



# **Analyzing the Politics and the Limitations of the International Criminal Court**

**الدكتور**

**محمد نبيل يوسف رجب على شكرى**

**قاضى بوزارة العدل**

**الإدارة العامة للتفتيش القاضى**

Table of Contents

DECLARATION.....

List of Abbreviations.....

Abstract.....

**Chapter 1: Introduction and Background of the International Criminal Court .....**

1.1 Introduction and Background.....

1.1.1 Distrust of the International Criminal Court.....

1.1.2 Overplay of Politics in the Justice System.....

1.2 Research question.....

1.3 Aims and objectives.....

1.4 Structure and Research methodology.....

1.5 Conclusion.....

**Chapter 2: A Brief Outline of the Legal Frameworks of the International Criminal Court: The Underlying Politics and Limitations.....**

2.1 Introduction.....

2.2 The Legal Frameworks Which Governs the International Criminal Court.....

2.3 Limitations of the International Criminal Court.....

2.3.1 Political influences.....

2.3.2 Investigation: Evidence Collection & Witness Protection.....

2.3.3 Responsibility Shifts for International Criminal Crimes.....

2.3.4 The ICC a Court or a Political Instrument.....

2.4 Conclusion.....

**Chapter 3: African Countries Threaten to Withdraw from the ICC: A Case Study of Former Sudan President Al Bashir .....**

3.1 Introduction.....

3.2.4 The complexities around the ICC’s decision to prosecute al-Bashir.....

3.3 Conclusion.....

**Chapter 4 Conclusion.....**

4.1 The Conclusion to the Research Question.....

4.2 The Answer Was Structured in the Following Method.....

4.3 Recommendations:.....

### **List of Abbreviations**

AU	The Organization of the African Union
Al-Bashir	Omar Hassan Ahmad Al Bashir
ICC	International Criminal Court
NCP	National Congress Party of Sudan
UN	The United Nations
UNAMID	The United Nations African Union Mission in Darfur
UNSC	The United Nations Security Council
US	The United States of America
UK	The United Kingdom

## **Abstract**

Since the establishment of the International Criminal Court (ICC) in 1998, its intentions were to create international justice and contribute towards world peace<sup>1</sup>. However, some arguments suggest that the ICC has accomplished neither due to many obstacles such as limited resources, bias against Global South countries, manipulations of some states and institutional restrictions to name a few.<sup>2</sup> On the other hand, many other opinions argue the contrary and states that, the ICC has contributed to world peace and justice by making examples of prosecuting perpetrators and having a system of accountability in place amongst others.<sup>3</sup> This paper will look at both arguments and discuss the underlying issues behind the two opposing opinions. In doing the above, this thesis will explore the functional strength of the ICC as an institution.

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- 1) "Establishment Of An International Criminal Court - Overview". 2021. Legal.Un.Org.  
<https://legal.un.org/icc/general/overview.htm>.
  - 2) Wong, Frankie. 2021. "Criticisms And Shortcomings Of The ICC | Access Accountability". Accessaccountability. Org.  
<https://accessaccountability.org/index.php/2019/09/26/criticisms-and-shortcomings-of-the-icc/>.
  - 3) Ibid.

## **Chapter 1: Introduction and Background of the International Criminal Court**

“We need to promote greater tolerance and understanding among the peoples of the world. Nothing can be more dangerous to our efforts to build peace and development than a world divided along religious, ethnic or cultural lines. In each nation, and among all nations, we must work to promote unity based on our shared humanity.”... Kofi Annan

### **1.1 Introduction and Background**

In 1948, the United Nations adopted resolution 260, which involved the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>4</sup> The act of genocide has revealed to many countries that global cooperation in this regard is required, as they witnessed what had happened in Germany under the Nazi regime. Therefore, according to Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide, it states that “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”.<sup>5</sup>

The state parties to the Convention on the Prevention and Punishment of the Crime of Genocide also agreed that perpetrators of genocide, should be tried as it mentions under Article VI “Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”.<sup>6</sup>

After the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948, it took almost 50 years later for the UN to recognize the need to create the ICC, as an institution to trial individuals accused of crimes so heinous such as genocide, war crimes and crimes against humanity.<sup>7</sup> Many events occurred between the adoption of the UN’s resolution 206 in 1948 and the first sitting of the ICC in 2002. However, the catalyst for the ICC to be officially established as an independent judiciary organ could be attributed to the events which occurred in former Yugoslavia in 1993, as there were crimes

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1) "Genocide, Convention On The Prevention And Punishment Of The Crime Of - - Prevent Genocide International". 2021. *Preventgenocide.Org*.

[http://www.preventgenocide.org/law/convention/text.htm?fbclid=IwAR2Qll7bsoQTkrg2dTvjJuV92sgif8bML\\_O-3ED95GTuigsAussTTWupPQgo](http://www.preventgenocide.org/law/convention/text.htm?fbclid=IwAR2Qll7bsoQTkrg2dTvjJuV92sgif8bML_O-3ED95GTuigsAussTTWupPQgo).

2) Ibid.

3) Ibid.

4) Op cit note 1.

against humanity, genocide and war crimes which spurred international attention to intervene.<sup>8</sup>

As a consequence, the UN Security Council established the ad hoc International Criminal Tribunal for the Former Yugoslavia, to hold individuals accountable for those atrocities and, by so doing, deter similar crimes in the future. The International Law Commission, successfully completed its work on the draft statute for an international criminal court and in 1994 gave the draft statute to the General Assembly.<sup>9</sup> The General Assembly then took the Committee's report into consideration and created the Preparatory Committee on the Establishment of an International Criminal Court, in order to prepare a widely acceptable consolidated draft text for submission to a diplomatic conference.<sup>10</sup> The Preparatory Committee, which met from 1996 to 1998, held its final session in March and April of 1998 and completed the drafting of the text.<sup>11</sup>

It is important to note that, even though the ICC is an international legal instrument, it has the capability to prosecute any person anywhere in the world so long as the perpetrators' country is a state party to the ICC Statute.<sup>12</sup> Up to date, there are 123 countries which are state parties to the Rome Statute of the ICC.<sup>13</sup> The majority of the ICC membership is made up of Global South countries with 30 cases adjudicated thus far.<sup>14</sup> However, the ICC's jurisdiction is only applicable to crimes committed after 2002.<sup>15</sup> Although in theory, the ICC paints a depiction of a well-intentioned juridical organ, it has received immense criticism to the point of many countries threatening to withdraw their membership to the ICC. For example, in 2016, South Africa and Burundi notified the UN of their plans to withdraw their membership to the ICC by stating claims of distrust in the ICC and the overplay of politics in this institution.<sup>16</sup>

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1. 5) Catherine Gegout (2013) *The International Criminal Court: limits, potential and conditions for the promotion of justice and peace*, *Third World Quarterly*, 34:5, 800-818, DOI: 10.1080/01436597.2013.800737
  2. 6) *Ibid.*
  3. *Ibid.*
  4. *Ibid.*
  5. Graefrath, Bernhard. 1990. "Universal Criminal Jurisdiction And An International Criminal Court". *European Journal Of International Law* 1 (1): 67-88. doi:10.1093/oxfordjournals.ejil.a035783.
  6. "The States Parties To The Rome Statute". 2021. Asp.Icc-Cpi.Int. [https://asp.iccpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.iccpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx).
  7. *Ibid*
  8. Op cit note 12.
  9. "Burundi, South Africa To Withdraw From International Criminal Court". 2021. International Justice Resource Center. <https://ijrcenter.org/2016/10/25/burundi-south-africa-to-withdraw-from-internationalcriminal-court/>.

