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The Role of the United Nations Security Council and the Assembly of States Parties in Enforcing State Cooperation with the ICC's Requests and Decisions

Thesis submitted by

Suzgo Lungu
Student No. 1593362

In fulfilment of the degree of

Doctor of Philosophy

In the School of law at the University of the Witwatersrand, Johannesburg under the supervision of Professor Ntombizozuko Dyani-Mhango

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DECLARATIONS

DECLARATIONS I declare that this thesis is my own unaided work. I further declare that this thesis has never before been submitted for any degree or examination in any university.

SUZGO LUNGU

_____

Signature Date:

This thesis has been submitted with my permission as supervisor appointed by the University of the Witwatersrand, Johannesburg.

Prof. Ntombizozuko Dyani-Mhango

_____

Signature Date:

DEDICATION

To my wife, **CYNTHIA AMANDA LUNGU**, my two daughters, **SAHARA** LUNGU and **SAVANNA LUNGU**.

ACKNOWLEDGEMENTS

This doctoral project could not have been completed without the grace of God. I am eternally thankful.

I wish to express my gratitude and profound appreciation to Professor Ntombizozuko Dyani-Mhango for the guidance and support rendered to me during my research. I am deeply indebted to Prof. Dyani-Mhango for her understanding, flexibility and above all patience with, at times, my poor writing style. She gave me all the tools necessary for me to undertake my research with maximum flexibility and harmony.

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To my little Girls, Sahara and Savanna, I started this journey when they were 5 and 3 years old respectively-very young ages to understand the importance of patience when Dad is studying. They supported me throughout these two years by not disturbing me when I sat on my working table with headphones on! Now that I have finalized this project, it remains of me to pay back. This is for you, the three ladies in the house!

I should also honour Dr. Steven Kayuni for his academic, material and moral support along the way. Dr. Kayuni kept pushing and encouraging me at times when I felt like giving up. I salute you Dr. Kayuni.

Whilst I give credit to those that have contributed enormously to this work for all the good things; any faults or errors to this work are entirely mine.

ABSTRACT

It has been almost 10 years since the International Criminal Court ('ICC') issued two warrants for the arrest of former President of Sudan, Omar Hassan Ahmad Al Bashir ('Al Bashir') on charges of crimes against humanity, war crimes and genocide. Despite the warrants, Al Bashir and some of his alleged co-perpetrators remain free as the ICC does not try suspects in absentia. Al Bashir has travelled to several countries, both contracting and non-contracting parties to the Rome Statute of the ICC ('Statute'), in defiance of the warrants for his arrest without being arrested. Failure by states to cooperate with ICC requests to arrest and surrender him for prosecution has been the biggest challenge of the international criminal justice system over the years.

Arresting and surrendering a person in the position of Al Bashir raises a number of legal issues relevant to this thesis. First, Sudan is a non-contracting state to the Statute and generally, it is not obliged to cooperate with the ICC. This raises the second question as to whether Al Bashir is entitled to immunities when it comes to contracting states to the Statute that are requested to arrest and surrender him to the ICC. Third, several contracting parties to the Statute have failed to arrest and surrender him to the ICC thereby breaching their obligations under the Statute. These states claim that there is a conflict between Articles 27(2), on non-immunity of a head of state, and 98(1), which requires the requested non-contracting state party to waive its immunity prior to arresting and surrendering Al Bashir to the ICC, in case they breach their customary international law obligations owed to Sudan. Fourth, they claim that the United Nations Security Council ('UNSC') Resolution 1593 (2005) which referred the situation of Sudan to the ICC does not impose any obligation on states other than Sudan to cooperate with the ICC on this matter. Fifth, several states have still failed to cooperate with ICC requests to arrest and surrender Al Bashir despite the ICC Pre-Trial Chamber (PTC) holding that there is no conflict between their statute and international law obligations towards the Sudan. The PTC referred these non-cooperating states to the ICC Assembly of States Parties ('ASP') and United Nations Security Council ('UNSC') in terms of article 87(7) of the Statute. However, they have so far faced no consequences.

What is unclear from Article 87(7) is the nature and scope of *remedies* that are available to the ASP and the UNSC when a non-cooperating state has been referred by the ICC for enforcement. It is also unclear as to what *procedure* the ASP and the UNSC would follow in

enforcing cooperation. It is observed from the provisions of the Statute that the ASP's powers are unclear, whereas the UNSC is expected to act in terms of its Chapter VII powers under the UN Charter. It is further observed from the decisions of the PTC and the reports of the ICC Prosecutor to the UNSC that both the ASP and the UNSC have not yet taken any action against non-cooperating states. As a matter of fact, it is unclear whether the ASP or the UNSC will ever take any action against non-cooperating states for failing to arrest and surrender Al Bashir to the ICC.

Using the example of Sudan and Al Bashir, this thesis analyses the enforcement of the ICC's requests and decisions by the UNSC and the ASP in relation to states' failure to cooperate. Since the ICC cannot operate without the cooperation of states, the thesis argues that there is a need for the ASP and UNSC to take strong measures against non-cooperating states. The thesis identifies a critical need for a strong, clear and elaborate follow-up mechanism against non-cooperating states that have been referred to the ASP and UNSC under the Statute in order to contribute to the fight against international crimes and ending impunity. The thesis therefore does two things. Firstly, it examines the nature and scope of the powers of the UNSC and ASP under the Statute in relation to enforcing state cooperation with the ICC requests. This entails exploring how the UNSC and ASP can compel states to fulfill their Statute obligation to cooperate with the ICC's requests to arrest and surrender suspects. Secondly, the thesis develops recommendations to the UNSC and ASP for the enforcement of the ICC's requests and decisions to arrest and surrender suspects. In order to develop proposals for an effective enforcement of cooperation with ICC requests to arrest and surrender Al Bashir and persons in similar position under the Statute, the thesis draws lessons from the two regional human rights tribunals of the Inter-American Court of Human Rights (IActHR) and the European Court on Human Rights (ECtHR). Although, the African Court on Human and People's Rights (AfCHPR) has the capacity to monitor state cooperation with its decisions through the existence of a legal framework under the Charter, it has not yet developed this area of the law. The AfCHPR has neither clear practice nor policy on enforcement of state cooperation. The AfCHPR does not also have follow-up mechanisms on enforcement of state cooperation with its decisions. It is for this reason that a discussion of this system in this thesis is merely illustrative of the legal framework on state cooperation including the areas that may require improvement if the system is to achieve maximum state cooperation.

LIST OF ABBREVIATIONS

AC: Appeals Chamber of the International Criminal Court

ACHPR: African Charter on Human and Peoples' Rights

AfCHPR: African Court on Human and Peoples' Rights

ASP: Assembly of State Parties to the International Criminal Court

ASPEU: Assembly of States Parties Enforcement Unit

AU: African Union

CC: Constitutional Court of South Africa

CoM: Committee of Ministers of the Council of Europe

DRC: Democratic Republic of Congo

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

ECtHR: European Court of Human Rights

EU: European Union

IActHR: Inter-American Court on Human Rights

ICC: International Criminal Court

ICGM: International Contact Group for Madagascar

ICISS: International Commission on Intervention and State Responsibility

ICJ: International Court of Justice

ICTR: International Criminal Tribunal for Rwanda

ICTY: International Criminal tribunal for the former Yugoslavia

IDPs: Internally Displaced Persons

ILC: International Law Commission

JEM: Justice and Equality Movement of Sudan

MONUC: United Nations Organisation Mission in the Democratic Republic of Congo

NATO: North Atlantic Treaty Organisation

OAS GA: Organisation of American States' General Assembly

OAS: Organisation of American states

OAS: Organization of American States

OAU: Organization of American Unity

OCHA: Office for the Coordination of Humanitarian Affairs

OHCHR: Office of the High Commissioner for Human Rights

OTP: Office of the Prosecutor to the International Criminal Court

PEU: Permanent Enforcement Unit

PTC: Pre-Trial Chamber of the International Criminal Court

R2P: Responsibility to Protect

SaR: Sovereignty as Responsibility

SLA: Sudanese Liberation Army

UDHR: Universal Declaration of Human Rights

UN: United Nations

UNGA: United Nations General Assembly

UNMIS: United Nations Mission in Sudan

UNSC: United Nations Security Council

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CHAPTER 1

INTRODUCTION

1.1. What is this thesis about?

This thesis is about exploring ways of enforcing state cooperation with requests and decisions of the International Criminal Court ('ICC') under the Rome Statute of the ICC ('Statute'). The thesis focuses on the obligation of states to arrest and surrender persons from both contracting and non-contracting states to the ICC. The thesis examines how the UNSC and the ASP can compel states to fulfill their Statute obligation to cooperate with the ICC's requests to arrest and surrender suspects including those who enjoy immunities. The failure by states to cooperate in arresting and surrendering suspects to the ICC has been the biggest challenge of the international criminal justice system over the years. In order to achieve this objective, the thesis refers to the situation of Sudan, as an example in order, to understand the challenges faced by the ICC when it comes to state cooperation under the Statute with a view to proposing ways of improving the regime of cooperation under the Statute.

The issue of state cooperation is important because it has been almost 10 years since the ICC issued the first warrant of arrest for the former President of Sudan, Omar Hassan Ahmad Al Bashir ('Al Bashir'), on charges of crimes against humanity,[1] war crimes and genocide.[2] Despite the above warrants, Al Bashir and some of his co-accused remain free as the ICC does not try suspects in absentia.[3] Al Bashir has travelled to several countries, both contracting and non-contracting parties to the Statute, in defiance of the arrest warrants without facing any arrest. This thesis, therefore, identifies solutions that will compel states to cooperate with the ICC in order to fight international crimes and end impunity. In order to understand the arguments that will be advanced

[1] *Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar Al Bashir") (Warrant of Arrest for Omar Hassan Ahmad Al Bashir)*, 4 March 2009, ICC-02/05-01/09, online *https://www.icc-cpi.int/CourtRecords/CR2009_01514.PDF*, last accessed on 27 February, 2019.

[2] On 12 July 2010, the ICC issued a second warrant for the arrest of Al Bashir on charges of Genocide: see *Prosecutor v Omar Hassan Ahmad Al-Bashir* (Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir) Pre-Trial Chamber I, 12 July 2010, ICC-02/05-01/09-95, 12 July 2010; See also *Prosecutor v Omar Hassan Ahmad Al Bashir (Second Decision on the Prosecution's Application for a Warrant of Arrest),* Pre-Trial Chamber I, 12 July 2010, ICC-02/05-01/09-94, available on line at *https://www.icc-cpi.int/ICCRecords/CR2010_04825.PDF*, last accessed on 9 November, 2018.

[3] For full details of individuals indicted for crimes committed in the Darfur region of Sudan by the ICC, visit the ICC official website at *https://www.icc-cpi.int/darfur*, last accessed on 30 August, 2016.

in this thesis, it is important to give a background to the situation of Sudan. This will highlight some of the challenges that the ICC is currently facing when it comes to state cooperation.

1.2. Background to the problem

Al Bashir was indicted by the ICC for atrocities that were allegedly committed in the Darfur of Sudan[4] in 2003. He was one of the few longest serving Presidents in Africa, having come into power in 1989 through a military coup.[5] During his tenure, Sudan was embroiled in countless incidents of internal armed conflicts especially in the Darfur region. Of particular relevance to the ICC Prosecutor, are the attacks by the Sudanese Liberation Army (SLA) and the Justice and Equality Movement (JEM) at the El Fasher Airport. This incident is considered to be one that triggered the commission of atrocities by Government forces in the area.[6]

According to reports, the coming into power of Al Bashir was opposed by a number of tribes, including, the Fur, Masalit and the Zaghawa, who for a long time, felt that they were being marginalised.[7] These groups cited the 'appointment of a non-Darfurian to the governor of Darfur'[8] in 1980; the division of Darfur into three states by Al Bashir in 1994; and the 1995 enactment of

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[4] To read more about the Darfur region, see UN 'Report of the International Commission of Inquiry on Darfur to the Secretary-General, Pursuant to Security Council resolution 1564 (2004) of 18 September 2004' (25 January 2005) p 1-3, UN Doc. S/2005/60, ('Commission of Inquiry') online at *http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/WPS%20S%202005%2060.pdf*, last accessed on 11 February 2017; As regards full details of the 'jurisdiction in the general situation' and 'the context of "alleged crimes" committed in the Region', visit the ICC, 'Darfur, Sudan: Situation in Darfur, Sudan' online at *https://www.icc-cpi.int/darfur*, last accessed on the 11 February 2017.

[5]Al Bashir was removed from power on 11 April 2019 following protests 'and a prolonged sit-in outside military headquarters by civilian protesters against his rule. See Andrew Tchie 'How Sudan's Omar al-Bashir was forced out of power by protesters' *cbcafrica online* at *https://www.cnbcafrica.com/news/special-report/2019/04/12/how-sudans-omar-al-bashir-was-forced-out-of-power-by-protesters/*, last accessed on 19th September, 2019; for the earlier background information, see Howard LaFranchi, 'New Violence in Sudan, Darfur, One Years after the Indictment of Bashir', *Christian Science Monitor*, Mar 4, 2010, online at *https://www.csmonitor.com/USA/Foreign-Policy/2010/0304/New-violence-in-Sudan-Darfur-one-year-after-indictment-of-Bashir*, last accessed on 19 March, 2018; See also Julie Flint, 'Rhetoric and Reality: The Failure to Resolve the Darfur Conflict', *Smalls Arms Survey HSBA Working Paper* 19, January 2010, online at *http://www.smallarmssurveysudan.org/fileadmin/docs/working-papers/HSBA-WP-19-The-Failure-to-Resolve-the-Darfur-Conflict.pdf*, last accessed on 19 March 2018. See also Gwen P. Barnes, 'The International Criminal ICC's Ineffectiveness: The Indictment of President Omar Al Bashir', (2011) 34 *Fordham Int'l L. J*. 1584.

[6] See The 'ICC prosecutor's Summary to the application for a Warrant of Arrest' online at *https://www.icc-cpi.int/darfur/albashir*, last accessed on 28 September, 2017; see also African Union, *Report of the African Union: High-Level Panel on Darfur, Press Release* 29 October, 2009, p 93. The report is available online at *http://www.refworld.org/docid/4ccfde402.html*, last accessed on 19 March 2018.

[7] Gwen P. Barnes, 'The International Criminal ICC's Ineffective Enforcement Mechanisms: the Indictment of President Omar Al Bashir', (2011) (34) 6 *Fordham Int'l L.J*. P 1585-1619, p1603-1604.

[8] Gwen P. Barnes, *ibid*. p 1604.

a 'reform that shifted the power of the electoral college in west Darfur so that the majority were non-Masalits'[9] as some examples of marginalisation. The attacks of El Fasher Airport by the SLA and the JEM, were a response to the alleged marginalisation of these tribes by the government of Sudan.[10]

As a response to that attack, the Sudan Peoples' Armed Forces and their militia, the Janjaweed; the Sudanese Police Forces; the National Intelligence and Security Service; and the Humanitarian Aid Commission launched counter-insurgency against the SLA, the JEM and other minority groups opposing the presidency of al Bashir.[11] The counter-insurgency led to widespread and systematic killings and alleged genocide of innocent civilians in the Darfur region of Sudan.[12]

The continued violence in the Darfur region of Sudan caught the eye of a number of UN bodies, including, the UN High Commissioner for Human Rights (OHCHR), who established a High-Level Mission to investigate the human rights situation in the Darfur.[13] The report that was released by the High-Level Mission was so damning of the human rights situation in Darfur, disclosing that the Sudanese government has failed to protect its citizens and that it was also actively participating in human rights violations against its people.[14] The High-Level Mission also established that the Sudanese government and its allies were committing massive and gross human rights violations, possibly amounting to war crimes and crimes against humanity.[15] As a result, the High-Level Mission made a number of recommendations, including, that the UNSC should take action, with the support of the ICC, to hold those responsible for the large scale violations of human

[9] Gwen P. Barnes, *ibid*, p 1604.
[10] Gwen P. Barnes, op cit, fn. 7.
[11] *Ibid.,* p, 1603, online at *http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2313&context=ilj*, last accessed on 16 March 2017; For more on this see also the Indictment of President Al Basher at the ICC official website, online at *https://www.icc-cpi.int/ICCRecords/CR2009_01517.PDF*, last accessed on 16 March 2017.
[12] For a comprehensive facts on the Al Bashir case read the *Prosecutor v Omar Hassan Ahmad Al Bashir ("Omar Al Bashir") (Warrant of Arrest for Omar Hassan Ahmad Al Bashir)*, 4 March 2009, ICC-02/05-01/09, pp 3-8, online *https://www.icc-cpi.int/CourtRecords/CR2009_01514.PDF*, last accessed on 27 February, 2019.
[13] See UN, 'Report of the High-Level Mission on the situation of Human Rights in Darfur pursuant to Human Rights Council decision S-4/101', 7 March, 2007, UN Doc. A/HRC/4/80, p 2 of the summary of the report, online at *https://reliefweb.int/sites/reliefweb.int/files/resources/EB95760E6AFC48DEC125729C00399295-Full_Report.pdf*, last accessed on 25 February, 2019 , last accessed on 20 September, 2017.
[14] See Report of Commission of Inquiry, op cit fn. 4 online at *http://www.un.org/news/dh/sudan/com_inq_darfur.pdf*, last accessed on 25 November, 2019, See paras 630-639 of the Report
[15] See *ibid*. para 630; See also OHCHR, 'Report of the United Nations High Commissioner for Human Rights and follow-up to the World Conference on Human Rights: Situation of Human Rights in the Darfur Region of the Sudan' p 97-107, UN Doc. E/CN.4/2005/3, 7 May 2004. Full Report available online at *https://undocs.org/E/CN.4/2005/3*, last accessed on 20 September 2017.

rights and humanitarian law accountable.[16] The High-level Mission also observed that considering the seriousness of the situation in the region, the international community had the 'responsibility to protect the peoples of Darfur'[17] and end the rampant impunity which was then prevailing in the area.

A few months after receiving the report of the OHCHR, the UNSC, pursuant to resolution 1566 (2004), agreed that the situation in Sudan constituted a threat to international peace and security and, acting under Chapter VII of the UN Charter, demanded that,

> '[t]he government of Sudan fulfil its commitments to disarm the Janjaweed militias and apprehend and bring to justice Janjaweed leaders and their associates who have incited and carried out human rights and international humanitarian law violations and other atrocities…'[18]

Through the same resolution, the UNSC invited the Government of Sudan to cooperate with the High Commissioner for Human Rights. The UNSC stated as follows:

> 'W*elcomes* the work done by the High Commissioner for Human Rights observers to Sudan and *calls upon* the Government of Sudan to cooperate with the High Commissioner in the deployment of these observers;'[19]

Despite the foregoing calls for action, the Government of Sudan still failed to meet its obligations[20] and stop the atrocities. As a result, the UNSC, on 18th September, 2004, adopted a Resolution, 1564 (2004)[21] which, *inter alia*, requested the Secretary General of the United Nations to

> '[r]apidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all Parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.'[22]

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[16] See OHCHR, Report of the United Nations High Commissioner for Human Rights…' op cit, fn. 13, p 3-5 of the summary of the Report; See also UN 'Report of the International Commission of Inquiry…' op cit, fn 44, para 630

[17] See *ibid*, p. 25 ,

[18] UNSC Res. 1556 (2004), (30 July 2004) UN Doc S/RES/1556 para 6; See also Happold, 'Darfur, The Security Council, and the International Criminal ICC', (2006) 55 *Int. Comp. L. Q*., 226 at p 228; The resolution can also be accessed online at *http://www.un.org/press/en/2004/sc8160.doc.htm*, last accessed on 15 September, 2017.

[19] UNSC Res. 1556 (2004), (30 July 2004) UN Doc S/RES/1556, para 4.

[20] See Happold, 'The Security Council, and the International Criminal ICC', Op cit.,fn 18, p 228 and also UNSC Res 1564 (2004), Ibid. para 1. See also UN, 'Commission of Inquiry, op cit, fn 4 para 1 of the executive summary.

[21] The full content of the Resolution can be found at *http://www.un.org/press/en/2004/sc8191.doc.htm*, last accessed on 31st December 2015

[22] UNSC 1564 (2005) (18 Sept. 2004), UN Doc. S/RES/1564, para 12; See also UNSC Res. 1593 (2005), (31 March 2005), UN Doc. S/RES/1593 (2005).

By October 2004, the UN Secretary General appointed a team led by Antonio Cassese[23] to investigate the human rights situation in the Darfur region. The Commission was given a number of tasks including '…suggesting means of ensuring that those responsible for [human rights] violations are held accountable'.[24] The Commissioners were also directed to identify 'the perpetrators of violations'[25] 'with a view with a view to ensuring that those responsible were held accountable'.[26] The Commission complied with the UNSC directive and published their findings which confirmed the existence of widespread and systematic human rights violations in the Darfur region of Sudan. The Commission recommended that the ICC should investigate the atrocities and prosecute those found responsible for the commission of the crimes.

As for the reasons why the ICC should be involved when Sudan is not a contracting-party to the Statute, the Commission provided a number of reasons.[27] Firstly, they were of the view that since the ICC 'was established with an eye to crimes likely to threaten peace and security',[28] it was the appropriate institution to hold those responsible to account. It is clear from this justification that the UNSC referral had Chapter VII of the UN Charter and Article 13 of the Statute discussed above in mind.[29] Candorelli and Ciampi have also observed that although the Commission did not,

> '[m]ention article 13 of the Rome Statute, [their recommendation that the Security Council] should refer the situation to the ICC falls under and –it is submitted-fully conforms with the conditions laid down there under (on the conditions for the referrals by the Security Council […] .'[30]

Secondly, the Commission was also of the view that the ICC jurisdiction could be invoked because the:

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[23] Other members of the Commission were Mohamed Fayek, Hina Jilani, Dumisani Ntsebeza and Therese Striggner-Scott. For more on the Commission of inquiry see the report online at *http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/WPS%20S%202005%2060.pdf*, last accessed on 12 January 2016.

[24] Report of the Commission of Inquiry, op cit. fn 4, see the executive summary, para 1.

[25] Commission of Inquiry Report, op cit, fn 4.para 630

[26] Commission of Inquiry Report, op cit, fn 4, para 6; see also UNSC 1593 (2005), op cit.

[27] Commission of Inquiry Report, op cit, fn 4, para 575, p 145

[28] See Commission of Inquiry Report, op cit, fn 4, para. 572, p 145

[29] See UNSC Res.1593 (2005), para 5 and 6 of the Preamble to Resolution. See also UNSC Res. 1547 (2004) (11 June 2004) UN Doc. Res/1547/2004; UNSC Res. 1556 (2004), (30 July 2004) UN Doc S/RES/1556/2004; UNSC 1564 (2005) (18 Sept. 2004), UN Doc. S/RES/1564/2004; UNSC Res. 1074 (1996) (1 October, 1996), UN Doc. Res. S/RES/1074/1996; UNSC Res. 1585 (2005), (10 March 2005), UN Doc. Res S/RES/1588/2005; UNSC Res. 1590 (2005), (29 March 2005), UN Doc. S/Res/1591/2005.

[30] L. Condorelli and C. Ciampi, op cit at p 592. See also L. Condorelli and Villalpando, 'Referral and Deferral by the Security Council' in Cassese et al (eds.), *The Rome Statute for an International Criminal ICC: A Commentary*, (2002) 627-664 at 630 ff.

> '[…] investigation and prosecution in the Sudan of persons enjoying authority and prestige in the country and wielding control over the State apparatus, is difficult or even impossible, resort to the ICC, the only truly international institution of criminal justice, which would ensure that justice, be done.'[31]

Thirdly, the Commission was also of the view that the authority of the ICC with an 'international composition and a set of well-defined rules of procedure and evidence',[32] backed up by the UNSC; might compel both leading personalities in the Sudanese Government and the heads of rebels to submit to investigation and possibly criminal proceedings as they would be assured of fair trial.[33] The Commissioners were also persuaded by the fact that the jurisdiction of the ICC 'could be activated immediately, without any delay (which would not be the case if one were to establish *ad hoc* tribunals or so called mixed or internationalized courts)'.[34] Finally, the Commissioners were of the view that 'the institution of criminal proceedings before the ICC, at the request of the Security Council, would not necessarily involve a significant burden for the international community.'[35]

The Commissioners, according to the exposition above, clearly applied the principle of complementarity for their first justification. Indeed as the suspects were individuals who have authority and power, it is most likely that the Sudanese judiciary or authorities would have been unable to investigate, let alone, prosecute them hence the second justification. As for the third justification, the Commissioners' interpreted the powers of the UNSC when acting under Chapter VII of the UN Charter, in that, once a situation has been categorised as a Chapter VII situation, the UNSC can compel states to cooperate with the ICC since their obligation arises by virtue of their membership to the UN Charter.[36]

Finally, since the ICC was already in operation at the time the UNSC appointed the Commission, it would have meant that the international community will not require a separate legal framework to hold the suspects accountable. In that regard, the Commission observed that since 'the ICC is the first international Court capable of trying individuals accused [of international crimes],'[37] it is the appropriate body to handle the situation. The absence of any other international

[31] Commission of Inquiry, op cit, fn. 4, para 572.
[32] *Ibid*. para 648
[33] *Ibid*.
[34] Commission of Inquiry, op cit, fn. 4, para 572.
[35] Commission of Inquiry, op cit, fn. 4, par 572, p 145-146.
[36] See Erika de Wet, 'The Implications of President Al-Bashir's visit to South Africa for International and Domestic Law", (2015) 13 (5) *J. Int'l Cr. J.* 1049-1071.
[37] Commission of Inquiry, op cit, fn. 4 para 571.

criminal court at the time, therefore, compelled the Commissioners to recommend the ICC. One would argue, in light of the foregoing reasons, that the Commissioners were persuaded by a number of factors to reach their conclusions. First, they were compelled by the objective of the ICC being the fight against international crimes and impunity, in particular, against those who hold positions of power. Second, the Commissioners were compelled by the ability of the ICC to independently investigate the crimes allegedly committed in the region and prosecute those responsible. Further, the ICC was the ideal forum because of the nature of the crimes which were within its jurisdiction. Finally, it was easy for the Commissioners to propose the ICC because the crimes were allegedly committed after the coming into force of the Rome Statute hence the situation would not have been barred by rules against retrospectivity.[38]

When the UNSC received the Commission's report, it proceeded to adopt and issue a resolution where it referred the situation in Darfur to the ICC and ordered that 'the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully and provide any necessary assistance to the ICC and the Prosecutor…'[39] The UNSC also decided that '…while recognising that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organisations to cooperate fully.'[40] The resolution specifically encouraged all states parties to the UN Charter to cooperate with the ICC. However, it did not oblige them to do so. The resolution, however, obliged the Sudan Government to cooperate with and assist the ICC on this matter. Following the referral, Al Bashir was indicted of the crimes against humanity, genocide and war crimes.

The referral and subsequent indictment of Al Bashir was a remarkable and 'landmark event'[41] in the existence of the ICC because it involved Sudanese high profile individuals who hold positions of power and decision making in government and society. The indictment went a long way in making the ICC realise the vision of the framers of the Statute that those individuals who are in position of power and stature in society must be held accountable once they commit

[38] It is also interesting to observe that the Chair of the Commission actively participated in the negotiation of the Rome Statute and the coming into fruition of the ICC. One cannot, therefore, overlook the fact that he would have been motivated by the need to use the machinery of the institution that he was actively involved in its creation to try the crimes that his commission had identified.

[39] UNSC Res. 1593 (2005), op cit fn 29, para 2. Also available online at *https://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf*, last accessed on 12 August 2017.

[40] UNSC Res. 1593 (2005), *Ibid*, para 2 of the UNSC Resolution

[41] Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest' (2009) 7 *J. Int. Cr. Just*. 315-332, p. 332

international crimes. By focusing on individuals who are of high standing in society, the framers of the Statute believed that the ICC stands a better chance of ending impunity, heinous crimes; and unnecessary and avoidable conflicts as these individuals hold the key to decision making in these societies.

Despite the arrest warrants, Al Bashir has visited a number of countries without being arrested. The failure by these states to arrest Al Bashir has led to the biggest controversy under international law since the coming into force of the Rome Statute on how resolution 1593(2005) must be interpreted and enforced. Commentators have provided different interpretations of the meaning of resolution 1593(2005).[42] With respect to state cooperation, there are those who believe that the resolution had put both contracting and non-contracting states to the Statute in a similar position.[43] On the other hand, there are those who believe that since the resolution expressly compelled Sudan *only* to cooperate with the ICC, it cannot be concluded that all states parties to the UN Charter have an obligation to cooperate with the ICC.[44] The PTC II held in the *Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under obligation to immediately arrest and surrender Omar Al Bashir, The Prosecutor v Omar Hassan Ahmad Al Bashir* (hereinafter referred to as the '*South Africa Cooperation Decision')*[45] that the resolution imposes an obligation on both contracting and non-contracting states to the Statute to cooperate with the ICC in arresting and surrendering Al Bashir to the ICC.[46] The ICC

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[42] See, for example, See Korwa Gombe Adar, 'The International Criminal ICC and the Indictment of Omar al-Bashir: Implications for Sudan', *African Institute of South Africa Policy Briefing Number 10*, 2010, 10 February, 2010, p.1-8 available online *at http://www.ai.org.za/wp-content/uploads/downloads/2011/11/No-10.-The-International-Criminal-ICC-and-the-Indictment-of-President-Omar-al-Bashir.pdf*, last accessed on 12th September 2016; Alex de Waal and Gregory H. Stanton, 'Should President Omar Al Bashir of Sudan be Charged and arrested by the International Criminal ICC?' (2009) 4 (3) *Genocide Studies and Prevention*, online at *http://www.genocidewatch.org/images/ByStanton_Should_President_Omar_al-Bashir_of_Sudan_be_charged_and_arrested_by_the_International_Criminal_ICC.doc*, last accessed on 12 June 2016.

[43] See Erika de Wet, op cit., fn. 36. 1049-1071.

[44] Compare Goran Sluiter, 'Obtaining Cooperation from Sudan-Where is the Law?' (2008) 6 *JICJ*, 876-877; Ntombizozuko Dyani-Mhango, 'The ICC Pre-Trial Chamber's decision on Malawi regarding the failure to arrest and surrender President Al Bashir of Sudan: An opportunity missed', (2013) 28 *SAPL* 106-120.

[45] *Prosecutor v Omar Hassan Ahmad Al Bashir (Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir),* (ICC-02/05-01/09-309), Pre-Trial Chamber II, 11 December, 2017, also available online at *https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-309*, last accessed on 31 August 2018.

[46]See *Decision Following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under obligation to immediately arrest and surrender Omar Al Bashir, The Prosecutor v Omar Hassan Ahmad Al Bashir,* (ICC-02/05-01/09), Pre-Trial Chamber II, 13 June 2015; *Prosecutor v Omar Hassan Ahmad Al-Bashir (Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir),* Pre-Trial Chamber II, 6 July, 2017.

Appeals Chamber in the *Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir* (hereinafter referred to as the '*Jordan Appeals Case'),*[47] has finally settled and held that this position is, not only good law, but is also supported by customary international law.[48]

It is, therefore, sad to note that the interest that the indictment had created has died down as the ICC has so far failed, in some respects, to achieve its intended result.[49] Al Bashir and his accomplices remain free, violence and grave crimes still continue in Darfur.[50] Several states like China[51] have openly defied the UNSC resolutions. The same can also be said of regional organisations like the African Union (AU)[52] that have also failed to cooperate with the ICC by refusing or failing to execute the ICC's warrant of arrest. The narrative put forward was that the

[47] See See *Judgment in the Jordan referral re Al- Bashir Appeal,* Appeals Chamber, 6 May 2019, available online at *https://www.icc-cpi.int/CourtRecords/CR2019_02856.PDF,* last accessed on 21 September 2019. Jordan appealed against this decision and its grounds of Appeal can be found online at *https://www.icc-cpi.int/CourtRecords/CR2018_01658.PDF*, last accessed on 31 August 2018.

[48] See *Judgment in the Jordan referral re Al- Bashir Appeal,* para 7, Appeals Chamber, 6 May 2019, available online at *https://www.icc-cpi.int/CourtRecords/CR2019_02856.PDF*, last accessed on 21 September 2019.

[49] See the remarks of the ICC prosecutor, Ms. Fatou Bensouda, on the presentation of her twenty-third report on the Darfur Situation to the Security Council: See United Nations, 'Reports of the Secretary General on the Sudan and South Sudan', (9th June 2016), UN Doc. S/PV.7710, p 2, also available online at *http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7710.pdf,* last accessed on 12th September 2016 ; International Commission of Inquiry Report, op cit, fn. 4; Stephens D and Nastevski V, 'To arrest or not arrest the incumbent head of state: The Bashir case and the interplay between Law and Politics' (2016) 42 (3) *Monash Uni. L.R.* 740-782

[50] Ibid.

[51] See BBC, 'China defends visit by Sudan President Omar al-Bashir' *BBC News online*, 21 June, 2011, accessed at *https://www.bbc.co.uk/news/world-africa-13857894*, last accessed on 29 August 2018; See also The Sudan Tribune, 'Sudan's al-Bashir to visit China in September', 9 June 2018, online accessed at *http://www.sudantribune.com/spip.php?article65602*, last accessed on 29 August, 2018. See also International Federation for Human Rights, ('Fidh') 'China: Open Letter to Chinese Authorities Concerning President Omar Al Bashir's visit to China' *Press Release*, 29 August 2015, accessed online at *https://www.fidh.org/en/region/asia/china/china-open-letter-to-chinese-authorities-concerning-president-omar-al*, last accessed on 29 August 2018.

[52] See African Union, 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal ICC (ICC)', 1-3 July, 2009, Assembly, Doc. Assembly/AU/13(XIII), decision adopted on 8 July, 2009. The decisions are also available online at *https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf*, last accessed on 30 September, 2017; AU's 2010 resolution which requested the UN to defer the prosecution of President Al Bashir pursuant to article 16 of the Rome Statute. See also Dapo Akande, 'The African Union's Response to the ICC's Decisions on Bashir's Immunity: Will the ICJ Get another Immunity Case?' (2012) *EJIL*, online at *https://www.ejiltalk.org/the-african-unions-response-to-the-iccs-decisions-on-bashirs-immunity-will-the-icj-get-another-immunity-case/*, last accessed on 30 September, 2017.

ICC is a neo-colonial body targeting African leaders.[53] The AU has also adopted a strategy to withdraw from the ICC and it is yet to be seen as to how many countries will heed to these calls.[54] The AU also resolved to approach the International Court of Justice (ICJ) through the United Nations General Assembly ('UNGA') to seek an advisory opinion of the ICJ on the implications of Articles 27 (2) and 98 (1) of the Statute.[55] The UNSC and the ASP have also failed to respond to 'countless appeals' by the OTP to take action against those states that have failed to comply with the ICC's request to arrest and surrender Al Bashir.[56] The failure by the UNSC and the ASP to take action against non-complying states can be attributed to political reasons exemplified by differences of opinion and the threat by some permanent members to use their veto power.[57]

This can also be seen from the debates of this matter at the UNSC. For example, during the consideration of the ICC Prosecutor's twenty-third report to the Security Council in 2016, Mr.

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[53] The AU also cited the UNSC's refusal to defer the prosecution of the sitting Presidents of Sudan and Kenya as a justification for inviting their members to object to any cooperation with the ICC. See African Union, *Communiqué of the 142nd Meeting of Peace and Security Council, Communique PSC/Min/Comm. (CXLII),* 21 July 2008, Paras 4-11, available online at *http://www.iccnow.org/documents/AU_142-communique-eng.pdf*, last accessed 11September 2016; also see the AU, Resolution of the AU Summit, 'Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC), Assembly, AU Doc. AU/Dec 245 (XIII), available online at *http://www.au.int/en/decisions/assembly-african-union-thirteenth-ordinary-session*, last accessed on 11 September 2016; Again see the remarks of the Mr. Zagaynov, delegate of the Russian delegation to the UNSC in response to the remarks of the ICC prosecutor in United Nations, 'Reports of the Secretary General on the Sudan and South Sudan, 2016', UN Doc.S/PV.7710, p 4-5; See also Petrovic J, Stephens D and Nastevski V, 'To arrest or not arrest the incumbent head of state: The Bashir case and the interplay between Law and Politics' (2016) 42 (3) *Monash Uni. L.R.* 740-782.

[54] See African Union, 'Decision of the Meeting of State Parties to the Rome Statute of the International Criminal Court', 1-3 July 2009, Assembly, AU Doc. Assembly/AU/13(XIII), which was in the following terms: 'DECIDES that in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan', available online: *http://www.africa-union.org/root/au/conferences/2009/july/summit/decisions/ASSEMBLY%2AU%20DEC%20243%20-%20267%20(XIII)%20_E.PDF*, last accessed on 26 February, 2019.

[55] See African Union, 'Decision of the Assembly of the Union', 28-29 January 2018, Assembly, AU Docs. Assembly/AU/Dec.665-689(XXX); Assembly/AU/Decl.1-4(XXX); Assembly/AU/Res.1(XXX), available online at *https://au.int/sites/default/files/decisions/33908-assembly_decisions_665_-_689_e.pdf*, last accessed on 29 August 2018; See also Nabil M. Orina, 'Should the ICJ render an advisory opinion on the immunity question re Articles 27 and 98 of the Rome Statute?', 24 March 2018, online at *https://www.icjafrica.com/single-post/2018/03/24/Should-the-ICJ-render-an-advisory-opinion-on-the-immunity-question-re-Articles-27-98-of-the-Rome-Statute*, last accessed on 29 August 2018.

[56] See ICC, 'Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)', 20 June 2018, *Press Release*, available online at *https://www.icc-cpi.int/Pages/item.aspx?name=180620-otp-stat*, last accessed on 29 August 2018. See also the Remarks of the ICC Prosecutor, Ms. Fatou Bensouda on the presentation of her twenty-third report on the Darfur Situation to the Security Council. See United Nations, Reports of the Secretary General on the Sudan and South Sudan', 9 June, 2016, UN. Doc.S/PV.7710, p 2. *Also available online at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7710.pdf*, last accessed on 12th September 2016.

[57] See Ntombizozuko Dyani-Mhango, 'The ICC- Pre-Trial Chamber's Decision on South Africa's Failure to Arrest and Surrender President Al Bashir: South Africa Escapes 'Sanctions'!' (2017) *Afr. Yrbk Int'l Human. L,* 37, 70-76.

Zagaynov, a representative of the Russian Federation, alluded to differences of opinion among UNSC members on the implementation of Al Bashir indictment. The representative of Russia observed that there was 'no consensus, even among State parties to the Rome Statute, when it comes to implementing certain arrests warrants issued by the ICC.'[58] He further remarked that:

> 'In a number of cases, the African Union and its members have pointed to contradictions between ICC requirements and their own obligations under international law concerning the immunity [of] senior State officials. We understand the position of African countries on the issue of the ICC. We think it is justified. Unfortunately, as has been demonstrated in practice in recent years, not all members of the Council are ready to heed that position. Our delegation was interested in the initiative to establish a special ministerial committee of the African Union to address the concerns of African countries with regard to the ICC. We also supported the idea of convening a dialogue between the Security Council and representatives of such a committee. We hope there will soon be such a meeting in New York.'[59]

The Russian representative then went on to doubt the credibility of information on civilian victims and displaced persons submitted by the Prosecutor as not being 'corroborated by the Office for the Coordination of Humanitarian Affairs (OCHA)'.[60] When these comments are compared to the sentiments of Ms. Sornarajah, United Kingdom representative to the UNSC, one clearly sees the political differences existing at the UNSC level on this subject. The UK representative congratulated 'the Prosecutor for the progress her Office made to advance its investigations' despite facing numerous challenges.[61] The ICC prosecutor also received warm responses from the other members of the Council like the United States of America.[62]

The indictment of Al Bashir and other officials also led to the Government of Sudan, other states and the AU to react in a negative way against the ICC in general.[63] Sudan started to openly

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[58] See Report of the Prosecutor to the ICC to the UNSC, UN Doc S/PV.7710, op cit fn. 49, p 4-5.

[59] *Ibid*.; See also the recent report of the 7963rd Meeting of the Security Council which showed that members of the Council were split on how to handle the case of the Sudan's President and his accomplices. For an elaborate report on this, see *United Nations Meetings Coverage and Press Release report* of 8 June 2017, titled 'Culture of Impunity Must End for Justice to Prevail in Darfur, International Criminal ICC Prosecutor Tells Security Council', available online at *https://www.un.org/press/en/2017/sc12863*, last accessed on 19 January 2017.

[60] *Ibid* p 5

[61] ICC, 'Statement to the United Nations Security on the Situation in Darfur, pursuant to UNSCR 1593(2005)', 20 June 2018, *Press Release*, online at *https://www.icc-cpi.int/Pages/item.aspx?name=180620-otp-stat*, last accessed on 27 February, 2019.

[62] *Ibid*.

[63] C/f the Reports of the ICC Prosecutor to the UNSC which details the genesis of the issues, Government of Sudan's level of cooperation and how it eventually changed its position regarding the ICC. See ICC, 'Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council pursuant to UNSCR 1593 (2005). This was the first Report of the Prosecutor of the International Criminal Court to the Security Council pursuant to UNSCR 1593 (2005), online at *https://www.icc-cpi.int/NR/rdonlyres/CC6D24F9-473F-4A4F-896B-01A2B5A8A59A/0/ICC_Darfur_UNSC_Report_290605_EN.pdf*, last accessed on 16 September 2017. See ICC,

and forcefully defy calls for the surrender of its President and this led to the then UN Secretary General issuing a Statement calling for states to support the ICC and UNSC resolution.[64] He also called upon the Government of Sudan to cooperate fully with all UN entities regarding the arrest warrant.[65] The UN Secretary General's statement was openly defied, as the Government of Sudan continued to refuse cooperation.[66] As a response, the Prosecutor reiterated the request for assistance from the UNSC to force Sudan to cooperate. It also increased its campaign for support from all UN member States when presenting to the UNSC its 9th report on 5 June 2009.[67] In the report, it was also proposed that the UNSC must devise a framework for implementing UNSC 1593 (2005) as a way of enhancing state cooperation.[68]

On 3 July 2009, the AU, acting against the OTP's actions and UNSC resolutions on Sudan, met in Libya where they adopted the following resolution:

> 'Decide[d] that in view of the fact that the request by the African Union [to the UN Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of the ICC, has never been heard nor acted upon], the AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar Al Bashir of the Sudan.'[69]

'Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)', 14 June 2006, online at *https://reliefweb.int/sites/reliefweb.int/files/resources/89C3AEAF4A935E47C125718E0037367E-icc-sdn-14jun.pdf*, last accessed on 16 September, 2016. See also ICC, 'Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)', 5th December, 2007, online at *https://www.icc-cpi.int/NR/rdonlyres/D084A825-A985-4068-8320-5724AA894430/277791/OTPRP20071205UNSCENG.pdf*, last accessed on 11 September, 2017. See ICC, 'Eleventh Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), online at *https://www.icc-cpi.int/NR/rdonlyres/A250ECCD-D9E5-433B-90BB-76C068ED58A3/282160/11thUNSCReportENG1.pdf*, last accessed on 19 September, 2016

[64] See UN, 'As ICC Arrest Warrant issued for Sudan's President, Secretary-General says United Nations Vital Peacekeeping, Humanitarian Work in Country will continue', *Press Release*, 4 March 2009, UN Doc. SG/SM/12123-AFR/1820-L/3140. An excerpt can be accessed online at *https://www.un.org/press/en/2009/sgsm12123.doc.htm*, last visited 1 September, 2018.

