ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW IN DARFUR THROUGH THE INTERNATIONAL CRIMINAL COURT.

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE DEGREE OF MASTER OF LAWS (LL. M), UNIVERSITY OF NAIROBI.

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DECLARATION.

I, AGGREY OTSYULA MUCHELULE, do hereby declare that this Thesis is my original work and has not been submitted either in part or in whole for any degree in any other University.

Signed .....

AGGREY OTSYULA MUCHELULE.

This Thesis has been submitted for examination with my approval as University Supervisor.

Signed .....

DR. KITHURE KINDIKI.

DEDICATION.

To my wife KEZIAH,
and my children Linda,
Brian and Bruce.

ACKNOWLEDGEMENT.

I have benefited from the advice and encouragement of colleagues and friends in the development and writing of this project. I am grateful to them. My supervisors DR. KITHURE KINDIKI and MR. EDWIN BIKUNDO spared a lot of their time to discuss every bit of this work with me and deserve particular thanks.

My real and deepest thanks are due to my wife KEZIAH and my children LINDA, BRIAN and BRUCE. They endured long hours of valuable family time without me and bore the brunt of my pressures and anxiety. They remained loyal and loving throughout.

Otherwise, I take full responsibility for the end product.

ABBREVIATIONS.

1. AJIL	American Journal of International Law
2. CPA.....	Comprehensive Peace Agreement
3. Euro. Ct. H.R.	European Court of Human Rights
4. ICC.....	International Criminal Court
5. ICJ.....	International Court of Justice
6. ICTR.....	International Criminal Tribunal for Rwanda
7. ICTY.....	International Criminal Tribunal for Former Yugoslavia
8. ILC.....	International Law Commission
9. ILM.....	International Legal Materials
10.JEM.....	Justice and Equality Movement
11.NDA.....	National Democratic Alliance
12.New Eng. L. Rev.....	New England Law Journal
13.NGO.....	Non- Governmental Organization
14.NIF.....	National Islamic Front
15.NMRD.....	National Movement for Reform and Development
16.Rev. Int'l De Droit Penal	Revue International De Droit Penal
17.SLM/A.....	Sudan Liberation Movement/ Army
18.SPLM/A.....	Sudan People's Liberation Movement/Army
19.Stan. J. Int'l J.	Stanford Journal International Law
20.UN.....	United Nations Organization
21.UNGA.....	United Nations General Assembly
22.UNSC.....	United Nations security Council

23.US..... United States of America

24.USD..... United States Dollar

25.Va. J. Int'l L. ..... Virginia Journal International Law

LIST OF CASES.

1. Autronic A.G. V. Switzerland, Euro. Ct. H.R. Series A (178) 1990; 12 (1990) E.H.R.R. 485
2. Barcelona Traction, Light and Power Company Limited, Second Phase, ICJ Reports 1970, p.3
3. Case Concerning Military and Paramilitary Activities in and against Nicaragua, ICJ Reports, 1986, 76 ILR.
4. Corfu Channel Case, ICJ Reports, 1949, 16 ILR.
5. Legality of the Threat or Use of Nuclear weapons, ICJ Reports, 1996; (1997) 35 ILM 809.
6. Reparations for Injuries Case, ICJ Reports (1949) 149.
7. S.S. Lotus Case, P.C.I.J. Series A., no. 10 (1927)
8. The Prosecutor V. Jean- Paul Akayesu, ICTR- 96- 4- T.
9. The Trial of Major War Criminals of the International Military Tribunal Sitting at Nuremberg Germany, 1950.
10. The Prosecutor .V. Milan Martic IT- 95- 11- R61; 108 ILR 39.
11. The Prosecutor .V. Tadic (Jurisdiction of the Tribunal) IT- 94- 1- AR72; 35 ILM (1996), 32.
12. The Prosecutor .V. Tadic (Appeals Chamber), 1995, 70.

TABLE OF TREATIES AND AGREEMENTS.

1. Agreement for the Prosecution and Punishment of the Major Criminals of the European Axis and the Charter of the International Military Tribunal annexed thereto, 1945.
2. London Charter to try the German Army Leaders and Government Officials for the Atrocities Committed During the Second World War, 1945.
3. United Nations Charter, 1945.
4. Geneva Conventions, 1949, (and the two Additional Protocols of 1977).
5. International Convention on the Elimination of all Forms of Racial Discrimination, 1965.
6. International Convention on Civil and Political Rights, 1966.
7. International Convention on Economic, Social and Cultural Rights, 1966.
8. The Vienna Convention on the Law of Treaties, 1969.
9. The Convention on Rights of the Child, 1989.
10. The Statute of the International Criminal Court, 1998.

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CHAPTER ONE.

THE SCOPE OF THE STUDY.

1:1 Background.

Disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind[1]. Recognition of the inherent dignity and of equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. At the Nuremberg Trials[2] the following principle was put into practice: The moral responsibility of an individual cannot be superseded by the laws of the State. The Nuremberg Tribunal decided that "*crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of the international law be enforced*".

Prior to this, international law limited itself to a framework that sought to preserve the people and harmony of States. All States were juridically equal and not subject to any law to which they did not consent. The sovereign State was thought of as the only subject of international law[3]. An individual was not a subject of international law; that he had no rights and duties whatsoever and that he could not invoke it for his protection nor violate its rules.

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[1] See Preamble of the Universal Declaration on Human Rights, adopted by the U.N. General Assembly Resolution 217 A (III) of 10 December 1948.

[2] The Nuremberg International Military Tribunal was a four nation body established by the Allied Forces following the London Charter to try the German army leaders and government officials for the atrocities committed during the Second World War.

[3] Bowett, D.W., *The Law of International Institutions*, 4th Ed, 1982, Stevens & Sons (London), p. 283.

While the sovereignty norm remains the core of international law[4], developments in human rights and humanitarian law recognise other norms that are now competing with sovereignty for primacy[5]. The development of international criminal law has posed a further challenge to sovereignty. The law prohibits certain offences[6] which are regarded so outrageous that they offend not only domestic legal system but also international legal system. A person committing them becomes an enemy of the whole world and any country can prosecute him irrespective of where the offence was committed; or have obligation to extradite him to where he can be prosecuted or surrender him to an international tribunal. This right of international jurisdiction can trump any right of immunity or claim of sovereignty held by an individual or States. This jurisdiction is to ensure that when an atrocity is committed the international community has the responsibility to cause him to be tried for it.

This bid to punish individuals who commit atrocities wherever the y occur is what eventually led to the establishment of the International Criminal Court (ICC)[7]. One hundred and twenty states voted to adopt the ICC Statute, seven voted against and twenty- one abstained. The Court has mandate to try individuals[8] rather than States and to hold them accountable for the most serious crimes of concern to the international community- genocide[9], crimes

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[4] For instance, Article 2 (1) of the U.N. Charter provides that the Organization is based on the principle of the sovereign equality of all its Members.

[5] See. Bassiouni, M. C., *International Crimes; Jus Cogens and Obligations erga omnes*, 59 Law and Contemporary Problems, 63, 1996.

[6] They include genocide, crimes against humanity and war crimes.

[7] The Treaty establishing the International Criminal Court was signed on 17 July 1998 and it came into force on 1 July 2002. See U.N. Doc. A/CONF. 183/9 (1998)

[8] Article 25 of the ICC Statute.

[9] Article 6 of the ICC Statute

against humanity[10] , war crimes[11] and, eventually, the crime of aggression once a provision is adopted defining the crime and setting out the conditions under which the Court shall exercise jurisdiction in respect of the crime[12]. The ICC is more of a fulfilment of the promise at the Nuremberg Trials[13]. It has power to provide redress to victims and survivors of these crimes and it is intended that the mere presence of the ICC has a deterrent effect on future dictators and their collaborators. The Court has also the potential to advance the rule of law internationally, for example, by impelling national systems to investigate and prosecute those indicted thus strengthening the ability of national jurisdictions to bring to justice perpetrators of these heinous crimes[14]. In Paragraph 5 of the Preamble to the ICC Statute it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. The entire premise of the Court is based on the principle of complementarity, which means that the Court can only exercise its jurisdiction when a national court is unable or unwilling to genuinely do so itself[15]. The first priority will always go to national courts. The International Criminal Court is in no way meant to replace the authority of national courts. But there may be times when a State's court system collapses and ceases to function. Similarly, there may be governments that condone or participate in an atrocity themselves, or officials may be reluctant to prosecute someone in a position of great power and authority.

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[10] Article 7 of the ICC Statute
[11] Article 8 of the ICC Statute
[12] Article 5 (2) of the ICC Statute
[13] See the statement by the Secretary General of the U.N Kofi Annan on the entry into force of the Statute on 1 July 2002, available at http://www.unic.org.in/News/2002

[14] HRW, *Making the International Criminal Court Work: A Handbook for Implementing the Rome Statute*
[15] Article 17 of the ICC Statute

In early 2003 armed conflict erupted in Darfur of the Western Sudan when two loosely allied rebel groups, the Sudan Liberation Movement/ Army (SLA) and the Justice and Equality Movement (JEM), attacked the Government's military installations.

The rebels, who seek an end to the region's chronic economic and political marginalisation, also took up arms to protect their communities against a twenty- year campaign by Government- backed militias recruited among groups of Arab extraction in Darfur and Chad. These "*Janjaweed*" militias have received increased Government support to clear civilians from areas considered disloyal. Militia attacks and a scorched- earth Government offensive have led to massive displacement, indiscriminate killings, looting and mass rape, all in contravention of Common Article 3 of the 1949 Geneva Conventions that prohibits attacks on civilians.

The civil war, which risks inflicting irreparable damage on a delicate ethnic balance of seven million people who are uniformly Muslim, is actually multi- intertwined conflicts. One is between government allied forces and rebels; in a second Government militia raid civilians; yet a third involves a struggle among Darfur communities themselves. Its implications go far beyond Darfur's borders. The conflict indirectly threatens the regimes in both Sudan and Chad and has the potential to inspire insurgents in other parts of the country. The Beja Congress from Eastern Sudan has already allied itself with the SLA, and other groups could emerge- East and West- in an anti- Government collision, and even SPLA elements from the Nuba Mountains and Southern Blue Nile might be attracted back to the battlefield should they become dissatisfied with the Peace Agreement[16].

[16] Source: 2005 ICG Africa Report no. 76 of 25 March 2004 at http://www.crisisgroup.org/home/index.cfm?id=2550&1=1%20

It is estimated that 180,000 people have died in the upheaval, many from hunger and disease, and about 2 million others have been displaced since the conflict began[17].

The United Nations Security Council ordered an inquiry by the International Commission of Inquiry on Darfur[18] whose Report documented violations of international human rights by all parties concerned. It found that the atrocities do not legally constitute "*genocide*" but recognised that such crimes against humanity may be no less heinous than "*genocide*". Following the Commission's recommendation, on 31 March 2005 the Security Council referred the situation in Darfur to the ICC so that the Prosecutor can begin investigating and prosecuting those responsible for committing atrocities[19].

This vote marks the first time the Security Council has referred a situation to the ICC. The ICC has three other cases, Uganda, Congo and Central African Republic. Whereas these three cases were at the request of the respective States, the Sudan case has not been consented to. Further, Sudan is not a Party to the Treaty establishing the ICC.

Sudan has rejected trying its citizens in a foreign Court and has announced it will constitute a War Crimes Court which is going to be open to the media and to be supervised by the African Union. The ICC Treaty says suspects tried in credible and just proceedings cannot be tried at the Hague[20]. It is

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[17] See Kenya's Saturday Nation, May 14, 2005 at page 12.

[18] See U.N. Security Council Resolution 1564 of 18 September 2004.

[19] See U.N. Security Council Resolution 1593 of 31 March 2005.

[20] This is the seat of the ICC.

arguable whether Sudan can convince the international community that it can conduct such trials.

1:2 Statement of the problem.

This project deals with the question whether the ICC will be a limitation on Sudan's sovereignty and its sovereign right to exercise jurisdiction over its nationals. This is in view of the fact that the ICC was established with the sole purpose of prosecuting, punishing and deterring the commission of international crimes. Some of those crimes are being committed in the armed conflict in Darfur.

A subsidiary question is whether international judicial intervention in the Darfur will end impunity and bring peace to the region.

1:3 Justification of the Study.

The establishment of the ICC constitutes a deep, serious and incisive form of interference in the domestic jurisdiction of a State which has always been protected by the principles of state sovereignty and non- interference in domestic affairs[21]. The reference of the Darfur situation marks a watershed in the development of international criminal law since this is the first time the Security Council has referred a situation to the Court and this brings into scrutiny the jurisdictional relationship of the two bodies. Not lost is the fact that Sudan is a non- Party to the ICC. Further, the reference is in respect of a

[21] Lattanzi, F. and Schabas, W. A. (Ed.), *Essays on the Rome Statute of the International criminal Court,* Vol. 1, 1999 ISBN 88-87847-00-02, p. 9

continuing and evolving conflict with the potential of undermining on- going peace efforts.

1:4 Objectives of the Study.

The study will attempt to contribute to the scholarly debate regarding the value of Sudan's sovereignty in the face of egregious violations of human rights in the Darfur region, and the appropriateness of international justice through the ICC to bring the perpetrators to account.

The conflict in Darfur is multi- faceted. It is not only an ethnic conflict but also a reaction by the rebels against chronic economic and political marginalisation. As long as the conflict rages there will be human rights violations. The study seeks to discuss whether the judicial intervention will stop the conflict. If not, the study will seek to recommend other means that may contribute not only to end impunity but also to bring an end to the conflict.

1:5 Conceptual Framework.