### 1.1.1 Distrust of the International Criminal Court

Over the recent years there has been discussions amongst many scholars and politicians to name a few which hold the view that the ICC targets African countries in particular, undermines African countries sovereignty and most cases brought to the ICC involve African countries whilst ignoring other countries such as Syria to name a few.<sup>17</sup> Many prominent African leaders such as Paul Kagame stated “the court was never about “justice but politics disguised as international justice” likewise, President Yoweri Museveni has lambasted the ICC as “A bunch of useless people”.<sup>18</sup> These statements reiterate the growing sentiments that the ICC is becoming less of a justice organ but is instead being viewed more as political tool to oppress African countries with the disguise of “implementing the law”.

Therefore, it would appear that scholars and lawyers in the area of study should perhaps put more research into gathering the root causes for the current growing distrust from African countries and maybe weigh in some suggestions which could strengthen the ICC and win back the trust of many Global South countries. This is because, it is public knowledge that many African countries are newly independent and still face many issues such as civil wars, political instabilities, radical Islamism to name a few, which calls for institutions like the ICC to protect civilians against rogue rulers.

While countries like South Africa, Burundi and the Gambia are adamant in withdrawing their membership other countries such as Nigeria, Senegal and Cape Verde amongst others are strongly opposed to this idea.<sup>19</sup> These opposing countries argue that although the ICC is not perfect as an institution, its restructuring and reformation requires the will of all members instead of members exiting. “Granted, almost all the cases before the court were initiated by African countries themselves, including the first historic case by Uganda. [So] to now turn around and vilify the ICC smacks of hypocrisy,” says Mr. Assogbavi.<sup>20</sup> This research aims to look at case studies to weigh into these arguments to understand the underlying issues around the distrust of the ICC.

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1) Ibid

2) "ICC: Beyond The Threats Of Withdrawal". 2021. *Africa Renewal*.  
<https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal>.

3) 1) Ibid

4) 2) Ibid

### 1.1.2 Overplay of Politics in the Justice System

Other criticisms around the ICC is based on the fact that the UN Security Council has the authority to refer cases to the ICC yet not all permanent members are state parties to the ICC.<sup>21</sup> As a result, many countries which are state parties to the ICC loses confidence in the institutions legitimacy. For instance, both Libya and Sudan have been referred to the ICC by the UN Security Council even though the US, Russia and China are not state parties to the ICC but perhaps due to some of these non-state parties involvement in Syria, there was no efforts to do the same with this country.<sup>22</sup> Other prominent figures such as the former UN Secretary-General Kofi Annan voiced his concerns regarding the ICC and stated “only two of the five permanent members of the UN Security Council— the UK and France—are signatories to the Rome Statute [and therefore members of the ICC], open[ing] the court up to accusations of double standards.”<sup>23</sup>

However, these sentiments expressed above does not make a compelling argument to disregard the ICC entirely. This is because, despite the ICC’s weaknesses, it still appearsto be a credible court which is approachable after all internal remedies have been exhausted. Furthermore, many civil society groups across the African continent illustrates that the political set up of many countries often blurs the lines between the judicial and executive, which oftentimes means that courts are not able to carry out cases successfully. For instance, even though South Africa is one of the most democratic countries in Africa, its politics with the former Sudanese president overruled its duty to hand Al Bashir over to the ICC.

Therefore, in as much as the ICC also presents many issues and biases, it remains a better option to ensure that the perpetrators of inhumane crimes are brought to book as it is clear that regional politics influences the justice system. The judges of the ICC has reiterated that “The ICC works within an imperfect framework. However, leading nations like South Africa and its parliamentarians should spearhead initiatives to improve the court.<sup>24</sup> This is something that can only be done from within the system”. Therefore, this research explores the weaknesses of the ICC to perhaps suggest where it could improve to enhance its current functions.

### 1.2 Research question

The overarching question this research aims to address is;

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- 1) **Ibid**
  - 2) **Ibid**
  - 3) **Ibid**
  - 4) **Ibid**

- i) What are the politics and the limitations of the International Criminal Court, which affects the functions of the ICC?

In order to answer this question, ancillary questions need to be addressed such as

- ii) What are the jurisdiction issues regarding the ICC?
- iii) Why do many African countries want to withdraw their membership from the ICC?
- iv) What has been the successes and failures of the ICC?

### **1.3 Aims and objectives**

The aims and objectives of this research is multi-faceted and intends to take a multidisciplinary approach. This is because, unlike other legal issues, the ICC is marred with politics which requires an in depth analysis of the political issues to understand the justice system of the ICC. This research aims to highlight the politics and limitations of the ICC and perhaps study the deeper issues which causes them and in return could perhaps offer recommendations to improve these issues to enhance the court's functions. In doing the above, this study will highlight whether the court is relevant and carries out the functions it intended to.

### **1.4 Structure and Research methodology**

This research will be based on a desktop and library study. The primary sources will include treaties, case law, official documents of key institutions and articles written by experts and organizations in the International Criminal law field. The secondary sources will consist of journals, textbooks, conference papers, working papers, newspaper articles and relevant internet sources.

This research will be structured into 4 chapters as follows:

Chapter 1

Will provide the introduction and background of the study

Chapter 2  
Will look at the legal frameworks of the ICC by highlighting the politics and limitations of international/domestic courts when trying to trial international crimes.

Chapter 3  
Will use multiple case studies including the case of former Sudan president Omar al-Bashir to highlight the issues mentioned in chapter 2.

Chapter 4

*Furnishes* the conclusion of the research and offers pragmatic recommendations.

### **1.5 Conclusion**

The ICC serves as an important justice structure because global peace is not achievable with one country alone. As Mr Annan has also denoted before, the collective interest is in essence the individual interest which means that States are not able to achieve global peace alone and need to co-operate with each other in terms of ensuring world peace. Therefore, the ICC is one example where states are able to work with

each other to restore justice and to promote peace. Although the UN Security Council plays a vital role in the ICC, stronger States should not use the Security Council as a political instrument to oppress weaker states. Instead the UN Security Council should refrain from its personal political objectives and pursue justice which could also strengthen the ICC's legal frameworks.

The abuse of the Security Council will eventually lead to anarchy and dissolve many institutions which could include the ICC, the UN to name a few as these institutions only remain strong so long as states do not undermine them as like in the case of its predecessor, of the UN, the League of Nations. All States weak and strong should continue to observe the principles and duties of the ICC and continue to find greater mechanisms that ensure world peace. Certain factors threaten peace at a global level, such as; stronger States are not held accountable for their wrongs and continue to use institutions like the ICC to achieve their political objectives. Therefore, the ICC should strengthen its weaknesses and limit the play of politics in its governance.

