needs and interests. The fall of the Berlin wall in 1989 marked the end of the Cold War, and the world started moving towards globalization, and the internationalization of a great number of its policies. Reading political events from the perspective of international institutions gave theorists a new angle to study events away from the emphasis on power and state politics. In addition, a focus on institutions became more relevant as the economic and social dimensions of international politics became more important. Analyzing how those institutions influence society, what characterizes them, and the extent of their impact on the international system is the concern of liberal institutionalist theories.

Robert Keohane considers institutions as entities “with specific rules, agreed upon by governments that pertain to particular sets of issues in international politics.”⁴ Expanding further on the definition of institutions, B. Guy Peters defines a good institution as “One capable of inculcating its values into the behavior of its members and

⁴ Keohane, “Institutional Theory in International Relations,” 154.

propagating those common values.”⁵ Neo-institutionalism claims that the policies set by those institutions are not always the ones to influence the values of a state; in most cases it is quite the contrary. More often, the values and interests of member states are the ones that influence those institutions and maneuver them in the direction of the goals they want to attain.⁶ It is also more practical for states to sign treaties and be part of institutions especially when common interests and values converge. Institutions are more likely to succeed if they establish legitimacy within the institutional environment. Members of an institution often start their activities on the basis of their common professional values. When common values converge into one institution, it opens up opportunities to set common rules and the members start abiding by certain mutual regulations. This may restrain their behavior in favor of more ambitious objectives such as peace, prosperity, and justice.

Values such as inclination towards peace over war, international justice, and criminal justice made international politics the prime concern of every citizen around the world. Today, with the help of the mass media, bloggers and the advancement in technologies promoting globalization, international politics seems not so different from domestic politics. However, international institutions are always under-valued, with the recurring argument that they are weak entities that cannot have real influence on the international scene. The assumption is that institutions do not have armed forces and thus cannot use force to implement their rules and regulations on states in the international system, which renders them as weaker actors.

⁵ Peters, *Institutional Theory in Political Science*, 151.

⁶ Powell and DiMaggio, *The New Institutionalism in Organizational Analysis*, 63.

Institutionalists beg to differ, however. Robert Keohane suggests that when “Great powers respect the jurisdiction of lesser powers it is not because they lack the capacity to intervene but rather because the rules of the game mandate such respect.”⁷ Also neo-institutionalists such as John W. Meyer, argue that institutions do not only have economical or military functions, they are gaining legitimacy in the international system at large. The International Court of Justice (ICJ), for instance, was created to insure that states respect international law and each other’s national sovereignty. In October 2007 the ICJ handed down a ruling to end an eight-year contestation between Nicaragua and Honduras over their Caribbean Sea boundaries. Both countries have agreed to accept the ruling, thus bringing the dispute to an end. Here the ICJ played a very effective role regarding a serious dispute that could have potentially created a war between those two states if left unresolved. Instead they trusted their case to an institution, which was able to solve it peacefully and in accordance with international law.⁸ This example demonstrates how institutions can play a decisive role on the international scene.

2.3 Realists/Neo-realists vs. Institutionalists/Neo-Institutionalists

On the one hand, neo-realists such as Mearsheimer criticize institutionalists and argue that “Institutions have minimal influence on state behavior, and thus hold little

⁷ Carr, *International Relations Between the Two World Wars, 1919-1939*, 153.

⁸ International Court of Justice, “Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea.”

promise for promoting stability in the post-Cold War world.”⁹ Mearsheimer does not believe that international institutions play an important role in preventing states from going to war. On the contrary, he believes that they are only tools created by the most powerful states in order to have better control over their share of world power. In his opinion, institutions are only mirrors of the distribution of power in the system and not a balancing factor.

On the other hand, institutionalists accept most of what Mearsheimer puts forward that summarizes the three basic realist assumptions, which are that (1) states are the principal actors in world politics; (2) that they can be analyzed as rational actors; and (3) that they are not altruistic but, rather, are broadly ‘self-interested’. Superpowers are undoubtedly the main actors on the international scene, and there is no doubt that those powers do interfere in the national sovereignty of weaker powers, bend the rules set by international institutions, and sometimes ignore them all together. However, through certain international institutions such as the ICJ, or Human Rights Commissions, or the ICC, advocacy groups and citizens around the world are able to observe, denounce, judge and even indict political actors when they commit a crime or an illegal act. The international community subjects these superpowers, just like weaker powers, to daily scrutiny. Furthermore, these institutions can take measures whether they are directly or indirectly given the authority to interfere.

Alas, not all institutions are influential. Some are marginal, and others merely have observatory roles or advocacy functions. In reality institutions influence states differently, some try to play the role of think tanks and lobby against certain

⁹ Mearsheimer, “The False Promise of International Institutions,” 2.

governmental decisions, others try to shape the media. Some institutions, like the UN, enjoy greater legitimacy and authority that may force states to abide by their rulings or be subject to sanctions. The question is not whether international institutions play a major role in world politics in an absolute sense of power politics, but how much and in what ways do they have an effect on power politics? How do they influence the supposedly more established and effective institutions of domestic politics?¹⁰

2.4 Putting Faith in Institutionalism

It may be argued that Nicaragua and Honduras are not major powers or really matter much in the global world, and that they do not constitute a good example of powerful states yielding their powers to an institution, namely the ICJ. Moreover, it could be argued that major powers have previously ignored ICJ rulings as well as the ruling of other international institutions, and this might not be likely to change in the near future. Nonetheless, institutionalists insist that the fact that some countries, no matter how weak or seemingly trivial in the international system, are willing to accept what an international organization rules, is enormously significant today.¹¹ The world order is constantly changing, new powers are emerging, tipping the balance, and the new world order is giving more leeway to institutions that are slowly gaining more normative legitimacy and power.

States like the BRIC (Brazil, Russia, India and China) have considerable power. They are all members of very powerful institutions such as the UN, International

¹⁰ Lake, "Progress in International Relations: Beyond Paradigms in the Study of Institutions," 135.

¹¹ Carr, *International Relations Between the Two World Wars, 1919-1939*, 62.

Monetary Fund (IMF), WTO and their weight is becoming more and more visible. International public opinion is increasingly getting involved in international politics, and is taking into consideration the work of these institutions. These institutions are proving to be very effective in times of crisis (natural disasters, economic crisis etc.). They are also very important when injustices are taking place in mobilizing civil society to denounce crimes against humanity anywhere around the world even in the most authoritarian systems. The international system has more venues now that facilitate communication, information sharing and cooperation to ensure a more just and more peaceful world.

The UN is even reconsidering the makeup of its permanent members at the UNSC, as some member states have been protesting about not having the right to veto. The fact that permanent members no longer reflect the power sharing concretely in the international system is a key issue, and the UNSC is considering reforming its system.¹² Oran R. Young argues that “this could change the rules of the game when it comes to the bargaining power of those who participate in institutionalized activities at the international level.”¹³ According to Young, it may just be a matter of time before slightly less tiny and slightly more significant countries are willing to cede some of their sovereignty over to these organizations and institutions. Moreover, John Ikenberry points to the rise of China and Greater Asia and he argues that “In the decades to come, America’s unipolar power will give way to a more bipolar, multipolar or decentralized

¹² Young, “Are Institutions Intervening Variables or Basic Causal Forces: Causal Clusters vs. Causal Chains in International Society,” 176-191.

¹³ Ibid.

distribution of power.”¹⁴ He explains how China will most probably become a superpower and compete for dominance with the USA, taking us back to a bipolar system, which might easily evolve into a multipolar system with the rise of other super powers. Ikenberry argues that in order to secure America’s national interest it should engage more in building global institutions to facilitate power sharing without conflict. What the superpowers should be asking themselves now is: “what sorts of institutional arrangements do I want to have in place to protect my interests when I am less powerful?”¹⁵

2.5 Case Study: The ICC and the Arrest Warrant of Omar Al Bashir

Superpowers may still be the chief actors in the international system, but as we saw earlier some states are ceding willingly some of their autonomy to important institutions such as the ICJ, the UN and the ICC. The Rome Statute established the ICC, one of the most essential institutions to put an end to genocide, crimes of war and aggression, and crimes against humanity. As the Rome Statute declares, the ICC is:

“An international treaty, binding only on those states which formally express their consent to be bound by its provisions. These states then become ‘Parties’ to the statute. The court is independent and permanent; it has jurisdiction over genocide, crimes against humanity and war crimes. Its jurisdiction is over individuals accused of these crimes. This includes those directly responsible for committing the crimes as well as others who may be liable for the crimes, for example by aiding, abetting or otherwise assisting in the commission of a crime. The ICC is a court of last resort.”¹⁶

¹⁴ Ikenberry, “Grand Strategy as Liberal Order Building,” 17.

¹⁵ Roggeveen, “Liberal Institutionalism and its Critics.”

¹⁶ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *The Rome Statute of the International Criminal Court*.

In 2005 a peace agreement was signed that put an end to a twenty-year civil war in Sudan. Yet a humanitarian crisis was still taking place in Darfur while the Sudanese government failed to protect the civilians in Darfur. The UNSC, alarmed by this crisis, and considering it a breach of international peace and security, issued several resolutions that were ignored by Sudan. Thus, as a last resort, it decided to refer the case to the ICC in order to put an end to the crimes and sufferings taking place in that region, and to indict the perpetrators.

Sudan did not sign and ratify the Rome Statute of the ICC, and thus is not a party state of this international institution. It is thus not required under international law to cooperate with the ICC because it is not under its jurisdiction. Cognizant of this, the UNSC decided that UNSCR 1593 should be binding per Chapter VII of the UN Charter. It stated 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. The Security Council decided to refer the situation prevailing in Darfur since 1 July 2002 to the prosecutor of the International Criminal Court.”¹⁷

In this case two non-state entities, the UNSC and the ICC, collaborated to give the ICC the authority to investigate a national of a non-party state, and the ICC prosecutor, Luis Moreno-Ocampo was charged to investigate this crime. He secured two arrest warrants for two government officials before he was able to collect enough proof to accuse Al Bashir, who was eventually found to be implicated in seven grave crimes.

¹⁷ UN Security Council, *Security Council Resolution 1593 (2005) on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan*.

Al Bashir is compelled to cooperate with the ICC since the UNSC, acting under Chapter VII of the UN Charter, issued resolution 1593 (2005), which referred the case of Darfur to the ICC. This Chapter is binding for member states as well as non-members.