Sovereignty, as an ancestral concept in early modern European thought, traces its origin at least as far back as Roman law, which also bears a connection to the early natural law theory of the Stoics. It is this constellation that found its revival in twelfth and thirteenth century Christendom, and was perhaps best systemised in accordance with the

medieval European world view of St. Thomas Aquinas[22]. Aquinas attempted to determine wherein lay the authority to wage "*just war*" and to administer local justice. In both cases he argued that it was not the business of private individuals to take matters of life and death into their own hands; a private individual should rather appeal to "*the tribunal of the superior*" or to "*persons of rank having public authority*"[23]. To him, justice by way of "*just war*" or of condemnation, is always directed toward the good of the community or "*common weal*", and its prerogatives lie with those to whom the good of the community has been entrusted. The legitimacy of human law which is the jurisdiction of earthly sovereign was subject only to the sovereignty of God.

The modern idea of "*the State*" emerged by the virtue of its frequent identification with the "*king's estate*" and the contribution of Jean Bodin was the endowment of the State with the moral of a will[24]. In Bodin's formulation, law becomes the mechanism by which sovereign power defines and exercises the moral will of the State, and it is the marquee of sovereignty to "*give law to all in general and to each in particular*"[25]. Sovereignty implies an absolute property over one's territory and the subject within it, where no law exists beyond those borders- except perhaps that "*of God and of nature*".

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22 Schneewind, JB, *The Invention of Autonomy: A History of Modern Moral Philosophy*, Cambridge University Press, (1990), pp. 19-21.

23 Aquinas, St. Thomas, *Summa Theologica*, Volamez, translated by the Fathers of the English Dominican Province, New York: Benziger Brothers, pp. 1359-60, 1467-8.

24 Dyson, K., *The State tradition in Western Europe: A Study of an Idea and Institution*, Oxford University Press, 1980, pp. 28, 32.

25 Bodin, J., *On Sovereignty: Four Chapters from The Six Books of the Commonwealth*, translated and edited by Julian H. Franklin, Cambridge University Press, 1992, p. 56

It is Hugo Grotius who is considered the founder of "*international relations*", and who reset the terms of natural law by calling for a theory of moral obligation independent of any appeal to God's law[26]. Grotius drew upon the "*just war*" tradition inherited from Aquinas. Emmerich de Vattel takes natural law theory beyond the individual by taking the jurisdiction of sovereignties as unities that can be presumed as such[27]. Vattel projects onto the body politic an understanding and a will that constitutes the State not merely as a moral whole but as a moral person. He opined that all men inherit from nature a perfect liberty and independence, of which they cannot be deprived without their consent.

Wendt, while he saw Westphalian sovereignty as having been beneficial to the world in that it curtailed wars and established a basis for at least cordial, if not friendly, relations between most states, observed that recognition as a sovereign state implied a certain evaluation in terms of adhering to certain norms of criteria accepted within the international system[28]. Such standards may include democracy and human rights.

The positivist theories of sovereignty which underlined the supreme power of the sovereign where each State was equal and exercised complete and total authority over matters within its territorial boundaries and where it could only be bound by international law if consented to it have over a time been giving way to an international order where justice and respect for human rights is the norm. When the United Nations Charter was signed in

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26 Ibid. 1 pp. 70- 73.

27 Vattel, E., *The Law of Nations*, edited by Joseph Chitty, London; Sweet et al.

28 Wendt, A., *Social Theory of International Politics*, Cambridge University Press, 1999, pp. 291-3 and 292-3.

1945 there was a lot of importance attached to the concept of sovereignty which was enshrined in Article 2 (7)[29]. The material conditions under which sovereignty is exercised have dramatically changed since 1945. Sovereignty in the classical sense has suffered from the increasing internationalisation of human rights. The question of human rights has been removed from the domain of individual sovereign States. Fundamental rights and freedoms of the individual is now the concern of the international community as a collectivity. Since the Universal Declaration of Human Rights[30] States have entered many human rights treaties to the extent that these rights and freedoms are now universal and common.

In the 1990s the United Nations has endorsed humanitarian intervention despite the dictates of the right of non- intervention that States enjoyed. These kinds of intervention have occurred without necessarily the consent of the government involved. They have occurred in Iraq, the former Yugoslavia, Bosnia, Kosovo, Somalia, Haiti, Cambodia, and so on. The aspect of humanitarian intervention has been experienced and contemplated by the same states that have wanted sovereignty to be supreme. For instance all the members of the UN agree in Article 2 (7) of the Charter as well as in article 8 of the Montevideo Convention on Rights and duties of States[31] that states ought to exercise their right of sovereignty, yet the same Charter in the preamble expresses the need to ensure international respect of human rights law and humanitarian law through Articles 2 (7) and 25 together with

29 See Kindiki, K., *Universal Jurisdiction for International Crimes, The Public Good and the Changing Nature of State Sovereignty*, Article published in University of Nairobi Law Journal, 2004, p. 128.

30 Adopted by the UN General Assembly as Resolution 217 (III) of 10 December 1948

31 (1934) 165 L.N.T.S.19; U.S.T.S. 881; 4 Malloy 4807; 28 A.J.I.L. Supp., 75.

Chapter VII of the Charter. The States agreed to subject their sovereignty to the Security Council in matters that threaten international peace and security. Consequently, a basis (the UN Charter) and a reason (international peace and security) for the international community to intervene in a State's internal affairs were constituted.

The Charter of the Nuremberg tribunal and the common articles of the four Geneva conventions of 1949 expressly oblige a State to hold individuals responsible for criminal acts whether or not there is a nexus to the prosecuting State. Under Article 5 of the Rome Statute of the ICC, genocide, crimes against humanity and war crimes are considered to be crimes of concern to the international community as a whole as they threaten the peace, sovereignty and well- being of the world. Every State has to exercise its criminal jurisdiction over those responsible for these crimes, but if it is unable or unwilling then the Court will prosecute and punish.

Globalisation has also contributed to the erosion of State sovereignty. This affects national governments by subjecting their domestic policies to greater international scrutiny and increasing the ability of foreign governments to apply pressure on them[32]. The State is no longer the only actor in international relations. There are international organisations and corporations, non- governmental organisations and individuals.

This is the international environment in which Sudan is operating. It is an environment where sovereignty has been critically circumscribed under international law.

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32 Kwakwa, E., *Internal Armed Conflicts in Africa; Is There a Right of Humanitarian Action*?, Africa Year Book of International Law 2, (1994) p. 19.

State sovereignty is conditional and dependent on the degree to which a State respects the human rights of its citizens. The question of human rights is no longer the absolute domain reserve of sovereign States. In ***Tadic .V. Prosecutor,*** the Appeals Chamber observed as follows:

"*...it would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity...*"[33]

1:6 Research Questions.

This study will deal with the following pertinent questions:

a) In view of the human rights and humanitarian law violations in Darfur, is Sudan's claim to sovereignty legitimate under international law?

b) Is there a legal basis for international justice through the ICC to bring to account the perpetrators of human rights and humanitarian law in Darfur?

c) Will the reference of the Darfur situation to the ICC by the Security Council end impunity in Sudan and bring peace?

1:7 Hypotheses.

This study will seek to test the following hypotheses:

[33]ICTY, Interlocutory Appeal on Jurisdiction, (1995), 70

a) State sovereignty is no longer a sacrosanct principle of international law.

b) There is basis under international law to enforce international criminal law in Darfur through the ICC.

c) International judicial intervention alone will not end impunity in Darfur.

1:8 Research Methodology.

The study will consult both primary and secondary sources. Relevant primary sources include treaties, resolutions and reports. They will be analysed and interpreted. The secondary sources include books, conference papers and information obtained from the internet.

The study will be both descriptive and prescriptive. A lot of the study will be based on interactive literature review that will be assembled on the topic.

1:9 Literature Review.

Brownlie considers sovereignty to be the pillar of international law[34]. Shaw regards the Peace of Westphalia of 1648 to be the beginning of modern nation- state system[35]. It coincided with the '*positivist*' theories of sovereignty which underlined the supreme power of the sovereign and led to the notion of sovereignty of States. These theories were propounded by Bodin and Hobbes. The positivist doctrines were to dominate the 19th

34 Brownlie, I., *Principles of Public International Law*, 1998, Oxford University Press, p. 287.

35 Shaw, M.N., *International Law*, 5th Ed., Cambridge University Press, 2004, p. 25.

century when English philosopher John Austin elaborated on the law based upon the notion of a sovereign issuing a command backed by a sanction or punishment. In the context of international law this notion was problematic as there was no unified system of sanctions in the same sense as there was in municipal law. Because of sovereignty, a State could only be bound in international law if it consented to it. This school sees each State as being sovereign and equal and that it exercises complete and total authority over matters that are within its territorial boundaries, without hindrance from any other State(s) or other source[36]. The State then is the only subject of international law.

For Chandler international law is based upon equality, which means "*equality of derivation and equality of application*"[37]. He sees sovereignty as the quality that makes this equality possibly because when it comes to the formation and implementation of international law weak States have the same rights as powerful ones. He says that international law based upon the sovereign equality of States cannot be foisted on weak States by strong ones. Lauterpacht represents the naturalist strand and seeks the primary function of all law as concerned with the well- being of individuals, and advocates the supremacy of international law as the best method of attaining this[38]. It is an approach characterised by deep suspicion of an international system based upon sovereignty and absolute independence of States, and illuminated by faith in the capacity of the rules of international law to imbue

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36 See Jennings, R.Y. and Watts, A.D. (Eds), *Oppenheim's International Law*, 9th Edn., London, 1992, Vol.1, p. 52.

37 Chandler, D., *From Kosovo to Kabul: Human Rights and International Intervention*, Pluto Press, 2002, p. 151.

38 Shaw, M.N., *International Law*, 5th (Edn), 2004, Cambridge University Press, p. 122.

the international order with a sense of moral purpose and justice founded upon respect for human rights and the welfare of the individual. Sands criticises the judgement of Yerodia on the grounds that a broad presumption in favour of immunities will lead to a watered- down system of international criminal justice[39]. He argues that the House of Lords was correct in Pinochet's case to treat international law as a set of rules the primary purpose of which is to give effect to a set of broadly shared values, including a commitment to rooting out impunity for the gravest international crimes. Yerodia's case sees the rules of international law as being intended principally to facilitate relations between states, which remain the principal international actors.

Nowak observes that it is now accepted that international protection of human rights is not only considered a legitimate task of international law, but an obligation on the international community[40]. In case of extreme serious and systematic human rights violations, the Security Council is entitled to take the necessary measures under Chapter VII of the United Nations Charter. Spieker discusses the ICC and opines that it is now recognised that individuals can be criminally responsible for violations of international humanitarian law directly under international law and complementary to domestic jurisdiction and jurisprudence of State parties to the Statute[41].

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39 Sands, P., *From Nuremberg to the Hague: The Future of International Criminal Justice*, Cambridge University Press, 2003, p. 103 and 108

40 Nowak, M., *Introduction to the International Human Rights*, Martinus Nijhoff Publishers, 2003, p. 308.

41 Spieker, H., *The International Criminal Court and Non- International Armed Conflicts*, 13 Leiden Journal of International Law 395-425, 2000

A lot has been written about the international treaty obligations of States not parties to the ICC Statute[42], but these writings relate to the objections by the USA to the ICC. There hasn't been specific consideration of the question of the reference of the Darfur situation to the ICC by the Security Council and Sudan's objection to the same on basis sovereignty. Hence this study.

1:10 Limitations of the Study.

The fact that the conflict in the Darfur region is on- going at the time of this study means that various dimensions continue to emerge which may not be foreseen or taken care of by the study. The subject of ending impunity during war time is delicate and quite encompassing and a fairly wide range of mechanisms and actors would be involved requiring a very broad field of inquiry. But the study is limited to critical analysis of the Reference of the situation by the Security Council to the ICC as a way of ending impunity in the region.

This specific study has not received adequate exploration and the available literature is limited. While presenting an opportunity to deal with the subject it also means less literature is available for review and analysis.

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42 For instance, Frankowska, M., *The Vienna Convention on the Law of Treaties before the United States Court*, 28 Va. J. Int'l J. 281, 298-299 stating that the Vienna Convention is a codified customary international law and that before it entered into force its provisions had been invoked by states and the International Court of Justice; Broomhall, B., *Symposium: Universal Jurisdiction: Myths, Realities and Prospects: Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Criminal Law*, 35 New Eng. L. Rev. 399, 401 (2001) stating that State Parties to the Geneva Convention are under a duty to prosecute crimes under International Law or to extradite offenders to other states who may be interested in prosecuting such persons.

There is the temptation to delve into non- legal mechanisms to deal with human rights violations in Darfur, but the study endeavors to limit itself to a legal approach.

1:11 Summary of Chapters.

The study is divided into four Chapters. Chapter One deals with the background of the study; the theoretical context in which the study is set; the focus and objectives; and forum setting issues including the hypotheses and literature review.

Chapter Two discusses the historical and social background of the Darfur conflict; the nature of the conflict; and the applicability of the relevant international human rights and humanitarian law to the same.

Chapter Three is the core of the study. It entails critical analysis of the Security Council Reference of the Darfur situation to the ICC, given that the Court is a non- universally treaty based body and that Sudan is not a State party. The Chapter will deal with Sudan's reaction to and complaint about the Reference, and the general issues of sovereignty and complementarity.

Chapter Four concludes the study and makes recommendations on complementary measures to judicial intervention that may bring both accountability and end to the conflict in Darfur.

CHAPTER TWO

THE BACKGROUND AND NATURE OF THE DARFUR CONFLICT AND THE INTERNATIONAL LAW APPLICABLE IN THE CIRCUMSTANCES.

2:1 Sudan.