## **Chapter 2: A Brief Outline of the Legal Frameworks of the International Criminal Court: The Underlying Politics and Limitations**

### **2.1 Introduction**

The previous chapter outlined the background of the International Criminal Court (ICC), by discussing key events, which led to its formation, whilst highlighting its objectives to promote international peace and justice. Although chapter one outlined the aims and aspirations of the ICC, some issues of this institution were noted, such as the overplay of politics in the justice system and a general distrust from many African countries in the ICC overall. In lieu of the above, there are some arguments justifying these sentiments, while other debates acknowledges that the ICC has weaknesses, like any other institution but disagrees with the African states who threatens to withdraw its membership to this organization. In general, the strength of any institution requires the political will of its members and oftentimes reformations are best achieved from within.

The arguments around African countries aims to withdraw its membership from the ICC should be explored, to better understand how one could suggest possible alternatives to these states renouncing their ICC partnerships. This is because, opposing arguments suggest that African leaders accuse the ICC of an overplay of politics in the justice system, whilst their motivations for leaving the ICC is in fact partly due to

them playing politics.<sup>25</sup> For instance, South Africa refused to hand Al Bashir to the ICC due to its fears of deterring its political relations with Sudan.<sup>26</sup> Other arguments also suggest that African leaders are hypocrites as African states were the biggest advocates of the ICC with notable names such as the Late Nelson Mandela.<sup>27</sup> The need for an institution like the ICC is arguably paramount to the African continent because of many African countries still have issues around stable litigating institutions, gross human rights violations, weak governments, civil wars to name a few.<sup>28</sup>

The debates around the ICC is evidently split and this section briefly looks at the ICC's legal frameworks and explores the weaknesses which becomes politicized. This chapter is two-fold as it will; first identify a brief overview of the ICC's legal frameworks and lastly, a discussion around the flaws of the ICC will be explored by looking at political examples.

## **2.2 The Legal Frameworks Which Governs the International Criminal Court.**

The foundational documents of the ICC are the Rome Statute of the International Criminal Court (Statute), the Rules of Procedure and Evidence, the Elements of Crimes, the Regulations of the Court, the Regulations of the Registry, the Regulations of the Office of the Prosecutor and the Code of Professional Conduct for counsel.<sup>29</sup> Out of all the texts mentioned above, the Rome Statute remains the most important and also the first to be adopted to enter into force.<sup>30</sup>

The Rome Statute is made up of a Preamble and 13 Parts which outlines the Court's jurisdiction over crimes against humanity, aggression, war crimes and genocide.<sup>31</sup> Apart from the jurisdiction, this Statute also sets out the applicable law, admissibility, investigations and prosecution, the composition and administration of the Court, appeal and

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- 1) Reforms or Withdrawal? The Evolving Mosaic of Africa's ICC Strategies. (2021). Retrieved 5 September 2021, from <https://www.ispionline.it/it/pubblicazione/reforms-or-withdrawal-evolving-mosaic-africas-iccstrategies-16455>
  - 2) Ibid
  - 3) Ibid
  - 4) from <https://www.globus.uio.no/resources/global-justice-blog/gumede-icc-africa.html>
  - 5) Resource library. (2021). Retrieved 5 September 2021, from <https://www.icc-cpi.int/resource-library>
  - 6) Ibid
  - 7) Ibid

revision, enforcement and international cooperation and judicial assistance.<sup>32</sup>

## **2.3 Limitations of the International Criminal Court**

### **2.3.1 Political influences**

Even though the Rome Statute clearly outlines its obligations for its state parties, the ICC is limited to enforcement.<sup>33</sup> In other words, the ICC requires the political will of its state parties to enforce the ICC's laws.

<sup>34</sup>For example, in 2010, the African Union (AU) called its members to not cooperate with the ICC to arrest former Sudan president Al Bashir, even though this decision would go against the member's obligations to adhere to the rules of the Rome Statute.<sup>35</sup>

The AU's decision of non-cooperation with the ICC, could arguably be attributed to political reasons; first, the AU had formerly requested the UN Security Council for deferring the ICC proceedings against Al Bashir but was ignored.<sup>36</sup> Consequently, the AU retaliated by using its political influence to dissuade members from legally cooperating with the ICC, since its institution was undermined.<sup>37</sup> Secondly, the ICC's prosecutor made condescending political remarks against Al Bashir which signalled a bias.<sup>38</sup>

In lieu of the above, it is evident that the ICC as a legal institution requires the political will of its members to carry out its mandate to ensure the effectiveness of this court. This is further reiterated by H.E. Judge Dr. jur. h. c. Hans Peter Kaul, the second Vice President of the ICC as he stated;

“It has become more known in the last years that the ICC is absolutely, one hundred percent, dependent on effective cooperation with States Parties in preparing criminal cases, in particular when it comes to

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8) Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by procès- verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002.

1) Birkett, D. (2019). Twenty Years of the Rome Statute of the International Criminal Court: Appraising the State of National Implementing Legislation in Asia. *Chinese Journal Of International Law*, 18(2), 353-392. doi: 10.1093/chinesejil/jmz014

2) Ibid

3) Mills, K. (2012). "Bashir is Dividing Us": Africa and the International Criminal Court. *Human Rights Quarterly*, 34(2), 404-447. Retrieved September 5, 2021, from <http://www.jstor.org/stable/23254731>

4) The AU and the ICC Still not the Best of Friends - ISS Africa. (2021). Retrieved 5 September 2021, from <https://issafrica.org/iss-today/the-au-and-the-icc-still-not-the-best-of-friends>

5) Ibid

6) Ibid

the key issue of arrest and surrender of the accused this lack of any form of executive power is another weakness of the Court, its Achilles' heel, so to speak. The matter is simple: no arrests, no trials."<sup>39</sup>

### **2.3.2 Investigation: Evidence Collection & Witness Protection**

Article 51 of the Rome Statute outlines the rule of procedure and evidence.<sup>40</sup> However, many issues limit the collection of evidence such as travel difficulties from The Hague to remote and hostile regions in developing countries, ongoing conflicts and the lack of supporting institutions (police stations, independent journalists, etc.). These obstacles, limit the ICC's capabilities to verify or obtain critical evidence needed for carrying out investigations for successful prosecutions.

<sup>41</sup>Nonetheless, the ICC has made significant efforts in ensuring that witnesses have access to transport, allowances, accommodation and protection to name a few.<sup>42</sup>

Another important element in the collection of evidence is witness's testimonies in order to carry out successful investigations.<sup>43</sup> Article 68 of the Rome Statute outlines the protection of witnesses and their participation during proceedings.<sup>44</sup> However, there has been cases, which suggest that the current protection for witnesses granted by the ICC is insufficient, as they face intimidation and safety threats.<sup>45</sup> For example, the Institute for War & Peace Reporting mentioned that

“In the separate cases against Kenya's president, Uhuru Kenyatta and his deputy, William Ruto, ICC prosecutor Fatou Bensouda has repeatedly complained of widespread witness intimidation and interference”.

<sup>46</sup>Furthermore, in the Ruto case, Bensouda requested that the judges summon the seven witnesses who withdrew their evidence, due to immense security fears of being politically persecuted in Kenya.