ICC Prosecutor Ocampo, after investigating crimes supposedly committed in the territory of Darfur in Sudan, and working with the Pre-trial chamber of the ICC, found that there was reason beyond doubt to believe that Al Bashir is guilty of crimes of genocide, crimes against humanity, and war crimes. The Pre-trial chamber is the entity that authorizes the prosecutor to begin or not with an investigation depending on whether there are reasonable grounds to proceed with the investigation and that the case falls within the jurisdiction of the Court. Subsequently, the prosecutor sees necessary to issue a warrant of arrest to appear in Court, he should apply to the Pre-Trial Chamber and the latter shall issue one if there is proof beyond doubt that the incumbent has committed a crime within the jurisdiction of the Court.¹⁸ When the chamber found enough grounds to issue an arrest for Al Bashir, it caused great controversy.

What is noteworthy in this case is the fact that an institution was able to issue an arrest warrant to a seated president going beyond the sovereignty of a state. The case of Sudan and the ICC is thus interesting because it allows for the possibility of examining two overlapping issues: the neorealist vs. the neo-institutionalist debate, but also how the rules of the game sometimes change the bargaining power of not only those who willingly participate in institutions, but also those who refuse to take part in such a framework at the international level.

¹⁸ Corrie, "Pre-Trial Division of the International Criminal Court: Purpose, Powers, and First Cases," 3.

It is important to note that the ICC as an institution does not have universal jurisdiction. The Court may only exercise jurisdiction if: “the accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court; if the crime took place on the territory of a state party or a state otherwise accepting the jurisdiction of the Court; or if the UNSC has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.”¹⁹ Sudan’s immediate reaction was to discredit the prosecutor’s application of an arrest warrant, protesting that it is not a member of the Court, and that the latter had no jurisdiction over its territory or citizens. Sudan also accused the UNSC of interfering in the national sovereignty of Sudan. In addition, the LAS and the AU are asking for diplomatic immunity for Al Bashir and are outraged for such breach of state sovereignty. This is clearly a direct confrontation between justice and diplomacy, between institutional jurisdiction and state sovereignty. Who will win the state or the institution?

2.6 ICC vs. Sudan

According to realists there is no doubt about the state winning this contest. Nevertheless the ICC has many international laws and *jus cogens* on its side. Article IV of the Geneva Convention on Genocide states that “Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”²⁰ Also article

¹⁹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *The Rome Statute of the International Criminal Court*.

²⁰ UN Commission on Human Rights, *Convention on the Prevention and Punishment of the Crime of Genocide*.

27 of the ICC,²¹ confirms that a chief of state does not have immunity and could be subject to a warrant of arrest as well as be arrested and tried. Consequently, the arrest warrant applies to a sitting president, and these articles prove that Al Bashir enjoys no immunity and has the obligation to go for trial at the Hague. Under Article 89 of the Rome Statute, "Al Bashir might also be liable to arrest if he visits one of the 106 states that are parties to the treaty". Article 89 of the Court's statute stipulates "the court may transit a request for the arrest and surrender of a person [...] to any state on the territory of which that person may be found."

Skeptics of international law point to the failure of the ICC to prosecute Yugoslavia's Slobodan Milosevic and Augusto Pinochet of Chile, both of whom died or were no longer presidents before being convicted of any of the crimes they have committed while in office. The ICC has had many other unsuccessful prosecutions of former presidents and government officials in the past and this time it is even more challenging considering it is the first time the Court is investigating an acting Head of State.²² Nonetheless, it is worth noting that Ocampo has undeniable credibility and experience. He served as a prosecutor in Argentina between 1984 and 1992: "Mr. Moreno-Ocampo was involved in precedent-setting prosecutions of top military commanders for mass killings and other large-scale human rights abuses."²³ He was the assistant prosecutor in the "Military Junta" trial, which involved nine senior commanders, including three former heads of state that ruled Argentina between 1976 and 1983. Five of the accused were convicted on December 8, 1985. Ocampo has never

²¹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *The Rome Statute of the International Criminal Court*.

²² Thomasson, "ICC Prosecutor Seeks Arrest of Sudan's Bashir."

²³ "Biography of the Prosecutor."

been refused an arrest warrant in the previous eleven applications at The Hague.²⁴ Furthermore, and after a request from the prosecutor, the Pre-Trial chamber is reconsidering to add the charge of genocide to the seven other grave crimes that Al Bashir is being indicted for.

From a neorealist point of view, the arrest warrant of Al Bashir stands a slim chance of being carried out especially that Sudan is not cooperating. A neo-realist analysis would look at power politics and deduce that the government of Khartoum is backed by two very powerful states, namely China and Russia. China is “Khartoum’s biggest arms supplier and a major investor in its oil industry,”²⁵ as is Russia. Both countries are permanent members and hold veto power and can use it against any decision that the UNSC might enforce.

From the perspective of neo-institutionalists, the ICC’s investigation was instigated by a Chapter VII UNSCR, which was delegated by the five permanent members and the international system at large. The Court of course is only and strictly interested in carrying out its duties; prosecuting crimes of genocide, crimes against humanity and war crimes. The ICC has found reason beyond doubt to accuse Al Bashir for such crimes, and that sooner or later Al Bashir will be tried even if he does not present himself at The Hague. The sole concern is to bring justice to the people of Sudan.

The warrant also poses some other concerns in regard to those sustaining contacts with Al Bashir. The latter did not participate in the General Assembly meeting

²⁴ Al Jazeera and Agencies, “Sudan President Accused of Genocide.”

²⁵ “Biography of the Prosecutor.”

that was held in New York on September 15, 2009. He was not invited to the Islamic Summit that took place in Istanbul, Turkey on November 9, 2009. The ICC warrant has already disrupted his relations with the European Union (EU), Turkey and the USA and may affect Sudan's relations with China and Russia.²⁶ In other words, it might be true that Al Bashir still enjoys his freedom, however the ICC's arrest warrant already managed to disrupt his 'safe haven' in many ways. Unfortunately, international institutions are often viewed as yet another way for superpowers to expand their hegemony and/or promote democracy by force. To many, like the LAS and the AU, the ICC is viewed as an institution designed to dictate to other countries how to run their affairs; hence to many the ICC is a neo-imperialist institution.²⁷ Ikenberry explains that there is a solution to these anti-imperialist concerns.

Institutionalists can neutralize these charges by defining the institutions they want to build with a very strict set of laws that establish clearly their jurisdiction, leaving little room for interpretation as possible. "These proposed institutions must never be purposive in character like the NATO for instance. The NATO is an obvious example of a purposive institution, in that it was established with the specific aim of defending Western Europe from the Warsaw Pact and these institutions work best in very similar cultural environments and not on a global scale. Institutions should rather be *procedural*."²⁸ In Ikenberry's opinion, institutions should not have a defined goal; rather, they should be a friendly environment that allows member states to reach resolution of certain problems providing an environment that facilitates cooperation between states.

²⁶ BBC News, "World Reaction: Bashir Warrant.", May 13, 2010.

²⁷ Ikenberry, "Grand Strategy as Liberal Order Building," 11.

²⁸ Roggeveen, "Liberal Institutionalism and its Critics."

The Bretton Woods accords are a good example of this type of procedural category, as well as a body of international law such as the UN Convention on the Law of the Sea. Ikenberry suggests that building procedural institutions will protect states from disagreements over who defines the purpose of the institution and what its hidden agendas are. In turn, this will create more trust in the utility of international institutions. The ICC has been put in a situation in which it has to make double the effort now to clarify that it was established as an institution to prosecute those who commit crimes of war and aggression and genocide in order to protect innocent people with no other ulterior motives. The first review conference for the ICC, is taking place in Kampala, Uganda between May 31st and June 11, 2010 opening the opportunity to the State Parties to amend the Rome Statute and extending its jurisdiction to crimes of aggression that is yet to be defined.²⁹

2.7 Conclusion

Institutions do not have ulterior motives, states do. Some suggest that states control institutions; however others insist that institutions shape the preferences of states no matter how powerful those states are. It is a fact that independent institutions are struggling today in a world dominated by national, economical, and military interests over human rights protection and international justice. It is also a fact that more and more institutions are being created, and more and more states are willing to join them. Institutions are growing and most importantly they are eroding the false belief that

²⁹ BBC News, "Why ICC needs more than time", June 5, 2010.

political leaders have immunity and are protected by the sovereignty of their state. International institutions are succeeding in limiting the immunity of those who want to violate international norms and procedures. Institutionalism is not yet condemned to failure, as Mearsheimer predestined in *The False Promise of International Institutions*, rather it continues to evolve in scope and ability in a new era of international politics. As President Bill Clinton boldly declared in 1992, “in a world where freedom, not tyranny, is on the march, the cynical calculus of pure power politics simply does not compute. It is ill-suited to a new era.”³⁰ The next chapter provides a historical overview of Sudan’s politics in which it focuses on Al Bashir’s rule since he took power by force in 1989 leading the country through a twenty year long civil war that some believe is still ongoing.

³⁰ “THE 1992 CAMPAIGN; Excerpts From Speech By Clinton on U.S. Role.”

Chapter 3

Situating the ICC in the Context of the Conflict in Sudan

3.1 Introduction

This chapter identifies the key players, the major peace agreements that put an end to more than twenty years of civil war and the atrocities that were committed during that period. It also examines major UNSC Resolutions that were issued, as Sudan was becoming a threat to international peace and security. In order to understand the importance of the role of the ICC and international justice in the case of Sudan and Al Bashir's indictment, we must first analyze the Sudanese conflict with its various political parties and actors. This chapter examines how the Darfur case was transferred by the UNSC to the ICC. And what are the repercussions that this indictment had on the region, taking mainly the AU and LAS' response towards the indictment?

3.2 A History of Conflict

Sudan's history is that of coup d'états, conflict between the North and the South as well as in Darfur. It is an ethnic conflict at the surface but in reality a conflict over power and resource sharing. Despite the many attempts, the difficulty of reaching a peace agreement is without a doubt a challenge.

In 1924 the British colonialists separated the country into two administrations and instituted policies forbidding the population of the south, which was predominantly Christian and Animist, to move north and the people of the north, who were predominantly Arab and Muslim, to move south. After Sudan took its independence in 1956, the separation led to the development of the Islamic North and furthered the isolation of the Christian South that did not want to be dominated by the North.

Sudan was immersed in civil wars even before it gained its independence. Fighting between the Arab Muslim North and the Christian Animist South rarely left the country in peace. Controlled by Muslim Arabs, Khartoum's government always sought to gain control over the oil rich Christian Animist South. It imposed Islamic Sharia Law and wanted to turn Sudan, including the South, into federal states. The latter rebelled and formed the South Sudanese People's Liberation Army or Movement (SPLA/SPLM) led by John Garang de Mabior.³¹

The SPLA/M was fighting for a united but improved Sudan, with equal democratic rights for the entire country. They called for 'liberation', a new democratic government, a solution for the national and religious sensitivities, for secularism, federal-style regionalism, an end to the monopoly over power by Khartoum, balanced economic development in remote regions, a campaign against racism, tribalism, and sectarianism, and, most importantly, a freer economy not monopolized by the state.³² On the other hand, a new vision was also gaining popularity in the North, promoting "a new society to arise from the corruption of the old."³³ It materialized in June 1989, when the

³¹ SPLM, "Civil War: Historical Background."