Sudan is the largest country in Africa with a territory covering about 2.5 million square kilometers[43]. It borders Egypt to the North, the Red Sea, Eritrea and Ethiopia in the East, Uganda, Kenya and the Democratic Republic of the Congo in the South, and the Central African Republic, Chad and Libya in the West. The Sudan has an estimated population of 39 million people. About 32 % of the population are urban, 68% rural, and about 70% nomads. Islam is the predominant religion, particularly in the North, while Christianity and animist traditional religions are more prevalent in the South. The Sudan is a republic with a federal system of government. There are multiple levels of administration, with 26 states subdivided into approximately 120 loyalties.

The population is made up of a multitude of tribes and its inhabitants speak more than 130 languages and dialects. An Islamic- African- Arab culture has emerged over the years and has become predominant in the North of the country. The Arabic language is now spoken throughout most of the country and constitutes a *lingua franca* for most Sudanese.

The Sudan is considered a least Developed Country, and there is no adequate road network to connect the country. Large parts rely on agricultural and pastoral subsistence economy. However, commercial agriculture, industrial development as well as limited exploration of natural resources, in particular

[43] See International Commission of Inquiry on Darfur Report to the Secretary General, page 17

following the discovery of oil in the central/ southern part of the country, have developed in recent years. From the time of British colonisation to date focus of attention has been on both the central region where the Blue and White Niles meet, since development and construction are centred in Khartoum, and on the fertile region of El Jezzira where long- fibre cotton has been cultivated as the country's main crop. With the exception of these regions, the rest of the Sudan's wide territories have remained largely marginalised and neglected, including Darfur and other regions like Kordofan, the Nuba Mountains, the East of the Sudan and the South. Even the Northern region between the border with Egypt and Khartoum has remained a desolate, desert area.

Sudan became independent from the British- Egyptian rule in 1956 and has since had a turbulent political life, fluctuating between military regime and democratic rule. The current President of the Sudan, General Omar Hassan El- Bashir assumed power in 1989, following a military *coup d'etat.* Beginning 1989 the legal and judicial system were significantly altered to fit political Islam.

Since 1983 there has been internal conflict between the North and the South, characterised by serious human rights abuses and humanitarian disasters. In the conflict more than 2 million have died, mainly from hunger and disease, and 4.5 million people have been forcibly displaced. However, following many years of war, and also as a result of heavy international pressure, the Government and the main rebel movement in the South, the Sudan People's Liberation Movement/ Army (SPLM/A), initiated peace talks in 2002. Under the auspices of the Inter- Governmental Authority on Development (IGAD) and with the support of USA, U.K., Northern Island and Norway, the talks

were able to yield the Comprehensive Peace Agreement (CPA) on 9 January 2005[44].

2:2 Darfur.

The Darfur region in the western part of the Sudan is a geographically large area comprising 400, 000 square kilometres with an estimated population of 8 million. It borders on Libya and Chad. Geographically, the province is centred on the Jebel Mara Volcanic Massif. The amount of rainfall determines the character of the population in broad bands going from north to south: camel herders in the northern arid zone, settled peasants in the centre, cattle nomads in the south bordering in the Bahr- el- Ghazal province. The black African Fur tribe makes up over half the population, hence the name of the province Dar (home) of the Fur, and the rest is divided between over fifteen different ethnic/linguistic groups. All the inhabitants are Sunni Muslims.

Some of the tribes in Darfur are predominantly agriculturist and sedentary, living mainly from crop production during and following rainy seasons from July to September. Some of the sedentary tribes also include cattle herders. Among the agriculturists, one finds the Fur, the Barni, Tama, the Jebel, the Aranga and the Masaalit. Among the mainly sedentary cattle herders are the southern Rhezeghat and the Zaghawa. There are nomadic and semi- nomadic tribes who traditionally herd cattle and camels and include the Taaysha, the

[44] The CPA was signed in Nairobi, Kenya, and comprises all previous Agreements and Protocols. It was signed between Sudan's First Vice- President Taha and SPLM/A Chairman the late John Garang, who passed away on 30th July 2005

Habareya, the Beni Hebba and the Mahameed. Arabic is generally spoken, although some of the tribes possess their own language.

The region was home to the independent Sultanate of *Kayra Fur* between the mid- 17th century and 1916 when it was finally annexed to the Anglo-Egyptian Sudan[45]. This long tradition of independence from the centre of power in the distant Nile Valley has been a continuing source of alienation between Darfur and the rest of Sudan's Muslim North. Independence on 1 January 1956 did not mark any sort of watershed to the region of Darfur. Economic and social underdevelopment remained and contained the seeds of future conflicts as long as the Khartoum Government remained distant and oblivious to the problems of the region. At independence the province soon became a bastion of the Mahdist religions movement and a stronghold of its political wing of UMMA Party. Twice in the history of the Sudan (in 1968 and 1986) it was a solid block of UMMA voters in Darfur that gave the party and its leader Sadiq al- Mahdi victory in the polls.

There are two other aspects of the Darfurian politics that played a key role in the development of the present conflict. First, the inhabitants of the province, whether settled "African" peasants or "Arab" nomadic tribes (those two words have to be put between inverted commas since there are no "pure" Arabs but only people of mixed ethnic origins whose mother tongue is Arabic), have consistently identified with the Muslim north Sudan in the conflict with the Christian and animist south that has persisted on and off since 1955. The terms "Arab" or "African" have very little biological or even cultural relevance as some of the "Africans" lost their identity and adopted Arabic, while others practice forms of entrenched diglossia and

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[45] Source: http://www.crimesofwar.org/onnews/news-darfur.html. Accessed on 22 January 2005; Mohamad, Mohamed Suliman, Darfur: New Perspective: Cambridge Academic Press, 2004 at p. 17

others still have retained their original tongue. In terms of skin colour everybody is black. Usually the difference has to do with facial features (shape of nose or thickness of lips). The "Arab" versus "African" distinction took on its present meaning through ideological constructions which begun around the middle of the 20th century. Members of the various Darfur ethnic groups, mostly of the "African" tribes, made up a very large population (between 40 and 60%) of the northern troops fighting against the southern rebellions between 1955 and 1972 and then again between 1983 and the present. This Islam proved to be a stronger identity factor than racial/ cultural origins.

At the same time, the political gap in Darfur between those who identified themselves as "Arabs" and those who identified themselves as "Africans" widened from the mid- 1960s onwards. The 1980s saw repeated ethnic clashes that were precariously terminated by a locally brokered peace agreement in 1989, the same year in which the National Islamic Front (NIF) radical Muslim organisation took power in a military coup. There was thus a contradiction between the national political positioning of the African tribes, which were aligned with the Nile Valley Arabs in their struggle to retain control of the country against the southern challenge, and their provincial positioning where they fought the local representatives of those same Arabs.

In 1991 Daud Bolad, a Muslim Brother activist of Fur ethnic origin who had initially supported the NIF regime, tried to organise a revolt against his former friends after he realised that as a black African he was not the social equal of the Arabs, even within the supposedly egalitarian ethics of the radical Islamic movement. Daud Bolad was defeated and killed but his attempted uprising marked a turning point in many people's consciousness in Darfur.

The deep causes of the rebellion lie in the feeling of superiority and cultural elitism of the "Arabs", and/ or resentment and perceived oppression and neglect on the part of the "Africans".

The local leaders appointed by the central government on basis of their political loyalty to the regime have been seen to favour the "Arabs" as against the "Africans".

Drought and desertification have led to fights over scarce resources, particularly over pasture and water. The nomadic tribes have often invaded the fields and orchards of the agriculturists.

Inter- tribal conflict was further aggravated by an increased access to weapons, through channels with Chad and Libya in particular. Libya aspired to have a friendly rule in Chad and the attempts to contain Libya's ambitions in the region led several foreign governments to pour arms into the region. In addition, several Chadian armed rebellions were launched from Darfur. The conflict in the South of the Sudan also had its impact on the region through easier access to weapons. As a consequence, each major tribe as well as some villages began to organise militias and village defence groups, essentially a group of armed men ready to defend and promote the interests of the tribe or village.

2:3 The Current Conflict in Darfur.

The roots of the present conflict are complex[46]. In addition to the tribal feuds resulting from desertification, the availability of modern weapons, and the other factors noted above, deep layers relating to identity, governance, and

[46] See U.N. Commission Report (*ibid*) at p.22

the emergence of rebel movements which enjoy popular support amongst certain tribes, are playing a major role in shaping the present crisis.

The two rebel groups in Darfur, the secular Sudan Liberation Movement/ Army (SLM/A) and the pro- fundamentalist Justice and Equality Movement (JEM) begun organising themselves in the course of 2001 and 2002 in opposition to the Khartoum Government, which was perceived to be the main cause of the problems in Darfur. Both rebel groups had a clearly stated political agenda involving the entirety of Sudan, demanding more equal participation in government by all groups and regions of the Sudan. Furthermore, it is possible that the peace negotiations between the Government and the SPLM/A that were advancing rapidly, did in some way represent an example to be followed by other groups, since armed struggle would apparently lead to fruitful negotiations with the government.

It should be noted that the SLM/A is based mostly on Fur and Masaalit tribes and is said to be politically moderate. It has tried to ally itself to the National Democratic Alliance (NDA), the Asmara- based umbrella organisation which unites all Sudanese opposition groups. JEM is based mainly on the Zaghawa tribe. It is linked to the radical Popular Patriotic Congress Party.

The current insurrection started slowly and silently but in a determined fashion in February and March 2003 when the rebels attacked the government airport in El Fashir killing mainly government soldiers. An air-force commander was captured by the rebels and detained for about three months and later released following tribal mediation and relentless government effort. On the material date of the insurrection, the response of the Khartoum government was a mixture of panic, unrealistic accusations

and pointing fingers[47] and a denial of political reality of the long- standing Darfurian discontentment[48]. There were attacks mainly directed at local police stations, where the rebels would loot government property and weaponry. The Khartoum government branded the insurgents as other "armed bandits" or nomadic groups fighting each other in traditional conflicts over grazing rights.

During May and June 2003, the fighting grew in intensity. Faced with a serious military threat against the backdrop of a seriously deficient ground military capacity in Darfur, the Government decided to call upon local "Arab" tribes to assist in fighting the rebels, thereby exploiting the existing tensions between the different communities. With this unexpected move, the conflict raged unabated.

The government then reacted with increasing violent attacks on the civilian population[49] and many locals returned from far and wide to join the combat.

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[47] Israel, USA, the SPLM/A and Eritrea were all blamed for the uprising.

[48] The UN Commission Report (*ibid*) at pages 23 and 24 noted that most reports indicate that the government was taken by surprise by the intensity of the attacks, as it was ill- prepared to confront such a rapid military onslaught. Furthermore, the looting by the rebels of government weaponry strengthened their position. An additional problem was the fact that the government was apparently not in possession of sufficient military resources, as many of its forces were still located in the South, and those present in Darfur were mainly located in urban centres. Moreover, the rank and file of the Sudanese armed forces was largely composed of Darfurians, who were probably reluctant to fight "their own" people.

[49] This is the aspect that poses most human rights and humanitarian considerations. Civilians in areas of armed conflict and occupied territories are protected by the Four Geneva Conventions. As the International Court of Justice held in its advisory Opinion on *Legality of the Threat or Use of Nuclear weapons*, ICJ Reports, 1996, at Para. 78, "States must never make civilians the object of attack". The general rule on the matter was restated and specified in Article 51 (2) of the First Additional Protocol of 1977, whereby "The civilian population as such, as well as individual civilians, shall not be object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited". A similar provision is contained in article 13 (2) of the Second Additional protocol of 1977. These provisions, in part concerning the intention to spread terror, may be held to have turned into customary international law, if only because they ultimately spell out a notion inherent in the customary law prohibition of any deliberate attack on civilians. See also Article 8 (2) (e) (i) of the ICC Statute of 1998 and Article 4 (9) of the Statute of the Special Court for Sierra Leone. In Article 2 of the Humanitarian Cease Fire Agreement on the Conflict in Darfur, of 8 April 2004 each Party undertook to "refrain from any violence or any other abuse on civilian populations" as well as in Article 2 (1) of the Protocol on the Improvement of the Humanitarian situation in Darfur, of 9 November 2004 the Parties undertook "to take all steps required to

To strengthen their military capability, the guerrillas opened training camps in some uninhabited areas and recruits flocked in large numbers, apparently animated by the pre- existing discontent. Incapable of controlling the situation because of a seriously incapacitated, ill- equipped and weakened military force against an ever- growing and threatening political disorder, the government used three types of military tactics to curb the guerrilla warfare and activities. These were:

(a) Extensive use of airpower. Combat helicopters engaged in indiscriminate bombing and machine- gunning of civilians.

(b) Recruitment of large numbers of Arab militiamen called *janjaweed*, mounted on camels or horseback. This was done in the area and also in neighbouring Chad and was motivated by a mixture of cultural or racial prejudice and the lure for looting. These militiamen were armed and allowed to operate with impunity. They mercilessly engaged in the massacre of civilians. The recruits were paid what amounted to a good salary in the economic circumstances in the region: 79 USD a month for a man on foot and 117 USD if he had a horse or a camel. The weapons were provided in the camps that started to open. Many *janjaweed* received regular army uniforms and carried insignias of rank; they sported on the breast pocket a badge showing armed horseman[50].

(c) The destruction of the means of livelihood of the civilian population. Wells were re-filled, livestock was destroyed and foodstuff stores were vanquished, ostensibly to render the villages uninhabitable. This

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prevent all attacks, threats, intimidation and any other form of violence against civilians by any Party or group, includjng the ***janjaweed*** and other militias".

[50] Prunier, G., *Darfur: The Ambiguous Genocide*, Hurst & Company, London, 2005 at page 89.

caused massive displacements of civilian populations who either fled to what they hoped were "secure" areas of the province or to Chad[51].