[65] See ICC, 'Ninth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)', 18 May, 2009, para 34-39, online at *https://www.icc-cpi.int/NR/rdonlyres/C6FE9E52-4845-41BA-A45D-75BA41D8647C/280448/9th_UNSCReport_Eng1.pdf*, paras 51- 73 and 77 of the Report. See also ICC, 'Eighth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005),' 3 December, 2009 online at *https://reliefweb.int/sites/reliefweb.int/files/resources/8EB73BE261BDB2A5852575140079B305-Full_Report.pdf*, last accessed on 24 February, 2019, para 102.

[66] See ICC 'Ninth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)', 18 May, 2009, para 34-39, online at *https://www.icc-cpi.int/NR/rdonlyres/C6FE9E52-4845-41BA-A45D-75BA41D8647C/280448/9th_UNSCReport_Eng1.pdf*, last accessed on 30 September, 2018.

[67] See Ninth Report of the Prosecutor, *ibid.*

[68] See Ninth Report of the Prosecutor, op cit, fn.66 para 75 of the Report.

[69] See African Union, *Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, 1-3 July 2009, AU Doc. Assembly/AU/Dec.245(XIII), at

The AU's resolution was a reaction to the UNSC's failure to deal with a request it had sent calling for the suspension or deferment of the prosecution of Al Bashir by the ICC.[70] When the UNSC failed to act on the said request, the AU Assembly, as the supreme organ of the organisation, adopted a series of resolutions against the ICC.[71] The resolutions are binding on member states and must be fulfilled accordingly. It may also be observed that the above concerns led to the AU Assembly to object to the ICC's opening of a liaison office in Addis Ababa, Ethiopia, where the AU headquarters is based.[72] During the same period, the AU recalled the provisions of Article 23(2) of the Constitutive Act, which obliges member states to 'comply with the decisions and policies of the Union' and decided not to be coerced into cooperating with the ICC as it would entail a breach of their obligations under the Constitutive Act of the AU.[73]

It appears that some African states, both contracting and non-contracting parties to the Statute, have defied calls for cooperation with the ICC to arrest Al Bashir. This is shown by the increasing numbers of states who have welcomed him into their countries despite the indictment. Speaking when presenting her Twenty-Sixth Report on the situation in Darfur to the UNSC, the

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https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf, last accessed on 11 February, 2018; African Union, 'On the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the alleged failure by the Republic of Chad and the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of President Omar Hassan Al Bashir of the Republic of Sudan', 9 January, 2012, *Press Release No. 002/2012*, online at *http://www.iccnow.org/documents/PR-_002-_ICC_English_2012.pdf* , last accessed on 19 February, 2019; See also Djacoba Liva Tehindrazanarivelo, 'The African Union Principle on the Fights Against Impunity and the Arrest Warrants for Omar Hassan El-Bashir' in Marcelo Kohen et al, eds. *Perspectives of International Law in the 21st Century*, 2012, p 397, 435; See African Union, on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC)' 29-30 January 2012, AU Doc. *Assembly/AU/Dec.391-415 (XVIII)*. See ICC Assembly of States Parties, 'Report of the Bureau on non-cooperation: Note to the Secretariat', 1 November, 2012, ICC Doc. ICC-ASP/11/29, available online at *https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-29-ENG.pdf*, last accessed was on 19 February, 2019.

[70] See African Union, Assembly 'AU.Doc. Assembly/AU/Dec.245(XIII) Rev. 1, op cit, fn.69, para 9 of the decision.

[71] See also African Union, *Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the International Criminal Court (ICC)*, 2 February 2010, Assembly, AU.Doc. Assembly/AU/8(XIV), Assembly/AU/Dec.270 (XIV); African Union, *Decision on the Progress Report of the Commission on the Implementation of Decision, Assembly/AU/Dec.270(XIV on the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/10(XV)*, 25-27 July, 2010, Assembly/AU/Dec.296(xv); African Union *Decision on the Implementation of the Decisions on the International Criminal Court (ICC)*, 30-31 January 2011, Assembly, AU Doc. EX.CL/639(XVIII); Assembly Dec. 334(XVI).

[72] See Ninth Report of the Prosecutor, op cit., fn. 66, para 70.

[73] See African Union, 'Decision on the Meeting of African States Parties to the Statute of the International Criminal Court (ICC)', Assembly, AU Doc. Assembly/AU/13(XIII), Assembly/AU/Dec.245(XIII) Rev.1, see Para 10 of the Decision also available online at *https://au.int/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf*, last accessed on 22 March 2018.

Prosecutor Fatou Bensouda, lamented the lack of cooperation by AU Member states as follows:

> 'In the Darfur situation, effecting warrants of arrest remains a difficult challenge and a crucial area where greater collaboration is sorely needed. The entire judicial machinery of the Court can be frustrated and held in abeyance unless persons sought by the ICC appear before it.
>
> Similarly, States Parties receiving suspects the Court seeks to arrest cannot become 'business as usual'; not least out of respect for the suffering of victims and their yearning for accountability, and in the interest of greater enforcement of international justice.'[74]

Some of the countries that continue to defy the ICC's request for cooperation include countries whose cases had already been referred to the UNSC and ASP as per the terms of Article 87(7) of the Statute. For instance, the Prosecutor informed the UNSC of the failure of the Republic of Uganda to arrest President Al Bashir despite the country having already been referred to the UNSC for non-cooperation. In her words,

> '[i]n this regard, in relation to other States Parties, most recently, the Republic of Uganda, despite having been referred to this Council in July 2016 for its failure to arrest and surrender Mr Al Bashir to the Court while he was on Uganda territory in May 2016, once again invited and hosted Mr Al Bashir during the week of the 13th of November.'[75]

As can be observed from above, the failure by states, both contracting and non-contracting parties to the Statute, to cooperate with the ICC is also encouraged by permanent members of the UNSC and regional bodies like the AU. The ICC prosecutor confirmed this observation when she delivered the following Statement to the UNSC where she highlighted ICC's concerns on state cooperation:

> 'I regret to note that over the years my reports have highlighted the consistent failure of the Council to act when a number of States Parties to the Rome Statute have welcomed Mr Omar Al Bashir as an ICC suspect to their territories.'[76]

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[74] ICC 'Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), *Press Release*, 12 December, 2017, paras, 3-4, online at *https://www.icc-cpi.int/Pages/item.aspx?name=171212-otp-stat-UNSC*, last accessed on 2 July 2017. ; ICC, 'Twenty-sixth report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005)', 12 December 2017, online *https://www.icc-cpi.int/itemsDocuments/26-rep-UNSCR_1596_ICC-OTP_Eng.pdf*, last accessed on 2 July 2017

[75] ICC, 'Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), *ibid*. para 21

[76] *Ibid*. para 5

The above statement puts in perspective the challenges facing the ICC today that states, either deliberately fail or ignore to cooperate with the ICC in arresting and surrendering Al Bashir for prosecution. This thesis attempts to provide solutions for addressing these challenges.

1.3. Jurisprudence of the PTC following Failure by the States to arrest Al Bashir

It may be observed that a number of states have been summoned by the PTC of the ICC to provide reasons on why they failed to arrest Al Bashir when he visited their territories. Al most all the states summoned have justified their failure to arrest Al Bashir by citing a number of reasons including the existence of conflicting obligations due to the fact that Al Bashir is a sitting head of state from a non-contracting state who enjoys immunities from arrest.[77] They have particularly cited the provisions of Articles 27(2) and 98(1) of the Statute.[78] Their argument is that the two provisions provide for conflicting obligations when it comes to how states deal with a request for the arrest and surrender of a suspect who enjoys immunities and their obligation to accord him privileges and immunities.[79]

States have also relied on the wording of UNSC resolution 1593 (2005) which referred the situation of Sudan to the ICC. They argued that the above resolution does not impose any obligations on states, except the Sudan, to cooperate with the ICC.[80] In short, almost all the states that were summoned by the ICC responded that Al Bashir enjoys immunity as a sitting head of state. They also have submitted to the ICC a number of specific reasons including that the latter did not adduce evidence of a waiver of Al Bashir's immunity from Sudan in line with the provisions of Article 98(2) of the Statute.[81] Some of the African states have also cited their obligations under the African Union's Constitutive Act and various domestic legislative provisions

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[77] *Prosecutor v Omar Hassan Ahmad Al-Bashir,* (*Decision on the Cooperation of the Republic of Malawi regarding Omar Al-Bashir's Arrest and Surrender to the ICC, the Prosecutor v Al Bashir)*, (ICC-02/05-01/09), Pre-Trial Chamber I, 12 December, 2011.

[78] Ibid.

[79] See Dyani-Mhango, who argues that these two provisions appear to be in tension with each other. See Ntombizozuko-Dyani-Mhango, 'Pre-Trial Chamber decision on Malawi…', op cit, fn. 44 . See also Paolo Gaeta, op cit., fn 41; See also Dire Tladi, 'The ICC Decisions on Chad and Malawi: on Cooperation, Immunities and Article 98' (2013) 11 (1) *J. Intel Crim. J.* 199-221.

[80] See *Prosecutor v Omar Hassan Ahmad Al-Bashir (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the ICC, The Prosecutor v Omar Hassan Ahmad Al Bashir), (ICC-02/05-01/09),* Pre-Trial Chamber II, 9 April 2014.

[81] See *Prosecutor v Omar Hassan Al-Bashir (Decision on the Cooperation of the Republic of Chad regarding Omar Al-Bashir's Arrest and Surrender to the ICC),* (ICC-02/05-01/09), Pre-Trial Chamber I, 13 December 2011.

that guarantee immunities for foreign Heads of State and Government.[82] South Africa also took issue with the lack of clarity on consultation procedures between the ICC and states as provided for in Article 97 of the Statute.[83]

On this justification, the PTC II of the ICC held, in the *South African Cooperation Decision,*[84] that states must first consult with the ICC when they face conflicting obligations at all times. The PTC II also settled that there is no conflict between states' obligation to comply with its request to arrest and surrender Al Bashir and their customary international law obligation to accord him privileges and immunities as a sitting head of state. This is because the UNSC made the statute applicable to Sudan by means of resolution 1593 (2005) working to remove the immunities that Al Bashir would have otherwise enjoyed under international law.[85] The PTC II reasoned that because resolution 1593 (2005) of the Statute made the Statute applicable to the situation in Sudan, Article 27 (1) of the Statute applied to remove any claims of immunity by Omar Al Bashir and, indeed, the Sudan.[86] In other words, UNSC resolution 1593 (2005) paved the way for Article 27 (1) of the Statute to be invoked so as to make the issue of immunities inapplicable under the Statute and, indeed enable the ICC have jurisdiction over the Sudan situation. The PTC II presented the above reasoning in the following way:

> '[…] the effect of a referral is to enable the ICC to act in the referred situation, and to do so under the rules according to which it has been designed to act. In other words, the only legal regime in which this ICC may exercise the triggered jurisdiction is the one which is generally applicable to it, its Statute in *primis*.'[87]

Prior to this decision, the PTCs of the ICC has, on more than one occasion held that states have an obligation to cooperate with the ICC and arrest Al Bashir. A number of reasons were advanced including that since Al Bashir was indicted by an international tribunal, international law creates an exception when those who enjoy immunities are indicted by an international tribunal for international crimes to allow the tribunal assume jurisdiction.[88] The PTCs of the ICC have also

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[82] For example, Malawi also relied on their domestic legislation, the Immunities and Privileges Act, Chapter 16:01 of the Laws of Malawi which provides for immunities and privileges for a visiting Head of State and Government

[83] See *Prosecutor v Omar Hassan Ahmad Al Bashir, (Decision Following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under obligation to immediately arrest and surrender Omar Al Bashir*, Pre-Trial Chamber II, (ICC-02/05-01/09), 13 June 2015.

[84] Ibid. See also *the South Africa Cooperation Decision,* op cit., fn. 46, paras 84-85 and 97 of the decision.

[85] See *the South Africa Cooperation Decision, ibid*, paras 84-85 and 97 of the decision.

[86] See *the South Africa Cooperation Decision, ibid*, paras 84-85 and 97 of the decision.

[87] *See The South Africa Cooperation Decision,* op cit, fn. 46, para 86.

[88] *Prosecutor v Omar Hassan Ahmad Al Bashir (Republic of Malawi case,* op cit., fn. 77, p 36, paras33-37.

held that states were obliged to cooperate with the ICC and arrest Al Bashir because the UNSC 'implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State'.[89]

The foregoing discussion, therefore, shows that despite the above decisions and settled position of the law, states still continued to host Al Bashir in total disregard of their Statute and Charter obligations. Some of the states that failed to cooperate with the ICC, after these decisions include the Hashemite Kingdom of Jordan ('Jordan'). Jordan failed to arrest Al Bashir when he visited the country to attend an Arab League Summit and, as a consequence, it was summoned to appear before the PTC II to provide reasons on why it failed to cooperate and arrest Al Bashir.

The PTC II held that 'Jordan had failed to comply with its obligations under the Statute by not executing the ICCs request'.[90] The PTC II referred Jordan to the ASP and UNSC for enforcement due to its non-compliance.[91] On 12 Mach 2018, Jordan appealed against the decision of the PTC II of 11 December 2017.[92] The Appeals Chamber heard the Appeal from 10 to 14 September 2018 and reserved its Judgment.[93] Unlike Kenya,[94] Uganda,[95] Djibouti,[96] Malawi,[97] Chad,[98] Democratic Republic of the Congo (DRC),[99] and Jordan,[100] South Africa was not referred

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[89] *Prosecutor v Omar Hassan Ahmad Al-Bashir*, (*Decision on the Cooperation of the Democratic Republic)*, op cit., fn.80, para 30.

[90] See *Prosecutor v Omar Hassan Ahmad Al-Bashir* (*Decision of Jordan)* op cit, fn. 45, ICC-02/05-01/09, para 55.

[91] *Ibid*, para 55.

[92]*Ibid*, Jordan's submission to the Appeals Chamber online at *https://www.icc-cpi.int/ICCRecords/CR2018_01658.PDF*, last accessed on 9 November, 2018.

[93] See ICC, 'Al-Bashir case: ICC Appeals Chamber hearing submissions on legal matters raised by Jordan from 10 to 14 September 2018', *Media Advisory*, 4 September, 2018, also available online at *https://www.icc-cpi.int/Pages/item.aspx?name=ma232*, last accessed on 9 November, 2018.

[94] See Summary of the events on Kenya's civil society actions in light of Al Bashir's visit online at *http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/05/Case-Study-Kenya-and-Bashir.pdf*, last accessed on 12 September, 2017; Phillip Apuuli Kasaija, 'Kenya's provisional warrant of arrest for President Omar al Bashir of the Republic of Sudan', (2012) *African Human Rts L.J*. 623 *http://www.ahrlj.up.ac.za/images/ahrlj/2012/ahrlj_vol12_no2_2012_phillip_a_kasaija.pdf*, last accessed on 24 September, 2017. See the decision of the Kenyan Supreme ICC, *The AG et al vs. the Kenyan Section of International Commission of Jurists,* civil app. No. 105 of 2012 consolidated with Criminal Appeal No. 274 of 2011

[95]See also *Prosecutor v Omar Hassan Ahmad Al Bashir (Decision assigning the situation in Uganda to the Pre-Trial Chamber II),* ICC-02/04, 5th July 2004; online at *https://www.icc-cpi.int/ICCRecords/CR2016_04947.PDF*, last accessed on 10 January, 2017.

[96] See also recent non-cooperation *Prosecutor v Omar Hassan Al-Bashir* (*on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute)* Pre-Trial Chamber, II, 11 July 2016, online at *https://www.icc-cpi.int/ICCRecords/CR2016_04946.PDF*, last accessed on 10 January, 2017;

[97] See the *Decision on the Cooperation of the Republic of Malawi*, op cit, fn. 77.

[98]*See Prosecutor v Omar Hassan Ahmad Al Bashir (Decision on the Non-Compliance of the Republic of Chad),* fn. 81.

[99] *Decision on the Cooperation of the Democratic Republic of the Congo,* op cit, fn. 80.

[100] See *Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan* op cit, fn. 47.

to the ASP and the UNSC by the ICC for its failure to arrest Al Bashir who had visited the country in 2010 to attend an African Union Summit (AU)[101] as required by Article 87(7) of the Statute.

1.4. Problem Statement

Clearly, it is observed that state cooperation with decisions of the ICC has been one of the biggest challenges facing the ICC for so many years. In six instances that the ICC has made a finding of non-cooperation, it has referred all but two, namely, South Africa and Nigeria,[102] to both the ASP and the UNSC for failing to cooperate with its requests to arrest and surrender Al Bashir to the ICC.[103] In all the above circumstances, the UNSC has not taken any 'measures against States Parties that have failed to comply with their obligations to cooperate with the ICC'.[104] This is so despite different states proposing that there is need for the ICC 'to develop a follow-up mechanism concerning the referral of States to the Security Council by the ICC.'[105] The failure by states to arrest Al Bashir has seriously undermined the ICC's efforts of fighting international crimes and ending impunity.

Arresting and surrendering a person in the position of Al Bashir raises a number of controversial legal issues. Firstly, as Sudan is a non-contracting state to the Statute and, therefore, ordinarily is not obliged to cooperate with the ICC unless otherwise specified, it means that the regime of cooperation must be enhanced to deal with individuals in that category. Secondly, in situations where a non-cooperating state has been referred to the UNSC and the ASP but the latter has not done anything against the responsible state, there is a need to reflect on whether the current regime of cooperation under the Statute should be reconsidered. Thirdly, the regime of cooperation needs to be enhanced to enable the ICC enforce state cooperation with its requests and decisions. This, as this thesis proposes, must be done by the ASP and the UNSC which can deal with states that fail to cooperate with the ICC under the Statute.

What is not clear from Article 87(7) (which deal with failure to cooperate) is the nature and scope of remedies that are available to the ASP and the UNSC when a non-cooperating state has

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[101] See *Ibid*, para 54.
[102] Nigeria was not referred to the ASP and the UNSC despite Al Bashir visiting the country. For more see International Criminal ICC, Press Release 'Pre-Trial Chamber II requests Nigeria to immediately arrest Omar Al Bashir', 16 July 2013, online at *https://www.icc-cpi.int/legalAidConsultations?name=pr93*, last accessed on 25 September, 2017.
[103] See *Decision under article 87(7) of the Rome Statute on the non-applicability by South Africa*, op cit, fn. 46, para 138.
[104] See *Ibid.*, para 138.
[105] Ibid, para 138

been referred for enforcement. As things stand at the moment, states have no reason to fear the ASP or the UNSC as they have not imposed any penalties or remedies against non-cooperating states thereby perpetuating a culture of non-cooperation among contracting states to the Statute. This therefore means that the existence of a strong, clear and elaborate follow-up mechanism against non-cooperating states that have been referred to the ASP and UNSC under the Statute is of critical importance to the fight against international crimes and ending impunity.

1.5. The Aim of the Research

This thesis explores ways of enforcing state cooperation with requests and decisions of the ICC. It examines how the UNSC and ASP can compel states to fulfil their obligation to the Statute to cooperate with the ICC's requests to arrest and surrender suspects. Achieving this objective, however, entails examining the nature and scope of the obligation of states, and the role that the above two bodies can play in ensuring that states cooperate with the ICC, particularly with respect to the arrest and surrender of persons including those who enjoy immunities. The thesis argues that capitalising on the powers of the ASP and the UNSC will not only enhance state cooperation but also improve the ICC's fight against impunity for international crimes. Since the ICC cannot operate without the cooperation of states, there is need for the ASP and UNSC to take strong measures against non-cooperating states including establishing a system of enforcement of cooperation under the Statute. In order to develop proposals for incorporating the system of enforcing cooperation under the Statute, the thesis looks at three regional human rights tribunals of the Inter-American Court of Human Rights (IActHR), the European Court on Human Rights (ECtHR) and the African Court on human and Peoples Rights (AfCHPR) to draw lessons that can inform the ASP on how to enhance its regime of cooperation under the Statute. As it will be shown in this thesis, the system of enforcement of cooperation under the AfCHPR has not fully developed as such this discussion is merely illustrative of the areas that needs improvement for the court to effectively enforce its decisions.

1.6. Research Questions

In order to achieve the above objective, a number of research questions form part of the thesis. The central question to be considered in this thesis is how can the ASP and the UNSC enforce state cooperation with the ICC's requests and decisions to arrest and surrender suspects in terms of their obligations under the Statute? Aside from the above main question, the thesis also explores the

following issues:

a. What is the role of the ASP and the UNSC in ensuring that states cooperate with ICC's requests to arrest and surrender suspects to fulfil their obligations under the Statute?

b. What measures can be taken by the UNSC and the ASP to ensure that states fulfil their obligations under the Statute by cooperating with requests and decisions of the ICC?

c. How can the Statute framework on cooperation be improved so that the ICC achieves its objectives?

In order to appropriately deal with these questions, the current legal framework on cooperation under the Statute is critically examined in the next Chapter.

1.7. Significance of the Research

The significance of this thesis lies in the fact that it attempts to draw lessons on enforcement of judicial decisions delivered by regional human rights Tribunals and apply them to international criminal justice. By focusing on the specific area of enforcement and utilising the lessons drawn from international human rights tribunals, the thesis tries to significantly develop international law in general. Most literature on the subject has, either criticised the AU or the ICC or PTC's decisions, but has not addressed the specific problem of enforcement or compliance by states with decisions of the ICC.[106] In other words, a majority of the existing literature discusses the cases and judgments of the PTC in *Al Bashir cases,* analysing whether they were well founded in law or not.[107] This thesis focuses on the specific issue of enforcement, particularly, on how the UNSC

[106] See Paola Gaeta, op cit, fn. 41; Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', (2009) 7 *J. Int'l Crim. J.* 333-352; Alexandre Skander Galanda, 'Looking for Middle Ground on the Immunity of Al Bashir? Take the Third 'Security Council Route' *EJIL: Talk!*, 23 October, 2018, online at *https://www.ejiltalk.org/looking-for-middle-ground-on-the-immunity-of-al-bashir-take-the-third-security-council-route/*, last accessed on 9 November, 2018; Talita de Souza Dias, 'The 'Security Council Route' to the Derogation from Personal Head of State Immunity in the Al-Bashir Case: How Explicit must Security Council Resolutions be? *EJIL: Talk!*, 19 September, 2018, online at *https://www.ejiltalk.org/the-discussion-of-the-security-council-roots-to-the-derogation-from-personal-immunities-in-the-al-bashir-case-how-explicit-must-security-council-resolutions-be/*, last accessed on 9 November, 2018.

[107] See Dyani-Mhango, 'The ICC Pre-Trial Chamber's decision on Malawi', op cit, fn. 44; See also Lilian Chenwi & Franziska Sicker, 'South Africa's Competing Obligations in Relation to International Crimes, Const. ICC Review, (2015) 7 *Consti. Ct. Rev*. 199-245, p 218. Dire Tladi, 'The ICC Decisions on Chad and Malawi: on Cooperation, Immunities and Article 98' (2013) J. *Int'l Crim. J. L,* 199; Asad G. Kiyani, 'Al-Bashir & the ICC: The Problem of

and ASP can compel states to cooperate with the ICC requests and decisions. It may also be observed that a number of authors have written on enforcement of state cooperation with decisions of the IActHR,[108] the relationship between the ICC and the AU or its Members states in light of President Al Bashir's indictment.

It is also significant to observe that a number of authors have studied enforcement of state cooperation with decisions of the IActHR,[109] the ECtHR[110] and the AfCHPR.[111] Further considerable literature is also available on the cooperation regime of the International Criminal Tribunal for the former Yugoslavia (ICTY)[112] and International Criminal Tribunal for Rwanda (ICTR).[113] However, there has not been much focus by researchers on enforcement of state cooperation with requests and decisions of the ICC by the ASP and the UNSC. This study, therefore, intends to close this gap by providing a foundation for future research in this area.

Head of State Immunity', (2013) 12 *Chinese J. Int'l L.* 467-508, 471-477; C/f Von Michiel Blommestijn and Cedric Ryngaert, 'Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir: A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity' (2010), online publication, available at *http://www.zis-online.com/dat/artikel/2010_6_461.pdf*, last accessed on 27 September, 2017; Abel Knottnerus, 'The Immunity of al-Bashir: The Latest Turn in the Jurisprudence of the ICC', (2018) *EJIL: Talk!* 15 November, 2017, online at *https://www.ejiltalk.org/the-immunity-of-al-bashir-the-latest-turn-in-the-jurisprudence-of-the-icc/*, last accessed on 12 August 2018

[108] See Fernando Felipe Basch, 'The Doctrine of the Inter-American ICC of Human Rights Regarding States' Duty to Punish Human Rights Violations and its Dangers' (2007) 23 *Amer. Uni. L. R* 195-229

[109] See Fernando Felipe Basch, *ibid*.

[110] See Dia Anagnostou and Alina Mungui-Pippindi, 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Governance Effectiveness Matter', (2014) 25 *EJIL*, 205; Steven D. Roper and Lillian A. Barria, 'Judgments of the European ICC of Human Rights: A Test Case for Enforcement and Managerial Theories of State Compliance', *Presentation Paper, Annual Meeting of the American Political Science Association*, 1-4 September 2011, available online at *http://www.stevendroper.com/Roper%20and%20Barria%20APSA%20Paper.pdf*, last visited on 20 March 2018; See also Council of Europe, Committee of Legal Affairs and Human Rights 'Implementation of judgments of the European ICC of Human Rights: 8th Report: Stock-taking and proposals by the Rapporteur' *Press Release*, 10 May 2005; Andrew Dremczewski and James Gaughan, 'Implementing Strasbourg ICC Judgments: the Parliamentary Dimension' in Wolfgand Bedek et al (eds.) *European Yearbook on Human Rights*, 2010, 233, 235-237; Council of Europe, Committee on Legal Affairs and Human Rights: Implementation of judgments of the European ICC of Human Rights: 9th Report", 18 May 2017, online at *http://website-pace.net/documents/19838/3115031/AS-JUR-2017-15-EN.pdf/18891586-7d6c-4297-b5f7-4077636db28e*, last visited on 20 March 2018; See also Elisabeth Lambert Abdelgawad, 'The Execution of the Judgments of the European ICC of Human Rights: Towards a Non-coercive and Participatory Model of Accountability' (2006) (69) *ZaoRV* 12, online at *http://www.zaoerv.de/69_2009/69_2009_3_a_471_506.pdf*, last visited on 20 March 2018.

[111] See Lirette Louw, *An Analysis of State Compliance with the Recommendations of the African Commission on Human and Peoples Rights*, (unpublished PhD Thesis, University of Pretoria, 2005, available online at *https://repository.up.ac.za/bitstream/handle/2263/29798/Complete.pdf?sequence%3D5*, last visited on 18 March, 2018; See also Viljoen and Louw, 'State Compliance with the recommendations of the African Commission on Human and Peoples Rights, 1993-2004', (2007) 101 *Amer. J. Int'l L.* 1-34.

[112] Established on 25 May 1993 by the UNSC Resolution 827(1993).

[113] Established on 8 November 1994 by UNSC Resolution 955(1994).

1.8. Theoretical basis of the Thesis

This thesis departs from the assumption that the application and interpretation of the law must depend on at least a particular theory of law, especially when it comes to enforcement of international law[114]. In that regard, the thesis pays special attention to the theory of Responsibility to Protect (R2P) as providing a sound basis for analysing, interpreting and also applying the law on enforcement of state cooperation with decisions and requests of the ICC.

The thesis argues that the ICC, being an international Institution, has the potential to influence or impact on states behavior[115] if it utilizes the theory of Responsibility to Protect (R2P). Due to the Statute framework on cooperation, the R2P provides a solid basis for the UNSC to authorise intervention through both military and non-military measures for the protection of civilians. The R2P theory is relevant for enforcing state cooperation as intervention to enforce decisions of the ICC will be authorised by the UN. The R2P concept epitomises the importance of relying on states or decision-makers that are in control and authority of international affairs to intervene in the internal affairs of another state for purposes of protecting civilians and maintaining international peace and security. If those in authority and control work under the auspices of multilateral institutions like the UN and the ICC, peace and security will be easily achieved. As it is further elaborated below, the R2P concept has been embraced by the UNSC hence the need to seriously consider it when developing proposals for reforming the cooperation regime of the ICC.

1.9. Research Methodology

This thesis adopts a desktop research method, examining both primary and secondary sources of literature. On Primary sources, the thesis looks at international instruments around the subject area. A study of resolutions and decisions of the UNSC, Notes and Statements of the President of the UNSC, Reports of the UNSC including Statements of the Prosecutor of the ICC to the UNSC bare considered, as well as, critical discussions and analysis on selected cases and decisions of the ICC. The work of the International Law Commission (hereinafter referred to as 'the ILC') on the developments of the law of immunities are also considered. The secondary sources that are utilized

[114] See Benedict Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', (1998) (19) *Michigan J. Int'l L.* 345, p 346.

[115] Anne-Marie Slaughter, '*International Relations, Principal Theories*, *Max Planck Encyclopaedia of Pub. Int'l L* (2013), 8 online at *https://scholar.princeton.edu/sites/default/files/slaughter/files/722_intlrelprincipaltheories_slaughter_20110509zg.pdf*, last accessed on 26 February, 2019.

in the research are books, book-chapters, journals, policy and technical briefs, reports and online literature materials.

In terms of methodology, the research intends to carefully blend descriptive, analytical, cross jurisdictional review of legal developments in the European, Inter-American and African systems with the aim of drawing lessons to inform the ICC system. Geographically, however, the study uses the situation of Sudan as a reference point. Sudan has been identified because it is the first and only case under the ICC, from where a sitting head of state from a non-contracting state to the Statute has been indicted and, a warrant of arrest issued in that regard.[116]

1.10. Chapter Road Map and Outline

This thesis has seven Chapters.

Chapter 2 gives a critical overview of the legal framework on state cooperation under the Statute. A number of areas are considered including the obligation of contracting and non-contracting states to the Statute to cooperate with the ICC; and the procedure on how states' may cooperate with decisions of the ICC pertaining to the arrest and surrender of suspects. The Chapter also discusses the circumstances in which a state or the suspect may refuse or object to a request for the arrest and surrender of a suspect to the ICC. In that regard, the Chapter analyses the following circumstances that enables a state or a suspect to refuse to surrender: objection on the ground of failure to respect fair trial rights or due to existing international law obligations between the requested state and the country of the suspect. The Chapter also considers the subject of immunities or competing requests as another ground for objection. Since all these issues have been adjudicated upon by various PTCs of the ICC, the Chapter analyses some of the decisions as they relate to cooperation. As it is shown in the Chapter, the PTC decisions or reasoning on the *Al Bashir case* have been inconsistent thereby implicating state cooperation.

Chapter 3 of the thesis discusses and analyses the role of the UNSC in state cooperation with a particular focus on the principle of R2P. The Chapter commences by offering a critical overview of Article 87(7) of the Statute with a special focus on the role of the UNSC in enhancing

[116] President of Libya, Col. Gaddafi would have been prosecuted but he died before he could be arrested and surrendered to the ICC, see *The Prosecutor v Saif Al-Islam Gaddafi* (Formerly *The Prosecutor v Muammar Mohammed Abuminyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi (Decision on the admissibility of the case against Saif Al-Islam Gaddafi)*, 31 May 2013, ICC-01/11-01/11, online at *https://www.icc-cpi.int/libya/gaddafi*, last accessed on 28 August 2018. The President of Kenya, Uhuru Kenyatta, was also a sitting Head of State to be indicted by the ICC but his case was withdrawn before it started for lack of evidence.-

cooperation under the Statute. The Chapter critically analyses the powers of the UNSC which sometimes are hampered by political factors including the use of the veto power by the five permanent members of the UNSC. The Chapter makes a case of how the R2P principle can be utilised to provide a solution to these challenges.

Chapter 4 of the thesis critically analyses the power of the ASP to enforce cooperation under the Statute. The Chapter also critically analyses the steps taken by the ASP to improve state cooperation, including the formal and informal public response procedures. It analyses whether the steps taken by the ASP have any implication on vertical and horizontal models of cooperation. The mischief that the Chapter tries to address is whether these steps really enhance state cooperation with the ICC, an entity which is based on the vertical model of cooperation. Since cooperation also envisages the establishment of relationships among states, the Chapter further considers whether the proposed steps for enhancing cooperation really improves state cooperation in a horizontal model. Finally the Chapter critically analyses the measures or remedies available to the ASP and UNSC under the Statute to enhance cooperation before concluding.

Chapter 5 introduces a discussion on enforcement of decisions in three regional human rights tribunals of the IActHR, ECtHR and the AfCHPR. The Chapter discusses the solutions that two of the three regional tribunals have so far adopted to address problems of states' implementation of judicial decisions including decision relating to investigations and prosecution of suspected offenders of crimes. The lessons to be drawn from this discussion are employed to address the challenge of cooperation under the Statute. The lessons will also provide lessons to the ASP on how it should go about implementing its own system of enforcing cooperation under the Statute.

Chapter 6 discusses recommendations for enhancing cooperation under the Statute. The Chapter discusses various options for introducing the system of enforcement of state cooperation under the ICC. It also discusses how this can be achieved by, either, utilising the current framework of the Statute or through an amendment. It provides recommendations on the role, nature and scope of remedies that the ASP and UNSC can impose to ensure that states cooperate with the ICC. The Chapter also discusses the proposed nature of the system of enforcement of state cooperation including the introduction of adversarial hearings on compliance; direct engagement with national courts; and monitoring non-contracting states. The Chapter provides a

draft clause on cooperation which contains the proposed language to be inserted under the Statute on enforcement of cooperation. The proposed language contains provisions on the nature, scope and content of remedies available to the UNSC and the ASP against non-cooperating states. The Chapter further discusses the factors to be considered when imposing sanctions against non-cooperating states by the UNSC including the ranking of offences on non-cooperation; the timing on when remedies against non-cooperating states could be imposed; and the responsibility for imposing remedies before concluding.

Chapter 7 concludes this thesis with a summary of the findings and recommendations.

CHAPTER 2

LEGAL FRAMEWORK ON STATE COOPERATION WITH ICC REQUESTS AND DECISIONS TO ARREST AND SURRENDER SUSPECTS

2.1. Introduction

This Chapter examines the cooperation regime of the ICC, assessing whether the current legal framework advances the objective of fighting international crimes and ending impunity. The Chapter commences with a discussion of the legal framework on cooperation focusing on the provisions that impose duties and compel states to cooperate with the ICC. The discussion will also analyse the provisions that compels the ICC to make a determination of non-cooperation and refer non-cooperating states to the ASP and UNSC. A good example is the situation of Sudan which was referred to the ICC pursuant to a UNSC resolution 1593 (2005).[117] In such instances, the non-contracting state has an obligation to cooperate hence the reason why this chapter also considers obligations of non-contracting states to cooperate with the ICC.

This Chapter critically analyse selected decisions of the PTC on *the Al Bashir cases* to assess how the ICC's PTC has interpreted the Statute's framework on cooperation. It also discusses the legal framework on cooperation under the *Ad hoc* Tribunals of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) in order to highlight some of the differences between the ICC's legal framework to that of the two *Ad hoc* Tribunals. As it is shown below, there are contextual differences between the above *Ad hoc* Tribunals and the ICC regarding their powers to request states to cooperate and also, in some respects, with regard to the content of their duty to cooperate with decisions of the ICC. The fact that *Ad hoc* Tribunals were established as subsidiary organs of the UNSC[118] greatly contributed to the differences in cooperation by states as compared to the ICC.

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[117] See also Article 13 (b) of the Statute.

[118] In order to ensure the necessary performance of its functions under the Charter, the UNSC allows it to establish Committees, called subsidiary bodies. The powers of the UNSC to establish subsidiary bodies is laid down in Article 29 of the Charter, as read with Rule 28 of its Provisional Rules of procedure. See the Provisional Rules of Procedure of the Security Council (Adopted by the Security Council at its 1st meeting and amended at its 31st, 41st, 42nd, 44th and 48th meetings, on 9th April, 16 and 17 June 1946; 138th and 222nd meetings, on 4th June and 9th December 1947; 468th meeting, on 28th February 1950; 1463rd meeting on 24th January 1969; 1761st meeting on 1 January 1974; and 2410th meeting, on 21st December 1982). Previous versions of the Provisional Rules of Procedure were issued under the Symbols S/96 and Rev. 1-6.
Article 29 of the Charter states as follows:

The differences also explain why the two legal frameworks have different strengths.[119] The Chapter will conclude with a critical discussion of attempts by the ICC, particularly the ASP, to improve state cooperation. This discussion will analyse the steps that have currently been taken by the ASP to improve state cooperation. The Chapter will assess whether these steps will further the ICC's objectives of fighting international crimes and ending impunity. The chapter identifies gaps in the legal framework, particularly, on enforcement of non-cooperation with decisions of the ICC by states. It will be shown that the framework does not clarify the nature, role and even remedies that are available to above enforcement organs against non-cooperating States.

2.2. Evaluation of the Statute Framework on Cooperation

2.2.1. *Cooperation of contracting parties to the Statute*

The rules regulating duties of contracting states to cooperate with the ICC are clearly spelt out in the Statute.[120] Like in any international judicial institution, cooperation or assistance by the ICC can be requested from both contracting and non-contracting states depending on the circumstances of the case. Statute provisions on cooperation are systematically divided into those containing general obligations and those dealing with very specific obligations. The general obligations for states are contained in Article 86 of the Statute, where contracting parties to the Statute are obliged to cooperate fully with the ICC 'in accordance with the provisions of the Statute' and 'within the jurisdiction of the Court'.[121] Provisions on specific obligations of states ranges from guaranteeing suspects' fair trial rights' from the investigation stage,[122] to the

'The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.'

Rule 28 states:

'The Security Council may appoint a commission or committee or rapporteur for a specified question.'

[119] Generally see Goran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, (2002), p 86-87; See also Goran Sluiter 'Obtaining Cooperation from Sudan-where is the Law?' (2008) 6 *JCIL*, 876-877

[120] Generally see Part 9 of the Statute.

[121] Article 86 provides as follows: 'States Parties shall, in accordance with the provisions of this Statute, cooperate with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.'

[122] See Article 55 of the Statute which guarantees fair trial rights including (1) (a) the prohibition of self-incrimination; (b) prohibition of subjecting a suspect to 'any forms of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment'; (c) usage of language that a suspect understands when being questioned; (d) prohibition of arbitrary arrests and detention; (2) (a) guaranteeing the right of suspects to be informed of the reasons for their arrest; (2) (b) guaranteeing the right to silence; (2)(d) guaranteeing the right to legal representation; (2) (d) guaranteeing the right to be interrogated in the presence of a legal Counsel.

arrest,[123] during the trial process[124] and after conviction, (i.e. when serving sentence) are also clearly stipulated in the Statute.[125] The obligation to cooperate with the ICC can also be extended to 'any intergovernmental organisation'.[126]

Although the above provision obliges the ICC to seek cooperation from intergovernmental organisations, the primary responsibility is placed on states. States can, thus, be requested to cooperate with the ICC in 'investigation and prosecution of crimes within the jurisdiction of the court',[127] protection of witnesses,[128] provision of facilities or execution of sentences against convicted criminals[129] and surrender of persons suspected of committing international crimes.[130] It is, therefore, crucial that whenever one considers the cooperation regime of the Statute, the entire provisions of the Statute must be considered so that the legal framework on cooperation can be easily appreciated.

2.2.2. *Procedure for States' cooperation with requests for arrests and surrender of suspects*

The Statute has systematically separated the procedure on proceedings of arrest in the custodial state which is provided for under Article 59 of the Statute and that of surrender of persons to the ICC provided for under Article 89 of the Statute. The design of the regime of cooperation in these circumstances is such that the warrant of arrest or a request for the surrender of a person is issued by the ICC, but its full implementation or execution follows the provisions and procedures under national law.[131] In other words, implementation or execution of a warrant of arrest is done nationally in accordance with states' national legal framework.

The process commences by the ICC issuing an arrest warrant, at any time after an investigation has commenced, in accordance with the terms of Article 58 of the Statute.[132] Under this provision, a number of distinctive elements must be satisfied by the Prosecutor on 'reasonable grounds', before a warrant can be issued. First, the Prosecutor must prove that the

[123] See Article 59 of the Statute.
[124] See Part 9 of the Statute.
[125] See Article 70 of the Statute.
[126] See Article 87(6) of the Rome Statute.
[127] See Article 86, 87 (1) (a) of the Rome Statute
[128] See Article 68 of the Rome Statute
[129] See generally part 10 of the Rome Statute or Article 101 of the Statute.
[130] See Article 89 of the Statute.
[131] See article 59 as read with article 89 of the Statute.
[132] Article 58 of the Statute regulates the 'issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear' before the ICC by a suspect.

suspect has indeed 'committed a crime within the jurisdiction'.[133] Second, it must be proved to the satisfaction of the ICC that the suspect's arrest is or 'appears necessary' to ensure his attendance at trial and that he 'does not obstruct or endanger the investigation or the court proceedings'.[134] Sometimes the suspect may not be arrested but, 'as an alternative'; he may just be summoned to appear before the ICC. In such a case, the summons must be served directly on the suspect.[135] If the ICC is satisfied with the evidence adduced by the Prosecutor, it may proceed to issue a warrant of arrest or the summons accordingly.

Article 89 (1) of the Statute provides that:

> 'The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.'