³² Bechtold, *Politics in the Sudan*, 294.

³³ Burr, *Revolutionary Sudan*, 55.

Islamist leader of the National Islamic Front (NIF) Hassan Al-Turabi and Brigadier Al Bashir performed a bloodless military coup d'état resulting in Al Bashir taking the Presidency of Sudan and Al-Turabi appointed as Speaker of the National Assembly or Parliament.

Political opposition was suppressed by this new regime, and all attempts to democratize were soon revealed to be futile. Lack of trust and confidence in the government's intentions increased, and it soon became clear that the Khartoum government wanted to strengthen its power in the North. This led to deterioration in the country. In fact, the ruling elite cared only for preserving its own privileges and interests and continued the war with the SPLA. It declared Jihad against the non-Muslim South, which caused the already suffering population from torture, displacement, genocide, and starvation, to grow even more distant, distrusting, and hopeless.

The SPLA started to weaken in 1991, when serious intra-ethnic fighting broke because of an important divide within its own ranks. The Marxist regime of Mengistu Haile Mariam, in Ethiopia, a key regional ally of the SPLA fell at the same time, weakening the latter further. The SPLA survived through a series of coalition with opposition movements from the north as well as regional support. The North's power declined as well, when in December 1999, Al-Turabi challenged Al Bashir by trying to give a bigger role to the prime minister and parliament.

Al-Turabi assumed that he could allow the governors of the twenty-six federal states of Sudan to be directly elected, against the common practice of appointing them by the president. In addition, the prime minister would have to report to parliament

instead of the President, hence curtailing presidential powers even more.³⁴ Feeling that his presidency and authority were being threatened, Al Bashir, still favoring the military approach, resorted to force. The latter was not ready to surrender to Al-Turabi or be marginalized by the National Congress who personified the Islamist state. Yet he could not do much legally to avert or hinder Al-Turabi's governmental challenge. Consequently, Al Bashir dismissed Al-Turabi and dissolved the assembly. On December 12, 1999, he ordered army tanks to besiege the legislative building two days prior to the National Assembly's vote on curbing the powers of the presidency.³⁵ Al Bashir declared a state of emergency, called for new elections to the National Assembly in December 2000, and suspended parts of the constitution. Since February 2001, Al-Turabi was in and out of jail for signing a memorandum of understanding with the SPLA, or arrested and charged of being a threat to national security and the constitutional order.

When Al Bashir felt threatened by Al-Turabi he took power from him by force dismissing any democratic procedures. Consequently, the National Islamic Front was divided into the National Congress Party (NCP), which was the ruling party at the time and the Popular National Congress (PNC), which was founded by Al-Turabi, subsequently, in August 2000 "to recover the Islamist momentum that he and his allies had achieved over the past decade."³⁶ Then Al Bashir, acting as President, appointed state governors and ministers for the twenty six states; some of these governors were non-Muslim Southern Sudanese politicians but all of the latter were economically dependent on the government of Khartoum. In December 2000, Al Bashir held

³⁴ Ibid., 266.

³⁵ Ibid., 271.

³⁶ Ibid., 272.

presidential and legislative elections in order to reaffirm his legitimacy. He was reelected with “86.5 percent of the vote and his party, the now ruling National Congress Party, won 355 of 360 seats in the National Assembly.”³⁷ These figures were far from being representative of the will of the people of Sudan because the main opposition parties boycotted them and most of the south was not able to vote.

Frustration grew as health services were lacking. The education sector was neglected as well. There were no job opportunities and the infrastructure was left undeveloped. It was only in 2002 that the Machakos Protocol “granted the south the right to a referendum on self-determination following a six-year interim period and dictated that Sharia law would remain in force only in the north.”³⁸ Talks were supposed to continue on sharing power and wealth, on human rights, and a ceasefire was to be announced to set a framework for future successful negotiations.³⁹ But the parties left two basic historical and political inheritances unsettled in the composition of postcolonial Sudan: “The legacy of the radicalized state of the North and the ethnicization of Southern Sudan, increasing the possibility for renewed political violence from within and without.”⁴⁰ Consequently, the war went on; it affected every part of the country and every sector.

The country was now in war along racial, religious, ethnic, tribal, and regional grounds. Foreign aid was becoming scarce as well, because it was difficult to justify aid to a regime “perceived increasingly as persecuting its southern minority, harboring

³⁷ Hoile and European-Sudanese Public Affairs Council, *The Search for Peace in the Sudan : A Chronology of the Sudanese Peace Process 1989-2001*, 312.

³⁸ The Government of Sudan and The Sudan People's Liberation Movement, *Machakos Protocol*.

³⁹ “The Enough Project.”

⁴⁰ Idris, *Conflict and Politics of Identity in Sudan*, 92.

terrorists like Osama Bin Laden,”⁴¹ and implicated in the attempted assassination of Hosni Mubarak. Obstruction of aid deliveries like food and medicine was a daily occurrence. Massacres in the South were taking place while the authorities stood still. Slavery among the refugees reappeared caused by poverty, displacement and exodus. The Sudanese government and army were regularly accused of perpetrating these atrocities.⁴²

The NCP and the SPLM continued talks under heavy pressure from the USA. The main issues being negotiated were issues of “identity, power and wealth sharing, and the future of the three contested regions of the Nuba Mountains, Blue Nile, and Southern Kordofan.”⁴³ While the two parties negotiated, a new civil war was ignited in Darfur allowing the Government of Sudan (GoS) to delay reaching a peace agreement. It was only in early 2004 that these parties started making some progress. Finally, on January 9, 2005 the peace was officially signed by both sides in the so-called Comprehensive Peace Agreement (CPA) in which all parties agreed to put an end to Sudan’s civil war that lasted for more than 20 years.⁴⁴ The South became an independent area that included ten governorates, with Juba as the capital. John Garang, as leader of the SPLA/M, was appointed co-vice President and President of the South. He died shortly in a suspicious helicopter crash. General Salva Kiir Mayardit became the President of the South of Sudan. The agreement gave the South of Sudan the chance to enjoy autonomy by setting up a separate administration for a transitional period of six

⁴¹ Anderson, *Sudan in Crisis*, 235.

⁴² *Ibid.*, 49.

⁴³ Idris, *Conflict and Politics of Identity in Sudan*, 77.

⁴⁴ The Government of Sudan and The Sudan People's Liberation Movement, *The Comprehensive Peace Agreement*.

years. It was supposed to be followed by a referendum, which would determine the South's independence from the North.

The agreement also established an interim National Unity Government (NUG) with a power-sharing arrangement. Both parties, the North and South, agreed to divide oil revenues equally although most of Sudan's oil is in the south, and created a co-vice president position.⁴⁵ However, after the death of John Garang, the NCP started delaying and stalling, and damaging every chance for the CPA to be implemented. It did so by delaying the elections that were mandated by the agreement. It did not release the funds for the census, nor did it define the boundaries between North and South, which are essential in order to have electoral districts. Moreover, the NCP military forces did not relinquish the Southern oil fields contrary to the timetable agreed upon in the CPA.⁴⁶

The CPA failed to put in place a disarmament mechanism and thus both the North and South's armies remained in place allowing the possibility of new clashes and the fear factor to remain. Because of tribal rivalries and ethnic divisions, Darfur was unable to form a unified political front. The CPA had failed to address these problems and left Darfur's issue out of the CPA lest it jeopardizes the agreement. Consequently, in February 2003, rebel groups, such as the SLA/M and the Justice and Equality Movement (JEM), backed by Chad were left with no choice but to launch attacks on the government's army. Their cause was primarily political and was linked to the poor governance of the central government, which historically and politically marginalized Darfur. The violence broke soon after.

⁴⁵ Ibid.

⁴⁶ Idris, *Conflict and Politics of Identity in Sudan*, 77.

3.3 The Conflict in Darfur

Darfur had been accumulating the consequences of isolation since British colonial rule. Throughout the 1980s and the 1990s, discontent grew and rebel groups started rallying up in order to settle the many local grievances and disputes, particularly over land rights and greater autonomy. Also, on the economic level, Darfur was always cast aside from the state's structure and from the decision making process. The government, in turn, blamed Darfur's condition on desertification and the lack of resources due to tribal conflicts. Indeed, the government played on fears, identity differences and traditional critical grievances; it manipulated the ethnic divisions of the region to deflect the political issues raised by the rebels. This drove the rebels to organize as one opposition front.⁴⁷ Darfur was marginalized and the Khartoum government had control over its main resources, namely oil, which Sudan's economy relied on. The government did not allow the middle class to flourish, marginalized a big portion of the population, giving them choice but to take arms.

As a result, the GoS tried to break up the Darfur front into tribal clusters in order to limit the legitimacy of the opposition and their demands.⁴⁸ The GoS armed communities and tribes selectively to fight against one another, and sent troops to Darfur in order to weaken the rebels' role in the fighting. Most importantly, they armed the so-called Janjaweed, an Arab militia, to repress the rebels and ended up perpetrating the most disastrous and massive genocide, "the worst humanitarian crisis

⁴⁷ Ibid., 78.

⁴⁸ Ibid., 77.

in the world as described by the UN.”⁴⁹ 200,000 people were estimated killed in Darfur.⁵⁰ Satellite pictures show entire villages burnt and destroyed. Many more civilians still live in dreadful conditions. They are tortured, raped and displaced.

Had the parties included the Darfur conflict in the CPA, this humanitarian crisis could have been avoided. The Darfur Peace Agreement (DPA) was signed only after the tragic humanitarian atrocities took place. On May 5, 2006, the DPA, mediated by the AU, was signed by the GoS, however not all rebel groups were represented. Only one faction of the SLA led by Commander Minni Arkou Minnawi signed the deal. This peace process relied on two phases: the first phase called for an agreement after the disarmament of the Janjaweed militia as well as the rebel groups in order to integrate them into the army, the second phase was the Darfur-Darfur Dialogue and Consultation (DDD-C), a comprehensive process to extend the agreement to other political players and communities in order to deal more directly with the core issues of the conflict in Darfur such as power-sharing, land tenure and civil rights.⁵¹

The initial agreement was only accepted by one faction of a rebel group out of three other main players, thus lacking legitimacy and support on the ground. Although this peace agreement called for the disarmament of the Janjaweed and the rebel groups, it was doomed to failure because the rest of the non-signatory rebel groups continued to fight and considered the Minni Minnawi faction as government collaborators. This lack of representation ignited another mutiny on October 14, 2006, this time in the East of Sudan in the states of Red Sea and Kassala, led by a coalition of rebel groups, the

⁴⁹ Ibid., 78.