This is how the Government of Sudan's reaction to the rebellion has been described:

> *"First an aircraft would come over a village, as if smelling the target, and then return to release their bombs. The raids were carried out by Russian- built four- engine Antonov An- 12s, which are not bombers but transports. They have no bomb bays or aiming mechanisms, and the "bombs" they dropped were old oil drums stuffed with a mixture of explosives and metallic debris. These were rolled on the floor of the transport and dropped out of the rear ramp which was kept open during the flight. The result was primitive free- falling cluster bombs, which were completely useless from a military point of view since they would not be aimed but had a deadly efficiency against fixed civilian targets. As any combatant with a minimum of training could easily duck them, they were terror weapons aimed solely at civilians. After the Antonovs had finished their grisly job, combat helicopters and/ or MiG fighter- bombers would come, machine- gunning and firing rockets at large targets such as a school or a warehouse which might still be standing. Utter destruction was clearly programmed. When the air attacks were over, the* ***janjaweed*** *would arrive, either by themselves or in company of regular Army units. The militiamen would be mounted on horses and camels and often be accompanied by others riding in "technicals". They would surround the village and what followed would vary. In the "hard" pattern they would cordon off the place, loot personal belongings, rape the girls and women, steal the cattle and kill the donkeys. They would burn the houses and shoot all those who could not run away. Small children, being light, were often tossed back in the burning houses.*
>
> *In the "soft" pattern the militiamen would beat up people, loot, shoot a few recalcitrant men, rape the females, often scarring them or branding them with a hot iron so that they would become recognizable as "spoilt" women in the future"*[52].

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[51] All this has been in contravention of Common Article 3 to the Geneva Conventions which unequivocally enjoins state armies and insurgent groups to protect prisoners and to respect prohibitions relating to attack on civilians, hostage- taking, terrorist attacks and the use of starvation as a mode of combat.

[52] *Ibid*, 8 at page 99.

Why did the Khartoum government resort to attacking civilians? The government's hope was that the civilians would be terrorised into submission and that the civilian pool on which the guerrillas depended for their political and logistical survival and sustenance would dry up. With such destruction of the civilian base, the government conceived that the rebellion would soon die out.

In the midst of this flare- up, some desultory attempts at negotiations were made. As early as August 2003, a Chadian government- brokered mediation between representatives of the Khartoum government and the rebel groups led to the signing of an agreement envisaging a 45- day cessation of hostilities. It soon became apparent what the government wanted was in fact a simple surrender of the guerrilla weapons and cessation of combat, without any kind of political negotiation. When the surrender failed to materialise, military operations resumed, this time with renewed vigour and vitality involving even more violent anti- civilian actions.

To make matters worse and to further compound the humanitarian dimensions of the conflict, and to the total consternation of the world community, the Khartoum government used every possible excuse to prevent any humanitarian aid from reaching the Darfurian population, affected or not affected by the war[53]. For example, on 16 November 2003, the government refused to unload Darfur- bound food aid arguing that the cereals it contained were genetically- modified. Though it was subsequently

[53] Under the Geneva Conventions, relief organisations (e.g. Red Cross and Red Crescent) even in invaded or occupied territory should be allowed to provide humanitarian assistance and to be permitted to collect the wounded and sick and care for them, to visit prisoners of war and record what they see.

established that this was not the case, the food aid was not distributed to the starving Darfurian population[54].

The Khartoum government has also cited insecurity as a rationale for barring humanitarian access to the Darfur region. But, some state officials, in contradiction of this rationale, have apparently declared large areas accessible and secure for humanitarian purposes. The "immovability" restrictions have been premised on the government's attempt to restrict international access, perhaps for trial and evidentiary purposes, and further weaken potential civilian support for the rebel groups by rendering the populations of the disgruntled communities destitute.

On 9 February 2004, the Sudanese President declared that the war had been won and that there should be a political reconciliation conference to be organised in Khartoum. The rebels rejected the idea of "reconciliation without negotiation" and shot down two more helicopters on 12 February 2004. So far it is estimated that 200, 000 civilians have died and about 2 million displaced[55].

Amid increasing national and international awareness of the abuses taking place in Darfur, the Sudanese government continued to deny the existence of the situation and refused to provide protection or assistance to the affected people in Darfur. Despite warnings of the international community, led by the United Nations, that the Sudanese government must take immediate proactive steps to end the abuses and provide security to the targeted villages

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[54] Again in early January 2004, two Swiss NGOs, the Henri Dunant Centre and the Centre for Humanitarian Dialogue, arranged a humanitarian conference in Geneva to organise relief for Darfur. After promising to come, the Sudanese government refused at the last minute, arguing that it did not want to internationalise the conflict and that such a conference should be organised in Sudan by the government itself.

[55] See, for instance, "Darfur Turbulent Times", the Magazine of the International Red Cross and Red Crescent Movement; http://www.redcross.int/EN/mag/magazine 2004 3/ 4-9.html. Accessed on 22 January 2005.

and internally displaced persons, the government forces continued to recruit militia members, displace civilians and literally burn villages.

The conflict in Darfur has serious implications in Chad. Though the country hosts about 110, 000 members of the Zaghawa and Masaalit communities as displaced refugees, the humanitarian problem is not as confounding as the political problem. The Chadian political regime is severely threatened. While the Zaghawa community in Chad is closely linked with the Darfurian insurrection, the current Chadian President Idris Deby is closely allied to the Khartoum government which supported his takeover in December 1990. But, at the same time, the President is heavily dependent on his Zaghawa/ Bidayat support, particularly to keep control of the oilfields in Southern Chad. But since unlike him, the President's ethnic allies support the insurrection of their cousins in Darfur, there is a major ideological rift or contradiction between the Head of State and the people who form his political base. The result is that the power structure in the Chadian capital of N'djamena is split with some elements felling the Darfur rebels while others supporting the uprising. The Chadian Army has intervened several times on the Sudanese territory in support of the Khartoum's forces.

2.4 The Nature of the Conflict in Darfur and the Applicable International Law.

As already indicated in the foregoing, the Darfur conflict is essentially about two organised armed groups, namely the Sudan Liberation Movement/ Army (SLM/A) and the Justice and Equality Movement (JEM), fighting the forces of the Government of Sudan and militias recruited, armed and

supported by the Government[56]. These two rebel groups first took up arms about 2002 and the scale of the attacks increased noticeably in early 2003. The rebels exercise *de facto* control over some of the areas in Darfur. The conflict therefore does not merely amount "to a situation of internal disturbances and tensions, riots, or isolated and sporadic acts of violence. Rather, the requirements of i.) existence of organised armed groups fighting against the central authorities, ii.) control by rebels over part of the territory, and iii.) protracted fighting, in order for this situation to be considered an internal armed conflict under common Article 3 of the Geneva Conventions are met"[57].

Sudan has ratified the Four Geneva Conventions and not the two Additional Protocols of 1977, but in Article 10 (2) of the Protocol on the Establishment of Humanitarian Assistance in Darfur, signed on 8 April 2004 between the government of Sudan with the SLM/A and JEM the Parties agreed to the corpus of principles set out as follows:

> *"The concept and execution of the humanitarian assistance in Darfur will conform to the international principles with a view to guarantee that it will be credible, transparent and inclusive, notably: the 1949 Geneva Conventions and its two 1977 Additional Protocols; the 1948 Universal Declaration on Human Rights, the 1966 International Convention on Civil and Political Rights, the 1952 Geneva Convention on Refugees, the Guiding Principles on Internal Displacement (Deng Principles) and the Provisions of General Assembly resolution 46/ 182"*

All the parties to the conflict have recognised that this is an internal armed conflict. Common Article 3 of the Geneva Conventions of 1949 and

[56] A third rebel group recently emerged, namely the National Movement for Reform and Development, NMRD. According to a Report of the UN Secretary General of 3 December 2004, on 2, 3 and 26 November 2004 the NMRD reportedly attacked four villages around the Kulbus area. It also clashed with armed militias in the Jebel Moon area (see UN doc. 5/2004/947, at p. 10(f).)

[57] See UN Commission Report (*ibid*) at p. 27

Additional Protocol II of 1977 to the Geneva Conventions set out the pre-requisites of a non- international armed conflict which are met in the present conflict. In the decision of the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Prosecutor .V. Tadic (Jurisdiction of the Tribunal)*[58] the defendant maintained that the Tribunal lacked subject matter jurisdiction in respect of all the charges, on the ground that none of the acts alleged in the indictment had taken place in the course of an international armed conflict. The Trial Chamber held that the existence of an international conflict was not a requirement for the exercise of jurisdiction under the Statute of the Tribunal, that under common Article 3 of the Geneva Conventions and, the Additional Protocols to the Conventions, international humanitarian law was applicable to internal armed conflicts. On appeal, the Appeals Chamber held:

> *"an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between government authorities and organised armed groups or between such groups within a State"*[59].

The same Chamber observed that violations of the provisions of common Article 3 of the Geneva Conventions in internal armed conflicts entailed individual criminal responsibility.

It is particularly important to note that common Article 3 is binding not only to governments[60] but also to insurgents, without, however, confirming any legal status on them. Additional Protocol II supplements common Article 3,

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[58] Decision of 2 October 1995 in Case No. IT- 94- I- AR72, 35ILM (1996), 32

[59] See ICTY Appeals Chamber, Interlocutory Appeal on Jurisdiction, (1995), 70

[60] When militias (the ***Janjaweed***) attack jointly with the armed forces, it can be held that they act under effective control of the Government, consistently with the notion of control set out in 1999 in Tadic (Appeal), at p. 98- 145. Thus they are acting as *de facto* State officials of the Government of Sudan.

but has a narrower type of application than common Article 3. It applies only if the insurgent party controls part of the national territory[61].

The International Court of Justice in the *Corfu Channel Case*[62] and in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*[63] has provided the general principles of international law that are the cornerstones of the protection of war victims through law. They are binding under all circumstances and no derogation is ever permissible. They are as follows:

(a) Persons who are not, or are no longer, taking part in hostilities shall be respected, protected and treated humanely. They shall be given appropriate care, without any discrimination;

(b) Captured combatants and other persons whose freedom has been restricted shall be treated humanely. They shall be protected against all acts of violence, in particular against torture. If put on trial they shall enjoy fundamental guarantees of a regular judicial procedure;

(c) The right of parties to an armed conflict to choose methods or means of warfare is not unlimited. No superfluous injury or unnecessary suffering shall be inflicted; and

(d) In order to spare the civilian population, armed forces shall at all times, distinguish between population and civilian objects on one hand and military objectives on the other hand. Neither the civilian population as such nor individual civilians or civilian objects shall be the target of military attacks.

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[61] See ICTR, The Prosecutor .V. Jean- Paul Akayesu, ICTR- 96- 4- T, 2 September 1998, §23.

[62] ICJ Reports, 1949, 16ILR

[63] ICJ Reports, 1986, 76ILR

One of the most remarkable developments of the last decade has been the importation of human rights rules and standards into the law of armed conflict. The adaptation of important international instruments in the field of human rights such as the Universal Declaration of Human Rights (1948) and the International Convention on Civil and Political Rights (1966)[64], contributed to affirm the idea that everyone is entitled to the enjoyment of human rights, whether in time of peace or war. During wartime or public emergency, the enjoyment of certain rights may be restricted under certain circumstances. Article 3 common to the Geneva Conventions provides that in times of armed conflict persons protected by the Conventions should "in all circumstances be treated humanely, without any adverse distinction found in race, colour, religion or faith, sex, birth or wealth or any other similar criteria".

Article 3 common to the Geneva Conventions basically deals with matters pertaining to internal affairs of States. The regulation of internal affairs is basically the prerogative of the State. The inclusion of the Article in the Conventions, one year after the 1948 Universal Declaration of Human Rights, reflected the growing international concern about an important aspect of the internal affairs of States. Indeed, international rules on the protection of human rights oblige States to recognise and respect a number of basic rights of the individual and to ensure that they are upheld. Humanitarian law does the same in times of armed conflict. It enjoins parties to a conflict to respect and to preserve the lives and dignity of captured

[64] Other international treaties on human rights include the international Covenant on Economic Social and Cultural Rights (ICESCR), the Convention on the Elimination of all Forms of Racial Discrimination (ICERD), the Convention on the Rights of the Child (CRC), the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on Torture and Other Cruel Discrimination or Degrading Treatment or Punishment, and the Convention on the Elimination of Discrimination against Women.

enemy soldiers or civilians who are in their power. Human rights treaties (supported by customary law) achieve this objective in a comprehensive way in so far as they cover almost all aspects of life. Their rules must be applied to all persons and be respected in all circumstances (although a number of rights may be suspended in time of war or emergency). In internal armed conflicts human rights law and international humanitarian law apply concurrently.

Disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind[65]. Recognition of the inherent dignity and of equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Since the Nuremberg Trials[66] the crimes of genocide, war crimes and crimes against humanity have developed to create and impose an obligation upon states to prosecute perpetrators wherever they may be found[67]. This is principally because such crimes are regarded as *delicti jus gentium,* that is, against humanity and thus, qualify as international crimes or universal crimes that are an affront to humanity and its existence. States are, therefore, obligated to exercise jurisdiction over perpetrators without regard to the offender or the frontiers of territorial borders. This obligation is the *jus cogens* obligation under international law. A person committing these crimes may be extradited to where he can be prosecuted or surrendered to an

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[65] See Preamble of the Universal declaration on Human rights. Adopted by the UN General assembly Resolution 217A (III) of 10 December, 1948.

[66] The Nuremberg International Military Tribunal was a four-nation body established by the Allied Forces following the London Agreement of 8 August 1945 to try the senior German army leaders and government officials for the atrocities committed during the Second World War.