Administratively, the communication of the arrest warrant is circulated to states by the Registrar to the ICC.[136] The ICC may, thus, invite a state to assist in the identification and tracking of the whereabouts of the suspect, including his location if there is evidence suggesting that he is in the territory of the requested state.[137] The requested state is expected to comply with the ICC unless the suspect or convict in question, where applicable, objects to or opposes the request through domestic judicial processes.[138]

Where there is an objection to a request for cooperation, the requested state has an obligation to 'immediately consult' with the ICC to determine, *inter alia*, whether the suspects' case does not fall under the *ne bis in idem rule* in accordance with the provisions of Article 20 of the Statute.[139] If the answer is in the negative, the state is under an obligation to execute the

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[133] Article 58(a) of the Statute

[134] Article 58(1) (b) (i) (ii) (iii) of the Statute.

[135] Article 58(7) of the Statute

[136] See *Prosecutor v Omar Hassan Ahmad Al-Bashir (Decision Regarding Omar Al- Bashir's Potential Travel to the United States of America*, Pre-Trial Chamber II, 18 September, 2013, ICC-02/05-01/09, para 3 .

[137] See Article 93(1)(a) of the Statute.

[138] See Article 91 as read with Article 89 (1) of the Statute.

[139] See Article 89 (1) and (2). Article 20 (1) provides that 'except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court." However, if the person has been tried by another Court, 'for the purpose of shielding from criminal responsibility for crimes within the jurisdiction of the Court; or' the proceedings were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice', the provisions of article 20 shall not apply. See article 20(3) (a) and (b) respectively.

request, especially, where the case has already been admitted by the ICC.[140] If the answer is in the affirmative, the national court is obliged to postpone the execution 'until the [ICC] makes a determination on admissibility',[141] which if already done, will entitle the state to execute the request. The involvement of national courts in the execution of arrest warrants issued by the ICC could, potentially, lead to the delay of the whole process of surrender as the suspect has a right to challenge the decision through national appellate judicial processes. This, potentially, puts the ICC in collision with the State, especially, where a national court takes a decision in favour of the indicted suspect and objects to his surrender. As this is a consequence of the interaction between the international system and domestic system in so far as enforcement of ICC decisions is concerned, contracting States nevertheless have an obligation to fulfil their Statute obligations in good faith at all times.

2.2.3. *Refusal or objection to arrest or surrender*

The above discussion alludes to the fact that the Statute gives room for the refusal or objection to certain requests and decisions of the ICC.[142] In that situation, national courts are obliged to first scrutinise if fair trial rights of a suspect were complied with by the ICC, before authorising surrender. This ground may also be utilised by a suspect leading to, either a state or even national courts, refusing or objecting surrender.[143] It may be worthwhile to observe, however, that the 'general duty to cooperate' with the ICC may only 'be qualified or suspended'; it cannot be completely objected to.[144] According to the PTC II in *the South Africa Cooperation Decision*, a state cannot refuse to cooperate with the ICC, or postpone execution of a request for arrest and surrender'.[145] It is up to the ICC to determine whether a requested state has valid reasons for refusing or objecting arrest and surrender. The state has an obligation to consult with the ICC in all circumstances where it feels that there are reasons for refusing or objecting surrender.

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[140] Article 89(2) of the Statute.
[141] See Article 89 (2)
[142] Generally see Article 94(4) (9) as read with Article 73 of the Statute.
[143] See for example the case of *Ntakirutimana v Reno, 184 F.3d 419, 430 (5th Cir.1999)* which involved the request for the surrender of the suspect to the ICTR and the Fifth Circuit of the U.S Court of Appeals declined surrender. The decision was later overturned on appeal and the suspect was surrendered to the ICTR. The decision can be accessed online at *https://www.justice.gov/osg/brief/ntakirutimana-v-reno-opposition*, last accessed on 20 September, 2017; also at *http://caselaw.findlaw.com/us-5th-circuit/1261219.html*, last accessed on 20 September 2017.
[144] See *South Africa Cooperation Decision, op cit fn. 46, para 103.*
[145] *Ibid*, para 104.

The foregoing, notwithstanding, and contrary to the PTC II's decision in *the South Africa Cooperation Decision* discussed above, states still continue to refuse or object requests for the arrest and surrender of suspects. It is yet to be seen whether things will change in the future. In short, the manner in which the provisions of the Statute on cooperation are crafted also gives room for the refusal or objection by, either the state, or the suspect for various reasons. For purposes of this thesis, two general factors on why states may refuse or object to surrender bare discussed, namely, failure to respect fair trial rights and the existence of competing obligations.

2.2.3.1 *Objection on ground of failure to respect fair trial rights*

The first possible circumstance where a request for arrest and surrender may be refused or objected to relates to the failure by a state to respect a suspect's fair trial rights. Article 59 (2) of the Statute imposes an obligation on states to strictly adhere to, and respect suspects' fair trial rights, including the requirement that they be taken 'promptly' before national courts after their arrest. If the state failed to fulfil this standard, the request for surrender may be refused. It is submitted that when a suspect appears before the national court, nothing stops the said court from considering whether the suspect's rights were respected or not.[146] As such, a competent national court may likely adjudicate on all relevant fair trial rights issues, including, the following: the applicability of the arrest warrant to the suspect;[147] whether the suspect can be released in the interim[148] and whether he has been arrested 'with the proper processes[149].

A national court may also have recourse to the provisions of Article 93 (3) of the Statute according to which a state may refuse cooperation due to 'an existing fundamental legal principle of general application'. Of course, it is not clear what is meant by 'fundamental legal principle of general application', and this issue has not yet been dealt with by the ICC to date. If it is established that these requirements are not met the request may be refused. It is therefore, important that every requested state protects and promotes suspects fair trials rights before arresting and surrendering them to the ICC.

[146] See Article 59(2) of the Statute.
[147] Article 59 (2) (a) of the Statute.
[148] Article 59 (3) of the Statute.
[149] Article 5 9(2) (b) of the Statute.

2.2.3.2 *Objections to cooperation based on existing international law obligations*

The second possible circumstance in which a suspect or a state may either refuse or object to a request for the surrender of a suspect to the ICC relates to the existence of international law obligations between the requested state and a third state. In this instance, a state or a national court may refuse cooperation due to existing international law obligations, including immunities or rules pertaining to confidentiality.[150] In terms of states' obligations to matters that affect their commitments to confidentiality, the fundamental guiding principle is that the obligation must be pre-existing and owed to the originator. Depending on whether the same is owed to a contracting state or not, will determine whether cooperation will be refused or not.[151] If the existing international law obligation is owed to a contracting state, then the ICC takes precedence.[152] Otherwise, the state, in ordinary course of events, owes no obligation to the ICC. However, a state has an obligation to inform the ICC when 'it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator' in the event that the same is owed to a non-contracting state party.[153]

2.2.3.3 *Competing requests*

The third circumstance is where a state has received competing requests from multiple states or entities forcing it to decide on which one to honour. In order to resolve such requests, the Statute provides for a very comprehensive framework under Article 90 on how the state should resolve the situation. To deal with this scenario, the state needs to first evaluate whether the request originates from a contracting state or not. If it originates from a contracting state, the requested state is obliged to give priority to a request from the ICC. The only issue that the requested state may satisfy itself with is whether the suspect's case has already been admitted by the ICC or not before proceeding to cooperate.[154] In other words, once a matter has been admitted, the ICC takes

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[150] Article 73 of the Statute governs the management of competing obligations relating to confidentiality and it is in the following terms: 'If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.'

[151] Article 73 of the Statute

[152] See Article 73 of the Statute.

[153] *Ibid.*

[154] Article 90 (2) (a) of the Statute.

precedence over a contracting state. Presumably, if the matter is not yet admitted, the requested state may exercise its discretion and extradite the suspect to the requesting contracting state.

To deal with the second scenario i.e. where a request originates from a non-contracting state, the requested state is still obliged to give priority to the ICC, unless it is 'under an international obligation to extradite the person to the requesting state',[155] which in this case is the non-contracting state. In short, if the requested state has an international obligation with a non-contracting state, the suspect shall be extradited to the non-contracting state.[156] However, before doing so, the requested contracting state is obliged to consider a number of factors, including, 'the respective dates of the requests'.[157] The requested state is also supposed to consider 'the interests of the requesting state including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought';[158] and 'the possibility of subsequent surrender between the court and the requesting state before cooperating with either party'[159] before surrendering the suspect. If the foregoing factors point towards fulfilling the pre-existing obligation that the requested state has towards the third state, the former may cooperate with a request of the third state. The ICC has not specifically dealt with a case on these issues as such the law is yet to be tested.

2.2.3. 4 *Pre-existing obligation arising from a suspect's enjoyment of immunities*

The fourth possible circumstance where a suspect or a state may refuse or object to a request for surrender is where the wanted person enjoys immunities. This is the most difficult and controversial request that states have had to deal with since the indictment of Al Bashir. Suffice to observe that a state that is requested to arrest and surrender a suspect who enjoys immunities must consider the provisions of Articles 27 and 98 of the Statute as these will guide whether the request may be accepted or not.

Article 98 (1) of the Statute provides as follows:

> 'The Court may not proceed with a request for surrender or assistance which would require the requested State *to* act inconsistently with its obligations under international law with respect to

[155] Article 90 (4) of the Statute.
[156] See Article 90(4) of the Statute. The Provision stipulates as follows: 'If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.'
[157] See Article 90(6)(a) of the Statute.
[158] Article 90(6) of the Statute
[159] See Article 90(6)(c)of the Statute.

> the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.'[160]

The above provision restrains the ICC from requesting the arrest or surrender of a person who enjoys 'State or diplomatic immunity of a person or property of a third State' if doing so would entitle the state to 'act inconsistently with its obligations under international law'. The only way the ICC may request a state to arrest an individual who enjoys immunity is when the former obtains a waiver of his or her immunity from the third state (non-contracting State).[161] Similarly, the ICC may not proceed to request a state to arrest or surrender a person where doing so would require 'the requested state to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of the State to the Court'.[162] The ICC may, however, request the surrender of the suspect who enjoys immunities from arrest if the sending state has given 'consent for the surrender.'[163]

It is significant to observe that various PTCs of the ICC have been called upon to adjudicate on these issues in *the Al Bashir cases*, particularly on the question whether states have an obligation to comply with the request to arrest and surrender Al Bashir? The various PTCs have held that states have an obligation to cooperate with the request of the ICC to arrest and surrender Al Bashir to the ICC. As to why this is so, different reasons have been advanced by the PTCs as elaborated below.

2.3. Decisions of the PTC on States' failure to surrender Al Bashir

It has been held that all states, including Sudan, have an obligation to cooperate with the ICC for a number of reasons. In *the Malawi Cooperation case*[164], the PTC I held that Malawi had an obligation to arrest and surrender Al Bashir to the ICC because international law creates an exception when the present or former head of state is indicted by international tribunal.[165] According to the PTC I, the issue of immunity for sitting heads of state has been rejected time and time again and, since international tribunals are increasingly prosecuting sitting heads of state, the latter are no longer inviolable.[166] Accordingly, the PTC I found no justification for

[160] Emphasis added.
[161] See Paola Gaeta, 'op cit. fn. 41.
[162] Article 98(2) of the Statute.
[163] Article 98 (2) of the Statute.
[164] *Decision on Malawi,* op cit, fn. 77, para 43.
[165] *Ibid*, para 43.
[166] *Ibid*, para 39

Malawi's failure to arrest President Al Bashir due to the existence of Article 27 of the Statute which removes claims of immunity by a sitting head of state.

It may be observed that the PTC I arrived at this conclusion partly by relying on the ICJ decision in the *Arrest Warrant case*[167] and partly by considering a number of precedents, which others have criticised as having 'no relevance to the case at hand'.[168] In coming up with this decision, the PTC I also distinguished the *Arrest Warrant case* with *the Al Bashir Case* by stating that the former dealt with immunity before national jurisdiction whereas the latter dealt with immunity before an international tribunal for Statute crimes that are international in nature.[169] In summary, the PTC I held that the fact that Al Bashir enjoys immunity under customary international law does not prevent Malawi from complying with the request for the ICC because the same cannot arise before the ICC, which is an international tribunal.

The PTC I's findings in *the Malawi case* have been correctly criticised for being faulty in so many ways.[170] First, Kiyani argued that although the PTC I relied on the customary international law exception to hold that Al Bashir's immunities do not apply before the ICC, it nevertheless failed to identify or explain why and how such an exception was relied upon by the PTC I.[171] Second, it has been correctly argued by Gaeta that the PTC conflated the issue of immunities under Article 98 as if they concern the ICC's jurisdiction over a head of state yet the former governs the issue of cooperation, particularly whether there is a duty 'on States Parties to cooperate in the arrest and surrender of Heads of State before international tribunals of non-state parties.'[172]

Gaeta also argued that even though it may be contended that Al Bashir does not enjoy immunities in the present matter, it does not follow that Malawi was under an obligation to

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[167] See *Decision on Malawi*, *Ibid*. paras 33-35; See also *Arrest Warrant case of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, I.C.J. Reports 2002.

[168] See Asad G. Kiyani, 'Al-Bashir & the ICC: The Problem of Head of Satte Immunity' (2013) 12 *Chinese J. Int'l L*, pp 471-477

[169] *Decision on Malawi*, op cit. fn 77, para 34.

[170] See Dire Tladi, op cit, fn. 107.

[171] Asad G. Kiyani, op cit, fn. 168, 471-477; C/f Von Michiel Blommestijn and Cedric Ryngaert, 'Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir: A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity' (2010), online publication, available at *http://www.zis-online.com/dat/artikel/2010_6_461.pdf*, last accessed on 27 September, 2017.

[172] See Ntombizozuko Dyani-Mhango, 'ICC Pre-Trial Chamber Decision on Malawi' op cit, fn. 44. See also Dire Tladi, 'The Duty on South Africa to Arrest and Surrender Al- Bashir under South African and International Law: Attempting to Make a Collage from an Incoherent Framework', electronic copy available at *http://www.derebus.org.za/wp-content/uploads/2015/07/Dire-Tladi.pdf*, last accessed on 28 September, 2017.

cooperate with the PTC, at least, if the clear terms of Article 98(1) of the Statute are anything to go by.[173] This is because nothing in the provisions of Article 98(1) of the Statute compels Malawi to cooperate with the ICC when a person from a non-contracting state is indicted by the ICC. In other words, customary international law imposes an obligation on Malawi to respect the immunity of an incumbent head of state by not arresting him otherwise failure to fulfill this obligation will attract Malawi's responsibility under international law.[174] Accordingly, the ICC would be precluded under Article 98(1) of the Statute from proceeding with a request for arrest and surrender of Al Bashir, if by doing so, Malawi would be acting inconsistently with its obligations under international law with respect to the state or diplomatic immunity of Al Bashir unless his immunities were waived by Sudan.[175]

The PTC reasoning is also problematic in the *Malawi case* in that it overlooked the fact that as much as the ICC had indicted Al Bashir, it remains upon states to arrest and surrender him to the ICC unless he voluntarily does so.[176] To the extent that the arrest and surrender of a suspect has or had to be effected by a state, the law of immunities would still be in issue and applicable, anyway, at least within the domestic legal framework of the state in question, thereby, protecting the sitting President from any arrest and surrender.[177] By the PTC I holding that because Malawi should have disregarded the issue of immunity completely and cooperate with the ICC, clearly confuses the two legal issues even further.

In the second *case of the DRC*, the PTC II somehow changed its reasoning when it found DRC liable for failing to arrest President Al Bashir by recognising the existence of the immunity of the head of state. In its own words, the PTC II stated that,

> '[it] wishes to make clear that it is not disputed that under international law a sitting Head of State enjoys personal immunities from criminal jurisdiction and inviolability before national courts of foreign states even when suspected of having committed one or more of the crimes that fall within the jurisdiction of the Court'.[178]

Another important deviation from the Malawi case held by the PTC II was that, whilst Article 27(2) of the Statute removes head of state immunity, such removal is only confined to

[173] Paolo Gaeta, op cit, fn. 41. 330
[174] Gaeta, *Ibid*, 330-331
[175] *Ibid.*
[176] See Article 59 of the Statute.
[177] See *Decision on the failure to cooperate by DRC, supra*, fn. 80, para 27.
[178] *Ibid*, para 25.

contracting states to the Statute and not to all states in general. This is because 'the Statute cannot impose obligations on third states without their consent'[179] as doing so would be acting contrary to the principle of *pacta tertiis (nec nocent nec prosunt)* provided for in Article 34 of the 1969 Vienna Convention on the Law of Treaties.[180] Despite the change in its reasoning, the PTC II still held that the Democratic Republic of the Congo was under an obligation to arrest and surrender Al Bashir because his immunity was implicitly waived by the UNSC when it issued Resolution 1593 (2005) referring the Sudan situation to the ICC. The PTC II stated as follows:

> '[T]he SC implicitly waived the immunities granted to Omar Al Bashir under International law and attached to his position as a Head of State. Consequently, there also exists no impediment at the horizontal level between the DRC and Sudan as regards the execution of the 2009 and 2010 requests'.[181]

The PTC II also observed that the implicit waiver of immunity by the UNSC of Al Bashir's immunities also nullifies any defence on the part of the DRC for its failure to implement the ICC's request and decision to arrest and surrender him.[182] The PTC II emphasized this point as follow:

> '[C]onsidering that the SC, acting under Chapter VII, has implicitly lifted the immunities of Omar Al Bashir by virtue of Resolution 1593 (2005), the DRC cannot invoke any other decision, including that of the African Union, providing for any obligation to the contrary.'[183]

The PTC II repeated the DRC reasoning in *the South African (RSA Consultation Decision)*[184] as follows:

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[179] Dire Tladi, 'The Duty on South Africa to Arrest and Surrender Al-Bashir under South African and International Law: Attempting to make a collage from an incoherent framework', online at *http://www.derebus.org.za/wp-content/uploads/2015/07/Dire-Tladi.pdf, last visited on 2 October 2018.*

[180] See Vienna Convention on the Law of Treaties, adopted at Vienna on 23 May 1969, entered into force on 27 January, 1980, *UN Treaty Series No.* 1155, p 331.

[181] *Decision on the failure to cooperate by DRC*, op cit, fn 80, para 29.

[182] *Ibid*, para 30.

[183] *Decision on the failure to cooperate by DRC*, *supra*, fn. 80, para 31

[184] This decision should be distinguished from the 6 July decision delivered by the Chamber on the cooperation of South Africa. The RSA consultation hearing was issued after South Africa had requested the Court for a Consultation meeting on 11 June 2005. The consultations requested consultations after the Registry of the court, acting on the basis of media reports had written the government of South Africa seeking its cooperation to arrest and surrender President Al Bashir who was visiting the country. For purposes of this study, this decision shall be referred to as the '*the RSA Consultation Decision'*. For an account of the events that took place around this period see, *Prosecutor v Omar Hassan Ahmad Al Bashir (Decision under article 87(7) of the Rome Statute on the non-applicability by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir)*, ICC-02/05-01/09, para 5-16; see also *transcripts of the Consultation meeting* at ICC-02/05-01/09-243-Anx2; ICC-02/05-01/09-240; ICC-02/05-01/09-239-Conf-Anx1.

> 'In conclusion the Republic of South Africa is already aware of its obligation under the Rome Statute to immediately arrest Omar Al-Bashir and surrender him to the court, as it is aware of the court's explicit position (as publicly expressed, recently, on 9 April 2014 and reiterated during the consultations with the South African delegation on 12 June 2015) that the immunity granted to Omar al Bashir under international law and attached to his position as a head of state have been implicitly waived by the Security Council of the United Nations by resolution 1593(2005) referring the situation in Darfur, Sudan to the Prosecutor of the court and that the Republic of South Africa cannot invoke any other decision, including that of the African Union, providing for any obligation to the contrary.'[185]

The position of the PTC II changed on 6 July 2017 when it delivered its decision on the failure of South Africa to arrest President Al Bashir in *the South Africa Cooperation decision*.[186] The PTC II held that South Africa had an obligation, as a contracting state to the Statute, to arrest and surrender Al Bashir when he visited the country because the UNSC made the Statute applicable to Sudan by virtue of UNSC resolution 1593(2005) thereby removing any claims of immunities.[187] In others words, the effect of the UNSC resolution 1593 (2005) was to make the Statute, such as Article 27(1) as it relates to Article 98(2), apply to the situation in Darfur. As it is highlighted below, this was one of the major deviations from the earlier *Al Bashir cases*.

In this decision, the PTC II observed that the UNSC made Article 27 (1) applicable to the situation of Sudan to pave way for the ICC to adjudicate over the case. The PTC II presented this position in the following manner:

> '[T]he effect of a referral is to enable the Court to act in the referred situation, and to do so under the rules according to which it has been designed to act. In other words, the only legal regime in which this Court may exercise the triggered jurisdiction is the one which is generally applicable to it, its Statute in *primis*.'[188]

The PTC II justified its conclusion of why the provisions of Articles 27(2) and 98(2) of the Statute are applicable in this situation by raising a number of points. First, it held that since the 'object and purpose of article 27(2)' is to prevent any person from claiming immunity, it is only appropriate that the provision should be applicable to the Darfur situation due to the fact that the indicted individuals enjoys immunity.[189] Since immunity excludes the ICC's jurisdiction, 'the general exclusionary clause of Article 27(2) of the Statute, in its plain meaning, also encompasses

[185] See *the RSA Consultation Decision, ibid*, para 9.
[186] *South Africa Cooperation decision*, ICC-02/05-01/09, op cit, fn. 46. The decision can also be accessed online at *https://www.icc-cpi.int/CourtRecords/CR2017_04402.PDF*, last accessed on 27 September, 2017.
[187] See *the South Africa Cooperation Decision, ibid*, paras 84-85 and 97 of the decision.
[188] *Ibid*, para 86
[189] *The South Africa Cooperation Decision,* op cit., fn. 46, para 75.

that immunity'[190] to enable the ICC adjudicate over the matter. Finally, the fact that 'immunities or special procedural rules'[191] compel states not to cooperate with the ICC constitutes 'an insurmountable obstacle to the court's ability to exercise its jurisdiction', which made it necessary to invoke the application of the provisions of Article 27(2) in the case at hand.[192]

In view of these reasons, the PTC II felt that the provisions of Article 27 (2) of the Statute should be invoked so that, 'rights and obligations as provided in the Statute' shall, not only be applicable to Sudan, but also remove Al Bashir's immunities.[193] Since the PTC II concluded that the above provisions are applicable to the Darfur situation, it followed, therefore, that South Africa also had an obligation to arrest and surrender President Al Bashir to the ICC.[194] Again, as the PTC II invoked the provisions of Article 27(2), it also followed that 'any immunity on the ground of official capacity belonging to Sudan that would otherwise exist under international law'[195] would not apply to it.

However, the PTC II qualified its finding by holding that since Sudan is not a party to the Statute, the rights and obligations that would apply to it under the Statute are only limited to the 'defined parameters'[196]of the situation in Darfur and 'strictly within those parameters.'[197] Examples of the defined parameters included all other activities except 'Statute-based activities of the Court [like] the right to vote in the Assembly of State Parties and does not pay contributions towards the expenses of the Court in line with article 115 of the Statute.' [198] from this reason, it may be observed that non-contracting states to the Statute have an obligation to fulfill all rights and obligation of a contracting state except a few. There are a number of inconsistencies between the above decision and previous decisions of the PTCs. These inconsistence, it is submitted, seriously impacts on states' cooperation with decisions of the ICC.

[190] *Ibid*, para 74.
[191] *The South African Cooperation Decisions, op cit,* fn. 46, *para 75.*
[192] *The South Africa Cooperation Decision, ibid.* para 75.
[193] *Ibid*.
[194] *The South Africa Cooperation Decision, op cit,* fn 46. para 107.
[195] *Ibid*, para 9.
[196] *The South Africa Cooperation Decision, op cit*
[197] *Ibid*, para 90; See also para 85.
[198] *The South Africa Cooperation Decision, ibid, para* 90.

2.4. Implication of inconsistencies of PTC's decisions towards States

A number of observations can be raised from the inconsistent reasoning of the PTC in the above cases. First, it can be observed that the PTC II's reasoning in *the South Africa cooperation decision* differs from its earlier decisions in the *Malawi* and *the DRC cases*. For the ease of clarification, it may be recalled that in *the Malawi case*, the PTC I held that the immunities applicable to Sudan cannot apply because international law provides an exception to the head of state immunity when he or she has been indicted by an international tribunal for international crimes. In *the DRC case*, the PTC II held that the immunities that would have been applicable to Al Bashir were waived when the UNSC referred the Darfur situation to the ICC thereby making them inapplicable to the current case. The implication of these conclusions was to remove the Al Bashir's immunities so as to enable states to cooperate in arresting and surrendering him to the ICC.

However, it is significant to note that the fact that the PTC has pronounced, at least, three different reasons on similar set of facts not only confuses states but also impinges upon their obligation to cooperate with the ICC as they are unsure about which law to follow. The inconsistency displayed by the PTC in *the Al Bashir cases*, demonstrates uncertainty on its part about the law, which unfortunately, also impacts on state cooperation. On the other hand, one would also argue that since *the Al Bashir cases* were new and difficult cases by their nature, the change in reasoning signifies that the ICC was trying to find a campus to concretise the correct position of the law on this subject.[199] That notwithstanding, it is undeniable that the lack of certainty on the part of the PTC also contributes to poor state cooperation. One, therefore, sympathises with the position adopted by the AU with its recent resolution to refer the matter to the UNGA so that they can request the ICJ to provide an advisory opinion on the matter.[200]

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[199] The hope is that these problems will be settled in the forthcoming Judgment of the Appeals Chamber in the Appeal Case concerning the Hashemite Republic of Jordan. The Appeals Chamber heard submissions on the appeal between 8-14 September 2018. See The ICC, 'Al Bashir case: ICC Appeals Chamber hearing submissions on legal matters raised by Jordan from 10 to 14 September 2018', *Media Advisory*, 4 September 2018 online at *https://www.icc-cpi.int/Pages/item.aspx?name=ma232*, last accessed on 5 October 2018. See Dapo Akande, 'The Bashir Appeal at the ICC', (2018) *EJIL Analysis*, 10 September, 2018, online at *https://www.ejiltalk.org/the-bashir-appeal-at-the-icc/*, last accessed on 5 October 2018.

[200] See Coalition for the International Criminal Court, 'AU seeks ICJ Opinion on head of state immunities Witnesses take stand in two ICC trials', *Press Release*, 1 February, 2018, online at *http://coalitionfortheicc.org/news/20180201/globaljustice-weekly-au-seeks-icj-opinion-head-state-immunities-witnesses-take-stand*, last accessed on 28 February, 2018. C/f Max Du Plessis and Dire Tladi, 'The ICC immunity debate-the need for finality' (2017) *EJIL: Talk!* Online at *https://www.ejiltalk.org/the-iccs-immunity-debate-the-need-for-finality/*, last accessed on 28 February, 2018.

Second, it is important to note that despite the PTC changing its position in *the South Africa Cooperation decisions*, criticisms that were advanced by a number of leading commentators on the subject against the PTC's decisions in the *Malawi, Chad* and also the *DRC cases* still stand as the PTC failed to provide convincing responses on the issue of immunity and cooperation especially when it comes to countries other than Sudan.[201] In other words, the PTC did not deal convincingly with the issue of why a third state must cooperate with the ICC to arrest and surrender a person enjoying immunities to the court.

Finally, the PTC II's reasoning in *the South Africa cooperation decision* is still problematic in a number of ways. The PTC took the view that since it was dealing with the question of South Africa's obligation to cooperate with the ICC and not the issue of immunities, the issue of Al Bashir's immunities could not arise.[202] To focus the case on the issue of immunity of heads of state, the PTC argued, would have reduced 'the court's jurisdiction with respect to persons enjoying official capacity-the exercise of which fully depends on States Parties' execution of the Court's arrest and assistance in the conduct of investigations' to a 'purely theoretical concept'.[203] It is argued that the two issues, although separate, impact on each other as it is very difficult for one to focus on cooperation only and ignore the fact that the person in whose cooperation is sought enjoys immunity. The PTC was, therefore, supposed to deal with these issues together.

The above observations are also significant especially when one considers that the PTC II invoked Article 27 of the Rome Statute (immunity) to justify its decision. The PTC's reasoning not only conflated the issue of immunity with that of cooperation, but was also contradictory.[204] This is especially clear when one considers that in the same decision, the PTC relied upon the provisions of Article 27(2) to conclude that Sudan cannot claim the immunity of its President by virtue of this provision.[205] The PTC II held that by being a contracting state meant, implicitly, that any contracting state to the Statute has an 'obligation to arrest [President Al Bashir] and surrender him to the Court'.[206] The PTC II also relied on the same provision to hold that since

[201] See Max du Plessis and Dire Tladi, 'International Court must clear up vexed issue of Bashir's immunity' (2017) *EJIL Talk*, 11 August, 2017, online at *https://www.ejiltalk.org/the-iccs-immunity-debate-the-need-for-finality/*, last accessed on 26 September, 2017.
[202] *The South Africa Cooperation decisions,* op cit, fn. 46, paras 69-70.
[203] *Ibid*, para 75
[204] See Paola Gaeta, op cit, fn. 41, p 327-329.
[205] Since it was in a similar position to a Contracting State, as such, it is, by implication, bound by the provisions of Article 27(1).
[206]Ibid, para 92.

the UNSC made the provision applicable to Sudan, it meant that South Africa had an obligation to cooperate. In light of the foregoing, it is argued that the PTC II was already dealing with the issue of immunities of a head of state to find an obligation on Sudan and South Africa to cooperate with the ICC. Hence, PTC II's position that it should only look at the issue of cooperation and not immunities is contradictory and difficult to reconcile.

2.5. UNSC 1593 and its implications

The foregoing discussion also shows that the PTCs were able to identify the source of states' obligation to cooperate from UNSC 1593 (2005). However, the manner in which it interpreted the resolution has been a subject of controversy. In summary, PTC II in the DRC and South Africa *Al Bashir cases* held that resolution 1593 (2005) removed Al Bashir's immunities thereby making the provisions of the Statute applicable to the Sudan situation. If this conclusion was correct, the question that arises is what is the authority for such a conclusion? In other words, if indeed it is correct to suggest that UNSC resolution 1593 (2005) made Article 27(2) read with Article 98(2) of the Statute applicable to the situation in Sudan, thereby, expanding 'the applicability of an international treaty' provision to 'a state which has not voluntarily accepted it as such'[207], as held by the PTC II in the *South Africa Cooperation decision*, what is the authority for such a conclusion? Two schools of thought emerge. On the one hand, an argument is made that as long as a UNSC resolution has not expressly stated that a state must, or must not do, a particular act, no conclusions can be drawn to the intention of the UNSC.[208] If this argument is correct then the PTC II made an error in arriving at the conclusion it did in the *South Africa Cooperation Decision*.

De Wet, on the other hand, shares the position taken by the PTC II when she argued that there is no need for the UNSC to expressly stipulate obligations of states in a resolution for a number of reasons.[209] The first reason is that since the Statute is the only framework 'within which the ICC can operate' to try the suspects,[210] there was no need for the UNSC to specify the relationship as, at the time of the referral (and even now, it is submitted), the ICC was already

[207] Words used by the Chamber in *the South Africa Cooperation Decision*, op cit, fn. 46, para 89.[208] See Goran Sluiter, 'Obtaining Cooperation from Sudan-Where is the Law? (2008) 6 *JICJ*, 876-877, p 871.
[208] See Goran Sluiter, 'Obtaining Cooperation from Sudan-Where is the Law? (2008) 6 *JICJ*, 876-877, p 871.
[209] Erika de Wet, op cit, fn. 36, p 1061. The argument was made especially to resolution 1593(2005)
[210] *Ibid*, p 1058.

'in operation several years before it received its first referral by the Security Council'.[211] By contrast, she argues, that the creation of the ICTY and the ICTR were a 'complete novelty'[212] at the time of their establishment, hence it was necessary for the UNSC to spell out the relationship.

In response to de Wet's view, an argument could be made that one of the reasons why the UNSC clarified the relationship in resolutions 827(1993)[213] establishing the ICTY and 955 (1994)[214] for ICTR, was because these institutions were mere UNSC subsidiary organs.[215] Normally, when the UNSC establishes a subsidiary organ to assist the performance of its charter objectives, it expressly lays out the mandate and scope of their operation.[216] It can also be argued that the UNSC referral, in so far as the Rome Statute was concerned, was also a complete novelty at the time. This is because the referral was the first time for a non–contracting state to be compelled to submit to an institution established by a treaty that it did not consent to. UNSC 1593(2005) referral was unique and, as already observed, presented a number of legal complexities that were not tested prior to the resolution. For the sake of clarity and to ensure that states do not find loopholes for justifying non-cooperation, an elaboration of a UNSC resolution would have been important.

The Second reason de Wet advances is that if the UNSC were to expressly state in the resolution the implication of its decision, it would have been acting contrary to its established practice.[217] According to her, the UNSC only deals with 'what States may do, not what they should not do 'when deviating from international law […]'.[218] While de Wet's views are understandable, there is evidence to suggest that states usually interpret and act on resolutions depending on their own national interests. An example can be given of the implementation of

[211] Erika de Wet, op cit, fn. 36, p1059
[212] *Ibid*, p 1059
[213] See UNSC Res. 827 (1993), (25 May 1993) UN Doc. S/RES/827(1993), also available online at *http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf*, last accessed on 1 January, 2017.
[214] See UNS Res. 955 (1994) (8 November, 1994) UN Doc. S/RES/955(1994), Also available online at *https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement*, last accessed on 2 January, 2017
[215] See Article 29 of the Charter as read with Rule 28 of the Provisional Rules of Procedure of the Security Council op cit
[216] See an empirical analysis of Council Resolutions by Rosanna Deplano, 'The Use of International Law by the United Nations Security Council: An Empirical Framework for Analysis', (2015) Vol. 29 *Emory International Law Review* 2085;
[217] Erika de Wet, Op cit, fn. 36, p 1061
[218] *Ibid*

resolution 1973 (2011) on Libya,[219] and even 1593 (2005) on Sudan. Implementation of these two resolutions shows that national interests also play a huge role on how states view UNSC resolutions. While states failure to cooperate with UNSC resolutions cannot be supported, the above observations also demonstrate that UNSC resolutions that lack clarity contribute to the failure by states to cooperate. As long as UNSC resolutions do not expressly indicate what is expected of states, there is always room for subjective interpretation of resolutions, as was recently demonstrated with the implementation of resolution 1973(2011).

The Kenyan Court of Appeal seems to side with de Wet when, in it held that as long as Sudan and Kenya are members of the UN, they have an obligation to cooperate with the ICC which arises from its membership of the UN. In the Court's words:

> 'The obligation imposed on Sudan by the Security Council must be traced to Sudan's membership of the United Nations and the fact that it has ratified a number of UN Human Rights Conventions by which it has made binding international commitments to adhere to the standards and values laid down in these universal human rights documents. As a signatory to the UN Charter on 12th November 1956, Sudan undertook to uphold, promote and to act in accordance with the principles espoused in Article 2 of the Charter…It consented to the obligation to comply with the provisions of the Charter, including decisions and resolutions of the Security Council made pursuant to Chapter VII.'[220]

The Court of Appeal also held that Kenya had an obligation to cooperate with the ICC which stems from the Rome Statute, an even 'higher norm than the resolution [1593 (2005)]'.[221] The latter holding shows that the Court of Appeal found that Kenya's obligation arises from four sources, namely, customary international law, the UN Charter, the Rome Statute, and the country's international crimes Act.[222] The Court of appeal held as follows:

> '…for the final time, and to conclude this ground, that Kenya was and is bound by its international obligations to cooperate with the ICC to execute the original warrant issued by the ICC for the arrest of President Al Bashir when he visited Kenya on 27th August, 2010 and in future should he return to Kenya if the warrants are still in force.'[223]

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[219] See criticisms of the UNSC 1973 (2011) on Libya and its implications- Thomas G. Weiss & Others, 'The Responsibility to Protect: Challenges and Opportunities in light of the Libyan Intervention', (2011) *e-Int'l Relations,* online at *https://www.e-ir.info/wp-content/uploads/R2P.pdf*, last accessed on 2 October 2018.
[220] *AG et al vs The Kenyan Section of International Commission of Jurists*, Civil App. No 105 of 2012 as consolidated with Crim. App. No. 105 of 2012 (unreported), judgment delivered on 16th February, 2018, at p 56.
[221] Kenya Court of Appeal, *ibid*, p 56.
[222] Kenya Appeal Court, *Ibid.*
[223] Kenya Court of Appeal, op cit, fn. 220 p 57.

In light of the above reasoning, the Court of Appeal held that 'the Government [of Kenya's] failure to effect the arrest of President Al Bashir breached relevant international instruments, our constitution and legislations.'[224] In the Court of Appeal's view, this obligation persists until 'rescinded by the ICC, the warrants remain outstanding and can still be executed by Kenya.'[225]

Taken together, de Wet and the Kenyan Court of Appeal stand for the proposition that the UNSC does not need to expressly state implications of its decisions in a resolution; states just have to comply once the same has been adopted under Chapter VII of the UN Charter. The problem with this reasoning is that it talks in general terms the powers of the UNSC and not specifically to the terms of resolution 1593(2005). UNSC resolution 1593(2005) expressly stipulates 'that States not party to the Rome Statute have no obligation under the Statute'.[226] They were only *urged* to cooperate. The literal terms of this resolution, therefore, contradict both de Wet and the Kenyan court of appeals' conclusion as discussed above. Paola Gaeta aptly summarised this observation in the following way:

> 'In the resolution referring the situation in Darfur to the ICC, the Security Council has not made such a determination. Paragraph 2 of the operative part of the Security Council resolution provides that Sudan and all the other parties to the conflict shall cooperate fully with the Court. As for other states, the resolution simply recognizes that states not parties to the ICC Statute have no obligation under the ICC Statute to cooperate, but nonetheless it urges all states and concerned regional and other international organizations to cooperate fully with the ICC. The language of the resolution could not have been clearer: Sudan and the parties to the conflict are obliged to cooperate with the ICC by virtue of a decision of the Security Council, while other states are simply 'urged' to do so.'[227]

This, therefore, means that in situations where a situation has been referred to the ICC by a resolution of the UNSC, the terms of resolution are determinative of the obligations of states. It cannot just be concluded that the UNSC has imposed an obligation on all states to cooperate simply because a resolution has been adopted by the UNSC under Chapter VII.

2.6. Requesting cooperation from Non-contracting States

As already alluded to, the Statute also creates another framework for cooperation that targets non-contracting states. According to Article 87 (5) of the Statute, the ICC is obliged to enter into *ad hoc* arrangements, agreements or other appropriate basis (hereinafter referred to as '*ad hoc*

[224] Kenya Court of Appeal, *ibid*. p 58.
[225] Kenya Court of Appeal, *ibid* p 58.
[226] UNSC Res. 1593 (2005), op cit, fn. 29, para 2.
[227] Paola Gaeta, op cit, fn. 41 p 330-331.

arrangements') in accordance with the provisions of Article 12 (3) of the Statute[228] as read with Article 87(5) of the Statute for cooperation. Once an *ad hoc* arrangement has been concluded, the jurisdiction of the ICC shall only be applicable to non-contracting states 'with respect to the crime in question'.[229] Consequently, the obligation of non-contracting states' to cooperate with the ICC ceases once the arrangement ends. An argument could, therefore, be made that non-contracting states that accepts to cooperate with the ICC on the above basis could easily walk out of the *ad hoc* arrangement, in accordance with the terms of the said *ad hoc* arrangement. One would also argue that all the other elements on cooperation applicable to contracting states discussed above equally apply for non-contracting states in an *ad hoc* arrangement. This includes the fact that non-contracting states in an *ad* hoc arrangement may refuse or ignore certain requests of the ICC provided the same is done in accordance with the terms of the Statute.

The above discussion attests to the fact that there are certain factors like immunities under the Statute that may compel either a suspect or a requested state to refuse or object a request for cooperation to arrest and surrender a suspect to the ICC. Where the indicted person enjoys immunities, the Statute restrains the ICC from requesting a state to cooperate unless it fulfills certain requirements, like obtaining a waiver or consent from the third state. The foregoing notwithstanding, the numerous decisions of the PTC of the ICC discussed in this Chapter have held that in so far as the Al Bashir indictment is concerned, there is nothing that prevents states from cooperating with the ICC request to arrest and surrender him to the ICC for prosecution. This obligation applies to both contracting and non-contracting states to the statute by virtue of both UNSC resolution 1593 (2005) and the Statute. The referral of the situation by the UNSC to the ICC triggered the provisions of Article 27 as read with Article 98 (1) of the statute to provide a bar to any claims of immunities as a defence to prosecution. Despite this interpretation, states still continue to either refuse or ignore the ICC request to cooperate and this is the biggest problem facing the ICC today.

Suffice it to observe that the Statute provides remedies for failure by states to cooperate with its decisions. Whether this is enforced by the two organs entrusted with this mandate under the

[228] Article 12 (3) is in the following terms: 'If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction with the Court without any delay or exception in accordance with Part 9.'
[229] Article 12 (3) of the Statute.

Statute is the subject of the inquiry for this thesis. The thesis will, thus, explore the measures that need to be taken to enhance the regime of state cooperation under the Statute.

2.7. Contextualising the Problem on cooperation under the Statute

The discussion up to this point has focused on the powers of the ICC and duties of states to cooperate with the ICC. The theme running throughout the decisions of PTCs of the ICC and the literature so far reviewed is that states have a general duty to cooperate with the request and decisions of the ICC to arrest and surrender Al Bashir regardless of the fact that he enjoys immunities. However, despite the above settled position of the law, states still continue to either refuse or object to comply with the ICC's request to arrest and surrender Al Bashir to the ICC.

It is significant to observe that the Statute, under Article 87(7), provides for a legal framework for enforcing sates' failure to cooperate with the ICC by obliging the latter to make a finding and refer the non-cooperating state to the ASP and UNSC. The question that, therefore, arises is whether the ASP and the UNSC are fulfilling their role and this is where the discussion is now turning to.

2.8. Enforcing cooperation with ICC requests to arrest and surrender under the Statute: The role of the ASP and UNSC

Generally, the Statute grants powers to the ASP and the UNSC to enforce cooperation where a state fails to cooperate with its request. Article 87 (7) of the Statute provides that,

> 'Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council'.