<sup>47</sup>Likewise the future case against Kenyatta, was put into doubt as three witnesses had withdrawn their testimonies.<sup>48</sup> The witnesses withdrew

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1) (2021). Retrieved 5 September 2021, from <https://www.icc-cpi.int/nr/rdonlyres/289b449a-347d-3b7d0a4b9f06/283740/010911salzburglawschool.pdf>

2) Article 51, Rome Statute

3) Keppler, E. (2011). Managing Setbacks for the International Criminal Court in Africa. *Journal Of African Law*, 56(1), 1-14. doi: 10.1017/s0021855311000209

4) Ibid

5) Ibid

6) Article 68, Rome Statute

7) Action Urged on ICC Witness Protection. (2021). Retrieved 5 September 2021, from

<https://iwpr.net/global-voices/action-urged-icc-witness-protection>

8) Ibid

9) Ibid

10) Ibid

their testimonies because the court could not provide them with adequate safety and they did not want to become political targets.<sup>49</sup> The absence of witness protection inhibits the potential to collect information which is important for court cases to be successfully prosecuted by the ICC. However, the ICC should reconcile the fact that the cases brought forward are oftentimes very political, which means that the witnesses face political persecution if they step forward. Thus, greater levels of security protection for witnesses should be the focus, to ensure the successful investigation and prosecutions of ICC cases.<sup>50</sup>

### **2.3.3 Responsibility Shifts for International Criminal Crimes**

The Rome Statute looks at Article 6 Genocide, Article 7 Crimes against humanity, Article 8 War crimes and Crime of aggression.

<sup>51</sup>However, these crimes are often associated with armed conflicts and are carried out by orders “from the top”.<sup>52</sup> In other words, these crimes mentioned above are normally as a result of instructions from the leaders/rulers.<sup>53</sup> In terms of the chain of command, the top leaders/rulers are far removed from the actual crimes and cover their tracks to avoid future prosecutions.<sup>54</sup> As H.E. Judge Dr. jur. h. c. Hans Peter Kaul, the second Vice President of the ICC reiterated that “*In pursuing its task, therefore, the Court will almost inevitably be caught between the poles of brutal power politics on the one hand and law and human rights on the other*”.<sup>55</sup>

Therefore, even though the ICC Rome Statute clearly outlines its crimes which it focuses on, the ability to prosecute these crimes are much more complex. In some cases, the perpetrators of the crimes of genocide, crimes against humanity, aggression and war crimes are also politically protected by stronger States like the US. For example, in 2016, the ICC’s investigation into alleged war crimes by the US forces in Afghanistan, were met with retaliatory measures as the lawyers, judges and all other personnel involved in the investigations, had their bank accounts frozen or travel to the US revoked.<sup>56</sup> This is a clear example, which illustrates

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- 1) Ibid
  - 2) Gegout, C. (2013). The International Criminal Court: limits, potential and conditions for the promotion of justice and peace. *Third World Quarterly*, 34(5), 800-818. doi: 10.1080/01436597. 2013.800737
  - 3) Article 6,7,8 Rome Statute
  - 4) Op Cit note at 26
  - 5) Ibid
  - 6) Ibid
  - 7) Op cit note at 15
  - 8) US punishes International Criminal Court for investigating potential war crimes in Afghanistan. (2021). Retrieved 5 September 2021, from <https://theconversation.com/us-punishes-international-criminal-court-for-investigating-potential-war-crimes-in-afghanistan-143886>

the influence of politics over the strength of the ICC's institution itself. Otherwise put, the ICC's ability to prosecute international crimes could be limited by stronger political actors which affects the effectiveness of this Court.

#### **2.3.4 The ICC a Court or a Political Instrument**

According to the Article 13 (b)(c) of the Rome Statute; “*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; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.*”<sup>57</sup> Even though the United Nations Security Council (UNSC) was not involved in the process of establishing the ICC, the 1998 Rome Conference did include guidelines for the UNSC's engagement with the ICC.<sup>58</sup> This is because likewise, the ICC and the UNSC are complete two separate institutions which act under different mandates, yet they both aim to be instruments of international peace and security.<sup>59</sup> For instance, Article 24 of the United Nations Charter, states that the UNSC's primary responsibility is to promote and maintain international peace and security in conformity with the principles of justice and international peace by allowing it also to act on behalf of its members.<sup>60</sup> Since the formation of the ICC, the UNSC has only used its referral powers twice in the case of Libya and Darfur, which is strikingly odd as there has been numerous other cases such as Syria and Burma to name a few.<sup>61</sup> This begs the question as to why the UNSC refers only some cases whilst ignores others. Some arguments suggest that the proxy political wars which involves some members of the UNSC, impacts the role of the UNSC in the ICC.

As a consequence, in some ways one could suggest that the ICC has become a political tool for some members of the UNSC.<sup>62</sup> For instance,

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- 1) Article 13 (b)(c), Rome Statute
  - 2) The Politicisation of the International Criminal Court by United Nations Security Council Referrals – ACCORD. (2021). Retrieved 5 September 2021, from <https://www.accord.org.za/conflicttrends/politicisation-international-criminal-court-united-nations-security-council-referrals/>
  - 3) Ibid.
  - 4) Ibid
  - 5) Shamsi, N. (2016). the icc: a political tool? how the rome statute is susceptible to the pressures of more power states. *Willamette Journal of International Law and Dispute Resolution*, 24(1), 85-104. Retrieved September 5, 2021, from <http://www.jstor.org/stable/26210471>
  - 6) Failure to Protect: Syria and the UN Security Council - Global Centre for the Responsibility to Protect.(2021). Retrieved 5 September 2021, from

during the Syria crises of 2015, Russia and the US to name a few were involved thus, one could assert that Syria would not be brought in front of the ICC due to these two UNSC Members political involvements.

<sup>63</sup>Likewise, in 2008, the former French president Nicolas Sarkozy entered exclusive negotiations with Al Bashir to use its position in the UNSC to prevent the ICC from carrying out investigations in Sudan in exchange to reach a peace agreement between Sudan and Darfur.<sup>64</sup>

The ICC has brought immense changes and successful prosecutions but it's use has also created many political ills. For instance, the ICC can warrant arrest orders for perpetrators but other states can be reluctant to hand them over, due to fears of the perpetrator revealing its own government classified information if it has involvements in the same case or other cases.<sup>65</sup> Thus, politicians have used the ICC as a blackmail and negotiating tool to advance their own interests, which in effect undermines the ICC's legal system as a whole. Moreover, the UNSC is an important institution for the ICC, when there are crimes committed in countries which are not state parties to the Rome Statute.<sup>66</sup> This is because, the ICC only has jurisdiction powers over state parties of the ICC, however, the UNSC could use its referral authority to bring non-state parties under the jurisdiction of the ICC.<sup>67</sup> This is essential to ensure that the perpetrators of international crimes are held accountable and brought to justice.