⁵⁰ Associated Press, “Death Toll of 200,000 Disputed in Darfur.”

⁵¹ The Government of Sudan and The Sudan People's Liberation Movement, *Darfur Peace Agreement*.

SPLA and the JEM joining at a later stage.⁵² The latter demanded to have more power in the Southern Sudan agreement through better representation in the national government formation. They also opposed what they considered to be an unfair oil distribution. This latter issue is supposed to be addressed in the referendum that will take place in 2011. The CPA committed the North and the South to a referendum, which will give the South the right to vote to secede and become independent of the North.

3.4 The Referendum and its Implications

Any referendum on the future of the South has many implications that will affect the economy of Sudan and especially the North. Sudan's economy relies on countries such as China, Russia, Malaysia, India, France, Japan and Kuwait and their foreign-based oil drilling companies that have substantial investments in Sudan.⁵³ A clear majority in the South wants to secede from Sudan. If and when the South becomes sovereign it will then revoke any oil contracts made with Khartoum. In other words, if secession takes place and if oil contracts are revoked the losing parties are going to be China, Russia, Malaysia, India, France, Japan and Kuwait. Secession, also threatens directly the core economic interests of the North. In order to stall the implementation of the CPA, the GoS manipulates the tribes to camouflage its unwillingness to share power and wealth with the South.

⁵² Ibid., 86.

⁵³ Tønnesson and Kolas, "Energy Security in Asia: China, India, Oil and Peace."

3.5 The Role of the UN Security Council

The UN was an important proponent of the CPA. Originally the NCP was not able to defeat the SPLA. The USA started to put intense pressure on Sudanese officials using several techniques. The UNSC was one of the ways to pressure Sudan into signing the peace deal. Many resolutions were passed, like the June 2004 UNSCR 1574, which mandated the United Nations Mission in the Sudan (UNAMIS) to facilitate peace talks and arrange contacts with the concerned parties.⁵⁴ UNSCR 1556 was passed shortly thereafter, in July 2004 assigning more tasks to UNAMIS given the deteriorating situation in Darfur.⁵⁵ Simultaneously, the UNSC imposed a strict arms embargo on all non-governmental units and individuals, especially the Janjaweed operating in Darfur. UNSCR 1564 followed a month later. It noted that there was no progress in the security situation that civilians were still living in fear, that no action was being taken towards disarming the Janjaweed militias, and underscored the deliberate violation of international humanitarian law in Darfur.⁵⁶

Unable to punish criminals, the UNSC decided to refer the lawless situation in Darfur to the ICC in Resolution 1593.⁵⁷ Ocampo was the prosecutor appointed to study the Darfur case. He started by issuing two warrants of arrest asking the Minister of State for the Interior of the Government of Sudan Ahmad Muhammad Harun (Ahmad Harun) and a Popular Defence Force (PDF) member and a senior Militia/Janjaweed leader Ali Muhammad Al Abd-Al-Rahman (Ali Kushayb) to appear before the ICC.

⁵⁴ UN Security Council, *Security Council Resolution 1574 (2004) on Sudan*.

⁵⁵ UN Security Council, *Security Council Resolution 1556 (2004) On Measures to Prevent the Sale or Supply of Arms and Related Materiel*.

⁵⁶ UN Security Council, *Security Council Resolution 1569 (2004) on Sudan*.

⁵⁷ UN Security Council, *Security Council resolution 1590 (2005) [On Establishment of the UN Mission in Sudan (UNMIS)]*.

After that, he accused Al Bashir of involvement in crimes of war among seven other grave crimes. He was accused of giving his forces to eliminate three ethnic groups the Fur, the Masalit and the Zaghawa himself.⁵⁸ With the backing of the UNSC, which classified the situation in Sudan as a threat to international peace and security, the ICC set a precedent by indicting a seated president, a national of a non-state party to the Rome statute and who yet has the obligation to go to trial under Chapter VII of the Charter of the UN. This Resolution indirectly imposed on the GoS the duty to facilitate the arrest for those accused of crimes against humanity, as well as war crimes. However none of the indicted persons showed up for trial, neither the former Interior Minister nor the current Minister of State for Humanitarian Affairs, Ahmad Harun, and Janjaweed commander Ali Muhammad Ali Abd-Al-Rahman.⁵⁹ Ocampo pressed the pre-trial chamber to charge Al Bashir with Genocide. The ICC is currently reviewing their previous ruling in order to re-examine whether to add the allegation of genocide to Al Bashir's charge sheet.⁶⁰

International and regional actors as well as the UN tried to press the NCP and the SPLM to sign the CPA. Consequently, the UN issued more resolutions. In 2005, UNSCR 1591 was adopted in order to strengthen the arms embargo, to ban travel, to freeze the assets of rebel leaders as well as government officials.⁶¹ These resolutions opened the way for the regional mediation team of the Intergovernmental Authority on Development (IGAD),⁶² and the troika formed of the United Kingdom (UK), Norway,

⁵⁸ "ICC-02/05 Situation in Darfur, Sudan."

⁵⁹ Ibid.

⁶⁰ Black, "Genocide Charge Put Back on Arrest Warrant Against Sudan President."

⁶¹ UN Security Council, *Security Council Resolution 1591 (2005) on Sudan*.

⁶² Assembly of Heads of State and Government, *Agreement Establishing The Inter-Developmental Authority On Development (IGAD)*.

and Italy, to broker a peace deal. The CPA gave the South of Sudan the chance to enjoy autonomy by setting up a separate administration for a transitional period of six years, which will be followed by the referendum in 2011.

The military forces of the NCP are still present in the Southern oil fields contrary to the timetable agreed upon in the CPA. This agreement failed to put in place a disarmament mechanism and thus both the North and South armies remained in place allowing for the possibility of new clashes. People are wary of another civil war especially that the situation in the South is deteriorating. It seems now almost certain that the South is going to vote to secede from the North, which means Sudan will become two separate states, with two independent economies. If the South decides to secede, the North is going to have to let go of its control over oil. Oil has been the main source of revenue for the government of Khartoum. This might create some more tension between the North and South elevating the risk of falling back into another civil war.

3.6 The Role of Oil in the Conflict

Today, the risk of another all out civil war is real. However there are three main peace agreements: the 2004 Abyei Protocol, the 2005 CPA, and the 2006 DPA that have been signed and are ensuring the continuity of the current status quo. These three main agreements are supported, as I have mentioned, by many; the UNSC, by national parties, as well as regional and international actors. Yet clashes and tensions are still rising, the displaced still cannot return to their villages and homes are still destroyed. However, while the USA, the UK, the EU, as well as other major international actors

are endorsing any actions taken by the Khartoum government that is bringing the country closer to peace, others are working in the opposite direction. Some international actors are working against the peace process: “In a report from the Human Rights First (HRF) organization a claim states that 90% of the light weapons currently being imported by Sudan and used in the conflict are sold by China.”⁶³

Oil is the main source of revenue for the Sudanese government of Al Bashir. It is from these profits that Al Bashir is accused of buying weapons and fueling the conflict. Consequently, the Sudanese oil importers such as India, Russia and Japan are accused of supporting the economy of the government of Al Bashir, while the latter continues to obstruct the CPA. Al Bashir’s government is undermining the reforms critical to the development of the South. His party is politically manipulating the situation repeating the bait-and-switch routine of making unfulfilled promises in order to cut out international pressure, as well as weaken Salva Kiir’s efforts. It perceives the referendum as a threat to its regime survival. Their unwillingness to implement the CPA risks a return to war.

There is no doubt that implementing the peace agreements would change the current political, economic, and social status of the country. Peace agreements have been signed. They pledged responsibility from all the Sudanese parties involved the people, and the international community. Some are working for the realization of this peace, others are working against it. Strategies, rehabilitation programs, disarmament, and reintegration are necessary steps for Sudan to take and make sure that it does not relive another civil war.

⁶³ “90% of Weapons for Darfur Come from China.”

So far what appears to be a national consensus for peace in Sudan has revealed to be a tactic used by Al Bashir and his party to divert the attention of the international community and to silence the rebellion in his country. It is clear now that the continued conflicts in Sudan are mainly a result of a one track military solution that the NCP and the Government of Khartoum are following instead of channeling their efforts towards democratic transitions and the implementation of the CPA and the rest of the peace protocols.

The difficulty in this conflict stems from the vast power asymmetries between the two parties. The high power party (NCP) does not believe that a positive outcome would result from engaging in a resolution and reconciliation process and the low power party (SPLA/M) does not have the power to enforce their conditions on the process or negotiation. Each side has its own narratives. Al Bashir's party feels that their power base is threatened and as such creates narratives to justify their behaviors, while perpetrating some of the most atrocious human rights injustices in modern history. And while the Darfuris and the people of the South suffer from genocide, displacement, hunger and instability, they launched a resistance movement that is now a form of power in itself because they refuse to accept the status quo they are living in. In order to have a successful conflict resolution and eventual reconciliation, all parties must be equitable during negotiations. Unfortunately, the peace agreements that were signed were lacking justice and fairness and were guided solely by the concern to stop the war, in other words conflict settlement, which does not really address the social disparities or the root causes of this protracted civil war. The CPA was only led by the power relations between the parties involved.

In a keynote address to the International Crisis Group/Save Darfur Coalition/European Policy Centre Conference, the President of International Crisis Group, Gareth Evans, noted that:

“It is time for Sudan to rejoin the community of nations respected for their commitment to the highest standard and values, and for the international community, once and for all and without further excuses of its own – and with the EU and its key member states playing a leading role - to act decisively and effectively to persuade it to do so.”⁶⁴

Putting pressure on Khartoum to implement and fulfill the agreements it has signed is the only way to avoid the failure of the CPA, also holding accountable the people responsible for all the atrocities deters criminals from committing more violations. As Susan Rice and Gayle Smith argued in the Washington Post on May 30, 2004:

“The US administration has worked hard to end Sudan’s long running civil conflict. But this effort will have been wasted if we allow the Sudanese government to continue committing crimes against humanity. Not only will the international community have blood on its hand for failure to halt genocide, but we will have demonstrated to Khartoum that it can continue to act with impunity against its own people. In that case, any hard-won peace agreement will not be worth the paper its’ signed on.”⁶⁵

3.7 ICC Indictment and its Repercussions

Not only members of the international community like China, Russia, the US, the UK, and the EU are involved in the case of Sudan, but also the ICC indictment of Al Bashir drew the attention of important regional actors such as the LAS and the AU. All Arab and most African states are backing Sudan and refuse to extradite Al Bashir.