The above provision provides a legal basis for enforcing cooperation under the Statute by setting down a 'two-stage analysis'[230] for the ICC before referring a non-cooperating state for

[230]*Prosecutor v Uhuru Muigai Kenyatta, (Decision on prosecution's application for a finding of non-compliance under Article 87 (7) of the Statute),* I *Trial Chamber V (B),* Judgment of 19 August 2015, ICC-01/09-02/11 OA 5, (hereinafter referred to as 'the Kenyatta Judgment'); C/f *Prosecutor v Saif Al-Islam Gadaffi,* (Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council), 10 December 2014, ICC-01/11-01/11-577, paras 24-25, 33-34; See also *Prosecutor v Omar Al Hassan Ahmad Bashir, (Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan*), 9 March 2015, ICC-02/05-01/09-227, paras 18-19; See also *Prosecutor v Omar Hassan Ahmad Al Bashir, (Decision on the Cooperation of the democratic Republic of the Congo Regarding Omar Al Bashir Bashir's Arrest and Surrender to the Court),* 9 April 2014, ICC-02/05-01/09-195, para 34.

enforcement. According to the above provision, the first step that the PTC has to undertake is to establish whether a state has failed to cooperate with a request or decision of the ICC. Once this is established, the ICC Chamber has to go to the second step of deciding whether to refer the non-cooperating state to the ASP or the UNSC for enforcement. According to the Appeals Chamber *in the Jordan Referral re Al-Bashir Appeal*, 'it is only when the Chamber has established that *both* conditions are met that it may proceed to consider whether to refer the State to the Assembly of States Parties or the UN Security Council or both, following a finding of non-compliance'.[231] In the *Gaddafi Article 87 (7) Decision*, the PTC I confirmed this position when it held that:

> [W]hile a determination of the appropriateness and usefulness of this measure remains in the hands of the chamber, it is necessary that prior to such determination two conditions are met. There must be an objective failure on the part of the State to comply with a cooperation request and, pursuant to regulation 109(3) of the Regulations [of the Court], the requested State must be given the opportunity to be heard.'[232]

This means that the referral of a non-cooperating state to the ASP or the UNSC is not 'automatic'[233] but rather it is one of the remedies that 'falls within the discretion of the Chamber seized of Article 87 (7) application.'[234] The ICC Chamber may, thus, not even refer a non-cooperating state to the ASP or the UNSC in some cases, as this is a discretionary power, which must be exercised depending on the circumstances of each case. It is only when 'non-compliance is grave enough to prevent the Court from exercising its functions and powers under the Statute'[235] that a referral to the two bodies be necessary.

In terms of what constitutes a finding of 'failure to comply', for purposes of the ICC's determinations, a state must fail to comply with a decision of the ICC and not political organs like the ASP and UNSC. This conclusion is adopted from the reasoning of the ICTY in *the Blaskic Subpoena Judgment* which held that a finding of failure in the context of Article 29 of the ICTY Statute means the failure to comply with decisions of the ICTY and not political organs like the UNSC. According to the ICTY,

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[231] *Prosecutor v Omar Hassan Ahmad Al-Bashir (in the Jordan Referral re Al-Bashir Appeal)*, para 8, Judgment of 6 May 2019, ICC-02/05-01/09 OA2, available online at *https://www.icc-cpi.int/CourtRecords/CR2019_02856.PDF*, last accessed on 21 September 2019.
[232] *Gaddafi Article 87 (7) Decision*, op cit, fn. 230, para 24.
[233] *Kenyatta Judgment*, supra, fn. 230, para 48.
[234] *Kenyatta Judgment*, *ibid.* para 53.
[235] *Prosecutor v Omar Hassan Ahmad Al-Bashir (in the Jordan Referral re Al-Bashir Appeal)*, para 8, Judgment of 6 May 2019, ICC-02/05-01/09 OA2, available online at *https://www.icc-cpi.int/CourtRecords/CR2019_02856.PDF*, last accessed on 21 September 2019.

> '[A] Trial Chamber or the president must be satisfied that the State has clearly failed to comply with the order or request [of the ICTY]. This finding is totally different from that made, at the request of the Security Council, by a fact-finding body, and a fortiori from that undertaken by a political or quasi-political body. Depending on the circumstances the determination by the latter may undoubtedly constitute an authoritative statement of what has occurred in a particular area of interest to the Security Council; it may set forth the views of the relevant body on the question of whether or not a certain State has breached international standards. In addition, the conclusions of the bodies at issue may include suggestions or recommendations for action by the Security Council. By contrast, the International Tribunal (i.e., a Trial Chamber, a Judge or the President) engages in a judicial activity proper: acting upon all the principles and rules of judicial propriety, it scrutinizes the behaviour of a certain State in order to establish formally whether or not that Sate has breached its international obligation to cooperate with the International Tribunal.'[236]

The Appeals Chamber further held, that 'any recommendations or suggestions as to the course of action the Security Council may wish to take as a consequence of that finding'[237] does not constitute a finding for purposes of establishing whether the state has failed to cooperate with a decision of the Tribunal. It is, therefore, submitted that there are no reasons to justify a deviation from the above definition with respect to the ICC and the above definition must 'apply *mutatis mutandis* with respect to the court's finding under this paragraph'.[238] This means that any Chamber of the ICC must be satisfied that a state has 'failed' to cooperate with an 'order' or 'request' of the respective Chamber and not a request from the political organs of the ICC like the ASP or the UNSC. A state will be found to have failed to cooperate with a decision of the ICC if it is a product of 'a judicial activity proper'.[239] These other bodies may make a finding, recommendation or suggestions, but a state's failure to cooperate with these recommendations or suggestions do not amount to a finding of a failure to cooperate with a request or decision of the ICC for purposes of Article 87(7) proceedings.

The two-stage analysis discussed above is consistent with the approach that the ICC has taken on cases of non-cooperation over the years. According to the Appeals Chamber in *the Kenyatta Judgment*, the above approach is 'supported by the wording of Article 87 of the Statute […] that an automatic referral to the external actors is not required as a matter of law'.[240] The

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[236] *Prosecutor v Blaskic*, Case IT-95-14/2/, (*Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*), Appeals Chamber, 29 Oct. 1997, para 35, available online at *http://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html*, last accessed on 14 November, 2018.
[237] *Prosecutor v Blaskic*, *ibid*, para 36.
[238]See Otto Triffierer & Kai Ambos eds., *Rome Statute of the International Criminal Court: A Commentary*, 2016, p 2036.
[239] *Prosecutor v Blaskic*, op cit, fn. 236 para 36.
[240] *Kenyatta Judgment*, op cit, fn 230, *para 49.*

above interpretation also conforms to 'the object and purpose of paragraph 7 of Article 87 of the Statute',

> '[b]y providing the Court with the possibility of engaging certain actors to remedy cases of non-cooperation. Since the object and purpose of this provision is to foster cooperation, the Appeals Chamber believes that a referral to those particular actors was not intended to be the standard response to each instance of non-compliance, but only one that *may* be sought when the Chamber concludes that it is the most effective way of obtaining cooperation in concrete circumstances at hand.'[241]

The Appeals Chamber in *The Kenyatta Judgment* also confirmed that an alternative interpretation of the provisions of Article 87(7) of the Statute would also lead to the same result. This is because if one were to 'consider the introductory term "may" of the second clause to apply to both the finding and the referral,'[242] he or she will arrive at the same two-stage analysis conclusion. In any of the interpretations that one would prefer, 'the Court would always retain its discretion as to whether or not to engage external actors to obtain cooperation.'[243] In light of this interpretation, it is now settled that every Chamber of the ICC must look at each case on its own merits and decide whether to refer a non-cooperating state to the ASP, UNSC or so-called 'external actors'. A Chamber must in its discretion,

> '[C]onsider all factors that may be relevant in the circumstances of the case, including whether external actors could indeed provide concrete assistance to obtain the cooperation requested taking into account the form and content of the cooperation; whether the referral would provide an incentive for cooperation by the requested State; whether it would instead be beneficial to engage in further consultations with the requested State; and whether more effective external actions may be taken by actors other than the ASP or the UNSC, such as third States or international or regional organisations.'[244]

In any case, a Chamber is obliged to 'take into account considerations that are distinct from the factual assessment of whether the State has failed to comply with a request to cooperate.'[245]

Although the ICC is obliged to undertake the above two stage analysis, it does not necessarily mean that every non-cooperating state will be referred to the ASP, the UNSC or as, held by the Appeals Chamber in the *Kenyatta Judgment,* to 'external actors'. This was confirmed by the PTC in *Gadaffi Article 87 (7) Decision*, when it held that,

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[241] *Kenyatta Judgment, ibid*.
[242] *The Kenyatta Judgment, ibid*, para 43.
[243] *The Kenyatta Judgment, ibid*.
[244] *The Kenyatta judgment*, op cit, fn.230 para 53.
[245] *The Kenyatta judgment, ibid*.

> 'The Chamber considers that a determination on whether to make a finding of non-compliance and decide to refer a matter to the Security Council is discretionary in nature […] As this Chamber previously held, resort to the measure under article 87 (7) of the Statute is not a mandatory course of action that the Chamber is obliged to pursue in case of a State's failure to cooperate with the Court, but one of the tools available to the Court "to use at a certain point in time as a last resort measure or as part of a comprehensive strategy to promote cooperation.'[246]

The above approach was also adopted by the PTC II in the *Decision on the Cooperation of the Federal Republic of Nigeria regarding Omar Al-Bashir's Arrest and Surrender to the Court'*, where it was held that 'in light of its discretionary power by virtue of article 87(7) of the Statute, [the PTC II) considers that it is not warranted in the present circumstances to refer the matter to the [ASP] and/or to the [UNSC]'.[247] The same was also adopted by the PTC II in *the South Africa Cooperation Decision,* which did not refer South Africa to the ASP or UNSC. However, it did so for Jordan, yet both states failed to arrest President Al Bashir when he visited their respective countries.[248] In both instances, the PTC II used its discretion to arrive at different conclusions.[249]

In terms of the scope of the obligation of the ICC Chamber to 'make a finding', the Appeals Chamber in the *Kenyatta Judgment* held that the same is,

> 'limited to making a finding relevant to the factual determinations of a failure to comply with a request to cooperate which has prevented the Court from exercising its functions and powers under the Statute; or (ii) includes an assessment of whether it is appropriate to refer the matter of the State's non-compliance to the ASP or the to the UNSC.'[250]

As correctly held by the Appeals Chamber, the 'finding of non-compliance'[251] is a discretionary exercise because a reading of the terms of Article 87(7) of the Statute lead to the conclusion that 'the determination of the factual prerequisite of the first clause is not in itself the finding of non-compliance within the meaning of the second clause, which may or may not be made by the Chamber.'[252]

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[246] *Gadaffi Article 87 (7) Decision*, supra, fn. 230, para 23; See also *Gadaffi Leave to Appeal Decision,* supra, para 24
[247] See *Al Bashir Article 87 (7) Decision of 5 September 2013 on Nigeria,* supra, para 13
[248] See also an interesting discussion by Goran Sluiter, 'Enforcing Cooperation: Did the Drafters Approach it the Wrong Way?' (2018) 16 *J. Int'l Crim. Just.* 382-402, p 389-393
[249] *Ibid*. For an interesting discussing on the purpose of the finding of Non-cooperation and why the ICC comes to these different conclusions, see 'The ICC Pre-Trial Chamber's decision on South Africa's failure to arrest and Surrender President Al Bashir: South Africa escapes 'sanctions'! (2017) *African Yrbk Int'l Humanitarian L.* 37-77, p 52-67.
[250] *The Kenyatta Judgment*, op cit, fn. 230, para 40.
[251] Ibid, para 41
[252] *The Kenyatta Judgment*, supra, para 42.

It is, therefore, settled that Article 87(7) of the Statute provides for a 'two-stage analysis'; the first part of the analysis of the clause being 'a factual prerequisite that needs to be met for a finding of non-compliance […], namely that there is a failure to comply with the cooperation request to a certain gravity'.[253] The second part is a finding of whether the non-cooperating state may be referred to the ASP, UNSC or other external actors like regional and international organisations to assist on cooperation, as held by the Appeals Chamber in the *Kenyatta Judgment*.

It may be observed that the above approach has been criticised by Sluitter for not reflecting the intention of the framers of the Statute.[254] According to Sluitter, Article 87(7) of the Statute was deliberately inserted into the Statute as a basis for the ICC to refer non-cooperating states to the ASP and the UNSC being political bodies responsible for enforcement.[255] Sluiter argues that the framers of the Statute did not intend to use Article 87(7) of the Statute as a legal basis for the ICC to enforce its decision. That responsibility was left in the hands of the ASP and the UNSC. In Sluiter's view, Article 87(7) is merely a referral and not an enforcement provision that the ICC may utilise and that, it does not establish any discretionary powers for the ICC to exercise. Otherwise, he argues, allowing the ICC to also enforce the same decision it referred to the ASP and UNSC would be a judicial overreach. In any event, it will be allowing the ICC to be a judge in its own cause, having determined non-compliance and thereafter referring the non-complying state to the ASP and UNSC.

Dyani-Mhango has also analysed the provisions of Article 87(7) of the Statute and decisions of the Chamber and argued, correctly in this author's view, that the interpretation of this provision by the Appeals Chamber in the *Kenyatta Judgment* is correct because the clear terms of Article 87(7) of the Statute lead to a conclusion that a 'finding of non-compliance does not automatically lead to the non-complying state being automatically referred to the ASP or the UNSC.'[256] In any event, as Dyani-Mhango rightly argued, 'non-compliance does not translate into an automatic referral'.[257] The two issues are completely separate, even though, sometimes they may follow.

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[253] *The Kenyatta judgment*, supra, para 39.
[254] Goran Sluiter, 'Enforcing Cooperation', op cit, fn. 266, p 398-399.
[255] *Ibid*, p 388
[256] Ntombizozuko Dyani-Mhango, 'The ICC Pre-Trial Chamber's decision on South Africa's failure to arrest and Surrender President Al Bashir: South Africa escapes 'sanctions'! (2017) *African Yrbk Int'l Humanitarian L.* 37-77, p 53.
[257] Ntombizozuko Dyani-Mhango, ibid.

Consequently, any Chamber of the ICC faced with an Article 87(7) of the Statute's application must adopt a two-stage analysis by, first making a finding of non-compliance before referring a non-complying state to the ASP or UNSC. Some of the factors that may be pursued by the ICC before referring a non-complying state for enforcement include, firstly, that a state ignored earlier ICC requests and subsequent requests to explain their failure to cooperate.[258] Secondly, the fact that a non-complying state invokes the existence of its other international law obligations arising from treaties to which it is a party to, like the Constitutive Act of the AU for its failure to cooperate.[259] Thirdly, is the fact that the non-cooperating state invoked political reasons to justify its failure to cooperate with the ICC.[260] Finally, the fact the non-complying state did not consult with the ICC when it received a request for cooperation for the existence of conflicting obligations.[261]

When the arguments presented by the above two commentators are weighed together with the wording of Article 87(7) of the Statute, a conclusion is reached that Sluiter's analysis ignores the rules of treaty interpretation as guided by the Vienna Convention on the Law of Treaties. Article 31(1) of the Vienna Convention on the Law of Treaties provides that a 'treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.' This therefore means that the words used in Article 87(7) of the Statute must, as a general rule, and in the interest of certainty and uniformity, be interpreted in their ordinary meaning. The ordinary meaning shows that the Chamber has discretion in its decision making with the use of the word *may* in the provision.

One criticism that can be advanced against the Appeals Chamber decision in the *Kenyatta Judgment* relates to its holding that Article 87(7) of the Statute provides 'the Court with the possibility of *engaging certain actors* to remedy cases of non-cooperation.'[262] The Appeals Chamber also held that:

> '[A] referral to those particular actors was not intended to be the standard response to each instance of non-compliance, but only that *may* be sourced when the Chamber concludes that it is the most effective way of obtaining cooperation in concrete circumstances at hand'.[263]

[258] Ntombizozuko Dyani-Mhango *ibid*, p. 65.
[259] Ntombizozuko Dyani-Mhango, ibid, p 65.
[260] *Ibid*.
[261] Ntombizozuko Dyani-Mhango, 'The ICC Pre-Trial on South Africa', op cit, fn. 256, p 65.
[262] Emphasis added. See *The Kenyatta Judgment*, op cit, fn. 230 para 49.
[263] *The Kenyatta Judgment*, *ibid*, para 49

The Appeals Chamber took the view that this interpretation conforms to the object and purpose of this provision to foster cooperation.[264] When Article 87(7) of the Statute is read in its ordinary meaning, a conclusion is reached that it does not give room for the ICC to engage with 'certain actors to remedy cases of non-cooperation', as was held in the *Kenyatta Judgment.* Article 87(7) of the Statute simply identifies the ASP or the UNSC as being responsible for enforcing compliance. This, therefore, means that the Appeals Chamber may have 'read in' the existence of other actors outside the above two, devoid of clarity and unsupported by plain language of Article 87(7) of the Statute.[265] The foregoing notwithstanding, the question worth considering is what happens when a non-cooperating state has been referred to the ASP or the UNSC for enforcement but no action is taken? Assuming they take any action, what measures does the Statute allow the ASP or the UNSC to impose against such non-cooperating states in the circumstances? The other issue worth exploring is whether Article 87(7) of the Statute provides for a legal basis for the ASP or the UNSC to impose measures against non-cooperating states?

2.9. Enforcing non-compliance under Article 87(7) of the Statute

It may be recalled that since *the Al Bashir cases* commenced, the two organs mandated to enforce cooperation have not taken any decision nor imposed any measures against non-cooperating states. It is, however, significant to observe that Article 87(7) merely identifies the above two organs as being responsible for enforcing non-cooperation under the Statute. It, however, does not expressly indicate what the two bodies will do with the referred non-cooperating state. In other words, although Article 87(7) of the Statute identifies the ASP or the UNSC as organs responsible for enforcing cooperation, the provision does not elaborate the nature, scope and content of the *procedure* to be followed when the organs are hearing a case against a non-cooperating state. It also does not indicate the nature, scope and content of the *remedies* available to them in dealing with non-cooperating states and indeed enforcing cooperation, in general.[266] Article 87(7) of the Statute, in its current form, does not also clarify whether it is merely a procedural or substantive provision for enforcing cooperation. This raises a number of questions worth exploring including whether the provision gives a right for non-cooperating states to argue

[264] *The Kenyatta Judgment, ibid*.
[265] See also Otto Triffterer and Kai Ambos, eds. *Rome Statute of the International Criminal Court: A Commentary*, 2016, p 2040
[266] See Goran Sluiter, 'Enforcing Cooperation: Did the Drafters Approach it the Wrong Way?' (2018) 16 *J. Int'l Crim. Just*. 383-402, p387.

their case before the two organs in defence of non-cooperation.[267] The provision also fails to indicate whether a non-cooperating state that is sanctioned by these organs has a right of appeal or not against decisions of the organs.[268] In order to properly comment on whether the two organs have failed in their duty of enforcement, an understanding of their role, powers and possible measures that may be taken against states in the next Chapter would be ideal.

2.10. Conclusion

This Chapter has discussed the legal framework on cooperation by analysing the powers of the ICC and the duties of states under the Statute. The Chapter has established that the ICC has powers to request states to cooperate with its decisions which must be fulfilled without fail. States, however, may either refuse or object to cooperate with the ICC provided they do so in accordance with the provisions of the Statute including cooperating with the provisions of Articles 27 and 98 of the Statute. In any event, states must consult the ICC if they feel that the latter's requests interfere with its existing international law obligations. The Statute also establishes a legal framework on how the ICC will deal with the failure by states to cooperate. Although Article 87(7) of the Statute provides for a legal basis for the ICC to make a finding of non-cooperation, no state has suffered any consequences for its failure to cooperate with decisions of the ICC as the two organs mandated to enforce cooperation have not imposed any measures against them. The Chapter has also disclosed that there are a number of issues that Article 87(7) of the Statute does not clarify including, the nature of the remedies available to the organs designated under that provision to enforce non-cooperation; the role and the scope of remedies that may be imposed in the circumstances against non-cooperating states. The thesis, therefore, proceeds in the next Chapter to analyse the issue of enforcement under the Statute to address the issue of non-enforcement of state cooperation by the two organs, the ASP and the UNSC.

[267] See Goran Sluiter, *ibid*.
[268] Goran Sluiter, 'Enforcing Cooperation', op cit, fn. 266, p 388.

CHAPTER 3

ENFORCING COOPERATION WITH ICC REQUESTS TO ARREST AND SURRENDER SUSPECTS UNDER THE STATUTE: THE ROLE OF THE UNSC THROUGH THE LENS OF THE R2P

3.1. Introduction

This Chapter analyses the role of the UNSC in enforcing cooperation under the Statute. Chapter 2 of the thesis discloses that despite Article 87(7) of the Statute empowering the ASP and UNSC to enforce cooperation, no measures have been imposed against non-cooperating states. The next two Chapters, therefore, assesses whether the legal framework empowers the ASP and UNSC to enforce cooperation and if indeed the same is enforced in practice. As in any international enforcement mechanism, challenges of state cooperation with judicial decisions are not a new phenomenon. In the case of the ICC, this Chapter considers whether there are circumstances which impede the UNSC from enforcing cooperation under the Statute considering that the ICC has referred a number of states to the UNSC for enforcement. The Chapter also introduces the concept of R2P as a principle that may guide the UNSC to enforce cooperation under the Statute. The invocation of the principle is important to protect the civilian population who may be facing serious human rights violations.

3.2. Powers of the UNSC to enforce Cooperation under the Statute

According to Article 87(7) of the Statute, a matter will be referred to the UNSC, if the case was referred by the UNSC to the ICC.[269] This suggests that if a case was not referred to the ICC by the UNSC, it will be referred to the ASP for enforcement. Although the manner in which the referral of states for enforcement between contracting and non-contracting states under this provision differs, the objective is the same, namely, to ensure that decisions of the ICC are complied with. In that regard, it makes sense that proposals for improving the cooperation regime of the Statute must also target the improvement of the working relationship between the ASP and the UNSC as they both aim at achieving the same result.

As above discussed, Article 87(7) merely identifies the ASP and the UNSC as the bodies responsible for enforcing cooperation. However, it is submitted that in so far as enforcement of decisions of the ICC by the UNSC is concerned, Article 87(7) of the Statute must be read together

[269] Article 13(b) grants jurisdiction to the ICC if the matter was referred by the UNSC.

with Article 13(b) as it is the latter provision that the UNSC will rely upon, as was the case in the Sudan situation, to trigger the jurisdiction of the ICC. Once the competence of the ICC to adjudicate over the situation is triggered, the ICC will have the capacity to refer situations to the UNSC in line with Article 87(7) of the Statute. It is therefore reasonable to argue that cases where the ICC will refer non-cooperating states to the UNSC will, in a majority of circumstances, involve non-contracting parties to the Statute.[270] Article 87(7) of the Statute is silent on the role that the UNSC may play or how it is required to enforce cooperation when it has received a referral from the ICC. Suffice it to observe that the PTC I in the *Chad Decision* 'read in' the role of the UNSC when a matter is referred to the UNSC in the following manner:

> 'When the Security Council, acting under Chapter VII of the UN Charter, refers a situation to the Court as constituting a threat to international peace and security, it is expected that the Council would spend by way of taking such measures which are considered appropriate, if there is an apparent failure on the part of the relevant State Party to the Statute to cooperate in fulfilling the mandate entrusted to it by the Council. Otherwise, if there is no follow up action on the part of the Security Council, any referral by the Council to the ICC under Chapter VII would never achieve its ultimate goal, which is to put an end to impunity. Accordingly, any such referral would become futile.'[271]

The PTC I fell short of expressly specifying the so-called *appropriate measures* that the UNSC will have to impose against non-cooperating states. In other words, the PTC I failed to stipulate the sanctions or remedies that the UNSC were to impose against non-cooperating states. It only held that any failure by the UNSC to take appropriate measures against non-cooperating states will lead to the ICC not achieving its ultimate goal of ending impunity. At least the objective was clearly stipulated in that whatever measures are to be taken by the UNSC, the same must aim at ending impunity and eliminate international crimes. This means that measures must be appropriate and strong enough to achieve the above aim. However, in the absence of Article 87(7) of the Statute expressly stipulating the measures that are open to the UNSC to impose against non-cooperating states, it is submitted that recourse may be had to the UNSC Chapter VII powers of the UN Charter. Lessons could also be drawn from the ICTY and the ICTR on how it utilised the powers of the UNSC under the UN Charter when compelling states' to cooperate with its decisions.

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[270] Otto Triffterer and Kai Ambos, *Rome Statute of the International Criminal Court: A Commentary*, (2016) 696-704.

[271] *Chad Decision,* op cit, fn. 81, para 22.

3.3. UNSC Measures under the UN Charter

Under Chapter VII of the UN Charter, the UNSC is entrusted with the responsibility of maintaining international peace and security.[272] It investigates disputes or situations before determining the existence of a threat to peace, breach of peace, or an act of aggression.[273] Once it makes such a determination, the UNSC then 'decides what measures' to impose in order to maintain or restore international peace and security. Over the years, the UNSC has imposed numerous measures pursuant to Chapter VII of the UN Charter. Some of the measures are listed in Articles 41 and 42 of the Charter including 'measures not involving the use of armed force',[274] completely or partially interrupting economic relations between or among the state concerned;[275] interruption 'of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.'[276] It may also order 'demonstrations, blockade, and other operations by air, sea, or land forces of the members of the United Nations.'[277]

According to Article 24 (1) of the UN Charter, member states of the UN entrusted the UNSC with the responsibility to act 'on their behalf' when carrying out its duties under the Charter. Member states also undertook to comply and fulfill UNSC resolutions which are adopted pursuant to its Chapter VII powers.[278] In the *Namibian Advisory Opinion*, the ICJ held that since the UNSC resolution 748 (1992) was adopted in conformity with the purposes and principles of the Charter and in accordance with Articles 24 and 25, 'they were binding on all States Members of the UN, which were under an obligation to accept and carry the decisions of the Security Council in accordance with the […] Charter'.[279] In that regard, any decision arrived at by the UNSC in accordance with the UN Charter shall be carried out by the Members of the UN without fail and are binding on them.

The UNSC also enjoys the doctrine of implied powers, which enables it to perform its functions and duties easily.[280] The only limitation to these powers is Article 24 of the Charter

[272] See Articles 39-51 under Chapter VII of the United Nations Charter.
[273] See Article 39 of the Charter.
[274] Article 41 of the UN Charter.
[275] *Ibid.*
[276] Article 41 of the UN Charter
[277] See Article 42 of the UN Charter
[278] See Article 25 of the UN Charter
[279] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, (Advisory Opinion) ICJ Reports [1971] ICJ Reports 53, para. 115.
[280] Rosanna Deplano'The Use of International law by the United Nations Security Council: An Empirical Framework for Analysis' (2015) 29 *Emory International Law Review*, p 2085-2112, p 2087.

which obliges the UNSC to perform its duties 'in accordance with the Purposes and Principles' of the UN. In that regard, the UNSC cannot perform any other purposes than those that further the purposes and principles of the Charter. In that regard it is significant to observe that the first purpose of the UN is contained in Article 1 (1) of the Charter, namely,

> '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 international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.'

Derek Bowett argued that although member states of the UN conferred on the UNSC the power to make decisions on their behalf, they did not give the UNSC 'a blank cheque' to impose measures in the name of chapter VII as they wish.[281] Instead, there is a presumption within the delegation of the powers that the UNSC shall take decisions based on the principles of legality,[282] and in accordance with the principles and purposes of the Charter. The ICJ has on a number of occasions also made similar observations. In the *Expenses case* the ICJ stated as follows:

> '[W]hen the Organisation takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations; the presumption is that such action is not *ultra vires* the organisation.'[283]

Bowett puts it this way:

> 'Even if the UN purposes are ambiguous, conflicting and indeterminate, the Council has to act in accordance with (all of) them and thus, strike in all cases the concrete and proper balance between the primary goal of maintaining peace and security and the other UN purposes. This implies respect for the core provisions of human rights and humanitarian law, as well as the right to self-determination and territorial integrity of states; indeed, any violation of these would in all probability amount to a violation of a *jus cogens norm*.'[284]

In view of the foregoing, it may be stated that although the UNSC has broad powers, its decisions may be challenged if they are illegal and amendable to judicial review if they are not consistent with the Charter.[285] This means that even though every member state of the UN delegated some of

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[281] See Derek Bowett, 'The Impact of Security Council Decisions on Dispute Settlement Procedures' (1994) 5 *EJIL* 89-101, p 93
[282] Ibid
[283] *Certain Expenses of the United Nations*, [1962] ICJ Reports 151, at 168
[284] Bowett, 'The Impact of Security Council Decisions…' op cit, fn.281, p3
[285] See Erika De Wet 'Judicial Review of the United Nations Security Council and General Assembly through Advisory Opinion of the International Court of Justice' (2000) 10 *SRIEL*, 237-278; Erika De Wet, 'Judicial Review

its sovereign powers to the UNSC pursuant to Article 25 of the Charter, it did so with a caveat that the latter will uphold international law and safeguard the legal rights of states.[286]

The foregoing notwithstanding, the UNSC has powers to impose measures against states under the UN Charter for maintaining international peace and security. Articles 41 and 42 of the Charter provide a list of measures that the UNSC may impose across the globe to attain this objective. For example, the UNSC may impose measures not involving the use of force completely or partially interrupting economic relations between or among the state concerned. Since commencing its work in 1946, the UNSC has adopted over 2000 resolutions to date.[287] The UNSC has, for example, imposed sanctions as a remedy against recalcitrant states in the form of arms embargo imposed on Iraq,[288] Angola (targeting UNITA),[289] Sierra Leone (RUF),[290] Somalia,[291] Haiti,[292] Liberia,[293] Libya,[294] Rwanda,[295] Sudan,[296] Eritrea and Ethiopia[297] and the former

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as an Emerging General Principle of Law and its implications for the International Court of Justice' (2000) 47 *NILR*, 181-210; See also Zemanek, 'The Legal Foundations of the International system, General Course on Public International Law' (1997) 96 RCADI 266; I.A Nawaz, 'Law and International Organisation-A Perspective on the United Nations', (1977) 17 *Indian JIL* 239

[286] Ibid

[287] See A compilation of all UNSC Resolutions from 1946 to date at the UNSC official website, online at *http://www.un.org/en/sc/documents/resolutions/*, last accessed on 16 November, 2018.

[288] See UNSC Res. 661(1990), (6 August 1990), UN Doc. S/RES/661/1990.

[289] See UNSC Res. 864 (1993), (15 Sept, 1993), UN Doc. S/RES/864/1993, also available online at *https://www.treasury.gov/resource-center/sanctions/Documents/864.pdf*, last accessed on 11 December, 2018.

[290] See UNSC Res. 1132 (1997), (8 Oct. 1997), UN Doc. S/1132/1997, available online at *https://documents-dds-ny.un.org/doc/UNDOC/GEN/N97/267/13/PDF/N9726713.pdf?OpenElement*, last accessed on 11 December, 2018. This resolution was terminated in resolution UNSC Res. 1171 (1998), (5 June 1998), UN Doc. S/RES/1171/1998, available online at *http://repository.un.org/bitstream/handle/11176/46550/S_RES_1171%281998%29-EN.pdf?sequence=3&isAllowed=y*, last accessed on 11 December, 2018.

[291] See UNS Res. 733 (1992) (23 Jan. 1992), UN Doc. S/RES/733/1992, available online at *https://www.legal-tools.org/doc/0191cf/pdf/*, last accessed on 11 December, 2018.

[292] See UNSC Res. 841 (1993), (16 June 1993), UN Doc. S/RES/841/1993, available online at *https://documents-dds-ny.un.org/doc/UNDOC/GEN/N93/354/58/IMG/N9335458.pdf?OpenElement*, last accessed on 11 December, 2018.

[293] See UNSC Res. 788 (1992) (19 Nov. 1992), UN Doc. S/RES/788/1992, also available online at *https://documents-dds-ny.un.org/doc/UNDOC/GEN/N93/010/46/IMG/N9301046.pdf?OpenElement*, last accessed on 11 December, 2018.

[294] See UNSC Res. 748 (1992), (31 March 1992), UN Doc. S/RES/748/1992 suspended in resolution UNSC 1192 (1998), (27 August 1998), UN DOC. Res. S/RES/1192/1998

[295] See UNSC Res. 918 (1994), (17 May 1994), UN Doc. S/RES/918/1994, also available online at *https://documents-dds-ny.un.org/doc/UNDOC/GEN/N94/218/36/PDF/N9421836.pdf?OpenElement*, last accessed on 11 December, 2018

[296] See S/1591/2005 (29 March 2005), available online at *http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1591%20%282005%29*, last accessed on 11 December, 2005; See also S/2290/2016 (24 May 2017, also available online at *https://www.securitycouncilreport.org/wp-content/uploads/s_res_2353.pdf*, last accessed on 11 December, 2018.

[297] See UNSC Res. 1298 (2000), (17 May 2000), UN Doc. S/RES/1298/2000, also available online at *https://www.refworld.org/docid/3b00f2441c.html*, last accessed on 11 December, 2018.

Yugoslavia.[298] It has also invoked the threat of sanctions against Burundi as deterrence to a state on a verge of instability.[299] In Resolution 217 of 1965 the UNSC urged member states not to recognise the racist regime of Southern Rhodesia, South Africa's illegal occupation of Namibia[300] and South Africa's Constitution of 1984.[301] In 1977, through resolution 418, the UNSC imposed an arms embargo against the Apartheid regime of South Africa.[302] A Committee to study ways and means by which the mandatory arms embargo could be more effective against South Africa was also established pursuant to resolution 421 of 1977.[303] It also ordered the withdrawal of troops,[304] ordered cessation of hostilities,[305] ordered the use of force,[306] arms embargo,[307] and imposed numerous other measures under chapter VII mandate[308] on individuals and countries, whether parties or non-parties to the Charter including non-state actors.[309] The list is, however, not exhaustive as the powers of the UNSC are considered to be very wide.[310]

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[298] See UNSC Res. 713 (1991) (25 September, 1991), UN Doc. S/RES713/1991 (25 September, 1991), also available online at *https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/596/49/IMG/NR059649.pdf?OpenElement*, last accessed on 11 December, 2018. This resolution was terminated in resolution UNSC Res. 1074 (1996) (1 October, 1996), UN Doc. Res. S/RES/1074/1996. See also resolution UNSC Res. 1160(1998) (31 March 1998), UN Doc. S/RES/1160/1998

[299] See UNSC Res. 1040 (1996), 29 January 1996), UN Doc. S/RES/1040/1996 and UNSC Res. 1072 (1996), (24 July 1996) (S/1072/1996 both concerning situations in Burundi

[300] See UNSC Res. 283 (1970), (29 July 1970), UN Doc. S/RES/283/1970

[301] See UNSC Res. 554 (198), (17 August 1984), UN Doc. S/RES/554/1984

[302] See UNSC Res. 418 (1977), (4 November, 1977), UN Doc. S/res/418/1977

[303] See UNSC Res. 421 (1977), (9 December 1977), UN Doc. S/RES/421/1977

[304] See UNSC Res. 1946 (1946), (4th April 1946), UN Doc. S/RES/3/1946.

[305] See UNSC Res. 54 (1948), (15 July 1948), UN Doc. S/RES/54/1948, (15 July 1948). See also UNSC Res. 47 (1948), (29th April 1948), UN Doc. S/RES/47/1948.

[306]UNSC Res. 84 (1950), (7 July 1950), UN Doc. S/RES/84/1950.

[306] UNSC Res. 678 (1990) (29 November, 1990), UN Doc. S/RES/678/1990; See also UNSC Res. 1368 (2001), (12th September 2001) relating to military intervention in Afghanistan to overthrow the Talibans who were ruling the country.

[307] See UNSC Res. 661(1990), (6th August 1990), UN Doc. S/RES/661/1990; See UNSC Res. 50 (1948), (29th May 1948) UN Doc. S/RES/50/1948; see UNSC Res. 169 (1961), (24th November 1961), UN Doc S/RES/169/1961; UNSC Res. 178 (1963), (24th April 1963), UN Doc. S/RES/178/1963; See also UNSC Res 217 (1965), (20th November 1965), UN Doc. S/RES/217/1965.

[308] See UNSC Res. 161 (1961), (21st February 1961), UN Doc. S/RES/161/1961; See also UNSC Res. 479 (1980), (28th September 1980), UN Doc. S/RES/660/1990; See also UNSC Res. 660 (1990), (2nd August 1990), UN Doc. S/RES/660/1990; See also UNSC Res. 217 (1965), (20th November 1965), UN Doc. S/RES/217/1965; UNSC Res 216 (1965) (12th November 1965), UN Doc. S/RES/216/1965; UNSC Res. 674 (1990), (29th October 1990); See also UNSC Res. 677 (1990), (28th November 1990), UN Doc. S/RES/677/1990.

[309] See generally the following resolutions: UNSC. Res. 1373 (2001), (28 September, 2001), U.N. Doc. S/RES/1373 (Sept. 28, 2001); UNSC Res. 1540 (2004), (Apr. 28, 2004), U.N. Doc. S/RES/1540; UNSC Res. 1636 (2005), (Oct. 31, 2005), U.N. Doc. S/RES/1636; UNSC Res. 1701 (2006), (Aug., 11, 2006 U.N. Doc. S/RES/1701); UNSC Res. 1737 (2006), (Dec. 27, 2006), U.N. Doc. S/RES/1737; UNSC 1803 (2008), (Mar. 3, 2008) U.N. Doc. S/RES/1803

[310] See Rossana Deplano, op cit, fn. 297 p 2085-2112, also available online at *http://law.emory.edu/eilr/_documents/volumes/29/Recent%20Developments/deplano.pdf*, last accessed on 16 November, 2018.

When the UNSC adopts these measures, it places the responsibility of monitoring their compliance by states in the hands of subsidiary organs who may be a Committee, a Commission or a rapporteur for a special question.[311] As of November, 2018, the Council had about 33 Committees comprising of Working Groups, standing Committees, Ad-Hoc Committees Ad-hoc International Tribunals, Advisory subsidiary bodies, and Sanctions Committees.[312] The Military Staff Committee, comprising of only permanent members of the UNSC, is the only subsidiary organ that was established under the Charter.[313] The rest of the Committees consisting of all members of the UNSC, have been established pursuant to the powers vested in the UNSC under article 29 as read with rule 28 of its own rules of procedure.[314] The UNSC uses the UN Charter and the provisional rules to adopt a number of decisions including resolutions, Statements of the President of the Council, 'notes by the Security Council President, press statements and letters from the Security Council President'.[315]

The above subsidiary organs are established based on country or thematic agenda that the UNSC is dealing with. An example of a state based subsidiary organ established under the mandate of the UNSC is the Sanctions Committee on Sudan which comprises of all members of the UNSC. The Committee was established in 2005 under resolution 1591 to, *inter alia*, undertake the following tasks:

i. to monitor implementation that the measures in paragraph d of the resolution, namely, "that all states shall take the necessary measures to prevent entry into or transit through their territories of all persons as designated by the Committee"
ii. to designate those individuals subject to the measures imposed by subparagraphs (d) and (e) of this paragraph and to consider requests for exemptions in accordance with subparagraphs (f) and (g);
iii. to establish such guidelines as may be necessary to facilitate the implementation of the measures imposed by subparagraphs (f) and (g);
iv. to report at least every 90 days to the Security Council on its work;

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[311] See article 29 of the Charter as read with Rule 28 of the Provisional Rules of Procedure of the Security Council, op cit., fn.; See also UNSC 'Committee, Working Group and Ad hoc Bodies' updated online at *https://www.un.org/securitycouncil/content/committees-working-groups-and-ad-hoc-bodies*, last accessed on 27 February, 2019.

[312] See Note by the President of the Security Council, S/2016/2, 4 January 2016 and the visit Security Council Report at *securitycouncilreport.org or whatsinblue.org*, last visited on 16th July 2016.

[313] See Article 47 and UNSC Res. 1(1946), (25 January, 1946), UN Doc. S/RES/1/1946.

[314] See article 30 read with the provisions of the Provisional Rules of Procedure complementing the text of the U.N. Charter: U.N. S.C., *Provisional Rules of Procedure of the Security Council, rules 40-57,* U.N. Doc. S/96 (June 27, 1946); See also Articles 27-32 of the Charter providing for Note 507, complementing the Provisional Rules of Procedures.

[315] Rossana Deplano, op cit, fn 280; See also United Nations, Security Council Working Methods Handbook 90 (2012).

v. to consider requests from and, as appropriate, provide prior approval to the Government of Sudan for the movement of military equipment and supplies into the Darfur region in accordance with paragraph 7 below;

vi. To assess reports from the Panel of Experts established under subparagraph (b) of this paragraph, and Member States, in particular those in the region, on specific steps they are taking to implement the measures imposed by subparagraphs (d) and € and paragraph 7 below;

vii. To encourage a dialogue between the Committee and interested Member States, in particular those in the region, including by inviting representatives of such States to meet with the Committee to discuss implementation of the measures;'[316]

Another Committee established by the UNSC which is based on a thematic area is that of Children and Armed Conflict. This committee also carries similar terms of reference as the Sudan Sanctions Committee. Paragraph 3 of the preamble to the resolution 1612 (2005) which established the Working Group on Children and Armed Conflict stressed that it is 'the primary role of national governments in providing effective protection and relief to all children affected by armed conflict.'[317] Again paragraph 4 of the preamble to the same resolution recalls that it is the 'responsibilities of States to end impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes, and other egregious crimes perpetrated against children.' The resolution goes on to establish the committee for monitoring and reporting mechanisms on children and armed conflict contained in resolution 1539 (2004).[318] Similar terms of reference were also given for other Committees established under Resolution 1970 (2011) for the Libyan Sanctions Committee;[319] the Cote d'Ivoire Sanctions Committee established under Resolution 1572 (2004);[320] and the DRC Sanctions Committee established under Resolution 1533 (2003).[321]

An interesting issue to consider for purposes of this study is whether the UNSC has the power to impose binding measures against a non-cooperating state that has been referred to the UNSC for its failure to arrest and surrender a suspect to the ICC. In resolution 1593 (2005), the

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[316] S/Res. 1591 (2005), op cit, fn 296, para 3.

[317] UNSC Res. 1612 (2005), (26 July 2005), UN Doc. S/Res/1612/2005, online at *http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1612%20(2005)&Lang=E&Area=UNDOC*, last accessed on 2nd February 2019.

[318] UNSC Res. 1539 (2004), (22 April, 2004), UN Doc. S/Res/1539/2004, online at *http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1539%20(2004)&Lang=E&Area=UNDOC*, last accessed on 2nd February, 2019.