## 2.4 Conclusion

In conclusion, the ICC is unreservedly a milestone in terms of pushing for international peace and justice. This is because it remains a beacon of hope for victims who suffered crimes of humanity, genocide, war crimes and aggression. The Court has brought immense changes, even though the ICC has many flaws such as the overplay of politics in its legal structures, issues around evidence collections, leaders or commanders shifting responsibility for crimes and the UNSC politicisation of the ICC to name a few. Nonetheless, the Court requires

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<https://www.global2p.org/publications/failure-to-protect-syriaand-the-un-security-council/>

- 1) 'La rencontre au Qatar des présidents français et soudanais trouble les ONG', *Le Monde*, 29 November 2008.
- 2) **The Limits and Pitfalls of the International Criminal Court in Africa. (2021).** Retrieved 5 September from <https://www.e-ir.info/2011/04/28/the-limits-and-pitfalls-of-the-international-criminal-court-inafrica/#:~:text=A%20popular%20criticism%20of%20the%20International%20Criminal%20Court,about%20the%20strength%20of%20the%20ICC.>
- 3) Ibid
- 4) Ibid
- 5) Ibid

the political will of its members to ensure that it enforces its arrest warrants. This is because, the Rome Statute in itself is not able to do much, if the state parties are reluctant to cooperate. Reformation of the ICC requires a collective effort of all its members including the UNSC respecting the rule of law of the ICC. The next chapter will use three case studies to look at the limitations presented in this chapter more in depth.

### **Chapter 3: African Countries Threaten to Withdraw from the ICC: A Case Study of Former Sudan President Al Bashir**

#### **3.1 Introduction**

The previous chapter outlined the legal frameworks of the ICC and highlighted its limitations such as the overplay of politics in the legal structures, political intimidations of witnesses, the UNSC politicization of the ICC and the lack of political will amongst its state parties. In lieu of the above, it is generally not uncommon to identify the influence of politics in any institution. However, it is imperative that the judicial system of the ICC is strengthened against the overplay of politics to prevent its members from discrediting its legal credibility.

The ICC mainly deals with highly political issues, such as criminals responsible for civil wars, tribal wars, etc. The criminals involved in these wars mentioned above, are oftentimes accused for crimes against humanity, genocide, war crimes and aggression.<sup>68</sup> In order for the Court to keep these perpetrators accountable, the rule of law should prevail against the dominance of politics within this institution.<sup>69</sup> This is both important for ensuring that victims receive due justice and that real offenders are held accountable in a neutral platform.

This chapter looks at the crux of this research, through observing the case of former Sudan president Omar Hassan Ahmad Al Bashir (al-Bashir). The case of al-Bashir will be used to show the limitations of the ICC, which were discussed in chapter two such as the overreach of politics in the ICC, investigation issues and the contention of prosecuting lower ranked officials versus higher ranked persons. For purposes of time constraints, this paper will not go into the depths of the case itself but will rather focus on the key points by; first presenting the facts of the case. Secondly, address each issue mentioned above and lastly present a conclusion regarding chapter three.

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1) (ICC), The. 2021. "The Failure Of The International Criminal Court (ICC)". *Jerusalem Center For Public Affairs*. <https://jcpa.org/article/the-failure-of-the-international-criminal-court-icc/>.

2) Ibid

## **3.2 The case study of al-Bashir, Former President of Sudan**

### **3.2.1 The Facts of the Case**

Al-Bashir, was the seventh president of Sudan from 1993 to 2019.<sup>70</sup> He founded the National Congress Party (NCP) in Sudan, which was the majority party from 1992 to 2019.<sup>71</sup> Al Bashir used the NCP, to issue a coup against the former president Sadiq alMahdi and implemented Sharia law nationally.<sup>72</sup> A vast majority of people died and were displaced, due to the war between the Janjaweed militia, Sudanese Liberation Army and many other rebel groups.<sup>73</sup>

Eventually in 2005, the United Nations Security Council (UNSC) referred al-Bashir to the ICC, which led to the investigations being carried out in Darfur.<sup>74</sup> Upon the findings of the ICC in 2008, al-Bashir became the first indicted sitting president for war crimes, genocide and crimes against humanity.<sup>75</sup> The ICC issued a warrant of arrest for al-Bashir in 2009.<sup>76</sup> However, the ICC had to withdraw its genocide claims against al-Bashir as there was insufficient evidence.<sup>77</sup> As a consequence, the ICC issued its second warrant of arrest in 2010. From 2010 until 2018 the ICC struggled to have cooperation from its members to assist with the arrest of al-Bashir.

In 2019, al-Bashir was finally removed from his presidency which was a result of countless protests against him in Sudan.<sup>78</sup> Sudan eventually entered into talks with the ICC regarding al-Bashir's case and he was charged for five counts of crimes against humanity: murder, extermination, forcible transfer, torture, and rape; two counts of war crimes: intentionally directing attacks against a civilian population as

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1) "Sudan's Government Says It Thwarted A Coup Attempt By Bashir Loyalists". 2021. *Democracy Now!*.

[https://www.democracynow.org/2021/9/21/headlines/sudans\\_government\\_says\\_it\\_thwarted\\_a\\_coup\\_attempt\\_by\\_bashir\\_loyalists](https://www.democracynow.org/2021/9/21/headlines/sudans_government_says_it_thwarted_a_coup_attempt_by_bashir_loyalists).

2) Ibid

3) Ibid

4) "Profile: Omar Al-Bashir, Sudan's Longtime Ruler". 2021. *Aljazeera.Com*.

<https://www.aljazeera.com/news/2019/4/11/profile-omar-al-bashir-sudans-longtime-ruler>.

5) "Statement To The United Nations Security Council On The Situation In Darfur, Pursuant To UNSCR 1593 (2005)". 2021. *Icc-Cpi.Int*.

<https://www.icc-cpi.int/Pages/item.aspx?name=181214-stat-otp-UNSC1593>

6) "Omar Al-Bashir | Coalition For The International Criminal Court". 2021. *Coalitionfortheicc.Org*. <https://www.coalitionfortheicc.org/cases/omar-albashir>.

7) "Welcome To The International Criminal Court". 2021. *Icc-Cpi.Int*. <https://www.icc-cpi.int/>.

8) "Sudan Ruler Omar Al-Bashir Removed As President And Arrested By Military". 2021. *The Independent*.

<https://www.independent.co.uk/news/world/africa/sudan-omar-al-bashir-president-protestskhartoum-army-statement-a8864511.html>.

9) Op cit note at n9.

such or against individual civilians not taking part in hostilities, and pillaging; three counts of genocide: by killing, by causing serious bodily or mental harm, and by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction, allegedly committed at least between 2003 and 2008 in Darfur, Sudan.<sup>79</sup>

### **3.2.2 The Political Influences and The Role of The United Nations Security Council in Al-Bashir Case**

Almost every justice system operates with some sort of politics, as it would be hard to imagine a legal system which functions in a vacuum. In the situation of al-Bashir, his case could be considered as very political because the UNSC had an involvement in the war and also used its position to refer his case to the ICC.<sup>80</sup> Through the UNSC resolution 1769 in 2007, the UNSC deployed peacekeeping troops to Darfur, under the name of the United Nations African Union Mission in Darfur (UNAMID).