⁶⁴ Evans, “Darfur: What's Next?.”

⁶⁵ Rice and Smith, “The Darfur Catastrophe.”

For Sudan facing justice involves paying a high price for all the damage that has been done over the past twenty years; millions are displaced and millions of villages and homes were destroyed. The perpetrators, as well as their supporters, are not ready to neither make concessions nor comply with the law. The AU Assembly, for instance decided:

“Not to cooperate with the ICC pursuant to the provisions of Article 98 of the Rome Statute relating to immunities for the arrest and surrender of President Omar Al Bashir of The Sudan is a logical consequence of the stated position of the AU on the manner in which the prosecution against President Bashir has been conducted, the publicity-seeking approach of the ICC Prosecutor, the refusal by the UN Security Council to address the request made by the African Union and other important International groupings for deferment of the indictment against President Bashir of The Sudan, under Article 16 of the Rome Statute of the ICC.”⁶⁶

Nonetheless, as we have seen in the previous chapter the ICC is very aware of this limitation and is not trying to arrest Al Bashir by force; it simply found enough proof to indict him. Getting him to the Hague would be ideal but considering the circumstances, it can go ahead with the prosecution without him being there in person.

The AU also decided that:

2) “Testimony to the glaring reality that the situation in Darfur is too serious and complex an issue to be resolved without recourse to a harmonized approach to justice and peace, neither of which should be pursued at the expense of the other. “Furthermore, the decision was taken after due evaluation of the situation in Darfur informed by the commitment of Member States to finding a lasting solution to the problem in Darfur with a view to restoring peace, security and stability in The Sudan and the whole region and prevent further displacement and killings in that country. And one more decision worth noting is the request: 3) upon the United Nations Security Council to seriously consider the request by the AU for the deferral of the process initiated by the ICC, in accordance with Article 16 of the Rome Statute.”⁶⁷

⁶⁶ Membe, “Opening Statement by the Chairperson of the Executive Council, Hon. Bernard K. Membe MP, Minister for Foreign Affairs and International Cooperation of the United Republic of Tanzania.”

⁶⁷ “Press Release: Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC).”

On its part, and fearful lest Sudan's case set an objectionable precedent, the LAS decided to condemn the arrest warrant of Al Bashir. It reassured Sudan that it will support it in facing any further indictments that targets its sovereignty, its union, and its stability. It also stated that Sudan has the primary right to investigate matters of justice and rejects any attempts to politicize international law and apply it to undermine the sovereignty and stability of Sudan.

The LAS also underscored its position that presidents of states have immunity that was granted to them along with diplomatic privileges in the Vienna convention on Diplomatic relations year 1961. Article 29 of the convention states: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."⁶⁸ On the other hand, Article 32 clearly states that:

- 1) "The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under article 37 may be waived by the sending State.
- 2) Waiver must always be express.
- 3) The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim.
- 4) Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary."⁶⁹

The LAS also stated that the ICC indictment puts major obstacles in front of efforts exerted to reach a sustainable peace in Sudan. The LAS also argued that the indictment complicated preparations underway for the upcoming presidential and parliamentary

⁶⁸ United Nations, "Vienna Convention on the Law of Treaties."

⁶⁹ Ibid.

elections of April 2010. It requested the UNSC to take action in order to maintain civil peace and stability in Sudan.

The UNSC did take action by issuing a resolution under Chapter VII because it perceived that not only civil peace in Sudan was threatened but also international peace and stability. It is important to mention that the latter did not indict Al Bashir nor mentioned his name in the Resolution 1593. It only referred the case of Darfur to the ICC.

The Sudanese government is against the ICC indictments and is refusing to comply with it; it is protesting and mobilizing people against it. Moreover, the Sudanese government is using the media to discredit the ICC and to blame the USA of orchestrating the ICC indictment. As one commentator has noted, “The Sudanese government uses the local media, including television and newspapers, to tell the people what it wants them to believe about the court, according to Hashim Ahmed, director of Sudan Organization against Torture.”⁷⁰ The government in Khartoum is also spreading rumors, suggesting that the international community is using the ICC to try to invade Sudan, and that the ICC has no jurisdiction in Sudan, conveniently omitting any mention of how the UNSC empowered the ICC with the jurisdiction through a Chapter VII resolution. Above and beyond, there is a major misunderstanding and lack of information about what the court does: “Rumors circulate about how it operates and what impact it will have. Sometimes, even those people who support the court don't understand it, and spread wrong information with the best of intentions, said Ali.”⁷¹

⁷⁰ Goodman, “Court Outreach Under Fire.”

⁷¹ Ibid.

The reason is mainly because the people are only getting information from one source, namely the government.

In spite of government censorship, observers believe that attempts to raise awareness about the ICC are advancing, claiming that most people know about the court and support it, even if they do not understand all its details. “Ahmed said people want the ICC to try those responsible for crimes committed. People know the Sudanese judiciary is [in the hands of the] government and not capable or impartial, he said. It’s why the ICC should come in. People know the injustices being done.”⁷²

3.8 Conclusion

In order to reach a sustainable peace social, structural changes are necessary. There are different processes in resolving ethnic conflicts and bringing justice to people is one of these processes. The ICC is playing an important role in this conflict. The international community should take a more pro-active role and a commitment to sustain the needed pressure on Al Bashir’s regime to fulfill the requirements of the Peace Agreements. The government of Sudan must be pressured to abide by the ICC indictments. If those indictments are not well founded as Al Bashir claims, why oppose a fair trial to take place for the two government officials that the prosecutor indicted as well as Al Bashir himself.

These are the forces of transition and accountability measures that should be taken. It is the only way Sudan will ever get its conflict resolution and reconciliation. People must get justice in order to reconcile and have a lasting peace

⁷² Ibid.

with no vendettas and tensions rising up again every time a disagreement happens. It is only when the criminals who perpetrated all the crimes in Darfur and Sudan in general are held accountable that the people will feel safe. Once a safer and more secure environment is established, once the displaced and the refugees resettle and once there are no armed groups terrorizing civilians, only then can free and fair elections take place, unlike the ones that took place on April 2010.

Is the situation ripe enough to bring about justice? Justice demands a great social change for the greater good and that depends very much on the context of the conflict. The people of Sudan are still misinformed and confused about the legitimacy of the ICC over their nationals. The next chapter discusses the legality of the ICC's jurisdiction over Al Bashir.

Chapter 4

The Prosecution of Omar Hassan Ahmad Al Bashir: Legal or not?

4.1 Introduction

The ICC does not have jurisdiction over States, but only over individuals, particularly the nationals of party states. However, when international peace and security is breached there are certain exceptions, in which the Court can extend its jurisdiction. This chapter examines those exceptions, and analyzes the difference in the Court's jurisdiction over nationals of party states as well as non-party states.

Different aspects of the case against Al Bashir are examined: a) Sudan is not a party state to the ICC and Al Bashir is its president. How then can the ICC have jurisdiction over him? Moreover what are the implications of Chapter VII resolution 1593, which referred this case to the ICC? Consequently this chapter poses a number of questions: what changes in the authority of the ICC over nationals of non-party states when a prosecution is mandated under a Chapter VII resolution of the UN Charter? Why is the difference between prosecuting nationals of ICC party states and the nationals of non-party state blurred when the SC refers a case to the ICC? What happens to the immunity of government officials and heads of states? This chapter demonstrates that there is no such immunity before international law, when the Geneva Convention article IV and Article 27 of the Rome Statute are considered.

4.2 The ICC and the Rome Statute

Chapter VII of the UN Charter rules above most international laws and a resolution issued under it is considered very authoritative. Nonetheless many limitations remain to be challenged in the Statute and the ICC's jurisdiction. The Rome Statute is an international treaty that defines the preconditions of the Court's jurisdiction over persons charged with the gravest crimes of international concern, the elements of its jurisdiction, its functions as well as its limitations. The following is a summary of these preconditions and limitations: Article 5 defines the crimes, which the Court is authorized to look into. It is limited to the gravest crimes such as the crime of genocide, crimes against humanity, war crimes, crime of aggression.⁷³ Articles 6, 7, and 8 define each one of these crimes and what constitutes them. On the other hand Article 12 of the Statute sets the preconditions for the Court to exercise its jurisdiction.

“When a State signs the Statute, it accepts the jurisdiction of the Court and the crimes referred to in article 5:

“In the case of Article 13⁷⁴, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

- a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State, which is not a Party to this Statute, is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in

⁷³ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *The Rome Statute of the International Criminal Court*.

⁷⁴ Ibid.

question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.”⁷⁵

These are the conditions required in order for the Court to have jurisdiction over the national of a state. However, the following section explains the prosecution of a national of a non-party state.

4.3 Prosecuting a National of a Non-Party State: The Arrest Warrant of Al Bashir

The ICC is the first permanent criminal Court in the world. It came into effect on July 1, 2002 when sixty states accepted, entered or ratified the treaty and thus became ‘Parties’ to the Statute. Today, after several years of negotiations and opposition from various states, especially the USA, 111 states have joined the ICC. As the article of the statute indicates, the ICC has jurisdiction only over the nationals of party states i.e. the states that have signed or ratified its statute. However, there are certain exceptions to this rule as we saw in article 12 (3) as well as in other articles.

Al Bashir was accused by the ICC prosecutor of genocide per the Rome Statute, under Article 6, and of:

“(a) Killing members of the Fur, Masalit and Zaghawa ethnic groups (also referred to as ‘target groups’), (b) causing serious bodily or mental harm to members of those groups, and (c) deliberately inflicting on those groups conditions of life calculated to bring about their physical destruction in part; of crimes against humanity under Article 7 (1) of the Statute, committed as part of a widespread and systematic attack directed against the civilian population of Darfur with knowledge of the attack, the acts of (a) murder, (b) extermination,

⁷⁵ Ibid.

(c) forcible transfer of the population, (d) torture, and (e) rapes; and of war crimes under Article 8 (2)(e)(i) of the Statute, for intentionally directing attacks against the civilian population as such, and (v) pillaging a town or place.”⁷⁶

In this case the Prosecutor is not stating that Al Bashir perpetrated these crimes himself or directly, but is charging him of responsibility for giving the orders and orchestrating those crimes through the instruments of the state of Sudan, namely the army and the Militia/Janjaweed. It is clearly stated in article 25 (3) (a) of the Statute that the Court has the authority to indict persons even if they have not conducted a crime directly:

“1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.”⁷⁷

Sudan did not sign the ICC statute. Thus Sudan is not a ‘Party State’, which makes the arrest warrant of Al Bashir a controversial case. This controversy began in 2005 when the UNSC adopted resolution 1593 under Chapter VII stating that the situation in Darfur was a threat to international peace and security.⁷⁸ It was adopted by a vote of eleven in favor to none against, but with four abstentions (Algeria, Brazil, China, and the United States). As aforementioned, this was the first time that the UNSC

⁷⁶ Office of the Prosecutor, “Press Release: ICC Prosecutor Presents Case Against Sudanese President, Hassan Ahmad Al Bashir, for Genocide, Crimes Against Humanity and War Crimes in Darfur.”