[319] UNSC Res. 1970 (2011), (26 February, 2011), UN Doc. S/RES/1970, para 24, online at *https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2011_02/20110927_110226-UNSCR-1970.pdf*, last accessed on 2nd February, 2011.

[320] UNSC Res. 1572 (2004), (15 Nov. 2004), UND Doc. S/RES/1572, para 14, online at *http://unscr.com/en/resolutions/doc/1572*, last accessed on 2nd February, 2019.

[321] UNSC Res. 1533 (2004), (12 March, 2004), UN Doc. S/RES/1533/2004, para 9, online at *http://unscr.com/en/resolutions/doc/1533*, last accessed on 2nd February, 2019.

UNSC referred the situation of the Sudan to the ICC with a recommendation that the latter should investigate the situation and hold those responsible accountable for their crimes. The above resolution attests to the fact that the UNSC may impose an order against a State to arrest and surrender a suspect to the ICC. An argument could, therefore, be made that the UNSC could impose similar measures when enforcing states' failure to cooperate with the ICC under the current framework of the Statute. The UNSC could also impose such a measure pursuant to its Chapter VII powers of the UN Charter as the above examples have shown.

Suffice it to observe that the approach that was adopted by the ICTY in the *Blaskic Subpoena decision* was that once the ICTY has issued an order but a state is unwilling to fulfill the decision, the UNSC was obliged to adopt 'sanctions and penalties that can be imposed by the authorities of the State where the individual is located; and those that can be imposed by the International Tribunal'.[322] In this case, the non-cooperating state was obliged to impose penalties that already existed in the laws of the state concerned against the authorities responsible for executing the request before considering whether to look outside the laws of that country. The ICTY held as follows:

> '[T]he first set of sanctions is enumerated or hinted at in a number of implementing laws of States: these laws provide that, in case of non-compliance with an order of the International Tribunal, the national authorities shall apply the same remedies and penalties provided for in case of disregard of an order or injunction issued by a national authority. In addition, […] most States, whether of common-law or civil-law persuasion, generally provide for the enforcement of summonses or subpoenas issued by national courts. It is plausible that in those States, the national authorities will be ready to assist the International Tribunal by resorting to their own national criminal legislation.'[323]

The ICTY, thus, held that 'relevant national authorities' must be compelled by the responsible state 'to seek remedies or sanctions for non-compliance by individuals with a *subpoena* or order issued by a Judge or a Trial Chamber.'[324] The ICTY was of the view that 'legal remedies or sanctions put in place by national authorities themselves are more likely to work effectively and expeditiously'[325] in ensuring that an indicted individual is arrested and surrendered to an international tribunal.

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[322] See *Blaskic Subpoena decision*, op cit, fn. 236 para 57
[323] *Blaskic Subpoena decision*, *ibid*, para 57
[324] *Ibid*
[325] See *Blaskic Subpoena decision*, op cit, fn. 236, para 58.

However, as rightly observed by the ICTY in the same case, 'allowance should be made for cases where resort to national remedies or sanctions would not prove workable [or where it would] be unable to compel a State official to comply with an order issued [by the ICC].[326] This is because not all states are responsive to the demands of international tribunals, let alone, complying with resolutions of the UNSC. In such cases, this thesis argues that the UN must have recourse to its powers under the Charter and impose some of the remedies that are available under Chapter VII.

The above observations may hold true for the ICC, because although the latter relies on states to effectively implement its decisions including the arrest and surrender of suspects, such an obligation applies to contracting states only. The only way non-contracting states would carry similar obligations is when a situation was referred to the ICC by the UNSC or the non-contracting state has concluded an *ad hoc* agreement with the ICC for cooperation in line with the provisions of Article 12(3)[327] read with Article 87(5) of the Statute. Once an *ad hoc* arrangement has been concluded, the jurisdiction of the ICC shall only be applicable to non-contracting states 'with respect to the crime in question'.[328] Otherwise, non-contracting states would not owe any obligation to cooperate with the ICC unless the UNSC expressly impose the obligation against non-contracting states in the resolution referring the situation to the ICC. In other words, even though the situation was referred to the ICC pursuant to a UNSC resolution, as was the case with resolution 1593(2005) discussed above, the referral *per se* is not enough; the resolution must also expressly stipulate how all UN member states will cooperate with the ICC. But these are options available to the UNSC under the UN Charter as such one would only hope that the latter, when triggering the jurisdiction of the ICC, also sets out the obligations of the non-contracting state to cooperate with the ICC. In the case of the Sudan situation, the UNSC did not do enough to secure the cooperation of non-contracting States like Sudan by ensuring that its decision is fulfilled.

The importance of expressly stipulating the obligations of states in, either the statute or the referring UNSC resolution, is that the two instruments will impose on states, both contracting and non-contracting parties to the Statute, obligations that are not bilateral nor multilateral, but those that are 'obligation *erga omnes partes'*, as held by the ICJ in the *Barcelona Traction, Power Light*

[326] See *Blaskic Subpoena decision*, *ibid*, para 58.
[327] Article 12(3) is in the following terms: 'If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction with the Court without any delay or exception in accordance with Part 9.'
[328] Article 12 (3) of the Statute.

Co. case[329] and also approved by the ICTY in the *Blaskic Subpoena decision*.[330] The obligation by all UN member states to cooperate with decisions of international tribunals in the proposed formula translates itself into a community legal interest that every member of the United Nations owes to the international community to ensure its fulfillment.[331] This means that if a state fails to fulfill the decision of the ICC (where a situation has been referred by the ICC), the UNSC may impose remedies for non-compliance including the remedies that are available under its Chapter VII powers. The remedies imposed will have to be fulfilled by all UN member states. Alternatively, the UNSC when referring a situation to the ICC against non-cooperating states may indicate expressly how non-contracting states will fulfill their obligations in so far as the referred situation is concerned including the remedies or sanctions that may be imposed for its failure to cooperate.

The latter view finds support from Sluiter who analysed the cooperation regime of the Statute and the implication of UNSC resolution 1593 (2005). His arguments make compelling reading especially when future cooperation regimes that arise from UNSC referrals are concerned.[332] Sluiter argued that in a case like that of Sudan, where a situation from a non-contracting state has been referred to the ICC and, states, who are also members of the UN are invited to cooperate with the ICC, 'three alternative models' would be envisaged if the request to cooperate is going to be effective.[333] The first model would be for the UNSC to 'refer a situation without any reference to cooperation'[334] as was the case with resolution 1593(2005). The necessary implication for this model is that the provisions of the Statute are applicable and implementable by contracting states only, assuming they already have domesticated the Statute. In the event that they have not yet domesticated the Statute, it would be impossible for them to implement the request as they will have no law to regulate such cooperation unless they have a monist system of incorporating treaties.[335] In such a case, arguably, contracting states would be compelled to extradite the suspect to a state that is willing and able to prosecute him.

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[329] *Barcelona Traction, Power & Light Co.* case (I.C.J. Reports 1970), p. 33.
[330] *Prosecutor v Tihomir Blaskic, Case No. IT-95-14/2, (Judgment on the Request of the Republic of Croatia for Review of the decision of Trial Chamber II of 18 July 1997)* op cit, para 26.
[331] See *Blaskic Subpoena Judgment, ibid,* para 26.
[332] Goran Sluiter, 'The surrender of war criminals to the international criminal court' (2002-2003) 25 *Loyola Los Angeles Int'l *& Comp. L. Rev*, 605, 610-611, see particularly fn. 17 in the article.
[333] Goran Sluiter, 'Obtaining Cooperation from Sudan-Where is the Law?' (2008) *JCIL, ibid,*
[334] Sluiter, Obtaining Cooperation, *ibid*, p. 876
[335] See G. Ferreira and A Ferreira-Snyman, 'The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism, (2014) 17 (4) *PER/PELJ* 1470, also available online at *http://www.scielo.org.za/pdf/pelj/v17n4/09.pdf*, last accessed on 19 November, 2018. See also

The second model, which this thesis supports, is one where the UNSC imposes obligations on all states including non-contracting states to the Statute to cooperate with the ICC. In terms of this model, states shall be obliged to apply the ICC Statute or, through UNSC direction, follow a completely 'new cooperation regime' and apply it to the situation of Sudan.[336] According to this model resembles that which was established under the ICTY and ICTR cooperation regime following the resolution of the UNSC and as confirmed by the *Blaskic subpoena decision*.[337] In this model, all UN member states had an obligation to cooperate since the Ad hoc Tribunals' authority emanated from the UN Charter. The powers of the UNSC to establish subsidiary organs is set out in Article 29 of the UN charter as read with rule 28 of the provisional rules of procedure.[338]

The third model, according to Sluiter, is one where the UNSC disregards the first and second models but establishes a completely new regime of cooperation with guiding rules for cooperation. In other words, the UNSC establishes a completely new regime of how states must cooperate with the ICC. This model would not take the approach discussed under first and second models above but will be something that is just unique. How that would be shaped will depend on what the ICC decides at the time. The difficulty with this model is that it may likely be very complicated and difficult to attain under the current political environment, where even UNSC members hardly reach consensus on ICC matters. Commencing negotiations for a new cooperation regime, in the current political environment, where African states and, arguably some members of the UNSC, are agitated with the manner in which the ICC is conducting its affairs, would be a very challenging exercise.[339]

David Sloss, 'Domestic Application of Treaties', (2011) *Santa Clara Law Digital Commons*, 1, also available online at *https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1620&context=facpubs*, last accessed on 19 November, 2018.

[336] Sluiter, Obtaining Cooperation, op cit, fn 44, p 876, in particular footnote 14.

[337] See *The Prosecutor v Blaskic*, Case no. IT-95-14/2 (AC), op cit, fn. 236.

[338] See the Provisional Rules of Procedure of the Security Council, op cit, fn 118.

[339] See Edna Molewa, Head of the ANC's International Relations Subcommittee, 'ANC Decision to quit ICC is valid: Comment & Analysis', *Mail & Guardian*, November 4-10, 2016, p 30. Also available online at *https://www.pressreader.com/south-africa/mail-guardian/20161104/281913067672358*, last accessed on 30 September, 2017. See also Carien du Plessis, 'Decision to withdraw from the ICC still stands, says ANC' *News24*, online at *http://www.news24.com/SouthAfrica/News/decision-to-withdraw-from-icc-still-stands-says-anc-20170611*, last accessed on 30 September, 2017. Debate between David Hoile and Angela Madukuti, 'Is the ICC racist?' *New International Magazine*, December 1, 2014, available online at *https://newint.org/sections/argument/2014/12/01/international-criminal-court-racist*, last accessed on 30 November, 2016.

When the above arguments are considered in light of resolution 1593 (2005), it becomes apparent that the cooperation regime that the resolution established, on its terms, is problematic as it did not set down an obligation for all UN member states to cooperate with the ICC. Sluiter summed up the problems of resolution 1593 (2005) with respect to cooperation in the following way:

> 'The problem with Resolution 1593(2005) is that no choice was made. The key language is that the Council decides that the Government of Sudan 'shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution'. But what is meant by 'full cooperation'? A careful study of the record of the meeting preceding the resolution's adoption does not provide an answer to this question. Bearing in mind that at present two main cooperation regimes can be discerned in international criminal law-one highly vertical/effective applicable to the ICTY and International Criminal Tribunal for Rwanda (ICTR), and the other less vertical/effective belonging to the ICC-we simply cannot say which of the models the Council had in mind.'[340]

To understand Sluiter's arguments, one needs to compare resolution 1593 (2005) on the situation of Sudan to resolutions 827 (1993)[341] which established the ICTY and resolution 955 (1993)[342] which established accountability mechanisms for the situations of the former Yugoslavia and Rwanda, respectively.

Under resolution 827 (1993), the UNSC imposed an obligation on all UN member states to cooperate fully with the ICTY. According to Sluiter's proposed analysis, this was the second model above. Paragraph 4 of the resolution provided as follows:

> '4. Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute;'[343]

[340] Goran Sluiter, Obtaining Cooperation, op cit, p 208, footnotes omitted.
[341] See S/RES/827/1993, op cit, fn 112 .
[342] See S/RES/955/1994, op cit, fn 113
[343] See S/RES/827/1993, op cit

Similar language was also used in resolution 955 (1994) establishing the ICTR.[344] Articles 29[345] and 28 of the ICTY and the ICTR, respectively, expressly elaborated the scope and content of specific duties imposed upon states with respect to investigations and prosecution of persons suspected of international crimes. Articles 29 (2)[346] and 28 (2) of the ICTY and ICTR respectively obliged states to 'comply' with requests and orders for assistance from the tribunals. As can be clearly seen from the above provisions, the language and scope of the two resolutions left no doubt that the UNSC had imposed a strong obligation on states to cooperate with the two tribunals. The fact that the tribunals were established as subsidiary organs of the UNSC also helped matters as it meant that the obligation to cooperate and comply with decisions of the tribunals applied to all UN Member States by virtue of Article 25 of the UN Charter.[347] In his report to the Security Council, the then Secretary General of the UN emphasised this point as follows:

> '[…] the establishment of the International Tribunal on the basis of a chapter VII decision creates a binding obligation on all States to take whatever steps are required to implement the decision.'[348]

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[344] S/RES/827/1993, op cit, fn 112, Para 2 of the resolution states as follows: 'Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute, and requests States to keep the Secretary-General informed of such measures;' See S/RES/827 (1993), op cit.

[345] Article 29 (1) of the ICTY Statute provided as follows: 'States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.' The Statute can also be accessed online at *http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf,* last accessed on 12 May 2017. Article 28 of the ICTR Statute was also drafted in similar terms. The latter statute can be accessed only at the following link: *http://legal.un.org/avl/pdf/ha/ictr_EF.pdf,* last accessed on 12 May 2017

[346] Article 29(2) of the ICTY Statute stipulates as follows: 'States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (a) the identification and location of persons; (b) the taking of testimony and the production of evidence; (c) the service of documents; (d) the arrest or detention of persons; (e) the surrender or the transfer of the accused to the International Tribunal.' Article 28(2) of the ICTR Statute was also drafted in a similar manner. See online at *http://legal.un.org/avl/pdf/ha/ictr_EF.pdf, l*ast accessed on 12 May 2017.

[347]This article establishes that UN members agree to accept and carry out decisions of the UNSC. See also the decision of the ICJ in the Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa),* op cit.

[348] See UNSC, 'Report of the Secretary-General pursuant to paragraph 2 of the Security Council Resolution 808 (1993)', presented on 3 May 1993, UN Doc. S/25704 (1993), Paragraph 23.The full text of the Report can be accessed online at *http://repository.un.org/bitstream/handle/11176/51122/S_25704-EN.pdf?sequence=3&isAllowed=y,* last accessed on 22 March 2018.

Furthermore, states were called upon to take measures for the effective implementation of the resolutions.

The foregoing analysis, therefore, puts in perspective the PTC II's judgment in *the South Africa Cooperation decision*, that all states have an obligation to cooperate with the ICC. The PTC II, however, did not elaborate comprehensively the origin of the duty to cooperate for all Member States to the UN Charter on the situation of Sudan. In other words, the PTC II did not convincingly justify why all states other than Sudan must cooperate with the ICC in the absence of express obligation being imposed by the UNSC. In light of Sluiter's analysis discussed above, it may be concluded that the UNSC under its resolution 1593(2005) on the situation in Sudan, established a cooperation regime, like the first model of Sluiter's analysis. As Sluiter rightly observed the first model has a number of problems that would affect effective cooperation and, in fact, it is a regime that does the 'ICC a disfavour-and Sudan a favour-by neglecting the adoption of, or reference to, a legal framework applicable to Sudan's cooperation duties.'[349] It is, therefore, very important that future cooperation models draw lessons from the Sudan situation so that a cooperation regime that responds to the challenges experienced in enforcing the Sudan situation is established.

In view of the foregoing, it may be stated that although Article 87(7) of the Statute is silent on the powers and measures that the UNSC may adopt against non-cooperating states, the UNSC can draw its powers from the UN Charter. The above discussion has shown that the UNSC has broad powers provided they further the objective of the UN Charter and the ICC. Otherwise, any decision of the UNSC contrary to these objectives may be challenged. The possible legal remedy against UNSC decisions would be judicial review to ascertain whether the decision is consistent with the UN Charter.[350]

3.4. The UNSC's power to adopt measures for the arrest and surrender of a suspect

According to the *Blaskic Subpoena decision*, whenever a state failed to fulfill a request to cooperate in arresting and surrendering a suspect to the tribunal, then the ICTY had an obligation to refer the non-complying state to the UNSC. Once referred, the UNSC was obliged to adopt 'sanctions and

[349] Goran Sluitter, 'Obtaining Cooperation', op cit, fn. 44, p 877

[350] See Miachael J. Mathews, 'ICJ Review of Security Council Decisions' (2004) 36 Geo Wash. Intel L. Rev. 615; See also Bernd Martenczuk 'The Security Council, the International Court and Judicial; Review: What lessons from Lockerbie?' (1999) 10 (3) *EJIL* 517-547; Dagmar Richter, 'Judicial Review of Security Council Decisions-A Modern Vision of the Administration of Justice? (2012) 32 *Polish Yearbook of Int'l L. 271-297*

penalties that can be imposed by the authorities of the State where the individual is located; and those that can be imposed by the International Tribunal'.[351] The expectation was that a state, once requested to cooperate, was obliged to impose penalties that already existed under national laws of the requested state concerned against a competent authority or individual who had the responsibility of implementing the ICTY's request or decision.

This meant that all competent authorities responsible for executing the request would face sanctions for their failure to cooperate in accordance with national laws. This was the first point of call for the state before considering whether to look outside the laws of that country for assistance. In other words, enforcement of ICTY decisions was both domestic and international; they were national when it targeted nation authorities responsible for executing the request. They were international level when sanctions targeted the states in general for its failure to cooperate with the ICTY. The ICTY confirmed this position of law in the following way:

> '[T]he first set of sanctions is enumerated or hinted at in a number of implementing laws of States: these laws provide that, in case of non-compliance with an order of the International Tribunal, the national authorities shall apply the same remedies and penalties provided for in case of disregard of an order or injunction issued by a national authority. In addition, […] most States, whether of common-law or civil-law persuasion, generally provide for the enforcement of summonses or subpoenas issued by national courts. It is plausible that in those States, the national authorities will be ready to assist the International Tribunal by resorting to their own national criminal legislation.'[352]

The ICTY held that 'relevant national authorities' must be compelled by the responsible state 'to seek remedies or sanctions for non-compliance by individuals with a subpoena or order issued by a Judge or a Trial Chamber.'[353] The ICTY was also of the view that 'legal remedies or sanctions put in place by national authorities themselves are more likely to work effectively and expeditiously'[354] in ensuring that an indicted individual is arrested and surrendered to an international tribunal. However, as rightly observed by the ICTY in the same case, 'allowance should be made for cases where resort to national remedies or sanctions would not prove workable [or where it would] be unable to compel a State official to comply with an order issued [by the ICC].[355] This is because not all states are responsive to the demands of international tribunals, let alone, complying with resolutions of the UNSC. In such cases, this thesis argues that the UNSC

[351] *Blaskic Subpoena decision,* op cit, fn 236, para 57.
[352] See *Blaskic Subpoena decision, ibid.*
[353] *Ibid.*
[354] See *Blaskic Subpoena decision, ibid,* para 58.
[355] See *Blaskic Subpoena decision, op cit,* para 58.

must resort to the UN Charter and invoke its Chapter VII powers to impose some of the remedies that are available under the Charter. Resorting to the provisions of Chapter VII powers of the UN Charter will conform to the provisions of Article 87(7) as read with Article 13(b) of the Statute.

The above observations also hold true for the ICC, because although the latter relies on states to effectively implement its decisions including the arrest and surrender of suspects, such obligation is subject to national laws of contracting states. In any event the actual arrest is supposed to be implemented by an individual who has the authority to handle such requests. Under domestic legal framework of several states, there are competent authorities who are mandated to fulfill this objective. It is, therefore, reasonable to hold them personally accountable if they fail to fulfill this objective. In that regard, this thesis argues that the UNSC must adopt the approach of the ICTY and clarify the obligations of states in so far as enforcement of its decisions is concerned. There is need for guidance on how national laws should be framed to enable competent authorities enforce ICC requests and decisions like the approach adopted by the ICTY in the above decision.

The above proposals apply to contracting states only. As held by the PTC II in *Decision regarding Omar Al-Bashir's potential Travel to the United States of America* ('USA Decision), 'non-States Parties may decide to cooperate with the Court on an *ad hoc* basis, as foreseen in Article 87(5)(a) of the Statute.'[356] The only way a non-contracting state would carry similar obligations is if they consent that the Statute can impose such obligation.[357] A non-contracting state can conclude an *ad hoc* arrangement with the ICC for cooperation in line with the provisions of Article 12(3)[358] read with Article 87(5) of the Statute. Once an *ad hoc* arrangement has been concluded, the jurisdiction of the ICC shall only be applicable to non-contracting States 'with respect to the crime in question'.[359] Otherwise, non-contracting states would not owe any

[356] *Prosecutor v. Omar Hassan Ahmad Al Bashir*, (*Decision regarding Omar Al-Bashir's potential Travel to the United States of America*), op cit, fn. 155, para 10, also available online at *https://www.legal-tools.org/doc/0a0e59/pdf/*, last accessed on 10 February, 2019. See also *Prosecutor v. Al Bashir* (*Decision Regarding Omar Al Bashir's Potential Travel to the Federal Republic of Ethiopia and the Kingdom of Saudi Arabia*), Oct. 10, 2013, ICC-02/05-01/09, also available online at *https://www.icc-cpi.int/CourtRecords/CR2013_07402.PDF*, last accessed on 10 February 2019 ; Prosecutor v. Al Bashir, ICC-02/05-01/09-169, *Prosecutor v Al Bashir (Decision Regarding Omar Al Bashir's Potential Travel to the State of Kuwait*), 18 November, 2013,ICC-02/05-01/09-169, also available online at *https://www.icc-cpi.int/CourtRecords/CR2013_08951.PDF*, last accessed on 10 February 2019.

[357] *Al Bashir's Travel to United States, ibid*, Para 10; See also *Decision on the request of the Defence of Abdullah Al-Senussi*, supra, para. 12.

[358] Article 12 (3) is in the following terms: 'If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction with the Court without any delay or exception in accordance with Part 9.'

[359] Article 12 (3) of the Statute.

obligation to cooperate with the ICC unless the UNSC expressly impose the obligation against non-contracting states in the resolution referring the situation to the ICC. In other words, even though the situation was referred to the ICC pursuant to a UNSC resolution, as was the case with resolution 1593 (2005) discussed above, the referral *per se* is not enough; the resolution must also expressly stipulate how all UN member states will cooperate with the ICC.

A crucial issue for purposes of this thesis relates to situations where despite the UNSC authorising states to cooperate, they nevertheless refuse or fail to do so. Another issue relate to challenges that are inherent within the work of the UNSC itself due to differences of opinion among its permanent members. This thesis argues that finding a solution to this problem must be guided by the principle of R2P as below argued.

3.5. Enforcing state cooperation under the Statute through the lens of the R2P

The Chapter has created an impression that since Article 87(7) of the Statute empower the UNSC to enforce state cooperation then the latter will automatically proceed to adopt measures that will force the non-cooperating state to comply. The discussion has not considered circumstances that would also impede the UNSC from adopting measures against a non-cooperating state when a case has been referred for enforcement by the ICC in accordance with Article 87(7) of the Statute. If indeed the UNSC has enormous powers under the UN Charter it is yet to translate the said powers towards its work for the ICC under the Statute.

In practice, there are a number of factors that can prevent the UNSC from adopting measures for enforcing cooperation against non-cooperating states including the use of veto, which most of the five permanent members of the UNSC have regularly resorted to over the years. A veto is a single 'negative vote' on the substantive issues from one of the permanent members of the UNSC. A veto is enough to compel the UNSC not to adopt a resolution.[360] Article 27(3) of the UN Charter provides that the UNSC can adopt decisions or resolutions on 'substantive matters'[361] through 'an affirmative vote of nine members including the concurring votes of the permanent members'. Decisions on 'procedural matters' of the UNSC require a simple majority of members of the UNSC for it to succeed.[362] A good example of a case where

[360] Ibid.
[361] See Florence Emmanuela (Emmy) Dallas, 'The Security Council's sine qua non: The Veto Power', Rutgers Global Policy Occasional Paper no. 8, p. 7, online at *https://polisci.rutgers.edu/news-publications/occasional-paper-series/346-occasional-paper-8-florence-emmanuela-emmy-dallas/file*, last accessed on 2 Feb. 2019
[362] See Article 27 (3) of the U.N. Charter.

the veto power was used is the case of Syria where Russia vetoed a resolution sponsored by the U.S. to intervene militarily in the country's internal affairs.[363] The resolution was intended to take all measures necessary against the government of Syria for allegedly deploying chemical weapons against its people. In 2014, Russia and China also vetoed another UNSC resolution which was aimed at referring the government of Syria to the ICC.[364]

The above examples shows that even though the Statute has empowered the UNSC to enforce cooperation, the implementation of the decision is not straight forward as the UNSC will have to work in accordance with the provisions of the UN Charter, its own procedures and practices including the use of veto power. Although the UNSC presents a strongest opportunity for enforcing decisions of the ICC, challenges within the UNSC itself particularly with the use of veto power by its permanent members poses a serious threat to the ICC achieving its overall mandate as the latter may likely fail to adopt resolutions in favor of strong measures against non-cooperating states. In light of the foregoing challenges, there is scope for enhancing the regime of cooperation so that decisions of the ICC are not politicized at the UNSC. In other words, a case must be advanced that would legally enable the UNSC adopt measures against non-cooperating states regardless of the veto power.

The thesis, therefore, argues that the UNSC when considering a referral from the ICC on non-cooperation must be guided by the principle of R2P to override any challenges including the veto power. By utilising the R2P norm with a view of intervening in the territory of a state for purposes of arresting and surrendering a suspect in a non-military way, the UNSC will go a long way in progressively advancing the development of the enforcement regime of the Statute. In order to advance a solid argument in support of the R2P principle and understand its relevance and applicability to the ICC, one needs to look at the historical development of the principle under international law.[365] The R2P concept epitomizes the importance of relying on states or

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[363] See Merrit Kennedy, 'Russia Vetoes U.S. Resolution on Syria in U.N. Security Council' *Npr* 10 April 2018, online *https://www.npr.org/sections/thetwo-way/2018/04/10/601153602/u-n-security-council-meets-about-syria-as-inspectors-prepare-to-head-in*, last accessed on 2nd February, 2019; See also Michelle Nichols, 'Russia blocks U.N. Security Council condemnation of Syria attack' *Reuters*, 12 April, 2017, online at *https://www.reuters.com/article/us-mideast-crisis-syria-un-vote-idUSKBN17E2LK*, last accessed on 2nd February, 2019

[364] See Ian Black, 'Russia and China veto UN move to refer to Syria to international criminal court' *The Guardian*, 22 May 2014, online at *https://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court*, last accessed on 2 February 2019.

[365] See Carsten Stahn, 'Marital Stress or Grounds for Divorce? Re-thinking the relationship between R2P and International Criminal justice, (2015) 266 *Criminal Law Forum*, 13-50, also available online at *https://link.springer.com/content/pdf/10.1007/s10609-015-9255-2.pdf*, last accessed on 22 November, 2018.

decision makers that are in control and authority of international affairs to intervene in the internal affairs of another state for purposes of protecting civilians. If those in authority and control work under the auspices of multilateral institutions like the UN and the ICC, peace and security will be achieved while at the same time averting the commission of international crimes.

3.6. Background to the R2P

The history of the R2P concept can be traced to the fractious period in international affairs where conflicts and the commission of atrocious crimes were on the rise. Following a spate of atrocities that were committed in Kosovo,[366] Rwanda,[367] Sudan[368] and Somalia,[369], where the international community failed to deal with human rights violations against the civilian population, a number of scholars including Deng and his colleagues at the Brookings Institute[370] were looking for ways of solving the crisis. Deng and his colleagues were working on the issue of Internally Displaced Persons (IDPs), at the time, particularly on how states or governments can protect this vulnerable group, when undertaking their humanitarian work across the globe.[371] The biggest challenge to their work was the principles of sovereignty and non-interference in internal affairs of states which have been part of international law since the treaty of Westphalia in 1648,[372] and was the bedrock of the UN system and international law, in general. The UN Charter codifies the principles of sovereign equality of states; respect for the personality and inviolability, as well as the territorial integrity and political independence of states in Articles 2 (1), 2 (4) and 2 (7).[373] In

[366] For an account on these atrocities See Human Rights Watch, 'Kosovo Atrocities Recounted in Detail' Human Rights Watch official website, online, (26 July 1999), available at *https://www.hrw.org/news/1999/07/26/kosovo-atrocities-recounted-detail*, last accessed on 20 March 2018.

[367] For an account of some of the atrocities see Human Rights Watch, 'Shattered lives: sexual violence during the Rwanda Genocide and its Aftermath', Human Rights Watch, 1996, online at *https://www.hrw.org/legacy/reports/1996/Rwanda.htm*, last accessed on 20 March 2018.

[368] Samuel Totten and Eric Markusen, *Genocide in Darfur: Investigating the Atrocities in the Sudan*, 2006, p 3-25

[369] Human Rights Watch, 'So Much to Fear: War Crimes and the Devastation of Somalia', Human Rights Watch, 8 December, 2008, Human Rights Watch online *at https://www.hrw.org/report/2008/12/08/so-much-fear/war-crimes-and-devastation-somalia*, last accessed on 20 March 2018.

[370] See Roberta Cohen and Francis M. Deng, *Masses in flight: the global crisis of internal displacement*, 1998, 275.

[371] Francis M. Deng,' From 'Sovereignty as Responsibility' to the 'Responsibility to Protect' (2010) 2 (4) *Global Responsibility to protect*, 353-370

[372] See Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21 (3) *The Int'l History Review, 569*

[373] For an elaborate discussion on these issues, see Edward C. Luck, *United Nations Security Council: Practice and Promise* , (2006), p 20; Ruth B. Russell, *A History of the United Nations Charter: The Role of the United States 1940-1945*, 1958, 672; Edward C. Luck, 'Reforming the United Nations: Lessons from a History in Progress', *Occasional Paper No.1*, 2003, 7-10; R. J. Vincent, *Non-Intervention and International Order*, (2015) ; Jennifer Welsh, Carolin Thielking & S. Neill Macfarlane, 'The Responsibility to Protect: Assessing the report of the International Commission on Intervention and State Sovereignty', (2002) 4 *International Journal*, pp 489-512, 489

response, Deng and his team devised the principle of Sovereignty as Responsibility (SaR) arguing that a state has a responsibility towards its people and only when it conduct itself in an ideal way does it have legitimacy to claim sovereignty.[374]

Deng did not, however, expressly clarify on who will take up the responsibility of judging whether a state has failed in its sovereign responsibility to protect citizens warranting the international community to intervene. They only argued that the very existence of SaR implies that there is a 'higher authority capable of holding sovereigns accountable'.[375] The higher authority has an obligation to take the common good for humanity ahead of any states' national interest. According to Bellamy, one cannot doubt that Deng meant that 'the UN and UNSC' are the authorities that 'comes closest to fitting the bill'[376] of having the capacity to make the above decision. Suffice to observe that Deng's theory focused on the actions of the host state; that it should own up and decides whether to request for outside assistance when its civilians are facing a catastrophe usually through diplomatic contacts.[377] Bellamy observes that in 'other situations, however, the doctrine would [also] point to the referral of cases to a 'higher authority-namely the UN Security Council'[378] when a host state has failed to fulfill its sovereign responsibility. This means that the principle of SaR can also be read to mean that it places a responsibility on the international community on top of the host state to protect civilians when they are in serious danger from the actions of its own state.

The development of this theory led to the emergence of another important theory of international law, the theory of R2P, whose term was coined by the International Commission on Intervention and State Sovereignty (ICISS). Annan, the then Secretary General of the UN, challenged the International community with a now so widely quoted question: 'If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a

[374] See Francis M. Deng, et al, *Sovereignty as Responsibility: Conflict Management in Africa*, 1996, p 1;The Impact of State failure on migration, (2004) 14 (4) *Mediterranean Quarterly*, p 18

[375] See Roberta Cohen, 'The building principles on internal displacement: an innovation in international standard setting' (2004) 3 *Global Governance* 10, p740; Alex J. Bellamy, 'The Responsibility to Protect and the Problem of Military Intervention' (2008) 84 (4) *International/ Affairs* 616-639, at 619-620.

[376] Alex J. Bellamy, 'Responsibility to Protect and the Problem of Military Intervention' (2008) 84(4) *International Affairs, 615-639*, p 620.

[377] See Alex J. Bellamy, *ibid*; also see Thomas G. Weiss and David A. Korn, *Internal Displacement: conceptualisation and its consequences*, 2006, p 74-74

[378] Alex J. Bellamy, 'Responsibility to Protect and the Problem of Military Intervention' *Ibid*, p 620

Rwanda, to a Srebrenica?'[379] The question inspired the Canadian Government to come forward and attempt to provide a response to the calls that the international community must protect the civilian population in certain instances, by establishing the above Commission. The ICISS was tasked with the responsibility of comprehensively promoting a number of objectives including 'the debate about humanitarian intervention;'[380] 2) to foster a new political consensus on how to reconcile the principles of intervention and state sovereignty;[381] and 3) to translate that consensus into action'.[382] In its report, ICISS centralised Sovereignty as Responsibility as part of its proposals, which was framed in the following way:

> 'The Charter of the UN is itself an example of an international obligation voluntarily accepted by member states. On the one hand, in granting membership of the UN, the international community welcomes the signatory state as a responsible member of the community of nations. On the other hand, the State itself, in signing the Charter, accepts the responsibilities of membership flowing from the signature. There is no transfer or dilution of state sovereignty. But there is a necessary re-characterisation involved: from sovereignty as control to sovereignty as responsibility in both internal functions and external duties'.[383]

The proposals presented by the ICISS reports, as above highlighted, formally recognised and put into motion Deng's theory. While the report noted that the theory cannot be a demonstration of a new principle of customary international law, it nevertheless acknowledged that it is 'an emerging guiding principle'[384] that should be adopted. They, thus, termed it 'the responsibility to protect' also known as 'R2P'.[385]

According to ICISS, R2P refers to the intervention by the international community in the affairs of another state 'for human protection purposes'.[386] This entails intervening in the affairs of a state 'when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator.'[387] The R2P principle places an obligation on a state 'to act swiftly in order to prevent or interdict such crimes' where

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[379] See Report of the International Commission on Intervention and State Sovereignty (ICISS), 'Responsibility to Protect', December, 2001, p. 2available online at *http://responsibilitytoprotect.org/ICISS%20Report.pdf*, last accessed on 20 February 2018.
[380] *Ibid*, para 1.3.
[381] Jennifer Welsh et al, op cit, fn. 373 p 490-491.
[382] *Ibid.*
[383] ICISS Report, op cit, fn. 379, para 2.14.
[384] ICISS Report, *ibid*, para 2.25.
[385] ICISS Report, *ibid*, paragraph 2.25.
[386] *Ibid*
[387] ICISS Report, op cit, fn. 379, paragraph 2.25.

its population is facing any harm.[388] If the state is 'unable or unwilling to protect its civilians from mass atrocity crimes', the responsibility shifts to the international community to intervene as a whole.[389] The R2P concept is also driven by human rights considerations that the right to protect civilians from any harm supersedes sovereignty claims under international law.

The R2P concept is, therefore, a reconceptualisation of the principle of state sovereignty according to which a state can only claim sovereignty and non-interference in its internal affairs if it does what is right. If the state does not meet internationally recognised standards in preserving the rights of its people it loses its claim to sovereignty compelling other states within the international community to intervene in its internal affairs and assist the civilian population. The R2P principle therefore assists states not to yield their responsibility of protecting civilians unless they are unwilling and unable to do so. As established by the ICISS, R2P also entails a 'responsibility to react' to grave human rights suffering[390] and prevent the commission of these atrocities.[391]

The importance of the ICISS's report is that it resolved the questions surrounding the issue of intervention that Deng and his colleagues failed to explicitly elaborate, like the issue of under 'what circumstances is intervention legitimate? It is also answered the question of what institutions are entitled to authorize intervention?'[392] According to ICISS, intervention must take place when there is a justifiable cause to intervene which includes the existence of 'large scale loss of life' and 'large scale ethnic cleansing' and commitment to the 'precautionary principles ('right intention, 'last resort', 'proportional means and 'reasonable prospects'.[393] This is because the existence of large scale loss of life or ethnic cleansing makes it impossible for the permanent members of the UNSC to use their veto power as in that situation they will have 'no vital national interests' at stake[394] to protect.

The most interesting part of the ICISS recommendation, however, was the suggestion that if the UNSC failed to act against a state that is committing the above atrocities then the UN

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[388] Alex Stark, 'Introduction', in Thomas G. Weiss, and others, *The Responsibility to Protect: Challenges & Opportunities in light of the Libyan intervention*, e-international Relations, 2011, p 4.
[389] UN, 'High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility', 2004, para 203, doc. A/59/565, available at *https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/602/31/pdf/N0460231.pdf?OpenElement*, last accessed on 28 April 2017.
[390] Bellamy, 'Responsibility to Protect and the Problem of Military Intervention…', op cit, fn. 376, p 620-621.
[391] See ICISS, *Responsibility to Protect*, op cit, fn. 379, p. xi.
[392] Bellamy, op cit, fn. 376 p 621.
[393] Bellamy, *ibid*. P 621.
[394] Bellamy, op cit, fn. 376 p 621.

General Assembly, and if not, the relevant regional organisations must authorise intervention.[395] The ICISS proposal somehow reversed the hierarchy of enforcement under international law as it proposed that first, the responsibility to protect civilians must start with the host state and if it fails to do so then it must go straight to the UNSC. If the UNSC fails to take any action then the UNGA must make a decision on intervention. This proposal somehow goes against the UN Charter as under the latter the UNSC is the supreme body responsible for the enforcement of international peace and security. The foregoing, notwithstanding, it is submitted that the ICISS proposal, made intervention possible without the consent of the host state. The ICISS's proposal actually put the host state at the center of protecting civilians. However, if the state is unable or unwilling to protect civilians, the international community must intervene. This includes:

> '[N]on-consensual intervention within a wider continuum of measures including prevention, rebuilding and non-forcible means of reaction, and identifying arrange of practices other than the armed intervention that could contribute to eth prevention and mitigation of genocide and mass atrocities.'[396]

Although the framing of the above right to intervention as advanced by ICISS received strong opposition and criticism, it was not out rightly rejected, as it endeared well with the international community due to its focus on the 'prevention of genocide and mass atrocities, and the protection of the vulnerable populations.'[397] The international community appreciated the objective behind the principle as 'the rights of endangered populations rather than the rights of interveners',[398] was the ultimate aim. The international community felt that this idea is legitimate considering that the world has been beset with a number of atrocities over the past decade. This means that the R2P principle, by focusing on the victims, presents a solid basis for the UNSC to take measures against a state including authorising intervention.

It is significant to observe that at the UN level, the principle of R2P received recognition on a number of occasions. The first time was through the UN High-Level Panel on threats, challenges and change which affirmed 'the emerging norm that there is a collective international responsibility to protect'.[399] The High-Level panel resolved that the R2P placed an obligation on all UN member states when atrocities take place. The second time was when the then Secretary

[395] Bellamy, *ibid*.
[396] Bellamy, , op cit, fn 376 p 621.
[397] Bellamy, *ibid*, p 622.
[398] Bellamy, *ibid*.
[399] UN, 'High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility', op cit, fn. 389, para 203.

General of the UN, Koffi Annan released his report titled, '*In larger freedom: towards development, security and human rights for all*', which embraced the 'responsibility to protect',[400] as a basis for collective action 'against genocide, ethnic cleansing and crimes against humanity'[401] by all UN member states.

The third time and, also an important time for purposes of this thesis, was in 2005 when the UN organised a Summit, where the framework and scope of the concept of R2P was codified and clarified. Two paragraphs from the UN World Summit Outcome document provide the framework and, indeed, codification of the concept of R2P. The two paragraphs as quoted in full are in the following terms:

> '138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.'[402]

The above paragraphs lay out the parameters of the R2P principle in the following way. First, the responsibility of states under international law is towards its population or citizens. This means that states accepted to 'protect their citizens from genocide, war crimes, crimes against

[400] See UN General Assembly, Report of the Secretary General, Addendum, 'In larger freedom: towards development, security and human rights for all' UN.Doc. A/59/2005, available online at *http://www.ohchr.org/Documents/Publications/A.59.2005.Add.3.pdf*, last accessed on 28 April, 2017.
[401] *Ibid*, esp. The Executive Summary.
[402] See UNGA, 'Draft resolution referred to the High-level Plenary Meeting of the General Assembly by the General Assembly at its fifty-ninth session: 2005 World Summit Outcome', UN Doc. A/60/L.1, p 31, available online at *http://responsibilitytoprotect.org/world%20summit%20outcome%20doc%202005(1).pdf*, last accessed on 12 February, 2018.

humanity and ethnic cleansing.'[403] Second, the obligations of the international community to intervene in the affairs of another state only arise when the latter is 'unable' or 'unwilling' to protect its population. Third, states can invoke the R2P concept where the following crimes are being committed: genocide, war crimes, ethnic cleansing and crimes against humanity. The R2P concept can also be invoked where there is suspicion that the above crimes are about to be committed. In other words, it may be invoked as a pre-emptive action to avert the commission of crimes. Fourth, the R2P concept can only be invoked when UNSC, as an organ responsible for authorising intervention or the invocation of the principle, decides to do so. However, prevention was, emphasized and identified as a 'key ingredient for a successful strategy' of protecting civilians by the international community.[404] As has been observed, the above Summit not only embraced the R2P concept but also confirmed that this emerging concept is 'an ally of sovereignty, not an adversary'.[405]

With the World Summit Outcome Document, the international community, not only sealed the approval of R2P as a principle for protecting the civilian population, it also obliged states to use it in fighting international crimes and ending impunity through the ICC. States were obliged to use their authority and control to investigate and prosecute international crimes so that they are wiped out across the globe and impunity is ended. However, this can be possible if states identify very quickly, those individuals who are responsible for the commission of international crimes; arresting and surrendering them to the ICC for accountability. States can also work as a community and intervene in the affairs of responsible states to avert the commission of crimes.

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[403] Bellamy, 'The Responsibility to Protect and the Problem of military intervention', op cit, fn. 376, p 623.