<sup>81</sup>

Some scholars would argue that when the UNSC has an involvement in a war (even if they just deploy peacekeeping missions), then its best that the UNSC do not also use its referral authority to refer such cases to the ICC. This is because, the case would be considered from the onset a political witch-hunt, which could undermine the judgements of the ICC by those indicted and their affiliates.<sup>82</sup> Moreover, in 2008 the former French president Sarkozy, was willing to negotiate with al-Bashir to offer him a “lifeline” by suspending his prosecution for genocide in Darfur in return that al-Bashir implements radical policy changes.<sup>83</sup> In this meeting, Sarkozy explicitly mentioned that he would use France’s influential position in the UNSC to defer the ICC’s prosecution against him under the condition that al-Bashir commits to peace on his own accord.<sup>84</sup> In the words of the former French president, “France wants the Sudanese authorities to radically change their policies. It is now up to Mr Bashir to determine exactly what he wants”.<sup>85</sup> The fact that France wanted

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1) Allard Duursma & Tanja R. Müller (2019): **The ICC indictment against Al Bashir and its repercussions for peacekeeping and humanitarian operations in Darfur**, *Third World Quarterly*, DOI: 10.1080/01436597.2019.1579640

2) *Ibid*

3) *Ibid*

4) Reinl, James. 2021. "Sarkozy Offers Bashir Deal Over War Crimes: The French PM Extends His Sudanese Counterpart A Lifeline By Offering To Help Suspend His Prosecution For Genocide In Darfur."

<https://www.thenationalnews.com/world/europe/sarkozy-offers-bashir-deal-over-war-crimes-1.586571>.

5) *Ibid*

6) *Ibid*

1) "Omar Al-Bashir: Sudan's Ousted President". 2021. *BBC News*.

<https://www.bbc.com/news/worldafrica-16010445>.

to use its political position within the UNSC to influence the justice recourse of the ICC, this instance would strengthen the argument, that the ICC is more of a political instrument than an independent judiciary organ.

The actual arrest of al-Bashir had many political struggles which in some ways challenged the ICC's authority. For instance, even though the ICC issued its arrest warrant for al Bashir, he continued to visit countries such as Egypt, Saudi Arabia, Chad, Uganda and South Africa to name a few without being handed over to the ICC.<sup>86</sup> With the exception of Egypt and Saudi Arabia, these countries mentioned above should have complied with the ICC's arrest warrant and handed al-Bashir over to the ICC.

South Africa's response was "In its defence, the South African government had argued that international law granting immunity for sitting heads of state prevented it from arresting al-Bashir and conflicted with the Rome Statute's obligations to arrest and surrender him to the ICC".<sup>87</sup> However, the judges of the ICC countered this argument of South Africa by stating that "the customary international law provision of immunity that South Africa relied on has been superseded by UNSC Resolution 1593 that referred Darfur to the ICC."<sup>88</sup> This resolution effectively places Sudan in the same legal position as a state party to the Rome Statute.<sup>86</sup> And because sitting heads of states can, under the Rome Statute, be held responsible for crimes in their individual capacity, al-Bashir can be arrested and tried at the ICC".<sup>89</sup> South Africa did not take this response lightly, as they felt that when al-Bashir attended the African Summit in South Africa, he did so in his head of state capacity and this summit was intended to bring African presidents together, to form coalitions to enhance Africa's developmental goals.<sup>90</sup>

Therefore, it would be counterproductive for South Africa to arrest a head of State of another African country, while conducting an "African meeting".<sup>91</sup> As a consequence, South Africa reiterated that the ICC has a disregard for protocols of African led initiatives and responded with threats to withdraw from the institution.<sup>92</sup> Perhaps, one could argue that the arrest of al-Bashir in South Africa, would have sent the wrong

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2) "The Real Problem Behind South Africa's Refusal To Arrest Al-Bashir - ISS Africa". 2021. *ISS Africa*.

<https://issafrica.org/iss-today/the-real-problem-behind-south-africas-refusal-to-arrest-al-bashir>.

3) Ibid

4) Ibid

5) Ibid

6) Ibid

7) Ibid

1) "South Africa Revokes ICC Withdrawal After Court Ruling". 2021. *BBC News*.

<https://www.bbc.com/news/world-africa-39204035>.

message to other African countries, especially in the context of “African solidarity” which could deter future African planned summits.<sup>93</sup>

The Chadian Ambassador Bechir also reiterated Chad’s position regarding al-Bashir “the country is more loyal to the African Union, which passed a resolution encouraging members to not turn over al-Bashir, than they are to the ICC”.<sup>94</sup> However, it is clear that the political risks meant more for South Africa than to cooperate with the justice system of the ICC. The consequence of South Africa’s decision to not arrest al-Bashir could limit the Courts functions as it heavily relies on the cooperation of its members.<sup>95</sup>

### **3.2.3 ICC investigation issues**

#### **a) Insufficient evidence**

The ICC issued a warrant of arrest for al-Bashir on the basis of crimes against humanity, genocide and war crimes in 2009.<sup>96</sup> However, upon the ICC’s investigations, they had to withdraw the charges of genocide against al-Bashir due to the lack of proof thereof.<sup>97</sup> However, the appeals chamber of the ICC, argued that the decision for the prosecutor to reject the claims for genocide were wrong as the standard of proof the court used in 2009 was too stringent.<sup>98</sup> The appellate judge Erkki Kourula of Finland reiterated “the standard of proof the court used in 2009 to dismiss three counts of genocide against Bashir, was higher and more demanding than what is required in its statutes”.<sup>99</sup> Nonetheless, the ICC later presented a document whereby it stated that “it would issue an arrest warrant for genocide only if the only reasonable conclusion to be drawn from the prosecutor's evidence were reasonable grounds to believe in the existence of genocidal intent”.<sup>100</sup>

#### **b) Witnesses withdraw their participation in cases**

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2) Ibid

3) "International Criminal Court Investigations Sudan". 2021. *Archive.Globalpolicy.Org*.

<https://archive.globalpolicy.org/international-justice/the-international-criminal-court/iccinvestigations/darfur-sudan.html>.

4) "Al-Bashir And The ICC: There Are Better Ways To Achieve Justice". 2021. *The Conversation*.

<https://theconversation.com/al-bashir-and-the-icc-there-are-better-ways-to-achieve-justice-131850>.

5) Op cit note at n29

6) Ibid

7) "Al-Bashir Genocide Ruling Reversed | CBC News". 2021. *CBC*.

<https://www.cbc.ca/news/world/albashir-genocide-ruling-reversed-1.973756>.

8) Ibid

1) "Darfur Victims Withdraw From ICC Case Against Bashir". 2021. *Justice Hub*.

<https://testsite.justicehub.org/article/darfur-victims-withdraw-from-icc-case-against-bashir/>.