⁷⁷ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *The Rome Statute of the International Criminal Court*.

⁷⁸ UN Security Council, *Security Council Resolution 1593 (2005) on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan*.

refers a case to the ICC under Chapter VII. The next section investigates whether the ICC has jurisdiction over Al Bashir and what exactly a Chapter VII resolution entails in regard to the statute of the Court. It also examines the authority of the ICC over nationals of non-party states when mandated under Chapter VII.

4.4 Chapter VII Resolution 1593

The ICC has the authority to investigate nationals of party states who are suspected of the gravest of crimes. It should only be referred to as a case of last resort, that is, only if national courts have failed or are too corrupt to proceed with a fair trial. Article 13 of the Statute explains how state parties may refer crime cases to the Court on the condition that the cases are within its jurisdiction. The UNSC may also refer to Court crimes that have been committed in a situation that threatens or breaches international peace and security pursuant to Chapter VII of the UN Charter (Art.13).⁷⁹ The Prosecutor in charge investigates the situation and decides whether there are reasonable grounds to take it to the Pre-Trial Chamber. Thereafter, the Pre-Trial Chamber composed of one or three judges, proceeds with the judicial aspects and decides whether or not to grant the prosecutor a warrant of arrest.⁸⁰

The Pre-Trial Chamber studied the application for the warrant of arrest of Al Bashir and granted it. Article 58 of the Statute states that if the Pre-Trial Chamber judges that there is enough evidence and information to believe that the person, in this case Al Bashir being the head of state and the commander in chief of the Sudanese

⁷⁹ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *The Rome Statute of the International Criminal Court*.

⁸⁰ *Ibid.*

armed forces, has committed the crimes alleged and that those crimes are within the Court's jurisdiction, it may issue a warrant of arrest or a summons to appear before the Court.

However, and as aforementioned, Sudan is not party to the Rome Statute and allegedly not forced to cooperate with the ICC. Article 86 Part IX of the Rome Statute emphasizes that only "States parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."⁸¹ Yet this commitment is not binding upon states that did not join the ICC, unless they have declared that they accept to cooperate with the Court's jurisdiction or an ad hoc arrangement or agreement with the Court. However, one exception exists, and this is in Article 13 (b) of the Rome Statute on the exercise of the Court's jurisdiction which affirms that non-party states may be obliged under an international obligation to cooperate with the Court by a resolution of the SC issued under Chapter VII. In fact, Chapter VII Article 48 of the UN Charter obliges member states to heed SC decisions. UN Charter Chapter VII, Article 48 states:

"The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members."⁸²

Furthermore, UNSCR 1593 (2005), issued under Chapter VII, reiterates in paragraph 2 that the SC:

⁸¹ Ibid.

⁸² "Charter of the United Nations: Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Agression."

“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.”⁸³

UNSCR 1593 did not indict or mention Al Bashir. However it urges all parties to cooperate fully with the ICC’s decisions. It was only after the ICC indicted Al Bashir that the latter became involved in the matter.

Ian Brownlie contends that it might seem controversial to compel in a Chapter VII resolution a non-party state to cooperate with the ICC because the Rome Statute was principally established for states who willingly give permission to the Court in order for it to exercise its jurisdiction.⁸⁴ Issued under Chapter VII, the resolution 1593 eliminated the difference between party states and non-party states and their compliance with the ICC. It does so by stating that what is taking place in Darfur is threatening international peace and security. Consequently, the UNSC has to fulfill its duties in accordance with international laws and no matter what controversy its resolutions might create. Moreover, and since the ICC indictment has the international legal cover for this resolution, it has acquired legitimately the power to force on a national of Sudan, a non-party member to the Statute, its indictment. However, even under Chapter VII of the UN Charter the ICC still faces many other limitations in its Statute and the Court’s Powers. These restrictions are examined next.

According to Article 58, the arrest warrant clearly states:

⁸³ UN Security Council, *Security Council Resolution 1593 (2005) on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan*.

⁸⁴ Brownlie, *Principles of Public International Law*, 602.

“(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and (b) The arrest of the person appears necessary:

- (i) To ensure the person's appearance at trial;
- (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or
- (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.”

The Prosecutor’s powers are constrained by many limitations, such as the wait period of twelve months before investigating, or prosecuting the suspect after the UNSC has issued a resolution under Chapter VII referring a crime to the ICC in Article 16 of the Statute:

“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”⁸⁵

Moreover, such a resolution will require a majority of nine votes, including the five permanent members of the Council. Consequently, a single veto can annul such a request.

4.5 Immunity or the Absence of Immunity for Government Officials

Another pertinent question concerns whether or not government officials enjoy immunity or whether heads of states may be prosecuted. The convention on the Non-

⁸⁵ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *The Rome Statute of the International Criminal Court*.

Applicability of Statutory Limitations to War Crimes and Crimes against Humanity
Adopted by the General Assembly resolution 2391 (XXIII) of 26 November 1968 that
came into force on the 11th of November 1970, in accordance with article VIII states in
Article I, assures that there is no such immunity granted to officials when the crimes
involved are “grave breaches”:

“No statutory limitation shall apply to the following crimes, irrespective of the date of their commission: (a) War crimes as they are defined in the Charter of the International Military Tribunal, Nuremberg, of 8 August 1945 and confirmed by resolutions 3 (1) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims; (b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nuremberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.”

Furthermore, Article II clearly states that:

“If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.”⁸⁶

This means that those conditions also apply to presidents whether they are in power or not. We have also seen in the previous chapter that article IV of the Geneva Convention on Genocide states that “Persons committing genocide or any of the other acts

⁸⁶ United Nations General Assembly, “Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.”

enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”⁸⁷ This means that no matter what the statute of the individual being indicted is, he does not enjoy immunity, everybody is equally accountable and punishable.

The SC is not going further than reaffirming existing international law and suggesting a particular application in a particular situation.⁸⁸ The UNSCR 1593 is in complete harmony with already existent laws and jus cogens. Nonetheless, Sudan continues to refuse to cooperate with the Court, which is left paralyzed and unable to bring Al Bashir to the Hague. This explains why the ICC Prosecutor Ocampo has been pushing the Pre-Trial chamber to reconsider the accusation of Genocide that he had included in his first application of an arrest warrant in the name of Al Bashir. The prosecutor succeeded when the ICC declared that it is considering charging the President of Sudan with the crime of genocide on February 3rd 2010. “The Appeals Chamber directed the Pre-Trial Chamber to decide anew whether or not the arrest warrant should be extended to cover the charge of genocide.”⁸⁹ If the Pre-Trial Chamber decides that there is evidence beyond reasonable doubt that Al Bashir was involved in the crime of genocide, then under article IV of the Convention on the Prevention and Punishment of the Crime of Genocide this person shall be tried no matter what his status is.⁹⁰

⁸⁷ UN Commission on Human Rights, *Convention on the Prevention and Punishment of the Crime of Genocide*.

⁸⁸ Muller, *The International Court of Justice: Its Future Role After Fifty Years*, 235.

⁸⁹ “Al Bashir Case: The Appeals Chamber Directs Pre-Trial Chamber I to Decide Anew on the Genocide Charge.”

⁹⁰ Plaut, “Critical Year Ahead for Sudan Amid Fears of War.”

In addition, article 5 of the Convention affirms that “The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3.”⁹¹ Moreover, Articles 6 through 9 of the Convention, state that in case the national tribunals are not competent enough, they should contract an international penal tribunal. They also specify the kind of tribunal that should lead the trial. Article 7 states that genocide should not be treated like other political crimes because extradition is not the objective. In genocide cases, the parties involved act in accordance with their laws and treaties. Article 8 is also very important as it assures that any party involved may request from the organs of the UN to take action under Charter in order to prevent and stop any acts of genocide or any other acts listed under article 3. Article 9 allows for directing the parties to the ICJ in case the parties involved in the dispute disagreed about the interpretation or the enforcement of this Convention on Genocide and all acts enumerated under Article 3. Furthermore, Article 27 of the ICC Rome Statute confirms that heads of states do not have immunity and could be subjected to a warrant of arrest as well as be arrested and tried. Article 27 thus states the following:

“Irrelevance of official capacity” states that: “1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

⁹¹ United Nations General Assembly, “Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.”

2) Immunities 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.”⁹²

Given that Sudan still refuses to cooperate with the ICC, how then, draw in Al Bashir to Court?

4.6 Bringing Al Bashir to Court

The ICC does not have any armed forces and thus cannot send anyone to arrest Al Bashir. It is not the law’s duty to have such forces. It rather relies completely on states and their national authorities to arrest their own nationals when guilty. Thus Article 86 of the Statute sets a general obligation on all states: “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”⁹³ Nor does the Court have an enforcement mechanism of its own. Moreover, the Court cannot “seize evidentiary material, compel witnesses to give testimony, nor investigate the scene where crimes have been allegedly committed. The ICC does not have its own jails: sentences will have to be served in the facilities of State Parties which have volunteered to offer these.”⁹⁴ Consequently, how will Al Bashir be tried?

Other obstacles facing Al Bashir’s trial include state sovereignty. Presidents invoke state sovereignty to oppose any interference by the Court under the pretext of

⁹² United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *The Rome Statute of the International Criminal Court*.

⁹³ Ibid.

⁹⁴ Beigbeder, *Judging Criminal Leaders - The Slow Erosion of Impunity (NIJHOFF LAW SPECIALS Volume 55)*, 197.

protecting their government from hegemony and foreign interference. Al Bashir has invoked this issue against the international investigation, alongside his absolute rejection of the legitimacy of the international criminal tribunal all-together. The AU and LAS have tried to stall and contested the legality of the ICC indictment by referring to Article 16 of the Rome Statute, on the deferral of the investigation or prosecution, which states that: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the SC, in a resolution adopted under Chapter VII of the Charter of the UN, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”⁹⁵ However, the ICC did act in accordance with this article. All the arrest warrants were issued after more than twelve months of the adoption of resolution 1593 in 2005. In fact Al Bashir’s warrant of arrest was only issued in March 2009. All these obstacles make Ocampo’s accusation against Al Bashir difficult to execute, and to lure him to Court in the near future is rather slim.