[404] Thomas G. Weiss, Whither R2P in Thomas G. Weiss and others, *The Responsibility to Protect: Challenges & Opportunities in Light of the Libyan Intervention*, (2011) *e-international relations*, p 9 also available online at *http://www.operationspaix.net/DATA/DOCUMENT/6616~v~The_Responsibility_to_Protect__Challenges_and_Opportunities_in_Light_of_the_Libyan_Intervention.pdf*, last accessed on 21 March 2018; Eti Stamnes, 'The Responsibility to Protect and 'Root Cause' Prevention' (2010) *Norwegian Institute of Int'l Affairs*, p 7, available online at *https://www.files.ethz.ch/isn/127952/NUPI%20Report-R2P-9-Stamnes.pdf*, last accessed on 21 March 2018; See also Jide Martyns Okeke, 'Contextualising the 'Responsibility to Protect' in Darfur' (2010) 5 *Int'l J. of African Renaissance Studies-Multi-, Inter- and Transdisciplinary* 65-81; See also OG Mwangi, 'State collapse, peace enforcement and the responsibility to protect in Somalia', (2015) *The Int'l J. Human Rts.* 1227-1239; Ruben Reike, 'Libya and the Responsibility to Protect: Lessons for the Prevention of Mass Atrocities', (2012) 8 *St Anthony's Int'l Rev*. 1, 122-149; Yoojin Rhee, 'North Korea and the Responsibility to Protect: Challenges and Opportunities' (2012) *St Anthony's Int'l Rev*. 1

[405] See UNGA, 'Integrated and coordinated implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic, social and related fields, Follow-up to the outcome of the Millennium Summit-Implementing the responsibility to protect: Report of the Secretary-General' UN Doc A/63/677, Paragraph 10 (a); See also Jennifer M. Welsh, 'A Normative case for pluralism: reassessing Vincent's views on humanitarian intervention' (2011) 87 (5) *J. Int'l Affairs* 1193-1204.

Once arrested, the ICC will play an essential role in implementing the R2P concept as it will offer a space for accountability.

Since the latter will need evidence, states were also obliged to assist the ICC by ensuring that national authorities participate in implementing the ICC's requests for arrests and surrender of suspects. National authorities must also take steps to ensure that the R2P concept is made part of a country's culture, values and tradition. The implementation of this concept at national level will enable the state to fight international crimes and end impunity nationally.

The R2P concept could, therefore, prove useful in promoting state cooperation under the Statute as the state will be compelled to cooperate either through the mechanism of the ICC or the UN. Carsten Stahn argues that the 'R2P could be invoked more systematically to draw attention to (i) non-cooperation by states in relation to nearest, (ii) need to follow-up by the Council or (iii) to put pressure on States to allow access to territory for investigations and prosecutions for core crimes.'[406] He further argued that states 'interactions with the Security Council could be strengthened through adoption of a protocol, or the identification of general parameters, which could guide Council's actions in cases in which there are strong indications that the crimes under the Rome State are being committed and no domestic action is taken.'[407]

It is also significant to highlight that the principles advanced by the UN World Summit Outcome document were slightly different from the proposals of the ICISS. In the UN World Summit Outcome Document the threshold for transferring intervention from the host state to international community was when the state proved itself 'unable and unwilling' to protect its own citizens. In the World Outcome document the threshold was set at the time on which the state was 'manifestly failing' in its responsibility[408] to protect the civilian population. Another significant issue is that the UN World Summit Outcome Document placed an obligation on the UNSC to always stand ready to act when necessary[409] for purposes of protecting civilians. However, nothing stops the UNSC to act on a 'case-by-case' approach[410] as to when or at what

[406] Carsten Stahn, 'Marital Stress or Grounds for Divorce? Re-thinking the relationship between R2P and the International Criminal Justice' (2015), 26 *Criminal L. Forum,* 13-50, p 49.
[407] *Ibid;* David Kleimann, 'Positivism, the New Haven School, and the Use of Force in International Law' (2006) (3) *Brussels J. Int'l Stud*. P. 49
[408] Bellamy, 'The Responsibility to Protect and the Problem of military intervention', op cit, fn. 376, p 623.
[409] *Ibid.*
[410] Bellamy, op cit, fn. 376, p 623.

point would intervention be necessary. This, therefore, means that the UNSC must analyse each case on each own facts before authorising intervention.

The foregoing, notwithstanding, it may be observed that the recognition of the principle of R2P by the World Summit was important as it clarified the scope and parameters of the principle. For the purposes of this thesis, the UN World Summit Outcome Document confirmed that the R2P norm 'applies to genocide, war crimes, crimes against humanity and ethnic cleansing'[411]. These are some of the international crimes that the international community has an obligation of ensuring that they are not perpetrated against the civilian population.[412]

Another crucial issue that came out of the UN World Summit Outcome Document was the recognition that 'the Security Council in partnership with relevant regional organizations has a responsibility to use whatever means to determine necessary and appropriate'[413] action to take to protect the civilian population. This means that the institution responsible for declaring intervention was reverted to the UNSC. The recognition of the UNSC as the ultimate authority in so far as intervention is concerned was in line with the UN Charter. The recognition of the existence of atrocious crime as criteria for triggering intervention was also crucial as it reaffirmed that these crimes have no place internationally. According to Bellamy, this recognition also puts the atrocious crimes in a 'fairly precise legal meanings grounded in the Genocide Convention, the Rome Statute of the International Criminal Court, and the practice of the international criminal tribunals for former Yugoslavia and Rwanda.'[414] This is crucial as it elevates the crimes to a level that obliges every state to fight against their commission so that perpetrators do not find a safe haven.

From the exposition of the UN World Summit's Outcome Document, it is also significant to observe that R2P is not only about military intervention; it 'does *not* set out criteria for the use of force'[415] as some have argued. Rather it:

> '[S]ets out responsibilities that states have to their own citizens (the primary responsibility to protect), responsibilities that all states have as members of the international community (responsibilities to help build capacity and use peaceful means to prevent and protect) and

[411] Bellamy, *ibid*; See also Jennifer M. Welsh, 'Norm Contestation and the Responsibility to Protect' (2013) 5 *Global Responsibility to Protect* 365-396.
[412] Bellamy, op cit, fn. 376, p 627
[413] *Ibid*, p. 624
[414] Bellamy, op cit, fn. 376, p 623-624
[415] Bellamy, op cit, fn. 376, p 624.

> responsibilities that certain institutions have (the Security Council's responsibility to use all appropriate means when necessary, in partnership with relevant international organizations).'[416]

This means that military intervention for purposes of the R2P principle is one means of fulfilling the principle that was confirmed by the UN World Summit Outcome Document. 'The other – especially the commitments to encourage and help states to fulfil their responsibility, and to use a range of non-coercive measures to prevent and protect vulnerable populations'[417] are also other crucial commitments for the protection of civilians.

In view of the foregoing, an argument could be made that the international community has an obligation to establish 'a comprehensive global policy based on the mandate handed down' by the World Summit which;

> 'would include (but not limited to) measures to improve the capacity of the UN and regional organisations to provide better early warning of genocide and mass atrocities and […] measures to improve the deterrence capability of the International Criminal Court.'[418]

Bellamy also argue, correctly that while it is important not to lose sight of 'questions about legality, legitimacy and political will'[419] on how to go about protecting civilians, 'the ultimate test in the direst of situations is whether international engagement succeeds in protecting vulnerable populations.'[420]

It is, therefore, important to appreciate that the principle of R2P must not be translated into one which only promotes military intervention; rather it is a principle which fits into any other situation where the protection of civilians is of paramount consideration. What is crucial as a guide is to understand 'what the principle does and does not say about [intervention including] the use of non-consensual military force for humanitarian purposes.'[421] However, whatever options are taken in furtherance of protecting civilians must 'not countenance' action taken without:

> '[T]he authorization of the Security Council and does not set out criteria for [intervention including] the use of force beyond the four threshold crimes and the idea that the Council should assume responsibility in cases where the host state is 'manifestly failing' to protect.'[422]

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[416] *Ibid*.
[417] Bellamy, 'The Responsibility to Protect and the Problem of military intervention', op cit, fn. 376, p 634.
[418] *Ibid*.
[419] Bellamy, op cit, fn. 376, p 635.
[420] *Ibid*, p 635.
[421] Bellamy, op cit, fn. 376, p 638.
[422] *Ibid.*

From the above exposition it is argued that the R2P principle becomes operational and triggers the action of the UNSC whenever international crimes are being committed. What pauses a threat to the application of the principle is the question of determining the circumstances in which intervention is necessary.[423]

There is, therefore, ground to argue that on the strength of the R2P principle, the UNSC can also authorise intervention in the affairs of a state for purposes of implementing a decision of the ICC. As confirmed by many commentators on the subject, peacekeeping missions that are being authorised by the UNSC in recent years have already taken a different shape in that they now combine both civil and some form of military intervention in order to protect civilians. Some examples of how this is being done include the missions in Sudan the United Nations Mission in Sudan (UNMIS) and one in DRC, United Nations Mission in the Democratic Republic of the Congo (MONUC).[424] These examples attest to the fact that the UNSC can also authorise intervention for purposes of arresting and surrendering suspects of international crimes. In Chapter 6 of this thesis, practical suggestions of how this principle can be utilised to effect an arrest and surrender of a suspect to the ICC using peace keeping efforts is discussed.

Having made a case that the UNSC can authorize intervention for purposes of arresting suspects indicted by the ICC including those who enjoy immunities, it is significant to observe that the report of the UN World Summit has been recognised by the UNSC on a number of occasions. Paragraph 4 of resolution 1674 (2005) on the protection of civilians in armed conflict, expressly reaffirmed the provisions of paragraphs 138 and 139 of the World Summit Outcome Document on responsibility to protect in particular.[425] The principle was also reaffirmed in resolution 1706 (2006) concerning the Darfur crisis. China abstained from the adoption of this

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[423] Bellamy, op cit, fn. 376, p 627.

[424] See K. Masson, 'Use of force and civilian protection: peace operations in the Congo' (2005) 12 (4) *Int'l Peacekeeping*, 503-519; S. Res. 1590 (2005), (24 Mar. 2005); S. Res. 1565 (2004) (1 Oct. 2004); See also Thomas G. Weiss, 'The humanitarian impulse', in David M. Malone ed., *The U.N. Security Council: from the Cold War to the 21st century* (2004), p. 48; Victoria K. Holt, *The Responsibility to Protect: considering the operational capacity for civilian population* 2005.

[425] See Max W. Mathews, 'Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur' (2008) 31 *Boston College Int'l Compa. L. R*. 137, 138, also available online at *http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1042&context=iclr*, last accessed on 21 March 2018; Alex J. Bellamy, 'The Responsibility to Protect and the problem of military intervention' (2008) 84 (4) Int'l Affairs, 615-639; Nick Grono, 'Briefing: Darfur: The International Community's Failure to Protect' 105 (421) *African Affairs* 621-631

resolution and since then no other resolutions on Darfur have supported R2P apart from draft resolution 1769 (2007) where the principle was deleted from the text.[426]

After the adoption of resolution 1674 (2005), UNSC recognised the principle in two more instances, namely,[427] resolution 1894 (2009) which reaffirmed UNSC position on this matter[428] and resolutions 1814 (2008) on Somalia which referred to protection of civilians only without any implementing measures. The same was the case for UNSC resolution 1674.[429] In Resolution 1970 (2011) on Libya the UNSC referred to R2P in adopting a number of Chapter VII measures including arms embargo, asset freeze, travel bans, and referred the situation to the ICC.[430] Resolution 1973 (2011) which authorised 'all necessary measures to enforce a no-fly zone and protect civilians'[431] in Libya, is considered to be the most controversial resolution on R2P as it has been criticized for inciting the death of the R2P concept.[432] This is because, on the strength of this resolution, a number of countries, including France, United Kingdom, and the United States of America and other North Atlantic Treaty Organization (NATO) Member states,

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[426] Alex J Bellamy, 'The Responsibility to Protect-Five years on' (2010) 24 (2) Ethics & Int'l Affairs 143-169, p 145 available online at *https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1747-7093.2010.00254.x*, last accessed on 21 March 2018.

[427] Alex J. Bellamy, '*ibid*, p 145 online at *http://responsibilitytoprotect.org/Bellamy.pdf*, last accessed on 1 January 2018.

[428] See UNSC 'Annex to the letter dated 4 February 2013 from the Permanent Representative of the Republic of Korea to the United Nations addressed to the Secretary-General- Concept note for the Security Council open debate on the protection of civilians in armed conflict, 12 February 2013' UN Doc. S/2013/75, also available online at *http://responsibilitytoprotect.org/concept%20paper(1).pdf*, last accessed on 21 March 2018. The full text of the Resolution can be accessed here *http://www.globalr2p.org/media/files/un_security_council_resolution_1984.pdf*, last accessed on 21 March 2018. See also Global Centre for the Responsibility to protect, 11 November 2009, online at *http://www.globalr2p.org/resources/331*, last accessed on 21 March 2018.

[429] See Alex J. Bellamy, *Global Politics and the Responsibility to Protect: From Words to deeds*, 2011, p 29.

[430] Simon Adams, 'Libya and the Responsibility to Protect' (2012) Occasional Paper Series No. 3, October 2012, Global Centre for the Responsibility to Protect , online at *http://www.globalr2p.org/media/files/libyaandr2poccasionalpaper-1.pdf*, last accessed on 21 March 2018; Carsten Stahn, 'R2P, the ICC and the Libyan arrests' (2011) *The Hague Justice Portal*, online at *http://www.haguejusticeportal.net/index.php?id=12998*, , last accessed on 21 March 2018; Matthias Dembinski and Theresa Reinold, 'Libya and the Future of the Responsibility to Protect- African and European Perspective' (2011), *Peace Research Institute Frankfurt*, online at *https://www.hsfk.de/fileadmin/HSFK/hsfk_downloads/prif107.pdf*, last accessed on 21 March 2018

[431] See Thomas G. Weiss, Whither R2P in Thomas G. Weiss and others, *The Responsibility to Protect: Challenges & opportunities in light of the Libyan Intervention*, (2011) *e-international relations*, p 9.

[432] Nadir Edul Dalal, 'The R2P is Dead. Long Live the R2P. Libya, Syria, and the Responsibility to Protect' (2013) *Law School Student Scholarship Paper* 208, available online at *http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1208&context=student_scholarship*, last accessed on 18 March 2018; Maggie Powers, 'Responsibility to protect: dead, dying, or thriving? (2015) 19 *Int'l J. Human Rts.* 1257-1278; Ambassador. Richard W. Williamson, 'Sudan and the Implications for Responsibility to Protect' (2009) *Policy analysis brief*, online at *https://www.stanleyfoundation.org/publications/pab/WilliamsonPAB1009.pdf*, last accessed on 12 March 2018.

launched a military campaign against Libyan Government forces on the pretext of protecting civilians. This, however, led to a regime change in the country and the death of President Gadhafi of that country.[433] The resolution was adopted after Russia, China, Algeria, the Philippines and Brazil resisted its adoption, arguing that it was prematurely brought before the Security Council.[434]

Despite the shortcomings of the UNSC and its inconsistencies in the application of R2P in Libya, the R2P has been of great influence within the UN system and it is of particular relevance to the ICC system. Besides, this thesis has argued that since intervention does not only mean military intervention, the principle of R2P could play a crucial role in enforcing compliance of ICC decisions against non-contracting states, particularly when it comes to compelling the cooperation of non-contracting states to the Statute. This is because the international community will not be distracted by issues of sovereignty that may otherwise have prevented intervention but the desire to achieve human good for the people in the said non-contracting state.

3.7. Conclusion

This Chapter has analysed the enforcement provisions, particularly, Article 87(7) of the Statute to assess whether the current legal framework adequately equips the UNSC to enforce cooperation. Although Art. 87(7) identifies the UNSC as one of the two organs responsible for enforcing decisions of the ICC, the provision is silent on what role the UNSC will play in enforcing cooperation. It also does not explicitly indicate the measures available to the UNSC to impose against non-cooperating states as a penalty for their failure to cooperate. However, the Chapter has argued that the UNSC may have recourse to its Chapter VII powers under the UN Charter to enforce cooperation under the Statute. When the UNSC is adopting measures in furtherance of its Statute obligation, it will have to work as an organ of the UN Charter, as such, there are chances its work may be affected by political challenges within the UNSC itself including the use of veto. To ensure that the UNSC continues to work regardless of the veto power, the Chapter has argued that there need for the UNSC to utilise its powers through the lens of the R2P principle if the fight against international crimes would be successful. In the next

[433] Jane Kokan, 'The Perils of Regime Change…Libya: A Nation Engulfed in Chaos', *Risk Hedge*, 9 June 2017 online at *https://www.riskhedge.com/post/perils-regime-change-libya-nation-engulfed-chaos*, last accessed on 11 February, 2018.
[434] See Alex Bellamy, The Responsibility to Protect-Five Years on, op cit, fn. 426, p 145-146.

Chapter the thesis proceed to analyse the powers of the other organ responsible for enforcing cooperation under the Statute and the ASP.

CHAPTER 4

POWERS OF THE ASP TO ENFORCE COOPERATION UNDER THE STATUTE

4.1. Introduction

This Chapter discusses in greater detail the responsibilities of the ASP in enforcing cooperation under the Statute. The Chapter analyses the legal framework that empowers the ASP to enforce cooperation and whether the said organ is fulfilling its mandate in practice. As this Chapter shows, the ASP has taken steps to improve the level of state cooperation with decisions of the ICC. The question, however, is whether these steps are enough to achieve the intended purpose of fighting international crimes and ending impunity. The Chapter also evaluates whether the legal framework on cooperation sufficiently equips the ASP to enforce cooperation. The analysis commences by looking at the powers of the ASP and the efforts it has so far taken to improve cooperation under the Statute.

4.2. Powers of the ASP to enforce cooperation under the Statute

Article 87(7) of the Statute also empowers the ASP to enforce state cooperate with decisions of the ICC. The ASP has an obligation to enforce decisions of the ICC when they have been referred by the ICC, other than through a UNSC referral. Normally, all cases involving contracting states to the Statute will be enforced by the ASP unless otherwise decided either by the ICC or the UNSC. Although article 87(7) of the Statute provides a legal basis for the ASP to enforce cooperation under the Statute, it does not stipulate the full details of the enforcement process. In other words, art 87(7) of the Statute does not stipulate how the organ will undertake its work of enforcement. Suffice it to observe that once a decision of non-cooperation has been made by the ICC, as discussed in Chapter 3 above, the case may be referred to the ASP for enforcement. Once referred to the ASP, it is expected that measures may be adopted against the non-cooperating state. As already indicated in this thesis, so far no state has been sanctioned by the ASP or the UNSC for its failure to cooperate with the decision of the ICC.

It may be observed that the ASP is established under Article 112(1) of the Statute. It is an organ of the ICC which consists of one representative, who may be accompanied by alternatives and advisers from each state party to the Statute.[435] It is made up of a Bureau, which is elected

[435] Article 112(1) of the Statute.

annually comprising of 18 member representatives of states. The representatives are led by an elected President and two vice-presidents for a period of three years.[436] The Bureau meets at least once a year[437] to undertake a number of functions including dealing with non-cooperating states. The ASP also has a number of powers including considering, 'pursuant to Article 87, paragraphs 5 and 7, any question relating to non-cooperation';[438] and performing any functions that are 'consistent with th[e] Statute or the Rules of Procedure and Evidence.'[439] In order to enhance state cooperation, the ASP has adopted procedures relating to cooperation, which are divided into two, a formal procedure and informal procedure.[440]

4.3. Formal public response procedure of the ASP

The first procedure that the ASP adopts, which is called the formal 'and to some extent public' response procedure, is one which is undertaken by the ASP immediately after the delivery of a decision by the ICC.[441] This procedure is based on Article 87(7) of the Statute in that as soon as the ICC delivers a judgment, the ASP must immediately forward the same to 'all States parties without delay'.[442] At the same time, a press release must be issued by the Secretariat of the ASP to inform the general public of the delivery of the judgment. The Press Release must also specify the contents of the decision.[443] Once that has been done, the Bureau must undertake a number of follow-up steps, which 'list is not intended to be exhaustive'.[444] The Bureaus must hold an emergency meeting to strategize on the case, especially if the matter 'is such that urgent action by the Assembly may still bring about cooperation'.[445] At the meeting of the Bureau, the ASP must decide on the action that would be taken to ensure cooperation. It may use the meeting to 'receive oral report from the President on any action taken, and to decide on what further action would be required.'[446]

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[436] Article 112(3)(a) of the Statute
[437] Article 112(3)(a) of the Statute
[438] Article 112(2) (f) of the Statute.
[439] Article 112(2)(g) of the Statute.
[440] See ICC Assembly of States Parties, *Assembly Procedures Relating to Non-cooperation*, ICC-ASP/10/Res.5 annex, 10 December 2010, at *https://asp.icc-cpi.int/iccdocs/asp_docs/Non-coop/ICC-ASP-10-Res.5-extract-annex-ENG.pdf*, last accessed on 1 October 2018. Hereinafter referred to as 'ASP Amendment Procedures'
[441] ASP Amendment Procedures, *ibid*, Section D, para 13 (a)
[442] *Ibid*.
[443] ASP Amendment Procedures, *ibid*.
[444] Goran Sluiter 'Enforcing Cooperation …' op cit, fn. 266, p 395.
[445] ASP Amendment Procedures, op cit, fn 440 para 14 (a) of the ASP Amendment procedures.
[446] ASP Amendment Procedures, op cit, fn. 440, para 13.

The other action that the ASP may adopt is to send an open letter from the President of the ASP to the non-cooperating state, reminding the responsible state of its Statute 'obligations to cooperate and requesting its views on the matter within a specified limit of no more than two weeks.'[447] A copy of that letter must also be sent to all state parties 'encouraging them to raise the matter in bilateral contacts with the requested State, where appropriate.'[448] If the time stipulated in the letter expires without cooperation, the Bureau must invite the contracting state concerned 'to present its views on how it would cooperate with the Court in the future.'[449]

Under the formal public procedure, the ASP is also expected to hold 'a public meeting on the matter to allow for an open dialogue with the requested State'.[450] State parties, observers and civil society representatives are also allowed to participate at this open meeting.[451] The public meeting must be held immediately, assuming that 'the next session of the Assembly is scheduled to take place more than three months after the Bureau meeting' which was referred to earlier.[452] The Bureau must then prepare a report including its 'recommendation as to whether the matter requires action by the Assembly.'[453] The Bureau is also required to discuss the Report in plenary session 'at the next (or on-going) session of the Assembly, […] under the agenda item on cooperation.'[454] The Bureau, 'if necessary, [may] appoint a dedicated facilitator to consult on a draft resolution containing concrete recommendations on the matter.'[455]

4.4. Informal Response Procedure of the ASP

The second procedure proposed by the ASP is what is known as the informal response procedure, which is not dependent on a judgment being delivered. The informal response procedure arises where:

> '[T]here are reasons to believe that a specific and serious incident of non-cooperation in respect of a request for arrest and surrender of a person…is about to occur or is currently on going requiring the ASP to take urgent action against the responsible state that may help bring about cooperation'.[456]

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[447] See ASP Amendment Procedures, *ibid*, para 14 (b).
[448] ASP Amendment Procedures, *ibid*, para 14.
[449] *Ibid*, para 14 (c) of the ASP Amendment Procedures.
[450] *Ibid*.
[451] See ICC-ASP/1/3 and Corr. 1, part II. C; Part XX.
[452] ASP Amendment Procedures, op cit, fn. 440, para 14 (d).
[453] Para 14 (e) of the ASP Amendment Procedures.
[454] ASP Amendment Procedures, op cit, fn 440, para 14 (f).
[455] *Ibid*.
[456] ASP Amendment Procedures, op cit, fn. 440, s7 (b).

A good example is where the ASP has become aware of a visit by Al Bashir to Malawi prompting it to take action. Because Malawi is a contracting state to the Statute, the ASP will, under this procedure, be obliged to send a delegation or diplomatic correspondence to Malawi reminding the state of its statute obligations including consequences for its failure to cooperate with the request of the ICC. Under this procedure, the ASP takes a measure against Malawi without any finding by the ICC of non-cooperation. Sluiter cautions against this procedure:

> 'I am of the opinion that a significant degree of caution should be exercised in relation to 'non-cooperation issues' *that have not been* referred to the ASP by the Court. Without a judicial finding of non-compliance pursuant to Article 87 (7), it cannot be convincingly claimed that a state has violated its cooperation obligations under the ICC Statute. It may be that non-cooperating state has some valid reasons to refuse cooperation.'[457]

According to Sluiter, it is always difficult to take measures against any state before the ICC makes a finding of non-cooperation. Indeed, much as pre-emptive actions are welcome in certain circumstances to rectify the problem of states cooperation, such measures are easily open to challenge. A state may question why it should be punished for a wrong that has not yet happened nor been confirmed by the PTC of the ICC.

4.5. Toolkit for Engaging States

Another important initiative that has been developed by the ASP is a Toolkit for engaging states in cases of non-cooperation. The Toolkit aims at encouraging the execution of warrants of arrests or surrender of suspects[458] by states. The Toolkit provides for the responsibilities of the ASP and contracting states to the Statute in this initiative and offers options that may be used for 'diplomatic action to implement procedures on non-cooperation'.[459] It also provides 'resources to promote information-sharing and to establish informal or formal channels of communication with the main actors in the non-cooperation procedure.'[460] The Toolkit is divided into formal and informal options with the latter intended to be 'non-compulsory set of actions, ready for use by

[457] Goran Sluiter, 'Enforcing Cooperation…', op cit, fn. 266, p 399-340.
[458] See Assembly of States Parties, 'Report of the Bureau on Cooperation', Seventeenth session, The Hague, 5-12 November, 2018, (Toolkit) Annex III, p 14 of the Report, ICC doc. ICC-ASP/17/31, also available online at *https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/ICC-ASP-17-31-ENG.pdf*, last accessed on 11 December 2018; also ICC-ASP/14/38; See also ICC-ASP Non-Cooperation Paper on Toolkit 15 June 2015, circulated by the Secretariat of the Assembly of States Parties on 22 June 2015, ASP, 'Report of the Bureau on non-cooperation', ICC Doc. ICC-ASP/14/38, fourteenth session, The Hague, 18-26 November, 2015, available online at *https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-38-ENG.pdf*, last accessed on 11 December, 2018.
[459] Toolkit, ICC-ASP/14/38, op cit, fn. 458 para 43.
[460] Toolkit, ICC-ASP/14/38, *ibid.* para 43.

States Parties wishing to monitor or prevent instances of non-cooperation.'[461] In this initiative, states are called upon to rely on tools for monitoring states which includes the setting up of 'Google alerts';[462] circulating and updating 'a listing of different events that persons under warrant of arrest might attend'[463] and the travel 'of persons under warrant of arrest to non-tates Parties.'[464] The latter tool will require the 'cooperation with the OTP'.

The monitoring toolkit also encourages States Parties to circulate information among and within contracting parties to the Statute and how to engage with the civil society.[465] The monitoring toolkit requires the focal points to:

> '[C]irculate, within their regional group, information on possible travels of persons subject of warrant of arrest issued by the Court; drafting of standardized messages for the use of the Focal Points; and the setting up of a procedure to receive more information from the OTP and circulate it among States Parties'[466].

Some of the tools for preventing instances of non-cooperation devised by the ASP include the drafting of 'statements';[467] 'note verbales';[468] 'speaking points to be used with the State Party involved, ahead of the travel [of a suspected offender], at all levels';[469] 'suggestions on how to take advantage of all meetings, bilateral and multilateral to raise non-cooperation issues';[470] and 'suggestions to help mainstreaming ICC sensitivity among the governmental structure of each State Party's'.[471]

States are also called upon to rely on these tools when providing 'suggestions of ways to discuss ICC issues in regional gathering[s]';[472] consideration 'of what routes an individual subject to an arrest warrant is likely to take when travelling, and to demarche relevant transit States accordingly; suggestions on contacts with the civil society';[473] the drafting of 'formulas

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[461] See Annex II to the Toolkit, para 1.
[462] Toolkit, ICC-ASP/14/38, op cit, fn. 458 Annex II, para 2 *(a)*.
[463] *Ibid*, para 2 *(b)*.
[464] Ibid
[465] Toolkit, ICC-ASP/14/38, op cit, fn. 458 Annex II to the Toolkit, part A, para 2 *(a)-(b)*.
[466] See Toolkit, ICC-ASP/14/38, *Ibid*, Annex II to the Toolkit, part A, para 2 *(a)-(b)*
[467] *Ibid*, part B, p 10, paras 4 *(a)-(e)*
[468] *Ibid*
[469], part B, p 10, paras 4 *(a)-(e)*.
[470] *Ibid.*
[471] *Ibid*, part B, p 10, paras 4 *(a)-(e).*
[472] See Toolkit, ICC-ASP/14/38, op cit, fn. 458 Annex II to the Toolkit, part B, p. 11, para 4 *(f)-(j).*
[473] *Ibid.*

for contacts with the medias, putting the emphasis on the victims narratives';[474] and 'suggestions in order to maintain the attention of the public on the situations, especially through the victims perspective'.[475] The Toolkit also calls upon states to consider the 'travel of persons under warrant of arrest to non-state parties';[476] 'inclusion of a clause for mandatory cooperation by all States in future referral by the Security Council and suggestions of strategies to find incentive for the States Parties to cooperate with the Court.'[477]

The Toolkit also calls upon the focal points to standardise 'formulas in order to remind States of obligations pertaining to the Rome Statute and the Charter of the UN';[478] standardise 'formulas to invite States Parties of its original group to take actions; standardise formulas to ask States parties for feed-back on their action and reporting to the Bureau';[479] 'suggestions of types of assistance to give to the ASP "Missions of good offices"[480] and that 'in all what precedes, consider also travels of persons under warrant of arrest to non-States Parties.'[481]

It may be appreciated that the ASP also has four regional focal points on cooperation comprising of members of the Bureau of the ASP and the President serving as an ex officio of his region.[482] The focal points' target 'instances of non-cooperation that is foreseen in the Assembly procedures on non-cooperation.'[483] They also engage states on instances of potential non-cooperation, i.e. the Bureau undertaking a pre-emptive action.[484]

The above procedural steps are a positive development towards improving cooperation under the Statute. However, they are political in nature taken by the ASP while relying on diplomatic and political connections with the responsible non-cooperating states to influence cooperation. As observed by Dyani-Mhango, the ASP's sole focus in this exercise is to encourage 'states to cooperate with the ICC requests rather than punishing them'[485] for their non-compliance. Its aim is to 'open the dialogue between the ASP and the non-cooperating states on

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[474] Toolkit, ICC-ASP/14/38, op cit, Annex II to the Toolkit, part B, p. 11, para 4 *(f)-(j).*
[475] Toolkit, ICC-ASP/14/38, op cit, Annex II to the Toolkit, part B, p. 11, para 4 *(f)-(j).*
[476] *Ibid.*
[477] ASP Toolkit, ICC-ASP/14/38, op cit, fn. 476, para 4; *ICC-ASP Non-Cooperation Paper on Toolkit 15 June 2015,* circulated by the Secretariat of the Assembly of States Parties on 22 June 2015,
[478] Ibid. para 5
[479] ASP Toolkit, ICC-ASP/14/38, op cit, fn. 458, para 5 *(c).*
[480] *Ibid.* para 5 *(d).*
[481] ASP Toolkit, op cit, fn. 458. para 5 *(e).*
[482] ASP Amendment Procedures, *ibid*, para 3.
[483] Ibid
[484] ASP Amendment Procedures, op cit, fn. 458, para 45.
[485] Dyani-Mhango,' South Africa's failure to arrest and surrender President Al Bashir…', op cit, fn., 44, p 69.

how to best deal with the cooperation requests and to support them so that they cooperate in the future.'[486] In this process, the ASP anticipates that non-cooperating states will respond positively to these calls for cooperation since they have 'been triggered by a formal decision of the Court referring the matter to the Assembly'.[487] In any event, the Bureau of the ASP is given the power to carry out a non-cooperation hearing 'in full respect of the authority and independence of the Court and its proceedings'.[488]

Although these procedural steps elaborate positive measures that the ASP takes in order to ensure cooperation, they are not enough to persuade non-cooperating states not to re-offend or repeat their non-cooperation. The problem with this approach is that cooperation remains at the mercy of the offending state. This is also shown by the 'language used in the resolutions [which] is non-binding as evidenced by the use of terms like the ASP calls upon'.[489] In short the proposed efforts are weak to compel or force a non-cooperating state to, not only fear the ASP as an enforcing organ, but also cooperate with its decisions.

Sluiter has raised a number of observations against these procedures. First, he argues that since the non-cooperating state is also a party to the Statute and, may likely also be a member of the ASP, these procedures provides an opportunity for an offending state 'to call into question the findings of the Court under Article 87(7) proceedings in the context of the subsequent 'consideration' of the matter within the ASP'.[490] In other words, reopening of the hearings at the ASP level against a non-cooperating state may be an opportunity for the latter to re-litigate and challenge the findings of the ICC. As observed by Sluiter, this also 'raises the broader question of what purpose can there be in organizing an open dialogue and allowing the non-cooperating state to present its views following a judicial intervention.'[491]

Sluiter also observes that normally in these situations non-cooperating states 'may also be supported in these efforts by befriended States, including states that have already been, or could be in the future, the object of non-cooperation procedures.'[492] As a result, the impact of the ASP proceedings against non-cooperating states may be affected as these states may support the

[486] Dyani-Mhango, *ibid*. p 69-70
[487] ASP Amendment Procedures, op cit, para 10.
[488] *Ibid*. para 12
[489] Dyani-Mhango, South Africa's failure to arrest and surrender President Al Bashir, op cit, fn. 44, p 69.
[490] Goran Sluiter, 'Enforcing Cooperation: Did the Drafters Approach it the Wrong Way?' op cit, fn., 266, p 394.
[491] Goran Sluiter, 'Enforcing Cooperation…' op cit, fn. 266, p 395.
[492] *Ibid*.

offending state. Although these observations are credible, they nevertheless create an impression that the ASP may not be objective enough to resist any pressure from the non-cooperating state and its allies, if any. Of course, any cooperation by a state arising from these procedures depends on the quality of the ASP's hearings,[493] and the measures the ASP intends to take after assessing the case. However, the fact that a non-cooperating state is given a chance to explain itself before the ASP does not mean, as further elaborated below, that the ICC is allowing a non-cooperating state to re-litigate its case.

Sluiter further observes that the proposed procedures are weak and 'appear utterly ineffective with no deterrent effect on states that have failed to cooperate or may do so in the future.'[494] According to him, the current ASP proposed procedures 'lack focus, simplicity and accountability, and, most importantly, effectiveness.'[495] Sluiter presents pertinent observations demonstrating that the cooperation regime of the Statute needs strengthening. This thesis provides responses to these arguments emphasizing that although the ASP, under enforcement of cooperation, may invite states to a hearing; such a hearing is not intended to re-open the case. The hearing is only focused on ascertaining facts pertaining to cooperation with requests and decisions of the ICC and not the merits of the decision.

A number of issues from this proposed procedure also deserve consideration. First, all the proposed initiatives as discussed above would only work well in a vertical cooperation model between the ICC and contracting parties to the Statute. It is doubtful if these proposals would work effectively in a horizontal cooperation model, where the issue of non-cooperation would involve a non-contracting state.[496] This is because in a horizontal model, consent of states is always a paramount requirement. It is to that discussion that this chapter now shifts to.

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[493] Goran Sluiter, 'Enforcing Cooperation…' op cit, fn. 266, p 394.
[494] *Ibid*. p 396
[495] Goran Sluiter, 'Enforcing Cooperation…' op cit, fn. 248, p 398.
[496] See Ferndinandusse 'improving inter-state cooperation for the national prosecution of international crimes: Towards a new Treaty?' 2014 18 (5) *ASIL Insights*, online at *https://www.asil.org/insights/volume/18/issue/15/improving-inter-state-cooperation-national-prosecution-international*, last accessed on 28 March 2018.

4.6. Vertical and horizontal models of cooperation

Under customary international law, a state does not have a general obligation to cooperate with international tribunals.[497] Such an obligation only arises through treaty provisions and, even in such cases, the provisions are grounded on, either bilateral[498] or multilateral[499] framework. When an international obligation is imposed on states, it is incumbent upon that state to domesticate their obligation to cooperate, as a normative requirement, to enable investigation and prosecutions of individuals suspected of committing international crimes at national level. A good example of these treaties includes the Convention on the Prevention and Punishment of the Crime of Genocide[500] and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[501] In that way, states would be able to cooperate between or among themselves and the international tribunal or the ICC accordingly. Since there is no 'comprehensive' and 'robust' framework that imposes the foregoing obligations on states under the Statute, it would be difficult to expect states to cooperate effectively, whether 'vertically' with the court or 'horizontally' between or among states themselves.[502].

The foregoing observations also makes the PTC II's judgment in *the South Africa Cooperation Decision,* which held that Sudan has an obligation, 'vertically' to cooperate with the ICC and 'horizontally' to cooperate with other states, difficult to appreciate. In the decision,

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[497] See Dire Tladi 'A horizontal Treaty on Cooperation in International Criminal Matters: The Next Step for the Evolution of a Comprehensive International Criminal Justice System?' (2014) 29(2) *Southern African Public Law*' 368-387.

[498] As is the case with Mutual Legal Assistance Agreements. See also Murdoch Watney, *A South African Perspective on mutual legal assistance and extradition in a globalized world*, (2012 vol. 15 (2).

[499] See for example, the Inter-American Convention on Mutual Assistance in Criminal Matters (adopted on 23th May 1992, entered into force on 14th April, 1996) 75 Treaty Series, OAS, available online at *http://www.oas.org/juridico/english/treaties/a-55.html*, last accessed on 28 February, 2018. See also United Nations Office on drugs and Crime, Manual on mutual Legal Assistance and Extradition, (September, 2012), (UNODC), available online at *https://www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf*, last accessed 28 February, 2018; The Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (adopted on 29th May 2000, 23rd August, 2005, available online at *file:///C:/Users/suzgol/Downloads/english.pdf*, last accessed on 27 February, 2018.

[500] See Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December, 1948, entered into force on 12 January 1951, UN. Treaty Ser. 278 of 1951, available online at *https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pd*f, last accessed on 13 November, 2018.

[501] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification by General Assembly 39/46 on 10 December 1984, entered into force on 26 June 1987, available online at *https://www.ohchr.org/en/professionalinterest/pages/cat.aspx*, last accessed on 13 November, 2018.

[502] Tladi 'A horizontal Treaty on Cooperation', op cit, fn 497 p 368.

the PTC II held, *inter alia*, that since the effect of Article 27 (2) of the Statute was to trigger the jurisdiction of the ICC over the situation in Sudan thereby bringing the situation within its competency, it followed that the latter was obliged to cooperate, 'vertically', with the request from the ICC to arrest and surrender Al Bashir and other indicted senior officials.[503] 'Horizontally', the PTC II also held, this means that Sudan was under an obligation to cooperate with a contracting state to arrest and surrender Al Bashir.[504] According to the PTC II, Sudan has an obligation, imposed by the Security Council, 'to cooperate fully and provide any necessary assistance' with a request from fellow non-contracting States 'as a result of […] a *sui generis regime*' of cooperation emanating from 'the Charter of the United Nations.'[505]

In terms of the manner in which Sudan would cooperate with the ICC, the PTC II held that it shall do so in accordance with the terms of the Statute as this was:

> '[A] necessary, un-severable, effect of the informed choice by the Security Council to trigger the jurisdiction of this Court and impose on Sudan the obligation to cooperate with it.' [506]

The above decision suggests that the obligation of Sudan or any non-contracting state to cooperate with the ICC only arises when the UNSC has so directed. This issue, as discussed earlier, is debatable in that some scholars take a different view, especially when one considers that the authority of Sudan to cooperate with the ICC arose from an express provision of a UNSC resolution. Since the UNSC resolution is the authority that the PTC II relied upon, the same is challengeable as the UNSC resolution 1593 (2005) did not impose the same obligation on all member states to the UN when authorizing the Sudan to cooperate with the ICC. In any event, it has been argued that the UNSC does not have the power to compel a state to be bound by provisions of the Treaty.[507] Suffice it to observe that the explicit indication by the UNSC of an obligation for all states to cooperate with the ICC makes it easier for the latter as states are then bound by the provisions of Article 25 of the UN Charter.

The second issue to observe from the proposed attempts by the ASP to improve cooperation is that it potentially creates a parallel judicial process for enforcing cooperation. Sluiter has observed the challenges that this procedure presents in the following way:

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[503] *Decision on South Africa Cooperation*, op cit, fn. 46, para 76.
[504] *Ibid*, para 79
[505] *Decision on South Africa Cooperation*, op cit, fn. 46, para 83.
[506] *Ibid*.
[507] Asadi. G. Kiyani, op cit, fn. 107.

> '[H]olding an open dialogue with the non-cooperating state and inviting the non-cooperating state to present its views on how to cooperate in the future are 'steps' which carry with them the potential for the non-cooperating state discussing, challenging, and thus undermining the judicial finding of non-compliance.'[508]

As argued by Sluiter, this scenario, 'raises the broader question of what purpose can there be in organizing an open dialogue and allowing non-cooperating state to present its views following a judicial intervention'[509]

The above observations are relevant to the discussion on the attempts by the ASP to improve state cooperation with decisions of the ICC. Attempts at improving state cooperation by the ASP rest on, or are dependent on the non-cooperating state giving consent to the measures adopted by the ASP, if any. This is because the proposed procedures puts the non-cooperating state in charge of cooperation in that the ASP approaches the state to invite its cooperation by taking measures towards fulfilling the decision of the ICC. Any refusal on the part of the responsible state will automatically lead to the failure on the part of the ASP to compel cooperation. In other words, the proposed attempts still retain the supremacy of the principle of sovereignty. Another issue is that diplomacy is put at the forefront of improving cooperation in the sense that states' ability to cooperate with the ICC is subject to the latter's consent.