Another issue among the investigating process of the al-Bashir case, was the ICC's deficiency of protection for some of the witnesses. For example, eight witnesses in the case of al-Bashir withdrew their intention to testify in the Court.<sup>101</sup> This is because in 2009, the ICC Prosecutor Fatou Bensouda made the decision to halt the ICC's investigations in Darfur.<sup>102</sup> This decision, meant that the witnesses could face immense security threats as the perpetrators are roaming free and as a result their lawyer withdrew their intention to participate in the case of al-Bashir.<sup>103</sup>

As the article from Mark Kersten put it "In the circumstances, Victims a/0443/09, a/0444/09, a/0445/09, a/0446/09, a/0447/09, a/0448/09, a/0449/09 & a/0450/09 will seek no further role in the al-Bashir case nor, for that matter, in the Darfur situation."<sup>104</sup> Without waiving any right to protection and to confidentiality of their identity, the Participants will not object to the removal of their participatory rights in the case against Omar Hassan Ahmed al-Bashir".<sup>105</sup> A similar incident also occurred in the case of Kenya's Uhuru Kenyatta, as the ICC had dropped its prosecution against him as witnesses withdrew their testimonies due to the fears of being persecuted by the Kenyan government.<sup>106</sup> Fatou Bensaouda claimed that "it was impossible to investigate the crimes further. This was because witnesses were terrified to testify and the Kenyan government refused to cooperate".<sup>107</sup> As a consequence, the ICC faced several issues regarding its investigations in the al-Bashir case such as halts put on the case, witnesses withdrawing their intentions to testify and the lack of proof to charge al-Bashir for the crime of genocide.

### **3.2.4 The complexities around the ICC's decision to prosecute al-Bashir**

The case of al-Bashir remains amongst one of the most complex cases for the ICC because it is the first time a sitting president has been indicted and issued with a warrant of arrest. The ICC could not avoid the

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2) Ibid

3) Ibid

4) Ibid

5) Ibid

6) Ibid

7) "Uhuru Kenyatta Denounces ICC As Kenya Charges Dropped". 2021. *BBC News*.

<https://www.bbc.com/news/world-africa-30344320>.

8) "Al-Bashir: Why The ICC Is Between A Rock And A Hard Place". 2021. *The Conversation*.

<https://theconversation.com/al-bashir-why-the-icc-is-between-a-rock-and-a-hard-place-115388>.

case of al-Bashir as it was brought forward by the UNSC referral.<sup>108</sup> Therefore, if the ICC refused to indict al-Bashir then it would strengthen the critics, which argues that the ICC is a toothless mechanism when it comes to holding top officials accountable such head of States.<sup>109</sup> This argument has a long history. For instance, the first case the ICC, involved the conviction of Congo's former warlord Thomas Lubanga in 2012.<sup>110</sup> The case of Thomas Lubanga, was considered among the lower rankings in terms of the chain of command, however, the ICC went after him instead of the more authoritative figures.<sup>111</sup> Therefore, the ICC's failure to carry out its investigations regarding al-Bashir, would only reinforce this criticism. Conversely, the ICC made the decision to prosecute al-Bashir, which also meant that there were immunity issues.<sup>112</sup> Some argued that a sitting president could not be arrested, which meant that other dictators could get the message to do as they please, so long as they maintain their official office as a head of state.<sup>113</sup>

Nonetheless the Appeals Chamber of the ICC argued that "article 27(2) of the ICC Rome Statute, stipulating that immunities are not a bar to the exercise of jurisdiction, reflects the status of customary international law."<sup>114</sup> It concluded that there is no Head of State immunity under customary international law vis-à-vis an international court.<sup>115</sup> Thus, in

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- 1) Many Criticisms Of International Criminal Court Have Validity". 2021. *The Irish Times*. <https://www.irishtimes.com/opinion/many-criticisms-of-international-criminal-court-have-validity-1.1418128>.
  - 2) "ICC VS. SUDAN – THE COMPLEXITIES BEHIND THE AL-BASHIR CASE". 2021. *TRANSCEND Media Service*. <https://www.transcend.org/tms/2009/03/icc-vs-sudan-%e2%80%93-the-complexities-behind-the-al-bashir-case/>.
  - 3) "Thomas Lubanga, Congolese Warlord, Convicted Of Using Child Soldiers". 2021. *Archive.Globalpolicy.Org*. <https://archive.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/democratic-republic-of-congo/51397-thomas-lubanga-congolese-warlord-convicted-of-using-child-soldiers.html?itemid=id>.
  - 4) Akande, Dapo. 2021. "ICC Issues Detailed Decision On Bashir's Immunity (. . . At Long Last . . . ) But Gets The Law Wrong". *Ejiltalk.Org*. <https://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir%E2%80%99s-immunity-at-long-last-but-gets-the-law-wrong/>.
  - 5) Ibid
  - 6) Site Design and Maintenance Pipsqueak Productions, you must care. So do we. Pipsqueak.com. 2021. "A Single Comment — Permalink | International Criminal Court Forum". *The International Criminal Court Forum*. <https://iccforum.com/forum/permalink/93/4084>.
  - 1) Ibid
  - 2) Al-Bashir Case: ICC Appeals Chamber Confirms Jordan's Non-Cooperation But Reverses The Decision Referring It To The ASP And UNSC". 2021. *Icc-Cpi.Int*. <https://www.icc-cpi.int/Pages/item.aspx?name=pr1452>.

the present circumstances, where Jordan (a State Party) is requested by the Court to arrest and surrender Mr Al-Bashir (the Head of State of Sudan at the relevant time), when Sudan is under an obligation to cooperate fully with the Court in accordance with the ICC Rome Statute due to UNSC resolution 1593, Head of State immunity is equally inapplicable”.<sup>116</sup>

Also, to make matters more difficult, the African Union firmly encouraged its members to not hand al-Bashir over to the ICC and reiterated that “in the future the court should rather focus on mid-level officials”. In many ways this undermines the efficacy of the ICC, as the OAU remains an separate body, which cannot dictate who the ICC should investigate. However, the OAU has a strong influence over its members and the fact that it discouraged its members from cooperating with the ICC meant that the ICC is limited without the cooperation of its state parties.

### **3.3 Conclusion**

In conclusion, the ICC still has many weaknesses which it should improve on in order to strengthen its legal apparatus. Nonetheless, the prosecution of al-Bashir is no doubt one of the ICC’s biggest milestones and a monumental precedent for future cases. Especially on a continent like Africa, where African leaders are very slow to relinquish their power, the fact that the ICC has prosecuted a sitting president has made a clear message that anyone involved with crimes against humanity, genocide and war crimes will face the law.<sup>117 118</sup> This is in many ways, is a message of hope for victims which often take years to see justice prevail over the atrocities committed against them. Of course, the ICC has to improve on its investigational efforts and its efficacy even in the midst of non- cooperation amongst its members.

The ICC, remains an institution, like any other which needs the political will of its members to succeed in its missions.<sup>119</sup> Although after many years, the ICC was eventually able to have al-Bashir handed over to it and to run its course. The arguments regarding al- Bashir’s case will remain divided as some members argues that the case was a step in the wrong direction which left some notable African countries like South

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3) Ibid

4) "Why Presidents Refuse To Relinquish Power: The African Dilemma. – African Democratic Institute".

5) *African-Di.Org.*

<http://www.african-di.org/990/>.

1) Roach, Steven C. 2013. "How Political Is The ICC? Pressing Challenges And The Need For Diplomatic Efficacy". *Global Governance: A Review Of Multilateralism And International Organizations* 19 (4): 507-523. doi:10.1163/19426720-01904003.

Africa threatening to withdraw its membership whereas other strong countries like Nigeria continues to support the position of the ICC.