4.7 Overcoming the Obstacles

By signing the Rome Statute the member states pledged to arrest any national guilty of crimes and extradite him. In Sudan’s case, since it is not a member state, the ICC is only capable of indicting Al Bashir. However, Ocampo is currently working on providing more proof to the Court in order to convict him of the crime of genocide. As aforementioned, the Pre-Trial Chamber has already agreed to reconsider a previous

⁹⁵ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *The Rome Statute of the International Criminal Court*.

decision about adding the crime of genocide to the seven other indictments of Al Bashir. “The Pre-Trial Chamber will be looking into the case again in order to decide whether to add the charge of genocide to the arrest warrant.”⁹⁶ The crime of genocide allows the Court to have not only UN Chapter VII on its side but also the Geneva Convention on Genocide, which is considered to be a jus cogens.

A jus cogens is a universal and non-derogable law. Jus cogens is Latin for compelling law; that is compelling to all states and one that supersedes all other types of law irrespective of any treaty. It is higher than a Chapter VII resolution or any other convention. According to Article 53 of the Vienna Convention on the Law of Treaties, the legal criteria for a general law or principle to become a jus cogens are: 1) “to have the status as a norm of general international law; 2) to get the acceptance by the international community of states as a whole, meaning by most of states; 3) the immunity from derogation; and 4) that it will be modifiable only by a new norm having the same status.”⁹⁷

Jus cogens are usually considered norms, such as the prohibition against the aggressive use of force, war crimes, genocide, crimes against humanity, slavery, racial discrimination, piracy, and torture. The Nuremberg Tribunal also added that jus cogens is applicable to individual, criminal liability. Therefore, if the ICC charges Al Bashir with genocide, Sudan will be compelled under international law to arrest the president liable of grave crimes punishable by jus cogens, not just by the ICC, which was referred by the UNSCR under Chapter VII. In this case Sudan is obliged to arrest

⁹⁶ “Al Bashir Case: The Appeals Chamber Directs Pre-Trial Chamber I to Decide Anew on the Genocide Charge.”

⁹⁷ United Nations, “Vienna Convention on the Law of Treaties.”

its own president. In effect the president is expected to hand himself over to the Hague. In addition, and according to Article 89 of the Rome Statute states that the Court “may transit a request for the arrest and surrender of a person...to any state on the territory of which that person may be found.”⁹⁸

4.8 Conclusion

The ICC may not be completely efficient in bringing criminals to justice but it is certainly on the right path of becoming a very influential institution. Even if Al Bashir still enjoys his freedom, the arrest warrant has already managed to disrupt his safe haven and his political stature. Now that the immunity of a current president has been challenged, the ICC is setting a precedent. Heads of states, government officials and war lords have reason to think twice before committing war crimes and other atrocities. Even if the country is too weak and too corrupt to bring criminals to justice, there is a way now through the ICC to put an end to impunity. The ICC should gain more influence as it achieves endorsement from other states that have yet to ratify the statute. Nevertheless, some may prefer to postpone pursuing justice, arguing that resolving the conflict and achieving stability is more important than implementing international justice. The next chapter concludes the thesis by examining the twin obligations of achieving stability and applying international justice.

⁹⁸ Reynolds, “Bashir Move Bold but Problematic.”

Chapter 5

Conclusion: Justice, Reconciliation and Peace in Sudan

5.1 Summing up the Argument

Despite the legality of UNSCR 1593 and the power of the ICC to enforce justice, the latter almost always comes with a cost. As academics studying a country in conflict, we must examine the structural roots of each conflict and look beyond issue specific aspects. This concluding chapter considers what constitutes a just solution for the conflict in Sudan. It argues that there can be no peace without justice and reconciliation. In this case, what is more important, stability or justice when resolving the conflict in Sudan? In other words, is it more important to stop the killings at the expense of maintaining the system or undertaking structural and revolutionary changes even if this will come at a very heavy cost?

5.2 Justice, Reconciliation and Peace in Sudan

In order to analyze whether social and structural change are deemed necessary in the midst of conflict intervention, we must recognize that there are three processes in resolving ethnic conflicts that are fundamentally and qualitatively different and are not

designed to reach the same end point. These processes are conflict settlement, conflict resolution, and reconciliation.⁹⁹

The goal of conflict settlement is to seek a formal termination of a conflict based on mutual interest. The issue of stability and system maintenance versus social and structural change is dependent on the “goals of the agreement, parties to the agreement, nature of the desired relationship, importance of mutual acceptance, and importance of future relations between the parties.”¹⁰⁰ This is represented by a formal agreement between the contending parties that reflects the power relations and dynamics between them. Such a settlement does not necessarily give fair attention to the needs of the parties and often does not stand for the weaker party’s long-term goals. The settlement does not concern itself necessarily with relationships between societies or with recognizing each party’s legitimacy and needs. The parties can have a cold or warm peace as long as their immediate interests are met and as long as they enjoy a tolerable arrangement of coexistence.

5.3 Conflict Settlement and Conflict Resolution

Sometimes system maintenance and stability are more important than revolutionary change. In conflict settlement, violence is reduced or avoided all together by coming to an arrangement or compromise. While conflict settlement is in no way a long-term solution it can be useful in certain contexts to avoid further escalation. Conflict settlements can best be described as formal agreements, where the future

⁹⁹ Rouhana, “Group Identity and Power Asymmetry in Reconciliation Processes.”

¹⁰⁰ *Ibid.*, 34-35.

relationship between the parties is limited to abiding by these agreements. Furthermore, mutual acceptance of one another is not important and any historical responsibility and truth is ignored. Most importantly in conflict settlement, there is no requirement of social and political restructuring, which makes these agreements easier to implement, if not to enforce over time.¹⁰¹ A perfect example of conflict settlement is the CPA that ended the civil war between North and South of Sudan. After a devastating twenty-year war that left thousands dead, millions of displaced, and billions of dollars in damaged infrastructure, a settlement was arranged that ended the conflict. This would be viewed as a conflict settlement since the different parties at stake, and the only relationship between those contending parties, is to adhere in principle to the agreement.

One can argue against such an approach as it does not deal with justice for the victims on both sides and because no party took responsibility or admitted any wrong doing in regards to human rights abuses. However in this context, conflict settlement is the correct approach as it quickly puts an end to a protracted conflict. An intervening party cannot in good conscious allow this hurting stalemate to continue in the hopes of reaching a restructuring of the social and political relationship between the North and the South. As mentioned before, social change is dependent on context and as conflict analysts, we must be able to recognize the limitations of the conflicts we face and temper our expectations and goals accordingly.

On the other hand, conflict resolution goes beyond settlement and seeks to address the causes of conflict and to reach historic compromises. The agreement addresses the basic human needs of both sides, regardless of the power dynamics

¹⁰¹ Rouhana, "Group Identity and Power Asymmetry in Reconciliation Processes."

between them. The political needs of both parties are addressed equitably and breaks away from the traditional power relations to establish a new relationship based on equality and reciprocity. Unlike conflict settlement, conflict resolution seeks not only coexistence, but also cooperation and a sustainable peace in which parties cooperate together and avoid further contention against one another.¹⁰²

Conflict resolution is best described as principled compromise, where there is genuine peace, and good relations are built between the parties. Within conflict resolution, the parties must mutually accept one another and legitimize each other's values. The satisfaction of basic human needs is the cornerstone of successful conflict resolution, and substantial restructuring of the social and political structure is necessary to achieve the desired change.¹⁰³

It is within the context of conflict resolution that the status quo is no longer acceptable. It recognizes that stability and system maintenance are not enough and that significant social change must occur. In this context, conflict interveners must recognize that their role is that of a catalyst for change, and that they must keep themselves "visible and available" to all parties to assess and share responsibility for the consequences that may develop.¹⁰⁴ Azar's Protracted Social Conflict (PSC) theory is ideal in this case to emphasize the importance of social and structural change in order to effectively resolve protracted conflicts. PSC refers to conflict situations, which are characterized by "the prolonged and often violent struggle by communal groups for such basic needs as security, recognition, and acceptance, fair access to political

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Laue, "Ch. 10: The Ethics of Intervention in Community Disputes," 230.

institutions and economic participation.”¹⁰⁵ These variables must be all satisfied to effectively resolve such conflicts and it is a clear point where the status quo will not be sufficient, with the exception of reaching temporary settlement.

5.4 Reconciliation and Justice

The final and most important process is reconciliation. Reconciliation is a particular progression that seeks to attain a mutual legitimacy as the basis of a sound relationship between the parties. “The open, public, and socially based granting of legitimacy – the culmination of the process- becomes the defining feature of the relationship and the cornerstone of mutual recognition and genuine security.”¹⁰⁶

Through changing society and reforming the political system, reconciliation achieves a solid relationship between the parties and puts an end to the conflict between them. For reconciliation to take root, justice, truth, historical responsibility and changes in the structural system that defines the parties must be addressed. The term of reference between the parties no longer becomes existing power dynamics, but rather the principle of justice for all. Justice can be achieved by bringing those who have committed inhumane crimes against weaker parties, holding all persons that violated basic human rights accountable, and returning lost land and property to those who were victimized.

Furthermore, reconciliation can only occur when the truth is brought to bear, particularly truths about wrongdoings. Testimonies about past atrocities should be

¹⁰⁵ Ramsbotham, *Contemporary Conflict Resolution*, 71.

¹⁰⁶ Rouhana, “Group Identity and Power Asymmetry in Reconciliation Processes,” 35.

established and publicly shared through commissions and investigations. Hard facts about human rights violations, the emotional and psychological impact on victims, and their many interpretations must be analyzed and discussed to achieve a viable reconciliation and peace.¹⁰⁷

Justice and responsibility lead to the kind of structural changes necessary to bring about a lasting peace. These structural changes can be a dramatic departure from the status quo and are determined by equality, human dignity, and international law regardless of the power of the perpetrators, as they will “inevitably lose some of the privileges they have unjustly gained.”¹⁰⁸ Khartoum’s government, feeling that their authority is being challenged, threatened that the ICC prosecution will make the situation in Darfur worse. Indeed, as soon as the warrant of arrest was issued, Al Bashir ordered the eviction of numerous aid workers and peacekeepers, aid organizations and relief missions from Sudan, which exacerbated the humanitarian crisis.

The best example of a successful reconciliation process remains the South African case. The plan was for societal reconciliation to be effected throughout the population, “while avoiding vindictiveness on the one hand and a disregard for wrongs and sufferings on the other.”¹⁰⁹ Together with some expression of responsibility and reparations, major structural changes occurred that allowed the people to accommodate one another and their history.

I have hitherto argued that while ideological and philosophical differences do occur between advocates of stability and system maintenance, and those social justice

¹⁰⁷ Ibid.