[67] See O' Neill, K. C., *A New customary Law of Head of State Immunity? : Hirohito and Pinochet*, 38 Stan. J. Int'l L. 289, at page 295 (discussing Post War developments of customary international law duty to prosecute for international crimes); See Bassiouni, M. C., *An appraisal of the Growth and Development of International Criminal Law*, 45 Rev. Int'l De Droit Penal 405 (1974).

international tribunal for prosecution if the country in which he is found in unwilling or unable to prosecute him.

Sudan is a member of the United Nations. The United Nations is based on the principle of sovereign equality of all its members[68] but also the universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language and religion[69]. Neither principle is superior to the other and therefore both principles have to be respected equally.

[68] Article 2(1) of the U.N. Charter.
[69] Article 55 of the U.N. Charter.

CHAPTER THREE.

THE REFERENCE OF THE DARFUR SITUATION TO THE INTERNATIONAL CRIMINAL COURT (ICC).

3:1 Introduction.

It is clear that the people of Darfur have suffered enormously since the conflict erupted as the violence and abuse have left thousands of people dead, women raped, villages burned, homes destroyed, and belongings looted. Many people have been forcibly displaced and have become refugees or internally displaced. The Sudanese Government is directly, and indirectly, taking part in the armed conflict and cannot be trusted to bring the perpetrators of these atrocities to account. Yet these people required protection from these violations.

Between October 2003 and January 2004, the Sudanese Government almost entirely obstructed international humanitarian assistance to displaced civilians in Darfur, and provided virtually no aid from its coffers to hundreds of thousands of displaced victims. It was citing insecurity as the rationale for barring access. Some form of international pressure became necessary and urgent.

Whereas the international community was aware of the atrocities in Darfur, there was reluctance on the part of any country to send its troops or even threaten the Khartoum Government with force. The United Nations Security Council members, and the West generally, dodged the question of tough action.

In early July 2004, United Nations Secretary General Kofi Annan and the United States Secretary of State Colin Powell visited Sudan and the Darfur

region, and urged the Sudanese Government to stop supporting the *Janjaweed* militias[70]. As of 5 July 2004 the African Union and the European Union had sent monitors to monitor the ceasefire signed on 8 April 2004, but the *Janjaweed* attacks had not stopped.

On 23 July 2004, the United States Senate and the House of Representatives passed a joint resolution declaring the armed conflict in the Darfur region to be *genocide* and calling on the Bush administration to lead an international effort to stop it. On 30 July 2004, the United Nations gave the Sudanese Government 30 days to disarm and bring to justice the *Janjaweed* and warned that it would consider sanctions if the deadline was not met[71]. In the Resolution an embargo was imposed on both the *Janjaweed* and other militia. The Sudanese Government saw the conflict as a mere skirmish and argued that the international concern over Darfur was actually targeting the Islamic state in Sudan. It warned the international community against interfering with the internal affairs of the country.

In August the African Union began sending troops to protect the ceasefire monitors. Their mandate did not include the protection of civilians. Presently there are about 6000 such troops and 244 civilian police officers.

The United Nations' 30 day deadline passed with little improvement on the situation. On 18 September 2004 the Security Council passed Resolution 1564 establishing an International Commission of Inquiry[72] to look into human rights violations, and to determine whether genocide was occurring. In its report violations of international human rights law by all parties was

[70] http://www.absoluteastronomy.com/encyclopedia/D/Darfur-conflict.htm

[71] S/ Resolution 1556 of 30 July 2004.

[72] The Commission was vested with wide and unprecedented mandate spanning from investigation, establishing of criminal liability and identification of perpetrators of violations in Darfur, tasks that would otherwise go to a criminal court of law or tribunal.

documented. It found that the atrocities did not legally constitute *genocide* but recognised that such crimes against humanity were being committed although less heinous than genocide. The Commission recommended to the Security Council to refer the situation to the International Criminal Court (ICC). On 31 March 2005 the Security Council referred the situation in Darfur to the Court so that the prosecutor could begin investigating and prosecuting those responsible for committing war crimes, crimes against humanity and genocide[73]. The reference was pursuant to Article 13 of the ICC Treaty.

Whereas the creation of the ICC meant that no ruler, army or individual anywhere could engage in serious violations of international crimes (genocide, war crimes and crimes against humanity) with impunity, it is arguable that the reference was a ploy by the international community, mainly the USA and Europe, to deflect pressure for intervention. It was in large part because the United States and Europe couldn't agree on an effective military response that they created a tribunal for the Balkans. The international court for Rwanda, too, was as much therapy for a shamed world as it was a meaningful response to that region's mounting crisis. Time and again, the West has shown itself willing to spend millions on lawyers and judges after the fact but far less inclined to take risks to stop slaughters in progress. The crisis in Darfur is still continuing and it is expected that the international community should stay focussed on generating the political and moral will to intervene effectively.

Nonetheless, a system of international justice to end impunity is essential to deter people contemplating the commission of international crimes, to allow

[73] See United Nations Security Council 1593 of 31 March 2005.

victims to obtain justice and redress and to support reconciliation between groups or states involved in a conflict[74]. Despite the extent and the horrific of crimes witnessed in the 20th century, shamefully, only a handful of people have ever been brought to justice. The majority of the prosecutions were for crimes committed during World War II, and, more recently in the former Yugoslavia and Rwanda. In these situations the international community established ad hoc tribunals to prosecute the most serious cases. The respective national courts were left to conduct prosecutions for the minor offenders to complement the efforts of the tribunals. In a small number of cases, national courts in other countries have investigated and prosecuted individuals accused of crimes who enter their territory, pursuant to the territoriality principle of exercise of jurisdiction.

The International Criminal Court impels national systems to investigate and prosecute those indicted thus strengthening the ability of national jurisdictions to bring to justice perpetrators of genocide, war crimes and crimes against humanity. It is the duty of every State- Member to exercise its criminal jurisdiction over those responsible for international crimes[75]. Where the State is genuinely *unable* or *unwilling* to investigate or to prosecute, the Court will exercise its jurisdiction to investigate or prosecute[76].

Following the Security Council's Resolution to refer the Darfur situation to the ICC, Sudan's representative to the United Nations[77] bitterly complained

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[74] In his Foreword to Gene Sharp's Book *Gandhi Wields the Weapon of Moral Power* , Albert Einstein observes that "*At the Nuremberg trials, the following principle was put into practice: The moral responsibility of an individual cannot be superseded by the laws of a state. May the day come when this principle is not merely put into operation in the case of citizens of a vanquished country.*"

[75] Paragraph 5 of the Preamble of the ICC Statute.

[76] Article 17 of the ICC Statute.

[77] ELFATIH MOHAMED AHMED ERWA

that the scales of justice were based on exceptions and exploitation of cases in developing countries and bargaining among major powers, and did little to settle the question of accountability in Darfur, but exposed the fact that the ICC was intended for developing and weak countries and as a tool to exercise cultural superiority. There has also been the observation that international justice based upon a diminution of sovereignty authorises international relations based on power and that what is claimed to be an exercise of international law is in reality an exercise of power masquerading as law[78]. The USA abstained from the vote referring the Darfur situation to the ICC but it had already negotiated (and this was adopted in the Resolution) that States not party to the ICC Statute (the USA is such a State) would have its government officials in Darfur exempted from the investigations. It had also successfully negotiated that none of the expenses incurred in connection with the referral would be borne by the United Nations, but instead such would be borne by the Parties to the ICC Statute and those that contributed voluntarily[79].

Sudan is not a Party to the treaty establishing the ICC, but it is a member of the United Nations. It has rejected trying its citizens in a foreign court and has constituted a War Crimes Court[80] which it says is going to be open to the

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[78] Chandler, D., *From Kosovo to Kabul: Human Rights and International Intervention,* Pluto Press, 2002, HBK: ISBN 0 7543 1884 3, Pages 148 and 153.

[79] Under Articles 115 and 116 of the ICC Statute expenses of the Court will come from State Parties; the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council; and the voluntary contributions. The USA is opposed to the ICC and did not want to be seen to be supporting the reference and in fact abstained from the vote. It was its wish that the perpetrators of atrocities in Darfur be brought to account in the ad hoc Tribunal for Rwanda.

[80] See Kenya's *The Sunday Standard*, May 22, 2005, at page 7 and *The Standard*, Monday, June 13, 2005, at page 20.

media and to be supervised by the African Union. The Rome Treaty says suspects tried in credible and just proceedings cannot be tried again at the Hague. The United Nations does not believe that the Government of Sudan can hold credible trials owing to its complicity.

Against this background, this Chapter seeks to critically examine whether a non- universally ratified treaty- based body (the ICC) can exercise jurisdiction over a non- state party (the Sudan) pursuant to powers conferred by a universally ratified treaty- based body (the UN Security Council).

3:2 The Relationship between the Security Council and the ICC.

The relationship between the Security Council and the ICC has proved to be one of the most controversial aspects of the 1998 Statute[81]. Historically the relationship between the ICC and the Security Council was initially outlined in Article 23 of the International Law Commission's 1994 Draft Statute for an International Criminal Court[82] and later rethought by the Plenipotentiaries of the Rome Conference, which later established the ICC.

The Security Council is one of the organs of the United Nations, which is established under Chapter V of the United Nations Charter. Its main function is the maintenance of international peace and security[83]. The Council

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[81] Gowlland - Debbas, V., *The Role of the Security Council in the New International Criminal Court from a Systemic Perspective*, in L. Boisson de Chazournes and Vera Gowlland- Debbas (ed), *The International Legal System in Quest of Equity and Universality*, Liber Amicorum Georges Abi- Saab, Martinus Nijhoff, 2001, pp. 629- 650.

[82] See Draft Statute for an International Criminal Court in Report of the International Law Commission on the work of its forty- sixth session (UN Doc. A/ 49/10) (1994), (1994) 33 International Legal Materials 253.

[83] In Chapter 1 of the United Nations Charter the principle purpose of the United Nations is to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and

responds to any actions with respect to threats of peace, breaches of peace or acts of aggression as empowered by Chapter VII of the Charter, precisely Articles 24 to 26. The Security Council is therefore a political body that determines whether there is a situation of threat to peace, breach of peace or acts of aggression and acts in accordance with the Charter.

The ICC, on the other hand, is an international judicial body, which is established by a Statute. The Statute was a result of the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of the International Criminal Court in Rome by 160 countries[84]. The Court attempts to end impunity by instituting criminal proceedings against perpetrators of grave crimes which threaten the peace, security and well being of the world as well as shock the conscience of mankind[85].

The United Nations is an abstract body if it does not have organs like the Security Council. Each of its organs represents a vital goal and function. The fact that the Conference that gave rise to the Rome Statute was convened by the United Nations demonstrates a clear relation between the overall United Nations spirit as expressed in its organs and the judicial body which it establishes. The instance of the Conference establishing the Statute having been convened under the auspices of the United Nations indicates that there is a connection in the principles that the two bodies stand for.

With respect to functions, the roles of the ICC and the Security Council are complementary in respect of the four crimes over which the Court assumes

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international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace. In Article 24 of the Charter the Security Council's primary responsibility is to maintain international peace and security.

[84] http://www.igc.org/icc/html/timeline.htm

[85] *Ibid*

jurisdiction. It is the responsibility of the Security Council under Article 39 of the United Nations Charter to determine the existence of any threat to the peace, breach of the peace, or act of aggression and to take appropriate measures to maintain or restore international peace and security. The measures may not involve the use of armed force[86] but where such measures would be inadequate the Council may resort to the use of force[87]. The ICC recognises in its Preamble that the crimes under its jurisdiction, which the Court attempts to punish, threaten the peace, security and well being of the world. The two bodies in that regard have the ultimate responsibility to secure peace in the world. The ICC has no enforcement powers. It does not have its own police force, for instance. All States have an obligation to comply with any decision made by the Security Council under Chapter VII, once the Council has determined the existence of a threat to, or a breach to the peace or act of aggression[88]. The ICC Statute provides that all members have the responsibility to cooperate with it[89] failure to which the matter may be referred to the Security Council for enforcement[90].

Under Article 5 of the ICC Statute, the crime of aggression is not one of those that are being tried by the Court as there was no agreeable definition of the crime reached by the Plenipotentiaries at the Rome Conference[91].

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[86] Article 41 of the U. N. Charter.

[87] Article 42 of the U. N. Charter.

[88] Shaw, M. N., *International Law*; 4th Edition, Cambridge University Press, 2003, p. 842, Lockerbie Case; ICJ Reports, 1992, p. 15; *Tadic (Appeal Chamber) Case* No. IT- 94- 1- AR72, page 13.

[89] Article 86

[90] Article 87 (5) (b) and (7).

[91] Sadat, L. N., and Carden, S. R., : *The New International Criminal Court: An Uneasy Revolution*, 88 Geo L. J. (2000).

Whatever definition that will be reached will have to be "*consistent with the relevant provisions of the Charter of the United Nations*". It is manifest in Article 39 of the United Nations Charter that it is the Security Council which has the mandate to determine what constitutes an act of aggression for the purpose of restoring international peace and security. It may be reasonable to speculate that, when the definition is ultimately agreed upon, a complaint regarding aggression will not be brought before the ICC unless the Security Council has first determined that a State has committed the act of aggression which is subject to the complaint.

Article 13 (b) of the ICC Statute provides that the Court may exercise its jurisdiction with respect to a crime referred to it in Article 5 in accordance with the provision of the Statute if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations. This is the provision under which the Security Council referred the Darfur situation to the ICC. The Article means the Security Council has an overriding power to refer a situation to the ICC in absence of jurisdiction *Ratione Personae* or *Ratione Loci* under Article 12, and in absence of a non-State Party having accepted jurisdiction of the Court. The qualification of this referral is that there has to be a situation that amounts to a threat to the peace or breach of the peace or aggression under Article 39 of the United Nations Charter.