4.7. ASP powers to adopt measures for enforcing cooperation

The foregoing discussion shows that although the current framework of Article 87(7) of the Statute imposes an obligation on the ASP to enforce state cooperation, there is need to elaborate on a number of issues if the ASP is to assume its role. Article 87(7), is not clear on what the ASP will exactly do when a situation has been referred for enforcement. In other words, although Article 87 (7) of the Statute identifies the ASP as the organ responsible for enforcing cooperation, it does not elaborate the nature, scope and content of *the procedure* to be followed when the organ is hearing a case against a non-cooperating state. It also does not indicate the nature, scope and content of *the remedies* available to the ASP in dealing with non-cooperating states and indeed enforcing

[508] Goran Sluiter, 'Enforcing Cooperation: Did the Drafters Approach it the Wrong Way?' op cit, fn. 44, p 395.
[509] *Ibid*. p 395

cooperation, in general.[510] Article 87(7) of the Statute, in its current form, does not, thus, clarify whether it is merely a procedural or substantive provision for enforcing cooperation.

The provision also fails to indicate whether a non-cooperating state that will be sanctioned by the ASP has a right of appeal or not against its decision.[511] Article 112 of the Statute which establishes the ASP is also silent on the exact nature of the role that the ASP will play in this exercise. In other words, the above two provisions do not clarify both the procedure and substance of the ASP's role in enforcing cooperation under the Statute. This is one of the gaps that this thesis addresses in Chapter 6 so that enforcing cooperation under the Statute may improve.

Meanwhile, the ASP has been taking measures or steps in line with its mandate of enforcing cooperation despite the provision being silent on the exact role, nature and content of procedures and remedies it may impose against non-cooperating states. The provision is also silent on how the ASP will be executing decisions of the ICC once a matter is referred for enforcement. Although the ASP has been taking steps to fulfill this obligation, the measures which are being currently implemented are weak and needs strengthening. It is submitted that the entire legal framework on enforcement of cooperation by the ASP and a few provisions that deal with the foregoing needs reviewing to ensure that the ASP imposes measures that deter non-cooperation.

4.8. Conclusion

This Chapter has discussed the legal framework of cooperation under the Statute disclosing that Article 87(7) of the Statute identifies the ASP as one of the two organs responsible for enforcing cooperation. The Chapter considered the framework for enforcing cooperation under the Statute, focusing on the provisions of Article 87(7) which provides for consequences of failure by states to cooperate with the ICC. The Chapter has shown that the Statute empowers the ICC to refer non-cooperating states to the ASP or UNSC, however, it is silent on what role the ASP will play in enforcing cooperation, let alone, indicating the measures that would be available to the ASP when imposing measures against non-cooperating states as a penalty for their failure to cooperate. Although the ASP has been attempting to adopt measures for improving state cooperation, the said measures are weak and deserve re-consideration.

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[510] See Goran Sluiter, 'Enforcing Cooperation: Did the Drafters Approach it the Wrong Way?' (2018) 16 *J. Int'l Crim. Just*. 383-402, p387.
[511] Goran Sluiter, 'Enforcing Cooperation: Did the Drafters Approach it the Wrong Way? ibid' p 388.

CHAPTER 5

HOW DO HUMAN RIGHTS TRIBUNALS ENFORCE STATE COOPERATION: LESSONS FOR THE ASP

5.1. Introduction

State resistance with decisions of international courts and tribunals is not a new phenomenon under international law.[512] From the Nuremberg tribunals, the *Ad* hoc tribunals of the ICTY and ICTR to the ICJ, states have, at some point, failed or deliberately refused to cooperate with decisions of international judicial bodies.[513] This phenomenon has not escaped regional human rights tribunals such as the IActHR, the ECtHR and the AfCPHR, where evidence exist that states have either failed or refused to implement some of their orders or Judgments.[514]

As a response to these challenges and to ensure effectiveness of the protection and promotion of people's rights within the geographical area of their operation, some of these regional tribunals have adopted measures to enhance state cooperation with their decisions.[515] This has been done through the adoption of the 'compliance phase of litigation'.[516] In this thesis, the 'compliance phase of litigation', is hereby referred to as the 'enforcement of cooperation' phase of litigation.

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[512] International scholars have investigated why states comply with international law generally and international tribunals in particular with divergent results. See Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale L.J.* 2599, 2600, Oona Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale L.J.* 1935, 1944-64; Louis Henkin, *How Do Nations Behave* (1979) 2nd edition.

[513] Victor Peskin, 'Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2005) 4 (2) *J. Hum. Rts.*' 213- 231; Susan W. Tiefenbrun, 'Paradox of International Adjudication: Developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court' (2000) 25 (3) *North Carolina J. Int'l L. & Commercial Regulation*, 551, also available online at *http://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1679&context=ncilj*, last accessed on 21 January, 2018; Etienne Mutabazi, *The United Nations ad hoc Tribunals' effectiveness in prosecuting international crimes*, (Doctoral Theses, UNISA, 2014), also available online at *http://uir.unisa.ac.za/bitstream/handle/10500/14130/thesis_mutabazi_e.pdf?sequence=1&isAllowed=y*, last accessed on 12 January 2018.

[514] See James Cavallaro and Stephanie Erin Brewer, 'Re-evaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court', (2008) 102 (4) *AJIL*, 768, p 785.

[515] *Ibid.* 768.

[516] The IActHR had jurisdiction to hear matters on the following themes: 'advisory, and judgments; advisory opinions; and provisional measures'. As explained later in this Chapter, the IActHR added another jurisdictional theme, 'the supervision of compliance' to monitor states' implementation of its decisions. This point is also expressly elaborated on the IActHR's official website as a jurisprudential clarification of the IActHR. For more on jurisprudential classification under this system, visit the IActHR's official website online at *http://www.corteidh.or.cr/cf/Jurisprudencia2/index.cfm?lang=en*, last accessed on 12 June 2017.

This Chapter, therefore, considers how the IActHR, the ECtHR and the AfCPHR enforce their decisions including those relating to the obligation for states to investigate and prosecute suspected offenders of international crimes. The Chapter analyses their practices to draw lessons that may inform the ASP in its effort to enhance state cooperation under the Statute. The first part of the analysis discusses the enforcement of state cooperation under the IActHR, followed by the ECtHR before finalising with a discussion of supervision of compliance under the AfCPHR's. Where necessary, the chapter will also discuss supervision of compliance before *Ad hoc* tribunals of the ICTY and ICTR.[517]

5.2. Enforcement of Decisions under the IActHR

The IActHR, a judicial body of the Organisation of American States (OAS), has been in operation since 1979.[518] It is established by the American Convention on Human Rights, also known as the 'pact of San Jose', Costa Rica (hereinafter referred to as 'the Inter-American Convention'), as an organ responsible for the fulfilment of state commitments under the Inter-American convention.[519] Generally, the Inter-American system of human rights was established in 1948 in Bogota, Colombia when a number of American States adopted the Charter of the Organisation of American States at their Ninth International Conference of American States. This conference also adopted the American Declaration of the Rights and Duties of Man which, although is an important and founding instrument for the protection and promotion of human rights under this system, did not initially provide for any organs to monitor human rights at the time of its adoption. It took the fifth meeting of consultation of Ministers of Foreign Affairs, which took

[517] There is plethora of literature from numerous scholars studying the tendencies of 'states to comply with human rights obligations'; see Courtney Hillebrecht, *Domestic Politics, International Human Rights Adjudication, and the Problem of Political Will*, (2009); See also Fernando Basch, 'The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions' (2010) 7 (12) *Sur Journal-Int'l J. on Human Rts*, online at *https://poseidon01.ssrn.com/delivery.php?ID=999110013020000099094118089076124065028075037051019060102005083028115081006112119101124013053029106045002085121094065018082126007001075005054070114089030021008102031037085049115121088114113127075094000022006069118123010029090084075101092017025084078122&EXT=pdf*, last accessed on 15 June 2017.

[518] American Convention on Human Rights, adopted on 22 November, 1969, entered into force 18 July 1978. For more detailed discussion of the history of the Court, see the Court's official website, *http://www.corteidh.or.cr/index.php/en/about-us/historia-de-la-corteidh*, last accessed on 6th September, 2016.

[519] See Article 33 of the American Convention.

place eleven years later, in 1959, for the region to adopt a resolution which established the Inter-American Commission on Human Rights ('the Inter-American Commission').[520]

The American Convention was, thus, adopted in 1978 with the mandate of promoting and protecting civil and political rights contained in Articles 3 to 25 and economic, social and cultural rights, which are referenced briefly in Article 26 of the Inter-American Convention.[521] The system has a dual arrangement of operation, in that some states are only subject to the Inter-American Commission in terms of the OAS Charter and the American Declaration on the Rights and Duties of Man.[522] Others are only amenable to the system by virtue of American Declaration of the Rights and Duties of Man.[523] About 24 out of 35 member states of the Organisation of American States ('OAS') have ratified the American Convention and only about 25 states are parties to the Treaty that establishes the court, having accepted its compulsory jurisdiction.[524]

The IActHR adjudicates over contentious cases and also provides advisory opinions on various legal matters involving human rights.[525] However, just like any other judicial body, the IActHR has faced a number of challenges when it comes to state cooperation as a number of states have resisted compliance with its determinations on several occasions.[526] This led to the IActHR to develop jurisprudence on enforcement of cooperation, transforming and building new policies on enforcement of their judicial determinations. As of September 2016, over 472 cases

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[520] For a thorough historical discussion of this system, see KD King-Hopkins 'Inter-American Commission on Human Rights: Is its bark worse than its bite in resolving human rights disputes?' (2000) 35 *Tulsa L. J*. 421; VR Rescia & MD Seitles 'The development of the Inter-American human rights system: A historical perspective and a modern day critique' (2000) 16 *NY L. Sch. J. Human Rts* 593; See also the Declaration of the Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, 12 August-18, Final Act, Doc. OEA/Ser.C/II.5, p 10-11, accessible online at *http://www.oas.org/en/iachr/mandate/basics/intro.asp*, last accessed on 2 January, 2017.

[521]VR Rescia & MD Seitles 'The development of the Inter-American human rights system: A historical perspective and a modern day critique' (2000) 16 *NY L. Sch. J. Human Rts* 593.

[522] David Padilla, 'An African Human Rights Court: Reflections from the perspective of the Inter-American System' (2002) 2 *African Human Rts. L. J.* 185, 186.

[523] For more on the duality of the system see David Padilla, 'An African Human Rights Court…' *ibid.*

[524] See the IActHR, 'I/A Court History', *Press release*, online at *http://www.corteidh.or.cr/index.php/en/about-us/historia-de-la-corteidh*, last accessed on 12th February 2019.

[525] See Articles 1 and 2 of the Statute of the Inter-American Court of Human Rights, adopted by the OAS GA 1 October, 1979, entered into force on 1 January, 1980) accessed online at *http://www.corteidh.or.cr/index.php/en/about-us/estatuto*, last accessed on 6th September 2016.

[526] For a comprehensive data on decisions of the court on supervision of compliance with the court's decisions please visit the court's web page at *http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda_supervision_cumplimiento.cfm?lang=en*, last accessed on 6th September 2016. See also Judge Antonio Augusto Cancado Trinidade 'Statement delivered during a seminar on Dialogue between Judges, European Court of Human Rights, titled *Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility*, p 10-17, available online at *http://www.echr.coe.int/Documents/Dialogue_2014_ENG.pdf*, last accessed on 12th September 2016.

were, either on, or had undergone the supervision of compliance stage.[527] This stage has over the years grown in importance as reflected by a number of publications on the subject.[528]

5.3. Problems of Implementation of the IActHR's Judgments

When the IActHR finds that a state is liable for 'a violation of a right or freedom protected by the Convention', it either, rules 'that the injured party be ensured the enjoyment of his right or freedom that was violated,'[529] or may order reparations, in the form of 'fair compensation be paid to the injured party.'[530] It may also order, 'in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to the persons', provisional measures 'as it deems pertinent in the matters it has under consideration.'[531] In other words, any violation of people's rights attracts responsibility in that the IActHR imposes orders for reparation which must be enforced.

5.4. Enforcement of state cooperation with decisions of the tribunal under the IActHR

The genesis of the enforcement of cooperation stage of judicial determinations, under the IActHR, can be traced to a number of cases that were decided at almost the same time, namely: '*the Velasquez Rodriguez case, together with the Godinez Cruz, and Fairen Garbi and Solis*

[527] For more on this information access the updated record of cases on the Court's official website at *http://www.corteidh.or.cr/cf/Jurisprudencia2/index.cfm?lang=en*, last accessed on 12th September 2016
[528] *Ibid*; See also the comments of Judge Trinidade, *ibid*. See also Fernando Felipe Basch, 'The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning & Compliance with its Decisions' (2010) 7 (12) *Int.'l J. on Human Rts*. P. 9.
[529] Article 63 (1) of the American Convention.
[530] Ibid
[531] Article 63 (2) of the American Convention.

Corrales cases'.[532]Almost all these cases concerned 'forced disappearance practices by the Honduran government during the early 1980s.'[533]

It has been argued that the IActHR deliberately targeted these cases to send a message to the respective governments about the issue.[534] What is also interesting about these cases is that the IActHR made the 'closure of a case contingent on a completed investigation of human rights abuse and prosecution of those responsible.'[535] It is, thus, significant to observe that as of June 2016, over 420 decisions had undergone the process of supervision of compliance and this process has arguably been very successful.[536]

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[532] Leona Lam et al, 'Velasquez Rodriguez v Honduras (2014) 36 *Loy. L.A. Int'l & Comp. L. Rev* 1913, abstract, p 1913; See also *Velasquez Rodriguez v Honduras, Reparations and Costs, Compliance with Judgment*, Order of the Inter-American Court of Human Rights, , Series C No. 4 (Decision of 10 September, 1996), online at *http://www.corteidh.or.cr/CF/Jurisprudencia2/index.cfm?lang=en&nId_Estado=19*, last accessed on 10 October, 2017; *Case of Godinez-Cruz v Honduras*, Ser. C No. 5 (Merits), (Judgment of January 20, 1989) available online at *http://www.corteidh.or.cr/docs/casos/articulos/seriec_05_ing.pdf*, last accessed on 22 March, 2018; See the *Case of Godinez-Cruz v Honduras*, (Reparations and Costs), See. C No. 8, (judgment of 21 July 1989) accessible online at *http://www.corteidh.or.cr/docs/casos/articulos/seriec_08_ing.pdf*; Cavallaro & Brewer, p 791; See also the following cases *Aloeboetoe et al v Suriname*, (Reparations and Costs), (See. C No. 15) (judgment of 10 September 1993, online *http://www.corteidh.or.cr/docs/casos/articulos/seriec_15_ing.pdf*, last accessed on 22 June 2017; *Gangaram-panday v Suriname, Merits, Reparations and Costs, judgment, inter-Am. Ct H.R.*, ser., C No. 16, January 21, 1994, para 69-71, online at *http://hrlibrary.umn.edu/iachr/C/16-ing.html*, last accessed on 23 June 2017. *Gangaram Panday v Suriname, merits, Reparations and Costs*, Judgment, Inter-Am. Ct. H.R., Ser. C, No. 16, 69-71, 21 January, 1994. See *El Amparo v Venezuela, Monitoring Compliance with Judgment, Reparations and Costs*, Judgment, Order of the Court, Inter-Am. Ct. H.R., (ser. C) No. 28, p 64, 14 September, 1996; *Barrios Altos v Peru, Reparations and Costs*, Judgment, Inter-Am. Ct. H.R., Ser. C, No. 87, 50, November 30, 2011, available online at *http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf*, last accessed on 12 February, 2019.

[533] Leona Lam et al, Ibid; See also Shirinnaz Zekavati, et al, 'Godinez Cruz v Honduras' (2014) 36 *Loy. L.A. Int'l & Comp. L.R.* 271. The article is also available online at *https://iachr.lls.edu/sites/iachr.lls.edu/files/iachr/Cases/Godinez_Cruz_v_Honduras/God%2B%C2%A1nez%20Cruz%20v.%20Honduras.pdf*, last accessed on 20 August, 2017; Theodore Nguyen, et al, "Aloeboetoe et al v Suriname", (2014) (37) *Loy. L.A. Int'l & Comp. L.R*. 1591. Also available online at *https://iachr.lls.edu/sites/iachr.lls.edu/files/iachr/Cases/Aloeboetoe_v_Suriname/nguyen_aloeboetoe_et_al._v._suriname.pdf*, last accessed on 20 August, 2017.

[534] Leona Lam et al, op cit, p 1913; See also See Kathrynn Benson, et al, 'Barrios-Altos v Peru', (2014) 37 *Loy. L.A. & Comp. L. R.* 1145, also available online at *https://iachr.lls.edu/sites/iachr.lls.edu/files/iachr/Cases/Barrios_Altos_v_Peru/benson_barrios_altos_v._peru.pdf*, last accessed on 22 August, 2017; A Summary of the facts of the case can also accessed online at *https://iachr.lls.edu/cases/barrios-altos-v-peru*, last accessed on 12 February, 2019. Summary of facts sourced from the summary prepared by Justice Schneewels et al, "Ugarte v Peru" (2014) (36) *Loy. L.A. Int'l & Comp. L.R*. 173, also available online at *https://iachr.lls.edu/cases/durand-and-ugarte-v-peru*, last accessed on 12 February, 2019.

[535] David Baluarte, 'Strategizing For Compliance: The Evolution of a Compliance Phase of Inter-American Court Litigation and the Strategic Imperative For Victims' representatives' (2012) 27 (2) *AUILR* 263-321,. p 276

[536]For comprehensive data on decisions of the court on supervision of compliance visit the court's web page online at *http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda_supervision_cumplimiento.cfm?lang=en*, last accessed on 6th September 2016; See also Statement delivered by Judge Antonio Augusto Cancado Trinidade during a seminar on Dialogue between Judges, European Court of Human Rights, 2014, 'Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility?,' op cit, p 10-17, available online at *http://www.echr.coe.int/Documents/Dialogue_2014_ENG.pdf*, last accessed on 12th September 2016; the comments of Judge Trinidade, Ibid. See also Fernando Felipe Basch, 'The Effectiveness of the Inter-American System of

Suffice it to observe that although the IActHR had delivered a number of orders on supervision of compliance, as above discussed, no state had challenged the legality of the same except the state of Panama in the case of *Baena-Ricardo et al v Panama.*[537] The jurisprudence laid down in this decision by the IActHR significantly shaped the future of supervision of compliance under this system.

5.4.1 *Baena-Ricardo v Panama*

The case of *Baena-Ricardo et al v Panama* was submitted to the IActHR by the Inter-American Commission to, *inter alia,* adjudicate on the question of whether the Government of Panama had violated the following rights under the American Convention: states obligation to respect rights; domestic legal effects; and right to fair trial, among others.[538] The Inter-American Commission had initially decided in favour of about 270 public employees who were dismissed from work by the government of Panama.[539] During the proceedings before the Inter-American Commission, the parties, namely, the petitioners and the Government of Panama had indicated their willingness to reach a friendly settlement but that failed, hence the matter was referred to the IActHR.[540]

When the matter was brought before the IActHR, the State of Panama raised a number of objections concerning the competency of the IActHR to hear the matter at this stage of the proceedings. It may be observed that on the merits of the case, the IActHR had found the government of Panama liable for violating the Inter-American Convention, including, Article 9 on legality and non-retroactivity; Articles 8 (1), 8 (2); and 25 on judicial guarantees; Article 15 on the right to assembly; and Article 16 on freedom of association, among others.[541] After the delivery of the decision, Panama had initially indicated its willingness to comply with the judgment. However, instead of submitting a report on compliance, it filed several grounds objecting to the IActHR's competence to monitor compliance with its judgments. It is important to reproduce the arguments

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Human Rights Protection: A Quantitative Approach to its Functioning & Compliance with its Decisions' (2010) 7 (12) *Int.'l J. on Human Rts*. P 9.

[537] See *Case of Baena-Ricardo et al. v. Panama, (Competence), (Sr. C) No. 104, Judgment of November 28, 2003*, para 59.

[538] See *Case of Baena-Ricardo et al v Panama,* (Merits, Reparations and Costs), ser. C. No 72 Judgment of 2 February, 2001, para 1. Available online at *http://www.corteidh.or.cr/docs/casos/articulos/seriec_72_ing.pdf*, last accessed on 12 September, 2016.

[539] *Ibid*, para 4.

[540] *Ibid*, para 10

[541] See *Case of Baena-Ricardo et al v Panama, Judgment*, reparations and Costs, supra, para 214 of the Judgment on Merit.

made in court by the government of Panama to understand the complexity and importance of this decision in this area of the law.

Firstly, Panama argued that the IActHR was not mandated to supervise or monitor the compliance of its decisions because the '*stage of compliance with judgment is a "post-judgment" stage'* and that it 'is not included in the norms that regulate the jurisdiction and procedure of the international Court'.[542] It also argued that the IActHR's order 'of November 22, 2002, on compliance with judgment',[543] being a post judgment stage 'is not included in the norms that regulate the jurisdiction and procedure of the Court', meant that the IActHR had 'interpreted its own judgment of February 2, 2001.'[544]

Secondly, Panama argued that the post-judgment stage of monitoring compliance is 'strictly within the political sphere, which, in this case [is] exclusive to the General Assembly of the Organization of American States.'[545] According to Panama, the Inter-American Convention and the Statute of the IActHR establish clearly the limits of the jurisdiction and competence of the IActHR under Articles 65 of the Inter-American Convention. This provision delegates the 'function of monitoring compliance with the judgments of the Inter-American Court of Human Rights' to the General Assembly of the Organization of American states**.**[546] By delegating the powers for monitoring the implementation of judgments of the IActHR to the Assembly,[547] Panama argued, meant that contracting states did 'not anticipate or authorize a monitoring function for the Court' nor did they impose any obligations on states parties, neither did they 'grant rights to the Court nor competence to monitor compliance with its judgments.'[548]

To drive the point that international tribunals do not monitor state compliance with judicial decisions, Panama compared the IActHR's action to the work of the ICJ and the ECtHR that they

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[542] *See Baena-Ricardo et al vs. Panama,* (supervision of compliance) supra, fn 538, para 53 and 54 (a) of the Court's Judgment. (Emphasis added)
[543] *Ibid*, para 53.
[544] *Ibid*, para 53. It must be observed that on 2 February, 2001, the Court had delivered its Judgment on merits, reparations and costs and on 22 November, 2002, the Court had delivered a judgment on supervision of compliance. The terms of order are reproduced in the judgment of the Court in paragraph 21 of the Compliance Judgment of 28 November, 2003. See *Baena Ricardo et al. case. Compliance with judgment. Order of the Inter-American Court of Human Rights* of 22 November, 2002 op cit; See also *Case of Baena-Ricardo et al v Panama, Judgment, of 2 February, 2001*, (compliance) op cit.
[545] *Baena-Ricardo et al vs. Panama*, (compliance) supra, para 54 (a).
[546] *Baena-Ricardo et al vs. Panama*, supra, para 54(b) of the Judgment on supervision of 28 November, 2003.
[547] , See Article 65 of the Inter-American Convention.
[548] Baena-Ricardo et al, Judgment of 28 November, 2003, (supervision of compliance), fn 544 para 54 (b) of the Judgment.

delegate 'expressly the function of monitoring the Judgments' to the 'Security Council' and 'the Committee of Ministers', respectively.[549] Panama also argued that the annual report presented by the IActHR 'to the OAS General Assembly specifically' attest to the 'annual work of the Court, but not to the work of the States Parties in the contentious cases'[550]. Thirdly, Panama also argued that it found 'no grounds in general international law', in the Inter-American Convention, and in the Statute of the IActHR which affirms that 'all international bodies with jurisdictional functions, […] have the authority, inherent in their attributes, to determine the scope of their orders and judgments'.[551] This is because the legal instruments of the Inter-American Convention 'do not establish the possibility of a dispute with regard to the implementation of measures of reparation, but …' related to the 'specific norms of the American Convention'.[552]

In its judgment, the IActHR rejected Panama's arguments in their entirety and held that it had jurisdiction to supervise states compliance of its own judgments. In an elaborate and comprehensive decision, the IActHR laid out the law on supervision of compliance, which has guided the work of the IActHR to date.[553] The IActHR held that any contracting state that has been ordered by a court to implement a particular order and has accepted its contentious jurisdiction, (which in the case of Panama was on 9 May, 1990),[554] must 'observe the norms of the Convention that refer to compliance with that judgment or those judgments.'[555] According to the IActHR, this obligation also extends to, and 'binds all the State's powers and bodies'[556] within the national set up of the responsible state. This means that all institutions in the country must 'comply with the judgments of the Court promptly and fully.'[557]

According to the IActHR, therefore, a state's obligation to comply with the decisions of the court 'corresponds to' a number of basic principles of international law on 'responsibility of State', including the following principles: (a) *pacta sunt servanda*, which stipulate that 'a State

[549] *Ibid*, para 54*(d), (c)* and *(j)* of the 28 November 2003 Judgment.
[550] *Ibid*, (compliance), para 54 *(g)* of the 28 November 2003 Judgment.
[551] Baena-Ricardo et al, Judgment of 28 November, 2003, supra, para *(o)* to *(s)* of the Judgment.
[552] *Ibid*, para (x) of the 28 November 2003 Judgment.
[553] For a comprehensive update on the stage of supervision of compliance under the IActHR visit the court's official website at *http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda_supervision_cumplimiento.cfm?lang=en*, last accessed on 12 September, 2017.
[554] *Baena-Ricardo* (compliance) *et al*, op cit, Judgment of 28 November, 2003, supra, para 58.
[555] *Ibid*, para 60
[556] *Baena-Ricardo et al*, (compliance) op cit, para 60.
[557] *Ibid*.

must comply with its international treaty obligations in good faith'[558]; and (b) the *obligation to repair*, whose 'aspects' like the 'scope, nature, methods and determination of the beneficiaries' are also 'regulated by international law', according to which, a state may not modify or refuse to comply with decision of a tribunal 'by invoking provisions or difficulties of domestic law.'[559] The obligation to repair is one of the fundamental pillars of international law which is enshrined under Article 63 (1) of the Convention as a codification of customary law norm.[560]

The other principle is that of '*effect utile'* which means that a state has an obligation to ensure that the rights that it guaranteed to its citizens are, not only 'truly practical', but also 'effective, recalling the special nature of human treaties and their collective implementation.'[561] The *scope of 'effet utile',*[562] principle provides that a state 'must guarantee compliance with treaty provisions and their effects (*effet utile*) at their level of their respective domestic laws' once it accepts the competence of the international tribunal.[563] The IActHR went on to hold that the principle of *effet utile* 'is applicable not only with regard to the substantive norms of the human rights treaties (namely, those that contain provisions on protected rights), but also with regard to the procedural norms' like 'those relating to compliance with the decisions of the Court'.[564]

The above decision is very significant to the Inter-American system of human rights as the stage of supervision of compliance of judicial decisions under the system is not regulated by treaty. The Inter-American Convention does not expressly provide for a specific body to monitor compliance of judgments of the IActHR. Judges had to develop this practice and, its jurisprudence has now been embraced by the OAS General Assembly.[565] There are a number of provisions from the American Convention that the IActHR relied upon to establish the legal basis for enforcing state cooperation.

The first is Article 33 of the American Convention which established the IActHR as the competent organ to fulfil the commitments of the Convention. The second provision is Article 62(1) of the American Convention which states that a state party that has deposited 'its instrument

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[558] *Baena-Ricardo et al*, op cit, (compliance) Judgment of 28 November, 2003, supra, para 61 *(a)*.
[559] *Ibid*, para 62 of the Judgment.
[560] *Baena-Ricardo et al*, (compliance), op cit, para 65.
[561] *Ibid*, para 66 of the Judgment.
[562] *Baena-Ricardo et al*, (compliance) *o*p cit, para 65 of the Judgment.
[563] *Ibid*, para 66
[564] See *Baena-Ricardo et al*, (compliance) op cit, para 66 of the Judgment.
[565] See the Resolutions of the General Assembly of the Organisation of American States: AG/RES.1330 (XXV-O/95) of June 9, 1995; *Case of Baena-Ricardo et al. v. Panama, Judgment of 28 November, 2003* (compliance), op cit, fn. 357, paras. 110-113.

of ratification or adherence to [the] Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement', is bound by 'the jurisdiction of the Court on all matters relating to the interpretation or application of [the] Convention.'[566] The third provision is Article 62(3) of the American Convention which established the jurisdiction of the IActHR to hear cases, interpret and apply provisions of the treaty 'provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration [...]'[567]

The fourth provision is Article 65 of the American Convention which gives an obligation to the IActHR to provide reports 'to each regular session of the General Assembly of the Organisation of American States [….] on its work during the previous year [specifying] the cases in which a state has not complied with its judgments, making any pertinent recommendation'.[568] The fifth provision is Article 67 of the American Convention[569] read with Article 68 (1) provides that the 'Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.'[570] Article 68 (2) of the American Convention also stipulates that 'that part of the judgment [which] stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state'. Finally, the IActHR's own inherent jurisdiction[571] which, *inter alia,* laid down the law in the following manner*:*

> 'The Court, as any body with jurisdictional functions, has authority inherent in its attributions to determine the scope of its own competence (*Competence de la competence/ Kompetenz-Kompetenz*). The instruments accepting the optional clause on obligatory jurisdiction (Article 62(1) of the Convention) assume that the states submitting them accept the Court's right to settle any dispute relative to its jurisdiction, such as the dispute on the function of monitoring compliance with its judgments. An objection or any other action of the state intended to affect the competence of the court has no consequences, because, in all circumstances, the Court retains the *competence de la competence*, as it is master of its own jurisdiction'.[572]

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[566] *Ibid.*
[567] *Ibid.*
[568] *Velasquez Rodriguez,* supra, para, 67.
[569] This provision states that the 'judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment'.
[570] *Case of Baena-Ricardo et al. v. Panama*, (compliance) op cit.
[571] *Ibid.*
[572] *See Case of Baena-Ricardo et al. v. Panama,* Judgment of 28 November, 2003 (Competence), Inter-American court of Human Rights, Para 68 of the Judgment. This principle seems to be a restatement of the principle of implied powers under international law.

In summary, it may be observed that the enforcement of decisions of the IActHR under this system is conducted by the IActHR itself. The IActHR established this mandate on its own in the absence of express provisions in the American Convention to that effect. Although, the court was supervising state compliance with its decisions at first, it confirmed this position with the *Baena-Ricardo* judgment after a legal challenge from Panama. In this judgment the IActHR also laid down the scope of the principle of supervision of compliance under the Inter-American system.

5.4.2 Scope of the Principle of Supervision of Compliance

According to the *Baena-Ricardo* judgment the scope of the court supervising state compliance with its decisions takes several forms. First, as a general rule, supervision of compliance is not only within the court's 'inherent authority' but it is also an attribution within its jurisdictional functions 'to determine the scope of its own competence (*competence de la competence/ Kompetenz-Kompetenz*).'[573] In other words, the IActHR can determine its scope of competence to supervise states as that is part of its own functions. This, therefore, means that once a court has been established and is operational, it inherently 'retains the *competence de la competence*, as it is the master of its own jurisdiction'[574] and this competence cannot be abdicated in any event.[575]

Second, the IActHR held that the principle of supervision of compliance is 'related to the right of access to justice, which is embodied in Articles 8 (Right to a Fair Trial) and 25 (Judicial Protection) of the American Convention.'[576] This means that supervision of compliance is a much broader concept and hence, imposes an obligation on an international court or tribunal to ensure that states implement its decision, otherwise its work cannot be effective. According to the court, 'the effectiveness of judgments depends on their execution. The process should lead to the materialization of the protection of the right recognized in the judicial ruling, by the proper application of this ruling.'[577] The IActHR summarised the law in the following manner:

> 'When it has determined the international responsibility of the State for violation of the American Convention, the Court proceeds to order measures designed to remedy this violation. Its jurisdiction includes the authority to administer justice; it is not restricted to stating the law, but also encompasses monitoring compliance with what has been decided. It

[573] *Baena-Ricardo et al*, op cit para 68
[574] *Baena-Ricardo et al*, op cit, para 68
[575] *Ibid*, para 70
[576] *Ibid*, para 74
[577] *Baena-Ricardo et al*, op cit, 538, para 73 of the Judgment.

> is therefore necessary to establish and implement mechanisms or procedures for monitoring compliance with the judicial decisions, an activity that is inherent in the jurisdictional function. Monitoring compliance with judgments is one of the elements that comprises jurisdiction. To maintain otherwise, would mean affirming that the judgments delivered by the Court are merely declaratory and not effective. Compliance with the reparations ordered by the Court in its decisions is the materialization of justice for the specific case and, ultimately, of jurisdiction; to the contrary, the raison d'être for the functioning of the Court would be imperilled.'[578]

The above exposition demonstrates that the IActHR's responsibility does not end at the delivery of a judgment alone. It ends when a state fulfils its decision; or when it has put in place measures to compel 'results or responses' from the responsible state. Supervision of compliance extends and compel states to 'guarantee the means to execute the said final decisions', including embodying 'in their legislation and ensure due application of effective remedies and guarantees of due process of law' in their territories.[579] It is only when decisions or judgments of international tribunals are executed and fully complied with by the responsible state can it be considered that a person's right to access justice has been fully enjoyed. Otherwise, 'the contrary would imply the denial of this right.'[580] An international tribunal must, therefore, supervise state compliance with its decision as it cannot leave the enforcement of its decision 'to the discretion of parties.'[581] In light of the foregoing, the IActHR established a written procedure to give effect to its judgments.[582]

5.4.3. *Procedure of Supervision of Compliance under the IActHR*

The procedure established under the IActHR on supervision of compliance proceeds as follows: First, the responsible state is invited to present 'an initial report on the implementation of the provisions'[583] and the decision of the IActHR. It then monitors the level of compliance with the

[578] *Ibid*, para 72 of the Judgment.
[579] *Ibid*, para 79 as read with para 78 of the Judgment.
[580] *Ibid*, para 82
[581] *Ibid*, para 128.
[582] *Ibid*, para 105 of the Judgment
[583] Organisation of American states, Inter-American Commission on Human Rights, Annual Report of the Inter-American Court of Human Rights, 2016, (hereinafter referred to as 'the Compliance Report'), pp 72-77, at p 72, also available on *http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2016.pdf*, last accessed on 23 March, 2018. See also the Compliance report for the following years: 2014, available online at *http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2014.pdf*, p8, accessed on 23 March, 2018; 2013, available online at *http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2013.pdf*, last accessed on 23 march 2018; 2012, available online *http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2012.pdf*, last accessed on 23 March 2018; 2011, available online at *http://www.corteidh.or.cr/sitios/informes/docs/ENG/eng_2011.pdf*, last accessed on 23 march 2018.; See also Organisation of American states, Inter-American Commission on Human Rights (IACHR), 'Status of compliance with the recommendations and friendly settlements of the IACHR, Annual

judgment of the court by the responsible state. This report is analysed against comments made on the state's report by the Inter-American Commission and the victims or their legal representatives in an adversarial fashion[584] and determine whether they are correct or not.

Second, if the state still is not complying, the IActHR takes several steps including constantly 'issuing orders or even sending communication to the responsible state';[585] 'holding hearings, visiting the States found responsible, and daily monitoring by means of notes issued by the Court's Secretariat.'[586] These steps are taken with an aim of (a) expressing the Court's concern on non-compliance, urging it 'to comply with the Court's decisions'; (b) 'to request detailed information on the measures taken to comply with specific measures of reparation'; and (d) 'to provide instructions for compliance, as well as to clarify aspects relating to execution and implementation of the reparations about which there is a dispute between the parties.'[587]

The IActHR can also hold public hearings specifically on compliance.[588] According to the *Baena-Ricardo v Panama*, this procedure 'guarantees respect for the adversarial principle' because:

> '[B]oth the State and the Inter-American Commission and the victims or their legal representatives are able to provide the Court with all the information they deem relevant concerning compliance with the Court's decisions. Hence, the Court does not issue an order or, through another act, consider the status of compliance with its judgment without first examining the reports presented by the State and the respective comments forwarded by the Commission and the victims or their legal representatives.'[589]

The public hearings aim at arriving at a 'dialogic'[590] solution to the inputs from State Parties.[591] The IActHR allows all Parties to the case –viz- victims, the Inter-American Commission and the state, to orally present evidence and arguments on compliance. As it is stated below, the crucial participant not invited to these hearings is the suspected perpetrator of the

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Report 2016, online at *http://www.oas.org/en/iachr/docs/annual/2016/docs/InformeAnual2016cap2Dseguimiento-en.pdf,* last accessed on 20 February, 2018.

[584] *Baena-Ricardo case*, op cit, paras 105 and 134of the Judgment.

[585] *Ibid*, para 105 of the Judgment

[586] 2016 Compliance Report, op cit, fn. 603, p 72.

[587] *Baena-Ricardo case*, supra, p 33, paras 105 and 134 of the Judgment.

[588] See *In the El Amparo case, Compliance with judgment,* Order of the Inter-American Court of Human Rights of November 20, 2000.

[589] *Baena Ricardo case*, supra, para 106 of the Judgment.

[590] See Alexandra Huneeus, 'International Criminal Law by other means: The Quasi-Criminal Jurisdictions of the Human Rights Courts', (2013) 107 *Amer. J. Int'l L.* 1, p 12.

[591] See also *In the El Amparo case*, in its Order of 20 November, 2000, Compliance with judgment. Order of the Inter-American Court of Human Rights of 20 November, 2000.

crimes, in cases of a criminal nature.[592] At first the hearings were closed to the public but this was later changed.[593] The first compliance hearing to utilise this procedure was convened in 2008. The OAS's General Assembly only recognised the procedure, through a resolution, in 2009 which was in the following terms:

> '[R]ecognizing the important and constructive practice begun by the Inter-American Court of Human Rights to hold closed hearings on the monitoring of compliance with its judgments, and the outcomes thereof.'[594]

5.5. Other Developments on Supervision of compliance under the IActHR

The IActHR has perfected its system of supervising state compliance with its decisions in a number of ways. It now prescribes time periods within which a state must comply with a decision.[595] If the state does not comply within the set down period, the IActHR proceeds to make a decision on supervision of compliance.[596] The IActHR also supervises reparation orders 'on multiple cases involving one country and a similar type of reparations order.'[597] Initially it would monitor compliance orders individually but this was later changed, especially where it had 'ordered the same or similar reparations in the judgments in several cases and when compliance with them faces common factors, challenges or obstacles'.[598] This procedure, as it will be observed below resembles the 'pilot procedure' obtaining under the ECtHR.

The 'joint hearings' procedure was adopted by the IActHR to achieve a number of objectives. First, they allowed the IActHR to achieve economies of scale by dealing with 'an issue that is common to several cases involving the same state' at one and the same time instead of monitoring them separately.[599] They also help the IActHR to deal with the issues collectively 'instead of having to monitor the same measure in several cases separately' thereby impacting

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[592] See also Alexandra Huneeus, 'International Criminal Law by other means: The Quasi-Criminal Jurisdictions of the Human Rights Courts' (2013) 107 *Amer. J. Int'l L.* 1, 14. An abstract of which can also be accessed online at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2198587*, last accessed on 12 October, 2017.
[593] See David C. Baluarte, 'Strategizing for Compliance', op cit., fn. 353, p 278.
[594] IActHR, 'Observations and Recommendations on the Annual Report of the Inter-American Court of Human Rights', AG/RES. 2500 (XXXIX-O/09), 4 June 2009, also cited in David C. Baluarte, 'Strategizing for Compliance', op cit., p 278
[595] See Resolution of the General Assembly, 2005 titled 'Supervision of Compliance with Sentences (Applicability of Article 65 of the American Convention on Human Rights', *Inter-Amer. Ct. H*R, 29 June, 2005, available online at *www.corteidh.or.cr/docs/supervisiones/general_29_06_05.pdf*, last accessed on 12 June 2016.
[596] See Resolution of the General Assembly, 2005 Ibid.
[597] David C. Baluarte, 'Strategizing for Compliance', op cit, 353, p 278.
[598] 2016 Compliance Report, op cit, fn. 603, p 73.
[599] *Ibid*, p 73

greatly on the responsible state.[600] Second, joint hearings also helps the IActHR 'to encourage discussions among the different representatives of the victims in each case and results in a more dynamic participation by the State officials responsible for implementing the reparations at the domestic level.'[601] Third, joint hearings provide an overview to the IActHR and idea of 'the advances made and the factors impeding progress in the State concerned'.[602] They also assist the court to identify 'the reparations regarding which a significant dispute exists between the parties, and those to which they can give most attention and make most progress.'[603]

5.5.1. *The 2010 Rules of Procedure on Supervision of Compliance*

It is also important to observe that the IActHR's procedure on supervising compliance, as discussed above, has now been codified under the 2010 Rules of Procedure.[604] Under Article 69 of the rules, the IActHR is permitted to 'require from other sources of information' including, 'expert opinions or reports that it considers appropriate' to 'evaluate compliance' by a state with its decision.[605] Only when the IActHR 'has obtained all relevant information' can it conclude with certainty that the state has complied 'with its decisions and issue the relevant orders.'[606] The above discussion shows that over a period of time, the IActHR has innovated and broadened its scope on supervising compliance which is positive for human rights enforcement under the Inter-American system.

5.6. Complying with the Obligation to Investigate and Prosecute Suspected Offenders of International Crimes

The IActHR, as a judicial institution, does not have an obligation to investigate and prosecute suspected offenders of international crimes. Initially, the IActHR issued orders that only focused on monetary compensations. However, there is nothing that stops the IActHR to innovate and issue remedies or reparation orders that compels states to investigate and prosecute alleged

[600] 2016 Compliance Report, op cit, fn. 603, p 73
[601] *Ibid*, p 73
[602] 2016 Compliance Report, supra, p 73
[603] 2016 Compliance Report, supra, p 73
[604] Rules of Procedure of the IActHR, approved by the Court at its Forty-ninth Regular Session held from 16-25 November, 2000 can also be accessed online at *http://www.corteidh.or.cr/sitios/reglamento/ene_2009_ing.pdf*, last accessed on 28 February, 2018.
[605] Article 69(2) and (3) of the Rules of Procedure of the Court. Available online at *https://www.cidh.oas.org/Basicos/English/Basic20.Rules%20of%20Procedure%20of%20the%20Court.htm*, last accessed on 12 October, 2017.
[606] Article 69(4) of the Rules of Procedure of the Court.

offenders.[607] As such since 1996 the IActHR started issuing orders that compelled states' to investigate and prosecute suspected offenders.[608] By issuing orders to investigate and prosecute offenders, its '*quasi*-criminal review' or '*quasi*-criminal jurisdiction', as others have called it,[609] also helps states to change their behaviour. The issue worth exploring is what exactly does the term supervision of compliance with orders to investigate and prosecute suspected offenders of international crimes entail and what effect does it have on cooperation? In order to respond to these issues, a discussion of the elements of, and the obligation to investigate and prosecute suspected offenders under the Inter-American system would be ideal.