As many civil wars continue in Africa, it will be a disservice for the ICC to become ineffective, therefore, this research argues that the ICC should continue its efforts to ensure justice and world peace despite the myriad of complexities and adversaries it faces. The next chapter will give an overall conclusion and provide some suggestions which may be useful to overcome the issues presented in this thesis.

## **Chapter 4 Conclusion**

### **4.1 The Conclusion to the Research Question**

The overarching question which this research attempted to answer was whether the politics and limitations of the ICC affects its functions. In gathering materials around this question, there were a few observations made. First, it was established that the legal frameworks of the ICC faced many issues such as the overplay of politics in its judiciary system. For instance, even though ICC members were state parties to the Rome Statute, in some cases such as South Africa's non-compliance to arrest al-Bashir, countries chose political relations over judicial obligations.<sup>120</sup> The African Union also made deliberate attempts to encourage its members to not cooperate with the ICC regarding al-Bashir's arrest.<sup>121</sup> These actions expressed above, severely undermines the capabilities of the ICC to carry out its functions because it relies heavily on the cooperation and political will of its members.

Secondly, during the investigation process of the ICC, witnesses' testimonies serves as an important element when collecting evidence for cases. In theory, Article 68 of the Rome Statute outlines the protection of witnesses and their participation during proceedings but as in Uhuru Kenyatta's and in al-Bashir's case witnesses have withdrawn their testimonies due to fears of being intimidated and persecuted.<sup>122</sup> Moreover, judges of the ICC had dissenting views when looking at the standard of proof in al-Bashir's case for charges of genocide.<sup>123</sup> Given the highly politicization of al-Bashir's case, its uncertain whether the high

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2) "Al-Bashir Case: ICC Pre-Trial Chamber II Decides Not To Refer South Africa'S Non-Cooperation To The ASP Or The UNSC". 2021. *Icc-Cpi.Int*.

<https://www.icc-cpi.int/Pages/item.aspx?name=pr1320>.

3) Site Design and Maintenance Pipsqueak Productions, you must care. So do we. Pipsqueak.com. 2021. "Africa Debate — Is The ICC Targeting Africa Inappropriately?". *The International Criminal Court Forum*. <https://iccforum.com/africa>.

1) See Chapter two

2) Vagias, M., & Ferencz, J. (2015). Burden and Standard of Proof in Defence Challenges to the Jurisdiction of the International Criminal Court. *Leiden Journal of International Law*, 28(1), 133-155.

threshold for assessing the standard of proof for genocide charges was legally or politically decided.

Thirdly, the ICC has received a reputation for being a judicial system which only goes for the lower ranked criminals, whilst the top officials roam freely without any punishments.<sup>124</sup> Therefore, the case of al-Bashir was one of the most complex cases because it was the ICC's first attempt to issue an arrest warrant for a sitting head of state. While some arguments suggested that head of states are immune, the ICC presented a counter argument which meant that dictators should be aware that they do not have to leave power before facing justice for their crimes against humanity, genocide or war crimes.

Perhaps, one could have suggested that the ICC's decisions around al-Bashir should be viewed as a major milestone, yet it brought so much division to the extent of some notable countries threatening to withdraw their membership from the ICC. Although it is true, that al-Bashir's case received immense attention as if there aren't other leaders which should also be brought to justice, it remains a step in the right direction for the ICC to prosecute highly ranked officials.<sup>125</sup>

Lastly, the complex relationship between the ICC and the UNSC has created many issues.<sup>126 127</sup> For example, even though the ICC should be considered as an independent judiciary system, the overstretch of the UNSC minimizes the legitimacy of the ICC's decisions.<sup>128</sup> The UNSC would be considered more of a political body compared to a legal one, therefore, it could be assumed that the UNSC could use its referral powers for political motives.<sup>129</sup> For example, the former French president Sarkozy entered private negotiations with al-Bashir to implement radical policy changes in exchange that the UNSC could use its political influence in the UNSC to drop some charges against Al-Bashir. This is a clear illustration of the undermining of the ICC's ability to *function* independently. Considering that the ICC is a relative new body compared to older international litigating forums, it has a strenuous task to build a strong reputation amongst its members to prove its' legal legitimacy. However, the ICC is accused of being a political instrument for many of

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- 3) "International Criminal Court | Human Rights Watch". 2021. *Hrw.Org*.  
<https://www.hrw.org/topic/internationaljustice/international-criminal-court>.
  - 4) "The Deterrent Effect Of The ICC On The Commission Of International Crimes By Government Leaders". 2021. *Crisis Group*.  
<https://www.crisisgroup.org/global/deterrent-effect-icc-commission-international-crimesgovernment-leaders>.
  - 5) "The Complex Relationship Between The UNSC And The ICC: Opportunities For Institutional Reform?".
  - 6) *Ecpr.Eu*. <https://ecpr.eu/Events/Event/PaperDetails/2039>.
  - 1) Ibid
  - 2) Ibid

the UNSC members to oppress weaker countries by conducting witch-hunts on their opponents.<sup>130</sup>

#### **4.2 The Answer Was Structured in the Following Method**

To conclude, this research highlighted these points mentioned above by first mentioning the problem statement in chapter one. The second chapter looked at the legal frameworks and addressed the common issues which limits the ICC's functions and lastly in chapter three, the case study of al-Bashir was used to illustrate how the limitations in chapter two played out. In numerous ways, the ICC indeed has many limitations and is politicized, however, it remains an integral institution which aids in world peace and gives victims a window of hope.<sup>131</sup> Like any institution, the ICC has flaws but they are best overcome when reforms take place within, therefore, this chapter would like to contribute some insights which may be helpful to strengthen the ICC.<sup>132</sup>

#### **4.3 Recommendations:**

- The ICC should consider the efficacy of the timeframe it takes to conclude its cases, as the al-Bashir case took more than ten years to be finalized.
- The ICC could look into liaising with local courts to cut the costs in traveling to The Hague and perhaps use the saved costs to provide more witness protection measures.
- The ICC should consider adjudicating more high profile figures like the head of state of Syria to show more even handedness in its prosecution choices.
- The ICC could mobilize various efforts to contribute to the discussion of the UNSC reforming by including some if not even just one member from the Global South countries.
- The ICC should consider revisiting its laws regarding the referral powers of the UNSC, particularly when the referred case already has the involvement of the UNSC.
- The ICC could consider strengthening its relationship with the African Union to garner more support as this body has a much influential role amongst its members.
- The ICC could forge stronger ties with its member's domestic courts to aid cooperation regarding arrest warrants issued by the ICC.

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3) Ibid

4) "The Limits And Pitfalls Of The International Criminal Court In Africa". 2021. *E-International Relations*.

<https://www.e-ir.info/2011/04/28/the-limits-and-pitfalls-of-the-international-criminal-court-in-africa/>.

5) Ibid

- The ICC could also consider revisiting its investigation processes to ensure that it standardizes the “standard of proof” threshold to prevent future instances where charges are made and then dropped.
- The ICC could also use more strategic efforts to petition states which refuse to cooperate with its mandates.
- The ICC should perhaps consider hosting a conference every year, to allow member states’ legal personnel to address and highlight common dissatisfactions with the ICC. Perhaps a platform for internal discussions is appropriate to express concerns which makes countries want to withdraw their membership to the ICC.

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3. *Democracy Now!*
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