Article 16 of the ICC Statute further strengthens the connection between the ICC and the Security Council. It states that no investigations will be commenced for 12 months after the Security Council resolution has been adopted requesting that no investigations be carried out. The period is renewable by the Council. The general implication of this Article is a

limitation of jurisdiction of the ICC through the granting of immunity for 12 months or more. Article 16 is hence seen as a veto power for the Security Council[92]. The repercussions that it had include Resolution 1422[93] which granted a twelve- month immunity from the ICC to all UN Peacekeeping personnel contributed by the USA which is not a Party to the ICC Statute. This move by the Security Council resulted into a lot of criticism around the world. It was claimed that the ICC was condoning what it initially sought to prohibit: impunity. There was another Resolution[94] that had the effect of renewing the term of immunity for US servicemen.

Lastly, Article 2 of the ICC Statute states that the Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States and concluded by the President on its behalf. On 5 October 2004[95] the United Nations Secretary General and the Security Council agreed on a permanent working relationship between the ICC and the United Nations. The agreement included an exchange of representatives between the United Nations and the Court, the ICC's participation in the United Nations General Assembly as an observer and the United Nations cooperation if the Court requests testimony of United Nations officials. The existence of this Article basically indicates that the two bodies are not only complementary but are also related to each other.

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[92] Bergsmo, M., *The Jurisdictional Regime of the ICC*, 6 European Journal of Crime, Criminal Law and Criminal Justice, (April 1998), page 345.

[93] S/ Res 1422 of 12 July 2002.

[94] S/ Res 1487 of 12 June 2003.

[95] Lederer, E. M., U.N., *World Court Agree to Cooperate*, Associated Press, October 5, 2004. See http:/CM/UN-ICCRelationship.htm

3:3 The ICC Statute, the United Nations Charter and the obligations of a non- State Party (Sudan) under international law.

Sudan is a member of the United Nations. It has signed but has not ratified the ICC Statute[96]. Further, it has not accepted jurisdiction under Article 12 of the Statute and yet the Security Council has under Article 13 (b) of the Statute referred the Darfur situation to the ICC. The preconditions for the exercise of jurisdiction by the Court under Article 12 stipulate that for the Court to exercise jurisdiction in a particular case, either the State on the territory of which the crime was committed or the State of which person accused of the crime is a national, must be a Party to the Statute. States which are not Parties to the Statute, may, by means of a declaration accept jurisdiction in respect of a particular case. This allows the Security Council to initiate a process leading to the prosecution of individuals who have committed a crime on the territory of, or who are nationals of States which are not Parties to the Statute, and in the absence of those States' consent, although debatedly, the rules on admissibility which relate to the primacy of investigation or prosecution under domestic law may continue to apply[97].
Under Article 13 (b) States have allowed the Security Council to avail itself of the ICC as a means to manage its responsibilities within the framework of

[96] Under Article 18 of the Vienna Convention on the Law of Treaties 1969 (ratified by Sudan on 18 April 1990), Sudan is bound to refrain from "*acts which would defeat the object and purpose*" of the ICC Treaty.
[97] See Preparatory Commission for the International Criminal Court, Proceedings of the Seventh Session (26 February- 9 March 2001). Under Article 17 of the ICC Treaty which deals with issues of admissibility, the ICC can act if the state that would ordinarily exercise jurisdiction over the case is genuinely unable to proceed or is unwilling to proceed. Bonafide efforts to investigate and to hold accountable those responsible for any act of genocide, crimes against humanity or war crimes will bar the ICC from proceeding.

the Chapter VII of the Charter of the United Nations[98]. In such cases, the ICC will look rather like the *ad hoc* tribunals. In cases where the Prosecutor initiates an investigation upon referral of the Security Council some duties of cooperation also arise for non- party States. It is likely that these duties do not find their ultimate basis in the ICC Statute, (which, according to the traditional law of treaties, is "*res inter alios acta*"), but rather are founded on the decision of the Security Council. The Security Council acting under Chapter VII of the Charter, gives the ICC a competence which is complementary to the jurisdiction of States, independently of their acceptance of the Statute and the presence of the preconditions. Therefore, in such a context, the ICC may be considered an "*objective element*" acting within the framework of international relations, around which the Security Council creates a network of rights and duties for all States (at least for all State members of the United Nations). However, even upon referral by the Security Council, the fundamental feature of the ICC remains its complementarity to national criminal jurisdiction. Even in this situation, the ICC does not have primacy over national jurisdiction. In other words, the Security Council may refer a situation to the Prosecutor and the ICC may retain jurisdiction with regard to a specific case and declare the admissibility of the case, but only if the general requirements for exercising the complementarity jurisdiction when the Prosecution proceeds upon referral of a State or the Prosecution proceeds *proprio motu* are met.

The overall implication of Article 13 (b) is that the involvement of the Security Council may allow the Court to exercise its jurisdiction in spite of the principle of sovereignty of States which is enshrined in Article 2 (1) of

[98] Lattanzi F., and Schabs W. A., (Ed.), *Essays on the Rome Statute of the International Criminal Court*, Vol. 1999 ISBN 88- 87847- 00- 02 page 41.

the United Nations Charter and in Article 17 of the ICC Statute. Since the Peace of Westphalia of 1648 that ended the wars of religion between the Protestant and Catholic states[99] independent nation- state are founded upon a reverence of sovereignty. Sovereignty is the pillar of international law[100]. It is a concept of law that generally provides for states to exercise complete and total authority over matters that are within their territorial boundaries. It is the principle meant to allow states to manage their internal affairs free from outside interference and to prevent powerful states from influencing policy in weaker states or rendering weaker states extensions of themselves.

3:4 The Sovereignty of Sudan.

Sudan's complaint was that the Darfur situation referral was an attack on its sovereign responsibility to investigate and prosecute human rights atrocities in Darfur. However, analysis of the concept of state sovereignty shows a continuous shift from the state-centred conception to one where human rights protection is paramount. State sovereignty is being seen as conditional and dependent on the degree to which a state respects the human rights of its citizens. The question of human rights has been removed from the absolute domain reserve of sovereign states. It is now settled that international law has evolved from recognising states as ultimate subjects to conferring certain rights and duties on supranational institutions such the United Nations and

[99] Maogoto, J. N., *War Crimes and Realpolitik*, Lynne Rienner Publishers, 2004, page 2.

[100] Brownlie, I.,
Principles of International Law, Oxford University Press, (1998) at page 287. In the *Nicaragua V. USA* case (1986) ICJ Rep. 14 the International Court of Justice held that the principle of non-intervention in the affairs of states is a rule of customary international law.

the African Union[101] and other actors such as insurgent or rebel groups[102], individuals and corporations[103].

During World War II the international community was outraged at the atrocities by the Nazi regime. It felt that such cruelties against humanity should be punished. The United States, Great Britain, the Soviet Union and France signed the London Agreement of August 8, 1945[104], which was adhered to by nineteen other Allied Countries, to try the major German war criminals and state officials. The Nuremberg Tribunal laid the foundation of individual criminal responsibility. This position was at odds with the Pre-Nuremberg tradition. International law following Nuremberg witnessed a change in thinking regarding the rights, obligations, and duties of the individual and the state in the international context. The crimes of genocide, war crimes and crimes against humanity have since developed to create and

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[101] See *Reparations for Injuries Case*, ICJ Reports (1949), page 149.

[102] For example, Article 3, common to the Geneva Conventions of 1949, unequivocally enjoins insurgent groups and state armies to protect prisoners and to respect prohibitions relating to attacks on civilians, hostage- taking, terrorist attacks, or the use of starvation as a mode of combat. The Optional Protocol of the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict adopted by the UN General Assembly on 16 November 2000 places an obligation on armed groups, including rebel forces, to prevent children from participating in armed conflict. It also prohibits children into armed groups. Sudan has ratified the Geneva Conventions. Under the Geneva Conventions, all State parties solemnly undertake to respect and to ensure respect for international humanitarian law in all circumstances (Article 1 common to the Geneva Conventions). Consequently, they are to act to cooperate in the field of criminal prosecution according to a sort of "*dedoublement fonctionnel*", in the interest of fundamental values universally recognised by the international community, and therefore regardless of the nationality of the perpetrator, the nationality of the victim or the place wherever unlawful acts have been committed. States must enact national legislation prohibiting and punishing grave breaches. Such legislation must cover all persons, and acts committed both within and outside the territory of the State. States must also reach for and prosecute those alleged to be responsible for grave breaches. They are to prosecute such persons or extradite them for trial in another State concerned ("*aut judicare aut dedere*"), according to the principle of mandatory universal "*adjudicative*" jurisdiction.

[103] See *Autronic A.G. V. Switzerland Euro.* Ct. H. R. Series A 178 (1990), 12 (1990) E. H. R. R. 485 Para. 47.

[104] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Chapter of the International Military Tribunal annexed thereto, August 8, 1945 Art. 1, 82, UNTS 279.

impose an obligation upon states to prosecute perpetrators wherever they may be found[105]. This is principally because such crimes are regarded under international law as *delicti jus gentium*, that is, against humanity and thus qualify as international crimes or universal crimes that are an affront to humanity and its existence[106]. States are therefore obligated to exercise jurisdiction over perpetrators without regard to the nationality of the offender or the frontiers of territorial borders. The obligation is the *jus cogens* obligation under international law.

The principle of state sovereignty has been weakened by the establishment of international tribunals and recently by the ICC. The ICC, like most of the *ad hoc* tribunals established before it, has the ability to conduct investigations in the territory of sovereign states, to issue criminal indictments against their citizens, and to extradite them for trial in the Hague before sentencing them to prison terms, if they are found guilty, to be served outside the territory of their homeland. This is despite the fact that states are jealous of their right to try international criminals in their own courts and national pride leads them to have faith in their competence and fairness of their domestic judicial systems. They do not want to surrender control over criminal cases to another tribunal.

This is the present status of international law against which Sudan's claim to sovereignty has to be weighed. The human rights conditions of the people of

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[105] See O' Neill, K. C., *A New Customary Law of Head of State Immunity: Hirohito and Pinochet*, 38 Stan. J. Int'l L 289, at page 295 (discussing the Post World War developments of customary international law duty to prosecute for international crimes).

[106] See Bassiouni, N. C., *An Appraisal of the Growth and Development of International Criminal Law*, 45 Rev. Int'l De Droit Penal 405 (1974).

Darfur are not the absolute domain reserve of Sudan. International law has conferred certain rights and obligations to these people.

3:5 *Pacta Sunt Servanda* Principle and Sudan

An important issue that arises in relation to Article 13 (b) of the ICC Statute is the customary rule of treaties *Pacta sunt servanda*- that treaties bind on the parties and must be performed in good faith. A treaty does not create either obligations or rights for a third party without its consent ("*Pacta tertiis nec nocent nec prosunt*")[107]. This rule of customary international law is spelt out in Article 34 of the Vienna Convention on the Law of Treaties of 1969. This does not prelude a provision contained in a treaty from becoming law for a non- party when the provision has crystallised into international law. Article 34 contains the general rule- there are exceptions- that special territorial arrangements may produce obligations which third parties are obliged to respect.

Article 2 (6) of the United Nations Charter provides that

> "*The organisation shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security*".

This Article is today regarded as part of a customary international law and any state acting contrary to it would be violating customary international law. Sudan is consequently obliged, as a United Nations Member, to ensure the maintenance of international peace and security.

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[107] Wallace, R. M. M., *International Law*, 3rd Edition, Sweet & Maxwell (1997), at pages 235- 239.

A treaty can produce obligations for a third state "*if the parties to the treaty intend the provisions to be the means of establishing the obligation and the third party expressly accepts that obligation in writing*"[108]. A third state may derive rights from a treaty, for example such as those guaranteeing freedom of passage through the Suez and Kiel Canals, if that is the intention of the parties to the treaty and the assent of the third party has been secured. In contrast, however, to the assent of states on which an obligation is incumbent, the assent of a benefiting state "*shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides*"[109].

The general rule that a treaty cannot impose obligations upon third states has one major exception. That is where the provisions of the treaty in question have entered into customary law[110]. In such a case, all states would be bound, regardless of whether or not they had been parties to the original treaty. One example of this would be the laws relating to warfare adopted by the Hague Conventions and are regarded as part of customary international law.

The Vienna Convention stipulates grounds on which validity of an agreement may be challenged. The grounds include *jus cogens*. This refers to peremptory norms of international law. "*A peremptory norm*" is defined, for the purpose of the Convention, as one which is "*accepted and recognised by the international community of states as a whole*" and from

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[108] Article 35 of the Vienna Convention.

[109] Article 36 (1) of the Vienna Convention.

[110] Article 38 of the Vienna Convention. See Shaw, M. N., *International Law*, 4th Edition, Cambridge University Press, (1997), pages 652- 653. If a treaty codifies customary international law (for example, the prohibition against attack on civilians during armed conflict) then even non- parties to the treaty are bound by such provisions. In the case of *The Prosecutor V. Milan Martic* IT- 95- 11- R61, 108 ILR39 the ICTY Appeal Chamber affirmed that the prohibition on attacking the civilian population as such, or individual civilians, are both undoubtedly part of the customary law.

which "*no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*[111]. The Convention establishes that there are certain rules of international law which are of a superior status and which, as such, cannot be affected by a treaty. Rules which might be categorised as *jus cogens* are those prohibiting genocide, slavery and the use of force. In the Restatement of the Law: Third Restatement of the U.S. Foreign Relations Law[112], consistent patterns of gross violations of human rights has been cited as particularly shocking, fundamental and intrinsic to human dignity to be violation of customary international law. It is a peremptory norm.