¹⁰⁸ Rouhana, “Group Identity and Power Asymmetry in Reconciliation Processes,” 37.

¹⁰⁹ Ramsbotham, *Contemporary Conflict Resolution*, 239.

theories who demand great social change for the greater good, the answer lies in the context of the conflict and the goals we choose to achieve as we work towards resolution. “Powerful forces who are stakeholders in conflict exist at all levels of conflict resolution interaction. They have an investment in the status quo. At the same time, critics of traditional methods of conflict resolution with their emphasis on justice overlook the interdependency of systems maintenance and social justice outcomes particularly with respect to implementation and governance of agreements.”¹¹⁰

As Nadim Rouhana argues, it is during reconciliation that we seek structural change and need philosophical justifications for decisions made by those who seek international justice. The CPA has come a long way, however many are warning of its fragility to maintain peace. Aid organization notes that north and south Sudan are “far behind in their implementation of the most contentious provisions of the CPA.”¹¹¹ The peace agreement expires in 2011 and many of its provisions have still not been implemented. Nor are other attempts at reconciliation, such as Qatar’s recent mediation and concomitant cease-fire declaration, led to peace in Sudan.

The goal should be a historic reconciliation between the different ethnic groups and political parties. The importance of mutual acceptance cannot be emphasized enough; the terms of reference should be justice to all parties and peoples, long-term interest should be a goal for weaker and stronger parties. The truth about wrongdoing should be widely acknowledged, as well as the historical responsibility commonly faced by Khartoum. Finally, major social and political restructuring should transpire.

¹¹⁰ Schoeny and Warfield, “Reconnecting Systems Maintenance with Social Justice: A Critical Role for Conflict Resolution,” 266.

¹¹¹ Plaut, “Critical Year Ahead for Sudan Amid Fears of War.”

Justice should be the framework of this reconciliation in order for a new relationship to begin between the parties. However, “Paradoxically, it might be harder to accept responsibility in cases where injustice can be partly undone,” such as the displacement of an ethnic group that demands to return to their villages in Darfur. Sadly, in cases where the injustice cannot be undone such as “in cases where the ethnic group has been eliminated or almost eliminated,”¹¹² it is easier to grant justice and reconcile. Albeit it is sad to admit it, yet the facts are that justice and reconciliation may be easier to reach when there remains very little people left to compensate, refugees to repatriate, or homes to return to. It is then easier to face the responsibility, repent and come to terms with the injustices perpetrated.¹¹³

5.5 Toward Peace in Sudan

What then is more important, stability or the principle of change and social justice? Evidently for Ocampo, Al Bashir is a criminal that should be brought to justice for committing grave crimes according to international law, even if the short-term effect may destabilize civil peace and stability in Sudan. For the prosecutor, too many people have lost their lives, and genocide was perpetrated while the international community stood still without trying to stop it. For the regional as well as international heads of states, the arrest warrant is unacceptable, they do not want to set a precedent and risk being next. The ICC is one of many institutions that lack universal support. Only two Arab states, Jordan and Comoros, have signed its Rome Statute and the most

¹¹² Rouhana, “Group Identity and Power Asymmetry in Reconciliation Processes.”

¹¹³ Ibid.

powerful states such as the USA, China, and Russia etc. are still considering the consequences of becoming party states.

Al Bashir although indicted was re-elected in April with 68% of the votes,¹¹⁴ although widely believed that they were rigged, the results still got international recognition and the President was re-inaugurated. However, one day prior to his inauguration the ICC takes an unprecedented step and refers the case of Sudan back to the UNSC pressurizing the government of Sudan to take action in regard of both criminals Former Minister Ahmed Haroun and militia leader Ali Muhammad Al Abd-Al-Rahman that had been indicted earlier than Al Bashir. Also A special adviser to the ICC prosecutor, Beatrice le Fraper, told the BBC that similar action might be taken in relation to President Bashir, who is also wanted by the ICC for alleged war crimes in Darfur under a warrant issued in March 2009. "The arrest warrant will not disappear [on Thursday] when there is an inauguration of President al-Bashir," said Ms le Fraper. "It's very important that all those who attend the inauguration remember that it is first and foremost the inauguration of a man who has been charged with the crime of extermination."¹¹⁵

After the indictment of the seated president of Sudan the situation in Darfur worsened and it has caused several tribal and ethnic tensions all over the country. However, the long-term effects of indicting a war criminal need to be weighed. What is the cost of social justice? It is believed that Al Bashir was granted the Presidency in April's elections to avoid more bloodshed and more importantly to keep the status quo until the people of the South participate in the referendum that will take place in

¹¹⁴ BBC News, "President wins key Sudan election", April 26, 2010.

¹¹⁵ BBC News, "ICC refers Sudan war cases to UN", March 26, 2010.

January 2011 and decide whether they want to secede from the North. Al Bashir has publicly stated that he will respect the outcome of the referendum, but many find it difficult to trust him, especially that 80% of the oil reserves are in the South.¹¹⁶

In a personal interview conducted with a special adviser to Al Bashir, when asked if he supports secession, the advisor answered: “I am deeply saddened by the idea of secession but I believe that the South will secede and that is the best choice for them to gain independence since the government of Al Bashir has not been fair in their regard.” The latter went on to declare, “the current authority in Khartoum is the main obstacle for peace and development. I believe that if Al Bashir was removed from power, Sudan will have a better chance to reach stability and prosperity.” He also added “Sudan is passing through a very critical phase in history. The referendum will decide whether the south should remain part of a united Sudan, or become an independent state.”¹¹⁷

Al Bashir has recently won the elections but the oppositions withdrew from them charging electoral fraud. Many also warn that bringing Al Bashir to justice may disrupt the very critical and fragile stability that Sudan is enjoying. And although many fear that Sudan might plunge into yet another civil war, and that the time is not ripe for achieving social justice, others contend that if he is brought to justice, it might also be the best thing that has ever happened to Sudan. Trying Al Bashir is a matter of bringing back justice to the victims of Darfur as well as the many civil war victims in Sudan at large. Bringing justice to those people will contribute to conflict reconciliation, which allows

¹¹⁶ BBC News, “President wins key Sudan election”, April 26, 2010.

¹¹⁷ Author’s interview with Al Bashir’s aide, Beirut, July 21, 2009

for hope in peace for the people of Sudan. On the domestic level, bringing justice to the people of Sudan would be a matter of responsibility and accountability, while on the international level heads of states and war lords will start thinking twice before committing war crimes, crimes against humanity, and other atrocities. After all, it may be the case that sometimes structural and revolutionary change is worth the human costs associated with it, for this is the only route to achieve justice.

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Abbreviations

AU – African Union

BRIC – Brazil, Russia, India and China

CPA – Comprehensive Peace Agreement

DPA – Darfur Peace Agreement

DDD-C - Darfur-Darfur Dialogue and Consultation

EU – European Union

GoS – Government of Sudan

HRF - Human Rights First

ICC – International Criminal Court

ICJ – International Court of Justice

IGAD - Intergovernmental Authority on Development

IMF – International Monetary Fund

JEM - Justice and Equality Movement

LAS – League of Arab States

NATO – North Atlantic Trade Organization

NCP – National Congress Party

NIF - National Islamic Front

NUG – National Unity Government

PDF - Popular Defense Force

PNC - Popular National Congress

PSC - Protracted Social Conflict

SPLA/M - South Sudanese People’s Liberation Army or Movement

SLA/M – Sudan Liberation Army or Movement

UK - United Kingdom

UN – United Nations

UNAMIS – United Nations African Mission in Sudan

UNSC – United Nations Security Council

UNSCR – United Nations Security Council Resolution

WTO – World Trade Organization

Annex 1

SECURITY COUNCIL REFERS SITUATION IN DARFUR, SUDAN, TO PROSECUTOR

OF INTERNATIONAL CRIMINAL COURT

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

Security Council 5158th Meeting (Night) 31/03/2005

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.

**International Criminal Court
No.: ICC-02/05-01/09 Date: 4 March 2009**

PRE-TRIAL CHAMBER I

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

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;¹

HAVING EXAMINED the supporting material and other information submitted by the Prosecution;²

NOTING the “Decision on the Prosecution’s Request for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”³ 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,⁴ 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;

¹ ICC-02/05-151-US-Exp; ICC-02/05-151-US-Exp-Anxs1-89; Corrigendum ICC-02/05-151-US-Exp-Corr and Corrigendum ICC-02/05-151-US-Exp-Corr-Anxs1 & 2; and Public redacted version ICC-02/05-157 and ICC-02/05-157-AnxA.

² ICC-02/05-161 and ICC-02/05-161-Conf-AnxsA-J; ICC-02/05-179 and ICC-02/05-179-Conf-Exp-Anxs1-5; ICC-02/05-183-US-Exp and ICC-02/05-183-Conf-Exp-AnxsA-E.

³ ICC-02/05-01/09-1.

⁴ See Partly Dissenting Opinion of Judge Anita Ušacka to the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, Part IV.

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 counter-insurgency 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 groups⁵ – 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

⁵ See Partly Dissenting Opinion of Judge Anita Ušacka to the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", Part III. B.

forces systematically committed acts of pillaging after the seizure of the towns and villages that were subject to their attacks;⁶

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 above-mentioned 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

⁶ 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 Muhajeriya 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.

Darfur region, thousands of civilians, belonging primarily to the Fur, Masalit and Zaghawa groups, to acts of murder and extermination;⁷

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;⁸ (ii) thousands of civilian women, belonging primarily to these groups, to acts of rape;⁹ and (iii) civilians, belonging primarily to the same groups, to acts of torture;¹⁰

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-

⁷ 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.

⁸ 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.

⁹ 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.

¹⁰ 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.

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 above-mentioned 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,¹¹ 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;

¹¹ See Partly Dissenting Opinion of Judge Anita Ušacka to the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, Part IV.

- 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;

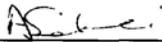
CONSIDERING that, under article 58(1) of the Statute, the arrest of Omar Al Bashir appears necessary at this stage to ensure (i) that he will appear before the Court; (ii) that he will not obstruct or endanger the ongoing investigation into the crimes for which he is allegedly responsible under the Statute; and (iii) that he will not continue with the commission of the above-mentioned crimes;

FOR THESE REASONS,

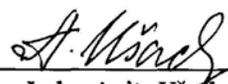
HEREBY ISSUES:

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 Jaáli 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-Béshir.

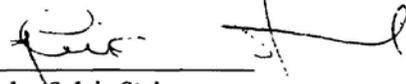
Done in English, Arabic and French, the English version being authoritative.



Judge Akua Kuenyehia
Presiding Judge



Judge Anita Ušacka



Judge Sylvia Steiner

Dated this Wednesday, 4 March 2009

At The Hague, The Netherlands