Since the Nuremberg Trials the crimes of genocide, war crimes and crimes against humanity have developed to create and impose an obligation upon states to prosecute perpetrators wherever they may be found. States are, therefore, obligated to exercise jurisdiction over perpetrators without regard to the offender or the frontiers of territorial borders. This is the *jus cogens* obligation under international law. A person committing these crimes may be extradited where he can be prosecuted or surrendered to where they can be prosecuted if the country in which he is found is unwilling or unable to prosecute him. This responsibility to all states is what is referred to as *erga omnes*.[113]

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[111] See Article 53 of the Vienna Convention. The International Court of Justice in the *Corfu Channel Case*, ICJ Reports, 1949, 16ILR and in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports, 1986, 76 ILR has provided that the general principles of international law that are cornerstones of the protection of war victims through law are binding under all circumstances and no derogation is ever permissible.

[112] 102, Cmt. J & Reporters note (1987) dealing with conflict between international agreement and customary law, stating in pertinent part that "*an agreement will not supersede a prior rule of customary law that is peremptory norm of international law, and an agreement will not supersede customary law if the agreement is invalid because of such peremptory norm*".

[113] Article 109 of the ICC Statute

It should be clear, though, that those *jus cogens* and *erga omnes* obligations, which include obligations on states to prevent, and to prosecute and punish genocide, war crimes and crimes against humanity (the crimes that form the subject of matter jurisdiction of the ICC) do not include a requirement that prevention and punishment occur through the mechanism of an international criminal court.

Sudan claims that the ICC Statute violates the Vienna Convention when it allows the ICC to try individuals for serious international crimes without the consent of their governments. However, like any treaty, the Statute creates obligations for State Parties: these include the obligations to comply with requests for the surrender and transfer of suspects to the Court[114], to provide requested evidence[115], to give effect to fines and forfeitures ordered by the Court[116], and to pay assessments for the regular budget of the Court[117]. None of these obligations applies to any non- party State, nor does the exercise of criminal jurisdiction against an accused individual bind that individual's home State.

The ICC Treaty does not bring a radical change in international law. Whether or not Sudan becomes a party to the treaty, it retains its fundamental right, including the right to try those accused of committing crimes on its territory and to try its nationals fro crimes committed elsewhere.

Every State has certain legal rights with regard to its nationals, but these are neither unlimited nor exclusive. General international law does not grant States exclusive jurisdiction over crimes committed by their nationals.

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[114] Article 117 of the ICC Statute

[115] See S.S. Lotus Case, 1927 P.C.I.J. (Ser. A) no. 10 at 24

[116] Article 109 of the ICC Statute

[117] Article 117 of the ICC Statute

Instead, it recognises that States may have concurrent jurisdiction when the crimes committed affect the interests of more than a single State[118]. No State, whether a party to the statute or not, has a legitimate interest in shielding its nationals from criminal responsibility for genocide, crimes against humanity or war crimes.

The jurisdiction of the ICC, as set out in the Rome Statute, is built upon the unquestioned right of States to prosecute crimes committed on their territory or by their nationals. Either the territorial State or the State of nationality of the accused must consent to every case prosecuted by the ICC, except for those referred under the authority of the Security Council.

3:6 The Recommendation to Security Council to refer the Darfur situation to the ICC.

The UN International Commission of Inquiry on Darfur found that all parties to the conflict were responsible for a number of violations of international human rights and humanitarian law and that some of these violations would amount to war crimes and crimes against humanity[119].

The ICC has jurisdiction to try these crimes. The ICC did not create these crimes but only provided a mechanism to try and punish them. The ICC jurisdiction over the crimes places the ultimate source of the crimes outside the ICC Statute and within the customary law of states. These crimes impose an obligation on Sudan to prevent their commission, but now that they had occurred, to prosecute the offenders or extradite them to states where they could be prosecuted and punished. It follows that the primary responsibility

[118] See S.S. Lotus Case, 1927 P.C.I.J (Ser. A) no.10 at 24
[119] Page 158 of the Report.

in this case rested with the state of Sudan to deal with these atrocities. Obligation *erga omnes* place responsibility on other states to prosecute these perpetrators if found in the territories of these states.

The ICC can only try these parties if Sudan is unwilling or unable to try them. An opportunity ought to have been given to the War Crimes Court in Sudan before the ICC Prosecutor was invited in. The ICC Statute in its Preamble provides that the jurisdiction of the Court comes to the fore and takes the place of national jurisdictions not at the beginning, but rather in a second and pathological phase, when states fail to manage correctly their sovereignty, allowing crimes to go unpunished. It is in these cases of failure that problems of *admissibility* may arise, addressed by Articles 17 and 18.

In recommending to the Security Council to immediately refer to the ICC the Darfur situation, the Commission noted as follows:

> "*The Sudanese justice system is unable and unwilling to address the situation in Darfur. This system has been significantly weakened during the last decade. Restrictive laws that grant broad powers to the executive particularly undermined the effectiveness of the judiciary. In fact, many of the laws in force in Sudan contravene basic human rights. The Sudanese criminal laws do not adequately prescribe war crimes and crimes against humanity such as those carried out in Darfur and Criminal Procedure Code contains provisions that prevent the effective prosecution of these acts. In addition, many victims informed the Commission that they had little confidence in the impartiality of the Sudanese justice system and its ability to bring to justice the perpetrators of the serious crimes committed in Darfur. In*

any event, many feared reprisals if they resorted to the national justice sytem"[120]

The Commission acknowledged that complementarity principle applies to referrals by the Security Council[121].

The establishment of an international order wherein national institutions, governments, and insurgent groups respond effectively to international crimes, thereby obviating the need for trials before the ICC, would be a major success for the Court and the international community as a whole[122]. The ICC's objective is not to *compete* with States for jurisdiction, but to help ensure that most serious international crimes do not go unpunished and therefore put an end to impunity. The complementarity regime serves as a mechanism to encourage and facilitate the compliance of States with their primary responsibility to investigate and prosecute core crimes. Where States genuinely fail to carry out proceedings, the Prosecutor must be ready to initiate and move decisively with proceedings. For third party states, the Security Council can then refer the matter to the Prosecutor to investigate.

Accordingly, two "*guiding principles*" may inform the approach to complementarity: partnership and vigilance[123]. "*Partnership*" highlights the fact that the relationship between the ICC and States that are genuinely investigating and prosecuting can and should be a positive, constructive one.

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[120] Pages 148- 149 of the Report.

[121] Page 154 of the Report.

[22] On 16 June 2003 at the ceremony for the Solemn Understanding of the Chief Prosecutor, MR. Luis Moreno- Ocampo said the following:

"*As a consequence of complementarity, the number of cases that reach the ICC should not be a measure of its efficacy. On the contrary, the absence of trials before the Court, as a consequence of the regular functioning of national institutions, would be a major success*".

[123] See Informal Expert Paper: *The Principle of Complementarity in Practice* ICC- OTP 2003.

The Prosecutor can, acting within the mandate provided by the Statute, encourage the State concerned to initiate national proceedings, help develop cooperative anti- impunity strategies, and possibly providing advice and certain forms of assistance to facilitate national efforts. "*Vigilance*" marks the converse principle that, at the same time, the ICC must diligently carry out its responsibilities under the Statute. The Prosecutor must be able to gather information in order to verify that national procedures are carried out genuinely. Cooperative States should genuinely benefit from a presumption of *bona fides* and baseline levels of scrutiny, but where there are indicia that a national process is not genuine, the Prosecutor must be poised to take up follow- up steps leading, if necessary, to an exercise of jurisdiction.

Sudan is not a Member State of the ICC and the Prosecutor could not have looked at its national system to see whether it could genuinely undertake proceedings. However, once the Commission acknowledged that it had to establish whether Sudan was genuinely *unwilling or unable* to undertake proceedings then it ought not to have paid lip- service to the principle of complementarity. It ought to have put forward verifiable facts to lead to the conclusion that Sudan was *unwilling or unable* to carry out genuine prosecutions.

The term *genuine* in Article 17 must be interpreted in relation not only to *unwillingness* but also *inability*, and it therefore connotes a certain basic level of objective quality. Thus, a country devastated by conflict and facing a collapse of its system might be *willing* to conduct proceedings, and yet be *unable* to genuinely carry out proceedings. There was no finding that Sudan's judiciary had been devastated by conflict or that it was facing a collapse.

Conversely, proceedings cannot be found "*non- genuine*" simply because of comparative lack of resources or because of lack of full compliance with all human rights. The issue is whether the proceedings are so inadequate that they cannot be considered "*genuine*" proceedings. The Report found that many laws in Sudan "*contravene basic human rights*". The laws were not indicated and it was not shown which "*basic human rights*" were being contravened by those laws. In any case, the admissibility assessment is not intended to "*judge*" a national legal system as a whole, but simply to assess the handling of the matter in question.

Regarding "*unwillingness*" Article 17 (2) indicates the indicia:

a) Direct or indirect proof of political interference or deliberate obstruction or delay;

b) General institutional deficiencies (political subordination of investigative, prosecutional or judicial branch of government;

c) Procedural irregulation indicating a lack of willingness to genuinely investigate or prosecute; or

d) A combination of these factors.

One did not see in the Report a thorough analysis of the circumstances in relation to Sudan to come to the conclusion that the judiciary was not independent or impartial, or that there was unjustified delay in bringing the perpetrators to justice, or that there was a general conspiracy to shield the perpetrators. It is borne in mind that the Sudanese authorities were accused of complicity in the violations and, ordinarily, the prosecution of war crimes and crimes against humanity when such authorities are still in power and when the victims remain subjugated would be ineffective. The justice system may, in such circumstances, prove incapable of being balanced and impartial.

"Inability" assessment is less complex as there is no need to infer hidden motives, and the authorities are not being accused of deception. Article 17 (3) specifies certain considerations in reaching inability consideration. It indicates two cumulative sets of considerations: first, *collapse* or *unavailability* of the national judicial system, and second, whether the State is unable to obtain the accused, or the evidence and testimony, or otherwise unable to carry out proceedings.

There was no allegation that Sudan did not have judges, investigators or prosecutors; or that there was lack of judicial infrastructure. The inadequacy of penal laws (substantive or procedural) was not substantiated.

3:7 Conclusion.

The serious human rights and humanitarian law violations have occurred in Darfur since early 2003, leaving many people dead, assaulted and displaced, and civilian property looted or destroyed. The United Nations Commission of Inquiry on Darfur found all parties to the armed conflict were responsible for these violations that amounted to war crimes and crimes against humanity. It successfully recommended to the Security Council to refer the situation to the ICC for investigation and prosecution.

The ICC has jurisdiction to try these crimes which are violations of customary international law. Sudan has protested against the reference on grounds that it is no a State- Party to the ICC and because the principle of sovereignty militated against the reference and gave it the responsibility to prosecute the offenders. The foregoing discussion has shown that although sovereignty is a cardinal doctrine of international customary law which has to respected at all times, since World War II the question of human rights

has been removed from the absolute domain of sovereign states and an obligation has now been imposed upon states and the international community to prosecute perpetrators wherever they may be found.

A treaty can only bind members to it and the complaint by Sudan against reference is not without merit. However, the Vienna Convention on which Sudan is relying acknowledges that since the Nuremberg Trials the crimes of genocide, war crimes and crimes against humanity have developed to create and impose an obligation upon states to prosecute perpetrators wherever they may be found. A person committing such crimes should be prosecuted or surrendered to an international community for prosecution, but only if the country is unwilling or unable to prosecute him. Sudan was under such obligation. It had the primary responsibility to prosecute.

Article 13 (b) of the ICC Statute recognises that the Security Council has some kind of supranational element causing it to refer a situation to the ICC despite the fact that a State is not a Party to the Statute but is a member of the United Nations and despite the fact of state sovereignty. There is a inference that there are some crimes, such as the ones mentioned in article 5 of the ICC Statute, that are of such a serious nature that they have acquired a status of condemnation from the international community. The United Nations Security Council to this extent would not be prescribing a new crime but would merely be restating crimes that have attained the status of customary international law. Any obligation of a non- State Party to cooperate would come from the State's compliance with the Security Council Resolution and not from the ICC Statute[124].

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[124] Lattanzi, F., *The Rome Statute and State Sovereignty: ICC Competence, Jurisdictional Links, Trigger Mechanism*, 51, 60- 4.

One may find fault with the factual basis for the recommendation by the United Nations Commission of Inquiry on Darfur, but the frustration that was going on at the Security Council has to be appreciated. It had passed several Resolutions urging Sudan to act to end impunity in Darfur, but killing, displacement, looting and destruction was going on unabated. Sudan was hiding behind the fact that it was not a State- Party to the ICC Statute, although it had signed it and therefore was under a duty to refrain from acts that may defeat the objects and purpose of the Statute. It was a member of the United Nations and therefore one of the *"creators"* of the Security Council and bound by its decisions. Besides, the Sudanese Government and the rebel groups had signed a number of agreements under which they undertook to adhere to the principles embodied in the United Nations Charter and other relevant international human rights and humanitarian instruments. The only logical forum for the Sudanese authorities and the rebel groups to be brought to account for their atrocities in Darfur was the ICC.

CHAPTER FOUR.

CONCLUSION AND RECOMMENDATIONS.

4:1 INTRODUCTION.

This study was aimed at discussing the enforcement of international criminal law in Darfur through the ICC; whether the ICC will be a limitation on Sudan's sovereignty and its sovereign right to exercise criminal jurisdiction over its nationals. It dealt with the reaction of the Security Council to the egregious violations of human rights and humanitarian law in the Darfur region by referring it to the ICC for investigation and prosecution of those responsible. It identified those responsible as being government authorities and the rebels. After the analysis of the issues above, the study makes the following conclusions.

4:2 CONCLUSIONS.

4:2:1 Conclusion 1:

There were egregious violations of human rights and humanitarian law violations by all parties to the Darfur conflict.

This has been supported by the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General[125].

4:2:2 Conclusion 2:

There is a legal basis for the reference of the Darfur situation to the ICC for investigation and prosecution of the perpetrators of human rights

[125] Report pursuant to Security Council Resolution no. 1564 of 18 September 2004

and humanitarian law in the region. This is despite the fact that Sudan is a non- Party of the ICC.

(a) Article 13 (b) of the ICC Statute.

This allows a situation in which one or more of the crimes under the jurisdiction of the Court appears to have been committed is referred to the Prosecutor by the Security Council under Chapter VII of the UN Charter. This Article means the Security Council has an overriding power to refer a situation to the ICC in absence of jurisdiction *ratione personae* or *ratione loci* under Article 12, and in the absence of a non- State Party having accepted jurisdiction of the Court. What is material is that the Security Council had determined that the situation in Darfur amounted to a threat to international peace and security under Article 39 of the UN Charter[126].

(b) International customary law supports the reference.

Since the Nuremberg Trials the crime of genocide, war crimes and crimes against humanity have developed to create and impose obligation upon states to prosecute perpetrators wherever they may be found. Such crimes offend the entire humanity and qualify as international crimes that are an affront to humanity and its existence. States are, therefore, obligated to exercise jurisdiction over perpetrators without regard to the offender or the frontiers of territorial borders. The obligation is the *jus cogens* obligation under international law. In regard to Sudan these crimes, being

[126] Security Council Resolution no. 1593 of 31 March 2005.

international crimes, affect all humanity and the international community has the responsibility to repress them.

(c) **If a treaty codifies customary international law— (for example the prohibition against genocide, crimes against humanity and war crimes) then even non- parties to the treaty are bound by such provisions[127].**

The Vienna Convention establishes that there are certain rules of international law which are of a superior status and which, as such, cannot be affected by a treaty. The general rule that a treaty cannot impose obligations upon third states has this exception. Sudan cannot therefore rely on the Vienna Convention to argue that it is a third party to the ICC and is not covered by the Court's jurisdiction. The ICC did not create the crimes under its jurisdiction but only provided for a mechanism for their suppression.

4:2:3 Conclusion 3:

State sovereignty is not sacrosanct.

The internationalisation of human rights, developments in international criminal law, globalisation, and so on, have created an international order where there is a sense of moral purpose and justice founded upon respect for human rights and the welfare of the individual. The question of human rights is no longer the absolute domain of a sovereign State. Borders cannot be allowed to be a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.

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[127] The Prosecutor. V Milan Martic IT-95-11-R61; 108 ILR 39

Sovereignty is a responsibility which is conditional and dependent on the degree to which a State respects human rights of its citizens.—

4:2:4 Conclusion 4:

Darfur situation is a case for humanitarian intervention.

The reference of the Darfur situation has not stopped the armed conflict in the region. The peace talks have been on and off and yet civilians continue to suffer and be displaced. The genocide that occurred in Rwanda where about 800,000 people lost lives should provide enough indication that action- tough action- is required and urgently to stop the carnage. Sudan has ignored Security Council resolutions. International judicial intervention alone may not stop impunity or bring peace.

4:2:5 Conclusion 5:

There is a place for national justice in Sudan to deal with the atrocities.

The ICC Statute acknowledges the fact that the primary task of repressing most serious crimes of international concern is placed on national criminal courts, for they constitute *forum conveniens*. International justice and national justice should not be seen to be in competition, but should complement each other. The international community should encourage and empower the national judicial system to make sure it is impartial and that basic human rights standards are applied to the parties before it. Confidence building should be seen as a challenge to be surmounted.

4:2:6 Conclusion 6:

There is a perception that the reference was a case of selective justice.

The Sudan Government saw the reference as a case of selective justice. The United States (U.S.), for instance, has opposed the ICC and withdrawn its consent.[128] It claims that the ICC seeks to usurp the sovereignty of its Members. An early proposal by the US to allow the United Nations Security Council to possess a veto power over the ICC thereby indirectly giving the US more influence was rejected. The US fears the possibility that its military personnel could be indicted and prosecuted by the Court for actions taken overseas. It opposes the ICC's claim to jurisdiction over non- participating States. It is ironic that the US was among the several dissenters to the ICC Treaty[129] because it was the US that shepherded the creation of the Nuremberg, Tokyo, Rwanda and Yugoslavia International Tribunals. President Clinton frequently spoke in favour of the ICC and appointed a first- ever Ambassador at large for War Crimes Issues[130] who reminded the Senate foreign Relations Committee on July 23, 1998 that

> "*Our experience with the establishment of International Criminal Tribunals for the former Yugoslavia and Rwanda had confirmed us of the merit of creating a permanent court that could be more quickly available for investigations and prosecutions and more cost- effective in its operation*".

The US, under the Clinton Administration, signed the Treaty. In April 2002, however, the Bush Administration announced several measures to

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[128] Sewall, S.B and Keysen, C. (Eds), *The United States and International Criminal Court: National Security and International Law,* The Rowan & Littlefield Publishing Group, 2000, ISBN 0-7425—134-5,p.4.

[129] The others include China, Iraq, Libya, Qatar and Yemen

[130] He was called David Scheffer. See Article by Schaf, M.P., The Case for Supporting the International Criminal Court, http://law-wastl.edu/igls/Intenational Debate/Schafpaper.html

undermine the ICC and even "*withdrew*" its signature. It adopted the American Service Members' Protection Act of 2002 and put heavy pressure on other states to enter into bilateral agreements aimed at exempting US citizens from being extradited to the Hague, and by even forcing the Security Council to adopt Resolution 1422 (2002) which requested the ICC, for a period of 12 months (extended for another 12 months by Security Council in Resolution 1487 of 12 June 2003), not to commence any investigation or prosecution against any official of the US and other non- party States having committed international crimes in the context of any "*United Nations established or authorised operation*". It is highly doubtful whether these bilateral agreements are compatible with the relevant provisions of the ICC Statute[131].

When the issue of Darfur situation's Reference to the ICC came up in the Security Council the US found itself in a dilemma. It had all along opposed the ICC for nearly the same reasons Sudan was opposed to the reference. The US officials had termed the situation in Darfur a "*genocide*" and urged international action. It had to abstain from the vote, but after negotiating a Resolution that was favourable. Given that the other cases before the ICC relate to African States' situations, one may be tempted to believe that the complaint by Sudan had some merit. However, atrocities were being committed in Darfur, Sudanese authorities had a hand in it and could not be trusted to bring the perpetrators to account, and therefore international intervention became necessary.

[131].Articles 16 and 98 of the ICC Statute

4:2:7 Conclusion 7:

There should be effort to bring comprehensive peace reconciliation to Darfur.

This will not be easy but it will take some measure of investigation and prosecution, humanitarian intervention and a measure of amnesty. Despite these, real reconciliation and peace can only be rooted in economic and social systems that provide for the basic needs of all in Darfur, and opportunities for a wide spectrum of its people, and that therefore give, a majority of the region's people a stake in its future. The devolution process, in the nature of the Comprehensive Peace Agreement envisaged in Southern Sudan, may ultimately be the future of Sudan.

4:3 RECOMMENDATIONS.

4:3:1 Recommendation 1:

There is need for Sudan to accept the investigations into the atrocities in Darfur and to cooperate with ICC in any action of prosecution that may follow.

The study has shown that there is a legal basis in international law for the reference. Sudan's sovereignty is intended for the protection of the fundamental rights and freedoms of its nationals who include the people of Darfur.

4:3:2 Recommendation 2:

There is need for Sudan to be encouraged to use its national system to bring the perpetrators of the Darfur human rights violations to account.

The establishment of War Crimes Court by the Government of Sudan should be supported as a way of complementing the efforts being undertaken to

enforce international criminal law through the ICC. In any case, the capacity of the ICC is limited. The most serious offenders (and they should just be about 10 or so for the purpose of showing international determination to end impunity) can be dealt with at the level of the ICC while the rest should be dealt with at the national level.

4:3:3 Recommendation 3:

There is need for humanitarian intervention in Darfur.

Judicial intervention and humanitarian intervention should not be seen as being mutually exclusive. Efforts by the Security Council to get the Khartoum authorities to disarm the *Janjaweed* and to allow unhindered access to Darfur by humanitarian agencies and international human rights monitors have not borne fruit. The war rages, civilians continue to be attacked, killed and their property targeted. The Security Council should authorise the application of force. If this cannot be agreed on any countries should take collective action to end these atrocities.

4:3:4 Recommendation 4:

There is need for the ICC to deal with the perception that it is pursuing justice based on exceptions and exploitation of crises in developing countries and bargaining among major powers.

The establishment of the ICC was a fulfilment of the promise of the Nuremberg Trials to ensure individuals who commit atrocities anywhere will face the commitment of the international community to cause them to be brought to account. Any perceptions that it is advancing selective justice will play into the hands of dictators and their collaborators who abound this world.

4:3:5 Recommendation 5:

There should be intensified peace efforts to stop the conflict in Darfur.

There are efforts going on at Abuja in Nigeria to reconcile the warring parties and to bring comprehensive peace in the Darfur region. Armed conflict is going on and past indications show that the parties are not keen to honour any agreement. However, the Comprehensive Peace Agreement signed between the Government of Sudan and the SPLM/A in Nairobi on 9 January 2005, and which Agreement appears to hold, should provide a source of optimism. However, effort for peace should not be left to the African Union alone. The tough negotiations that went on for peace in Southern Sudan should be a lesson that the entire international community should be mobilised to help in the peace process. The Security Council should be at the forefront in the search for peace in the Darfur region.

SELECTED BIBLIOGRAPHY.

Books.

1. Aquinas, St. Thomas, *Summa Theologica*, Volume 2, translated by the Fathers of the English Dominican Province, New York: Benziger Brothers
2. Bassiouni, M.C., *An Appraisal of the Growth and Development of International Criminal Law*, 45 Rev. Int'l De Droit Penal 405, 1974.
3. Bantekas, I., and Nash, S., *International Criminal Law*, 2nd Edn., Cavendish Publishing Limited, London, 2003.
4. Bergsmo, M., *The Jurisdictional Regime of the ICC*, 6 European Journal of Crime, Criminal Law and *Criminal* Justice, April 1998.
5. Bowett, D.W., *The Law of International Institutions*, 4th Edn., Stevens & Sons, 1982.
6. Broomhall, B., *Symposium: Universal Jurisdiction: Myths, Realities and Prospects: Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Criminal Law*, 35 New Eng. L. Rev. 2001.
7. Brownlie, I., *Principles of International Law*, Oxford University Press, 1998
8. *Criminal Court from a Systemic Perspective* in L. Boisson de Chazournes and Vera Gowlland Debas (ed.), *The International Legal system in Quest of Equity and Universality*, Liber Amicorum Georges Abi- Saab, Martinus Nijhoff, 2001.
9. Chandler, D., *From Kosovo to Kabul: Human Rights and International Intervention*, Pluto Press, 2002.
10. Jennings, R.Y. and Watts, A.D. (Eds.), *Oppenheim's International Law*, 9th Edn., London, 1992.
11. Kittichaisaree, K., *International Criminal Law*, Oxford University Press, 2001.
12. Lattanzi, F. and Schabas, W.A. (Eds.), *Essays on the Rome Statute of the International Criminal Court*, Vol. 1 ISBN 88-87847-00-2, 1999.

13. Prunier, G., *Darfur: The Ambiguous Genocide*, Hurst & Company, London, 2005.
14. Maogoto, J.N., *War Crimes and Realpolitik*, Lynne Rienner Publishers, 2004
15. Sands, P., *From Nuremberg to the Hague: The Future of International Criminal Justice*, Cambridge University Press, 2003.
16. Nowak, M., *Introduction to the International Human Rights*, Martinus Nijhoff Publishers, 2003.
17. Scabas, W.A., *An Introduction to the International Criminal Court*, Cambridge University Press, 2001.
18. Schneewind, J.B., *The Invention of Autonomy: A History of Modern Moral Philosophy*, Cambridge University Press, 1998.
19. Shaw, M.M., *International Law*, 5th Edn., Cambridge University Press, 2004.
20. Gowlland- Debas, V., *The Role of the Security Council in the New International*
21. Vattel, E., *The Law of Nations* edited by Joseph Chitty, London: Sweet et al.
22. Wendt, A., *Social Theory of International Politics*, Cambridge University Press, 1999

Journals.

1. Frankowska, M., *The Vienna Convention on the Law of treaties before the United States Court*, 28 Va. J. Int'l J.
2. Kindiki, K., *Universal Jurisdiction for International Crimes, The Public Good and the Changing Nature of State Sovereignty*, University of Nairobi Law Journal, 2004.
3. Sadat, L.N. and Carden, S.R., *The New International Criminal Court: An Uneasy Revolution*, 88 Geo L.J. (2000).
4. Spieker, H., *The International Criminal Court and Non- International armed Conflicts*, 13 Leiden Journal of International Law, 2000.

Report

1. Report of the International Commission of Inquiry on Darfur, Geneva, 25 January 2005, pursuant to Security Council Resolution 1564 of 18 September 2004.

Internet.

1. .http://www.absoluteastronomy.com/encyclopedia/D/Darfur-conflict.htm
2. http:/CM/UN-ICC Relationship.htm
3. http://www.crimesofwar.org/onnews/news-darfur.html
4. http://www.igc.org/icc/html/timeline.htm
5. http://www.redcross.int/EN/mag/magazine 2004 3/4-9.html
6. http://www.unic.org.in/News/2002