5.6.1. *Elements of the obligation to investigate and prosecute suspects of crimes*

The doctrine to investigate and prosecute suspected offenders by states under the Inter-American system traces its roots to the decision of the IActHR in the *Velasquez Rodrigues v Colombia* and *Godinez-Cruz v Colombia* cases. In these decisions, the IActHR held that the above obligation arises when any or all human rights protections guaranteed under the convention are violated. However, correctly so, this principle has been disputed as being an overstatement by one of the reading commentators of the Inter-American human rights system, Fernando Basch. In his publication entitled *The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers*, he argued that the above principle must be read as meaning that states' obligations to investigate and prosecute only arises when the violation 'is also a crime under national or international law'.[610] Only when a violation

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[607] Alexandra Huneeus, 'International Criminal Law by other Means', op cit, fn. 610,, p 12..

[608] See also *El Amparo v Venezuela*, op cit.; See also Alexandra Huneeus, Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights, (2011) 44 *Cornell Int'l L.J*. 493

[609] The expressions 'quasi-criminal review' or 'quasi-criminal jurisdiction' have been adopted from Alexandra Huneeus who coined the term to describe the form of accountability under the Inter-American system. He discusses these expressions in his article titled *International Law by other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts.* In the article, Alexandra Huneeus, argues that supranational tribunals like the IActHR's reparation orders and supervision of compliance stages is not only a '*practice'* but it is also a 'mechanism for accountability' where an 'international body' orders, monitors and guides national prosecutions to 'foster *local* processes of justice, memory and judicial reform' to 'reach prosecutorial outcomes'. By guiding national prosecutions, the international tribunals 'are able to pair restorative justice and victim-centered remedies with retributive justice.' See Alexandra Huneeus, 'International Law by other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts', supra, (107) *Amer. J. Int'l L*. 2; C/f Ratner, et al, *Accountability for Human Rights Violations in International Law: Beyond the Nuremburg Legacy* 3rd ed. 2009, p 257 who have argued that states that manage to investigate and prosecute suspects after being ordered by an international court was already willing and ready to do so. This article is also cited by Huneeus, at p 42.

[610] The argument has been adopted from Alexandra Huneeus citation of Basch's article at p 8, footnote 46 in Alexandra Huneeus, The International Criminal Law by other means, op cit, fn. 610, p 8.

offends the entire human kind can it trigger the duty of states to investigate and prosecute suspected offenders. This observation is consistent with customary international law and a number of international treaties that incriminates such violations. The foregoing, notwithstanding, reparation orders to investigate and prosecute suspected offenders, under the Inter-American system of human rights, is now part of the 'equitable' remedies that the IActHR imposes against states where it establishes human rights violations that border on the commission of international crimes.[611]

5.6.2. *Practice of Enforcing State Compliance with Orders to Investigate and Prosecute Crimes under the Inter-American System*

According to the practice of the IActHR, when a state has been ordered to investigate and prosecute suspected offenders, it undertakes a number of issues. The process commences with the IActHR proactively issuing orders or demands against the state for compliance. The orders or demands usually target both the 'substantive' and 'procedural' adjustments of national laws so as to open the way for investigations and prosecution of suspected offenders in the event that they do not exist.[612] A good example of this development is the IActHR's supervision of Colombia's compliance with its decision in the case of *La Rochela Massacre v Columbia.*[613] In this case, the IActHR had ordered Colombia to investigate the killing of about fifteen (15) judicial officers who, at the time of their death, were investigating crimes committed around La Rochella, Simacota Municipality.[614] The *La Rochella Massacre*, as it is now popularly known, occurred on 18 January 1989 at the Santander Department. During the hearing of the case, the IActHR had established that the Government of Columbia took unreasonably long period of time, namely, 'twenty-one years after the crime' had been committed and 'three years after the Court's reparations ruling', to conclude the investigations.[615]

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[611] See Alexandra Huneeus, *ibid*, p 6.
[612] See Alexandra Huneeus, op cit, fn. 610, p. 6.
[613] See Alexandra Huneeus, *ibid*, p 6; See also *La Rochela Massacre v Colombia, Monitoring Compliance with Judgment*, (Ser. C) No. 26, (26 Aug. 2010), available online *http://www.corteidh.or.cr/docs/supervisiones/rochela_26_08_10_ing.pdf*, last accessed on 20 March 2018
[614] *Case of the La Rochela Massacre v Colombia Judgment, Merits, reparations, and Costs, Inter. Amer. Ct H. R.*, 11 May 2007, op cit, also available online at *http://www.corteidh.or.cr/docs/casos/articulos/seriec_163_ing.pdf*, last accessed on 12 June 2017
[615] Alexandre Huneeus, "International criminal law by other means", op cit, fn. 610, p 10.

In a widely reported judgment, the IActHR went into great detail on how the government of Colombia could have, and were supposed to conduct the investigations and prosecutions of the crimes.[616] In effect the IActHR guided and gave pointers to state agents on how they should conduct investigations on the crime. The IActHR's direction proceeded as follows:

> '60. The information presented to the Court during the procedure to monitor compliance makes it possible to verify that, following the delivery of the Judgment some progress has been made in the investigation before the criminal courts…
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> …
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> 61. Even though progress has been made with the investigation and punishment, it is vital that the State continue investigating, with due diligence, in order to determine all those responsible for the La Rochela Massacre. In that respect, it is necessary to remember the seriousness of the crimes committed in this case, which entailed a complex structure of individuals that took part in planning and executing the crime. In the proceeding before the Court, the State itself acknowledged that, at least, forty members of the "Los Masetos" paramilitary group, acting in cooperation and with the acquiescence of State agents, initially detained the fifteen victims of the instant case, who were members of a Judicial Commission (Unidad Móvil de Investigación [Mobile Investigative Unit]) and later committed a massacre against them. As a result of the attack, twelve members of the Judicial Commission were killed and three survived. It should be considered that, as well as the participation of various members of "Los Masetos" paramilitary group and State agents, the Court observed that said Judicial Commission was investigating the disappearance case of the 19 Comerciantes [19 Tradesmen], among others, which was perpetrated by the ACDEGAM paramilitary group, and which had the support of and close links with senior leaders of the State security forces. These factors need to be taken into account to assess the number of persons that took part in the massacre and the motive.
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> 62. Therefore, it is essential that the State, in order to comply with its obligation to investigate, observe the criteria mentioned by the Court in its Judgment and inform the Court to that end. It is especially important to observe the criteria that ensure due diligence in the investigation.'[617]

The IActHR went on to acknowledge the willingness of the government of Colombia to 'comply with its international obligations to investigate the facts and, if applicable, punish those persons responsible for the human rights violations that were declared in the instant case'. The IActHR then ordered Colombia 'to forward updated and complete information on the,

> 'criminal proceeding currently underway and those that have yet to begin before the Supreme Court of Justice, covering the observance of the criteria established by the Court regarding the appropriate manner in which to fully and effectively comply with the obligation to investigate, including the criteria mentioned in Considering Clause 62 of this Order. The State must include information related to the preliminary examination statements to be taken, the apprehension orders pending execution, the actions taken in that regard and, if applicable, it must explain the

[616] See *Case of the Rochela Massacre v Colombia, Judgment, Monitoring Compliance with Judgment, 26 August 2010,op cit,* paras 60-64 of the Judgment. The judgment is also available online at *http://www.corteidh.or.cr/docs/supervisiones/rochela_26_08_10_ing.pdf,* last accessed on 19th October, 2017.
[617] *Ibid*, footnotes omitted.

> reasons why they were not executed. Also, it must indicate whether the investigation has been referred to the Supreme Court of Justice and the progress made in such investigation and explain on what charge or charges former Lieutenant Luis Enrique Andrade Ortiz is being investigated, taking into account the decision adopted by the Court in its Judgment regarding the violation of the principle of the competent, independent and impartial court [juez natural] which led to an order being passed, in favor of Lieutenant Luis Enrique Andrade Ortiz, to close the case on the homicide charge.'[618]

The above exposition confirms that the IActHR, when supervising states compliance with its orders 'tells the state *what lines of investigation it must explore*; it *names individuals* who should be investigated; and it suggests *analytical connections that should be* drawn between cases.'[619] By doing so, not only is the IActHR supervising 'national prosecution authorities', it is also exercising its 'mandate into a form of quasi-criminal review'.[620] It is also observed from the above exposition that in providing a detailed direction to national authorities the IActHR is, in a way, criticising the manner in which the responsible state is conducting its investigations so that it can improve or adjust to achieve full compliance.[621] In short, the IActHR takes hands on approach and actively engages the responsible state in fulfilling its obligation.

5.7. Political Mechanisms on Supervision of Compliance under the IActHR

It is significant to observe that the IActHR submits reports to the OAS General Assembly every year during the regular session.[622] It also reports to OAS General Assembly about the cases that have not been complied with by member states. In other words, all non-cooperating states including the details of their cases are reported to the OAS General Assembly. When the reports are received by the OAS, they are analysed and adopted by the OAS General Assembly as part of its decision with a recommendation to the IActHR on ensuring that the responsible state complies with its decision. The OAS General Assembly, therefore, still leaves the issue of supervision of compliance with IActHR's decision to the court itself. The foregoing notwithstanding, however, the OAS General Assembly insists that the reports coming from the IActHR must contain full and comprehensive details on states' level of compliance. This position

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[618] *Case of the La Rochela Massacre v Colombia, Judgment, Monitoring Compliance with Judgment,* 26 August 2010, op cit, para 66.
[619] Emphasis added, See Alexandra Huneeus, International Criminal Law by other Means, op cit, fn. 609, p 11.
[620] *Ibid*, p 11
[621] Alexander Huneeus, op cit, p 11.
[622] *See Baena-Ricardo,(compliance),* op cit, fn para 110, particularly footnote 85 detailing a list of reports where the IActHR has submitted reports to the Court;

was also confirmed by the court in the *Baena-Ricardo v Panama case*[623] which held that the OAS General Assembly requires that the IActHR's reports 'should indicate the cases in which a State has not complied with its judgments.'[624] In the *case of Cantos v Argentina,* the court also made a similar observation and highlighted that the General Assembly's insistence for a detailed report is also the reason why the IActHR also calls upon 'State Parties to report opportunely with the information required by the Court.'[625]

In light of the foregoing, it is observed that although the Inter-American system obliges the IActHR to report to the OAS General Assembly at all times on the level of state cooperation to its decisions, the latter has always considered the issue of monitoring compliance with judgments of the IActHR to be 'a function of the Court itself'[626] and within its judicial competency. The IActHR is, thus, empowered to 'specify, in particular, the cases in which a State has not complied with its judgments, making any pertinent recommendations'[627] for the attention of the OAS General Assembly.

In summary, therefore, the Inter-American system of supervising compliance with judicial decisions, combines both legal and political mechanisms to ensure states' compliance with their obligations under the Convention. The political organ under this system, the OAS General Assembly, only receives reports on compliance from the IActHR. The responsibility of supervising state compliance with decisions of the IActHR is left in the hands of the IActHR itself.[628] The foregoing, notwithstanding, the Inter-American system is a comprehensive system

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[623] See *Baena-Ricardo*, op cit, fn 538, paras 110- 116 of the Judgment.

[624] *Ibid* para 114 of the Judgment.

[625] See *Case of Cantos v Argentina*, *(Monitoring Compliance with Judgment)*, (Ser. C, NO. 21), (26 *August, 2010)*, para 5, available online at *http://www.corteidh.or.cr/docs/supervisiones/cantos_26_08_10_ing.pdf*, last accessed on 13 February, 2019. See also footnote 4 of the Order which cites the OAS GA's resolution AG/RES. 2292 (XXXVII-O/07) Order of the General Assembly of the OAS passed on the fourth plenary session, celebrated on June 5, 2007, titled *Observations and Recommendations to the Annual Report of the Inter-American Court of Human Rights*, operative paragraph fourth; OAS GA's resolution AG/RES. 2408 (XXXVIII-O/08) Order of the General Assembly of the OAS passed on the fourth plenary session, celebrated on June 3, 2008, titled *Observations and Recommendations to the Annual Report of the Inter-American Court of Human Rights,* operative paragraph fourth; and OAS GA resolution AG/RES.2500 (XXXIX-O/09) Order of the General Assembly of the OAS passed on the fourth plenary session, celebrated on June 4, 2009, titled *Observations and Recommendations to the Annual Report of the Inter-American Court of Human Rights,* operative paragraph fourth.

[626] *Baena-Ricardo et al*, op cit, fn 538, para 114 of the Judgment

[627] Article 65 of the American Convention. Baluarte observes that this procedure was used prominently during the term of Judge Cancado Trinidade as the President of the Court, who according to him, advocated for the adoption of the European model to the Court. See David C. Baluarte, 'Strategizing Compliance, op cit, fn. 3523, p 280-281.

[628] See also OAS GA resolution AG/Res.1330 (XXV-O/95), *Observations and recommendations concerning the annual report of the Inter-American Court of Human Rights* (Resolution adopted at the ninth plenary session, held

that combines both 'human rights norms and supervisory institutions',[629] which can also assist the work of the ASP under the Statute, as elaborated below.

The above discussion has, therefore, shown that although the IActHR also faces challenges of states' compliance with its decisions; it has introduced the procedure of supervision of state compliance to solve this problem. In this system, the IActHR monitors how states are complying with its decisions. Even though the system did not initially have express provisions on supervision of compliance in its founding instrument, the American Convention, the IActHR has now established its own written procedure on supervision of compliance. In this system, the IActHR can impose timeframes within which a State may implement its decision. Once a case has been put under supervision stage, it is never closed until its decision is fully implemented.

Regarding, the duty to investigate and prosecute crimes by states, the IActHR has imposed certain orders requesting states to investigate and prosecute alleged perpetrators of international crimes. According to the practice developed by the IActHR over the years, non-complying states are guided on how they should conduct investigations and prosecution of cases. Sometimes, the IActHR can even name individuals who are alleged to have committed crimes. The IActHR engages the non-complying state in a dialogic manner to ensure the effective implementation of its decisions.

The IActHR also relies on the assistance of political bodies, the General Assembly of the OAS to put pressure on contracting states during their regular annual sessions. However, the action of supervision remains a responsibility of the court. This, therefore, shows that the IActHR's system of enforcing decisions is different from the ICC legal framework of enforcing cooperation where the responsibility of doing so is left in the hands of the ASP and the UNSC. In other words, under the latter system, political organs have been entrusted with the responsibility of ensuring that states are fulfilling decisions of the ICC.

The foregoing notwithstanding, although this system relies on the IActHR to supervise states' compliance with its decisions, there are a number of things from which the ASP can draw lessons from to enhance its system of enforcement under the Statute. For example the ASP can draw lessons on how to put pressure on states when it comes to cooperation. The ASP could draw

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on June 9, 1995, available online at *http://www.oas.org/en/pinfo/res/RESGA95/agd1330.htm*, last accessed on 13 February, 2019.

[629] Claudio Grossman, 'The Inter-American System of Human Rights: Challenges for the Future' (2008) 83 (4) *Indiana L.J.* 1267

lessons from the IActHR system of enforcement on procedures like setting down of clear, strong and enforceable timeframes for states to cooperate with decisions of the ICC. It may also draw lessons on how the IActHR implements its dialogic procedure where it sometimes assist states on how to undertake investigations and prosecutions including suggested ways of going about their work in this regard so that suspected offenders account for their wrongs.

The ASP could also draw lessons on how the OAS General Assembly deals with reports of the IActHR on supervision of compliance which are presented during the Annual General Assembly. The OAS General Assembly ensures that the IActHR's reports on supervision of compliance are detailed and comprehensive to enable them adopt resolutions that complement the work of the court in so far as cooperation is concerned. The ASP, being a political body, would adopt similar aggressive approaches against non-cooperating states under the Statute. This is important because the effective operation of any judicial enforcement institution depends on the political environment in which it is functioning hence the need for the ASP to assists the ICC in that regard.

5.8. SUPERVISION OF STATE COMPLIANCE WITH DECISIONS OF THE ECtHR

5.8.1. Introduction

Nicolas Hervieu wrote on the occasion of the 60th anniversary of the entry into force of the European Convention for the Protection of Human Rights, (the 'ECHR') that the European Court of Human Rights (ECtHR) is the 'centre of gravity of human rights in Europe'.[630] His words were not only remarkable at the time but also remains true todate, as the ECtHR has demonstrated its robust and judicial activism in the development of international human rights law in modern history.[631] The ECtHR was established by the ECHR[632] which was opened for signature on 4 November 1950 but only entered into force on 3 September 1953.[633]

The ECHR's conception has all the hallmarks of a poor human rights record that most European Member States faced during the cold war. When the cold war ended, European powers decided to establish the Council of Europe to, among other tasks, draw up the ECHR. One of the objectives and purposes of the ECHR is to protect and promote people's rights as enshrined under the Universal Declaration of Human Rights (hereinafter referred to as 'UDHR').[634] It is, therefore, significant to note that the framers of the ECHR were inspired by the above history which was not pleasant, to incorporate the provisions of the UDHR into the ECHR and hence, 'collectively', enforce violations of 'certain rights stated in the Universal Declaration of Human

[630] Dean Spielman, President of the European Court of Human Rights, 'Implementation of the Judgments of the European Court of Human Rights: a shared judicial responsibility' in *Dialogue between Judges: Proceedings of the Seminar,* 31 January 2014, p 5, quoted the expression of Nicolas Herviue. This is available online at *https://www.echr.coe.int/Documents/Dialogue_2014_ENG.pdf*, last accessed on 24 March 2018.

[631] See the Statement of Judge Linos-Alexandre Sicilianos, 'From the point of view of the Court: its role in the implementation of its judgments, powers and limits' Statement presented at the Diaologue between Judges of the European Court of Human Rights titled *Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility*? *Dialogue Between Judges* (2014) , p 18-21, also available online at *https://www.echr.coe.int/Documents/Dialogue_2014_ENG.pdf*, last accessed on 24 March 2018

[632] See Article 19 of the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature on 4 November, 1950, 213 U.N.T. S. 221. The full text of the Convention can be accessed online at which can also be accessed online at *http://www.echr.coe.int/Documents/Convention_ENG.pdf*, last accessed on 6th September 2016.

[633] For a comprehensive discussion about the Court visit its official website at *http://www.echr.coe.int/Documents/50Questions_ENG.pdf*, last accessed on 10 July 2016.

[634] This is also known as 'constitutional justice'. See Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948), reprinted in 43 Am. J. Int'l L. Supp 127 (1949)

Rights'.[635] The collective enforcement of human rights that the framers of ECHR aspired to achieve was confirmed by the ECtHR in the case of *Ireland v United Kingdom*[636] as follows:

> '[u]nlike international treaties of the classic kind, the [European] Convention comprise[d] more than mere reciprocal engagements between contracting states. [The European Convention] create[d], over and above a network of mutual, bilateral undertakings, objective obligations which…benefit from a 'collective enforcement.'[637]

From the exposition above, it is clear that the European system of human rights, gives states the power to actively and collectively monitor violations of human rights by fellow states in the interest of the whole European community. Any state party to the community can push for the compliance of the ECtHR's decision and it does not matter whether the applicant state has any special relation to the rights and interests or alleged violation of the responsible State.[638]

Collective enforcement of human rights violations under this system gives room for fellow Contracting states to petition the ECtHR when they feel that another contracting state is not fulfilling its obligations under the Convention. The system also allows individuals to petition the ECtHR for enforcing human rights violations in what is also known as 'individual justice'.[639] The ECtHR in the case of *Mamatkulov v Turkey* emphasised the point in the following way:

> '[T]the Convention right to individual application…has over the years become of high importance and is now a key component of the machinery for protecting the rights and freedoms set forth in the Convention.'[640]

The ECtHR's confirmation of individual justice reiterated its earlier decision in the case of *Ireland v United Kingdom* which held that, not only does it decide on individual cases but, more generally, it also,

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[635] Patricia Egli, 'Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Towards a More Effective Control Mechanism?' (2006) 17 J. Int'l Trans, L & Policy 1, 2, also accessible online at *http://www.law.fsu.edu/docs/default-source/journals/jtpl/previous-issues/volume-17-number-1.pdf?sfvrsn=4*, last accessed on 24 march 2018.
[636] *Ireland v United Kingdom*, (1979-80) 25 Eur. Ct. H.R. 25; 58 ILR (1980) 188, 291.
[637] *Ireland v United Kingdom*, 25 Eur. Ct. H.R. (ser. A), p 278, (1978).
[638] See Luzius Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' (2002) 23 *Hum. Rts. L.J.* 161, 162-163; See also Steven Greer, 'Constitutionalising Adjudication under the European Convention on Human Rights' (2003) 23 *Oxford J. Legal Stud*. 405, 406-407; See also article 33 of the European Convention
[639] See Luzius Wildhaber 'A Constitutional Future…' *ibid*; see also Steven Greer, ibid. See also article 34 of the European Convention.
[640] *Mamatkulov & Askarov v Turkey*, app nos. 46827/99, 46951/99, Eur. Ct. H.R. para 122, 4 Feb., 2005

> 'elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.'[641]

The collective nature of this system represents the best example of how the framers of the ECHR intended to effectively enforce the rights enshrined under the UDHR.

Initially, the ECHR established three institutions that were responsible for the enforcement of human rights obligations, namely, the European Commission of Human Rights, set up in 1954 which had a similar mandate as the ECtHR;[642] the ECtHR, set up in 1959 and responsible for the adjudication of legal disputes; and the Committee of Ministers of the Council of Europe (CoM), which is composed of Ministers of Foreign Affairs of the contracting states.[643] In 1998, this was changed following the adoption of Protocol No. 11 to the ECHR which abolished the European Commission on Human Rights and made it part of the ECtHR.[644] Apart from making individual access to the ECtHR compulsory, Protocol 11 also simplified the structure of the Court; shortened the length of proceedings; and removed the adjudicative role of the Council of Ministers.[645] Although the ECtHR was thus reformed, its workload still continued and matters got complicated

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[641] *Ireland v United Kingdom*, 25 Eur. Ct. H. R. (ser. A) at 154 (1978).

[642] For a comprehensive commentary and description of Protocol No. 11 See Rudolf Bernhardt, 'Reform of the Control Machinery, Under the European Convention on Human Rights: Protocol No. 11', (1995) 89 *Am. J. Int'l L.* 145; Andrew Dremczewski & Jens Meyer-Ladewig, 'Principal Characteristics of the New ECHR Control Mechanism, as established by Protocol No. 11', signed on 11 May 1994, (1994) 15 *Hum. Rts. L.J.* 81; Henry G. Schermers, 'Adaptation of the 11th Protocol to the European Convention on Human Rights', (1995) 20 *Eur. L. Rev*. 559.

[643] See Jennifer W. Reiss, 'Protocol No. 14 ECHR and Russian Non-Ratification: The Current State of Affairs', (2009) 22 *Harvard Human Rts J.* 293, also available online at *http://harvardhrj.com/wp-content/uploads/2009/09/protocol14.pdf*, last accessed on 24 march 2018;

[644] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established thereby, 1 Nov. 1998, also available online… For a comprehensive commentary and description of Protocol No. 11 See Rudolf Bernhardt, 'Reform of the Control Machinery, Under the European Convention on Human Rights: Protocol No. 11', (1995) (89) *Am. J. Int'l L.* 145; Andrew Dremczewski & Jens Meyer-Ladewig, 'Principal Characteristics of the New ECHR Control Mechanism, as established by Protocol No. 11, signed on 11 May 1994', (1994) 15 *Hum. Rts. L.J.* 81; Henry G. Schermers, Adaptation of the 11th Protocol to the European Convention on Human Rights, (1995) 20 *Eur. L. Rev*. 559.

[645] The Commission worked on a transitional period up to 31 October 1999 but only dealing with cases that it had already admitted. See generally Council of Europe, Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established thereby, also available online at …For a comprehensive commentary and description of Protocol No. 11 See Rudolf Bernhardt, Reform of the Control Machinery, Under the European Convention on Human Rights: Protocol No. 11, (1995) 89 *Am. J. Int'l L.* 145; Andrew Drzemczewski & Jens Meyer-Ladewig, Principal Characteristics of the New ECHR Control Mechanism, as established by Protocol No. 11, signed on 11 May 1994, (1994) 15 *Hum. Rts. L.J.* 81; Henry G. Schermers, Adaptation of the 11th Protocol to the European Convention on Human Rights, (1995) 20 *Eur. L. Rev*. 559.

when the volumes of similar cases and, sometimes, cases against the same state also increased.[646] In order to remedy this problem, they decided to adopt protocol 14.

5.8.2. Pilot Procedure under Protocol 14 to the ECHR

The European Union convened a Ministerial Conference on Human Rights in Rome, Italy in November 2000, at its 50th anniversary of the signing of the ECHR, to find solutions for improving the effectiveness of the ECtHR. The result was the introduction of the pilot procedure through the adoption of Protocol 14, as a framework for eliminating identical or repetitive cases.[647] Protocol 14, adjusted and introduced measures for filtering repetitive cases for purposes of admissibility. A single judge was introduced to process and decide on admissibility of cases as a primary requirement. In this process the single judge would not admit cases that were manifestly without merit.[648] The judge would also filter out 'repetitive cases' that disclosed similar, systemic or structural problems.[649] Protocol 14 also empowered a Committee of three judges to rule on admissibility and merits of a case 'if the underlying question in the case…is already the subject of a well-established case-law of the Court.'[650] Furthermore, Protocol 14 also introduced robust measures on execution of judgments by the CoM.

Examples where the ECtHR has dealt with cases under the 'Pilot judgment procedure' include *Broniowski v Poland,*[651] which concerned compensation of displaced individuals whose properties were situated beyond the Bug River, but had been affected by the redrawing of the Polish eastern border in the aftermath of the Second World War; the case of *Hutten-Czapska v Poland,*[652] which concerned the setting up of a ceiling on rent levels for landlords; the case of

[646]See Stephanie Lagoutte et al, (ed.), *Human Rights in Turmoil: Facing Threats, Consolidating Achievements, Martinus Nijhoff,* p 29.

[647] Generally see Council of Europe, 'Reforming the European Convention on Human Rights: a Work in Progress, a compilation of publications and documents relevant to the ongoing reform of the ECHR', p. 11, also available online at *http://www.echr.coe.int/librarydocs/dg2/isbn/coe-2009-en-9789287166043.pdf,* last accessed on 12 September, 2016.

[648] Patricia Egli, 'Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Towards a more Effective Control Mechanism?' (2007) 17 *J. Trans'l L. & Policy*, p 12.

[649] *Ibid*

[650] See article 28 (1) (b) of the European Convention.

[651] *Case of Broniowski v Poland, (Application no. 31443/96*), also available online at *https://hudoc.echr.coe.int/eng#{"itemid":["001-22924"]},* last accessed on 27 February, 2018; also available on this link: last accessed on 27 February 2018.

[652] Case of *Hutten-Czapska v Poland*, Application No. 35014/97, Judgment of 19 June 2006. Also available online at *http://www.fairhuurvoorverhuurders.nl/files/evrm/hutten-2006.pdf,* last accessed on 11th September, 2016

Suljagic v Bosnia and Herzegovina,[653] which concerned the repayment scheme of foreign currency deposited before the dissolution of the Socialist Federal Republic of Yugoslavia; the case of *Maria Atanasiu and others v Romania,* which concerned the failure to compensate and restitute nationalised or confiscated property; and the case of *Rumpf v Germany*, which concerned the issue of excessive length of proceedings and lack of domestic remedy, among others.[654]

In short, protocol 14 enabled the ECtHR to 'freeze' or 'adjourn' cases for a specified period[655] to allow national authorities remedy their defects or take steps towards complying with the decision of the ECtHR. As the matter stand adjourned, both the state and the ECtHR have an obligation to constantly update the victims on the progress made by the responsible state. The procedure also allows the ECtHR to clearly identify the defect in the state regulations and guide on how it can remedy the systemic and structural problems in its national system so that similar cases can be dealt with by the national authorities instead of the ECtHR.[656]

5.8.3 Principle of Subsidiarity

Generally, the ECtHR is based on the principle of subsidiarity in that contracting states have an obligation to 'secure to everyone within their jurisdiction the rights'[657] and freedoms guaranteed by the ECHR. In other words the European system of enforcing decisions of the ECtHR is differential to states in that the latter has the primary responsibility to implement decisions of the ECtHR. Contracting states are, therefore, obliged to decide what remedies would be adopted to

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[653] *Case of Alisic and Others v Bosnia and Herzegovina, Croatia, Serbia, Slovenia and The Former Yugoslav Republic of Macedonia*, Application No. 60642/08, Application No. 60642/08, Judgment of 16 July 2014. Also available online at *http://www.zastupnik.gov.rs/uploads/cr/presude/u-odnosu-na-rs/presuda-velikog-veca-evropskog-suda-za-ljudska-prava-alisic-i-drugi-protiv-bih-hrvatske-srbije-slovenije-i-bjr-makedonije-br.-60642-08/Alisic_i_drugi_presuda60642_08_eng_1_1.pdf*, last accessed on 11 September 2016.

[654] For a comprehensive discussion on the Pilot Judgment and examples of cases, see European Court of Human Rights, Press Unit, 'Pilot Judgment: fact sheet', which is available online at *http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf*, last accessed on 12 July 2016.

[655] See *Michelioudakis v Greece*, Application no. 54447/10, (Chamber Judgment), 3 April 2012, summary of the decision available online at *https://www.coe.int/t/dghl/cooperation/cepej/meetings/2012/Arret_Chambre_Michelioudakis_en.pdf*, last accessed on 24 March 2018 *and Glykantzi v Greece*, application no. 40150/09, *30 October 2012*, summary of the decision also available online at *file:///C:/Users/Suzgo/Downloads/003-4140708-4882764%20(1).pdf*, last accessed on 24 March 2018*'* See also European Court of Human Rights, Fact sheet-Pilot Judgments', online at *https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf*, last accessed on 24 march 2018.p 10.

[656] See Lize R. Glas, 'The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice' (2016) 34 *Netherlands Quarterly of Human Rts.* 41-70; See also Marco Bocchi, 'The Effectiveness of the pilot judgment procedure: A Comparative case-study on inhuman and degrading treatment against detainees in Russia and Italy' 8.2.2016, online at *https://blogs.uta.fi/ecthrworkshop/2016/02/08/bocchi/*, last accessed on 24 March 2018.

[657] See article 1 of the European Convention.

fulfil the ECtHR's decision. The ECtHR does not overrule national decisions, be it from the court or national actors; it only provides oversight and monitoring mechanisms, making sure that within the national authority's exercise of their discretionary powers, they do so in accordance with the law.[658] The ECtHR's responsibility, therefore, is to ensure that contracting states observe their ECHR's obligations diligently and, where necessary, guide them on how to do so.[659]

In the ECtHR's words, if domestic legal framework does not permit Contracting states to implement binding judicial decisions or let them be 'inoperative to the detriment of one party', the right of access to courts 'would be illusory'.[660] In the case of *Hornsby v Greece*, the court emphasised this point in the following way:

> 'Execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6'.[661]

Tulkens has also confirmed the above holding by emphasising that,

> 'a judgment of the European Court of Human Rights is not an end in itself, but a promise of future change, the starting point of a process which should enable rights and freedoms to be made effective.'[662]

This means that execution of judgments of the ECtHR represents a key indicator that the rights of the people have been fully enforced and that the ECtHR is effectively doing its job.[663] The question that arises is how does this system deal with non-compliance by states with decisions of the ECtHR?

5.8.4. Supervision of compliance with decisions of the ECtHR

The process of supervision of state compliance with decisions of the ECtHR commences with the latter delivering a judgment against a contracting state. The principle of subsidiarity, discussed earlier, obliges every contracting state to report to the ECtHR the steps it has or will take to implement the judgment. However, states may not always fulfil this obligation as a result

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[658] See Patricia Egli, 'Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Towards a More Effective Control Mechanism' op cit, fn. 648, p 10.
[659] See article 19 of the European Convention.
[660] *Hornsby v Greece, 19 March 1997*, para 40; see also *Paudicio v Italy*, 24 May 2007, para 53.
[661] *Hornsby v Greece*, Ibid; see also *Paudicio v Italy*, *ibid*.
[662] F. Tulkens, *Execution and Effects of Judgments of the European Court of Human Rights: The Role of the Judiciary, in Dialogue between Judges*, Council of Europe, Strasbourg, 2006, p 12.
[663] See the Statement of Linos-Alexander Sicilianos, Judge of the ECtHR, 'From the point of view of the Court: its role in the implementation of its judgments, powers and limits', *Dialogue Between Judges* op cit, p 18-21, p 19

the CoM is empowered under the ECHR to monitor implementation of decisions of the ECtHR by states. The delegation of the monitoring function to the CoM reinforces the 'collective' enforcement of human rights by peers under this system.[664] Once the CoM declares that the state has complied with a decision of the court, the case is closed. The CoM is assisted in this function by the Secretariat's Department for the Execution of Judgments.[665] The Department has a number of responsibilities, including, the preparation of case files; liaison with relevant state authorities about any matter that is being considered by 'the Committee's Human Rights' meetings as well as advising the Committee, in its role as custodians of the interests of the Convention.'[666] The process of supervising state compliance with decisions of the ECtHR follows a particular procedure before the CoM.

5.8.4.1. *Procedure on the CoM's supervision of compliance*

The CoM's powers of supervision are established under Article 46 of the ECtHR which states that, once a 'final judgment of the Court' is delivered, it is 'transmitted to the [CoM]' for supervision of 'its execution.' Since every member state of the ECHR undertook 'to abide by the final judgment of the ECtHR in any case to which they are parties',[667] compliance with ECtHR's decisions is not an option. Sometimes the lack of performance of a judgment by a contracting state is due to interpretation. In that case, the law empowers the CoM by 'a majority vote of two-thirds', to refer it to the ECtHR for interpretation.[668] If it finds the party to be at fault, it may refer the matter back to the CoM for consideration of measures to be taken.[669]

The CoM consists of one representative from each member state which, guided by the principle of collective enforcement of human rights violations, impresses on the responsible state to comply with the ECtHR's decision. The CoM has the right to inspect the level of compliance

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[664] For an interesting discussion on this see Robert Harmsen, 'The Reform of the Convention System: Institutional restructuring and the (geo-) politics of human rights', in Jonas Christoffersen, et al (eds.), *The European Court of Human Rights between Law and Politics*, 2011, p 135; See also Hao Duy Phan, A blueprint for a Southeast Asian Court of Human Rights', (2009*) Asian-Pacific Law and Policy J*. 428.

[665] For a comprehensive overview of this departments work see Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights, Committee of Ministers' Human Rights Meetings, online at *https://www.coe.int/en/web/execution/committee-of-ministers-human-rights-meetings,* last accessed on 12 November, 2017; See also Basak Cali and Nicola Bruch, *Monitoring The Implementation of Judgments of the European Court of Human Rights: A Handbook for Non-Governmental Organisation*, 2011, p 12-13

[666] Elisabeth Lambert Abdelgawad, *The Execution of judgments of the European Court of Human Rights*, 2ed. 2008, volume 88, p. 35 (hereinafter referred to as 'Human Rights Files No. 19').

[667] See article 46 (1) of the European Convention.

[668] Article 46 (3); See also Article 46 (4) as read with article 46 (1) of the European Convention.

[669] Article 46 (5) of the European Convention.

by national authorities during this process. Unlike the Inter-American system of human rights, the process of supervision of state compliance does not involve the participation of victims or their representatives even though they, NGOs and national institutions, are allowed to provide documents including, submission of arguments during this process.[670] It is significant to observe that the interpretation of the ECtHR's judgment has now taken an important dimension as members of the CoM may, sometimes, take a longer time to decide on the way forward.[671] The CoM, therefore, examines the cases in the following manner:

> 'Sections 3.a and 3.b: Supervision of payment of just satisfaction, depending on whether the deadline for payment expired more or less than 6 months previously; section 3.c: Examination of special payment problems; Section 4: Supervision of individual measures (4:1: Supervision of individual measures only; Section 4.2: Individual measures and/or general measures; 4:3: Special problems); Section 5: Supervision of general measures already announced (5.1: Legislative and/or regulatory changes; 5.2: Changes of courts' case-law or of administrative practice; 5.3: Publication/dissemination; 5.4: Other measures).'[672]

However, because of the volumes of cases that are handled, the CoM priorities some cases unlike others during their deliberations in line with the discussion below.

5.8.4.2. Standard and Enhanced Procedure of supervising Compliance

5.8.4.2.1. *Standard Procedure*

Generally, the implementation of Judgments of the ECtHR is divided into two procedures, the standard procedure and the enhanced procedure.[673] The standard procedure is the initial phase of the ECtHR's execution of the judgment which commences immediately after judgment is pronounced and communicated to the member state. Since any court's judgment has a grace

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[670] Lambert-Abdelgawad, Human Rights Files, no. 19, op cit, fn. 666, p 212.

[671] See European Commission for Democracy Through Law (Venice Commission), 53rd plenary Session, Venice, 13-14 December 2002 *Opinion on the Implementation of the Judgments of the European Court of Human Rights*, 76, Op. No. 209/2002, CDL-AD (2002)034, 18 December, 2002, also available online at *http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)034-e*, last accessed on 12 September 2016; See also Klaas de Vries, *Committee on Legal Affairs: Implementation of judgments of the European Court of Human Rights*, 8th Report, 2015, available online at *http://website-pace.net/documents/19838/1085720/20150623-ImplementationJudgements8-EN.pdf/67c5cb2a-3032-4183-9f3e-45c668257ede*, last accessed on 12 September, 2016.

[672] Elisabeth Lambert Abdelgawad, Human Rights Files No. 19, op cit, fn. 666 p 35

[673] For a comprehensive discussion of the two procedures, see Theodora A. Christou & Juan Pablo Raymond, *European Court of Human Rights: Remedies and Execution of Judgments'* (2005) issue 6 of occasional paper, British Institute of International and Comparative Law, 2005; Basak Cali and Nicola Bruch, *Monitoring The Implementation of Judgments of the European Court of Human Rights: A HANDBOOK FOR Non-Governmental Organisations,* 2011, part IV, P 12-13; Council of Europe Staff, *Supervision of the execution of judgments of the European Court of Human Rights,* 2nd Annual Report, 2008

period of three months before it becomes final,[674] the state or an applicant has the right of appeal against the decision. It may also request the Grand Chamber to consider the judgment, failing which the decision is final and ready for implementation.[675]

5.8.4.3. *Action Plan on Compliance*

Generally all cases are classified under the standard procedure where the CoM focuses on satisfying itself as to whether the state has submitted a report on how it intends to comply with the decision, in a form of *an action plan*. In other words, the CoM does not actively take any role under this procedure apart from making 'formal decisions that are necessary to progressing supervision'[676] like 'noting that the action plan has been received, progress is satisfactory, and that the case has been implemented and can be closed.'[677]

The state is obliged to submit the action plan within six months from the date of the judgment.[678] The action plan forms the basis of the CoM's discussions at its 'first or second meeting after the expiry of this six-month deadline'.[679] Since it is expected that the state, once it has received the decision, will produce a report outlining its action plan on how it intends to implement the decision and the steps or measures it has taken on compliance, the CoM, under the standard procedure, is just invited to adopt the state's report or action plan, which are also known as 'Action Reports'.[680]

Normally at this stage, the Secretariat may have already prepared a report narrating a conclusive assessment of the measures taken by the state for CoM's consideration.[681] The CoM will, thus, satisfy itself of a number of issues including: (a) whether 'any just satisfaction awarded

[674] See article 44 (2) of the ECHR
[675] See article 42 of the ECHR.
[676] Basak Cali et al, 'Monitoring the Implementation of Judgments of the European Court of Human Rights', op cit, fn. 665, p 13-14
[677] Basak Cali, *ibid*, p 14
[678] Debora Forst, 'The Execution of Judgments of the European Court of Human rights: Limits and Ways Ahead', (2013) 7 (3) *ICL Journal* p 13; See also Committee of Ministers of the Council of Europe, 'Supervision of the Execution of judgments and decisions of the European Court of Human Rights: Implementation of the Interlaken Action Plan-Modalities for a twin-track supervision system', publicly accessed information online at *http://www.coe.int/en/web/execution/rules-and-working-methods*, last accessed on 24th July 2016.
[679] Lambert Abdelgawad, Human Rights files No. 19, op cit, fn. 666, p 36.
[680] Debora Forst, 'The Execution of Judgments of the European Court of Human rights: Limits and Ways Ahead', op cit,fn. 698, p 20; See also Basak Cali et al, op cit, fn. 629, p 13.
[681] The Committee is assisted by the Department for the Execution of Judgments which works with respondent states to ensure the effective execution of court's ruling

by the Court has been paid, including, as the case may be, default interest';[682] (b) if 'individual measures have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation of the Convention';[683] (c) and whether 'general measures have been adopted preventing new violations similar to that or those found or putting an end to continuing violations.'[684]

Even in cases where a friendly settlement has been reached, the CoM is obliged to satisfy itself that the state has done its part and paid the victim as per the terms of the settlement.[685] As the above exposition demonstrates, all cases goes through the standard procedure, unless, they disclose facts requiring 'urgent individual measures'; it is one which qualifies for a pilot judgment; or it is a case which raises 'major structural or complex problems, and interstate cases'.[686] If these factors are proved then the case goes through an enhanced procedure, which is 'an active and intensive'[687] stage of monitoring compliance where the CoM pays a 'close attention to implementation'[688] and usually takes place in the Human Rights Committee.

5.8.6. *Liaison with the Department of Execution of Judgments*

A state's action plan is normally prepared in consultation with the Department of Execution of Judgments and basically, involves the government agents and the Department jointly reading the judgment in order to identify 'implementation requirements.'[689] During this period, the parties agree on how the plan for implementing the judgment must be set out. Usually, the state is invited to provide its response on implementation within six months of the date of the judgment becoming final. The state is also expected to provide 'details of what it will do and the time within which it will be completed.'[690] If the state is unable to provide these details within the

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[682] See Rule 6 (2) of the European Convention on Human Rights, adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies, also available in Lambert Abdelgawad, Human Rights Files No. 19, op cit 666, p 73.

[683] *Ibid.*

[684] See Rule 6 (2) of the European Convention on Human Rights, adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies, also available in Lambert Abdelgawad, Human Rights Files No. 19, op cit 666, p 73.

[685] See Rule 2 as read with Rule 12 of the Rules adopted by the Committee of Ministers for the application of Article 46, paragraph 2, of the European Convention on Human Rights, adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies, also available in Lambert Abdelgawad, Human Rights Files No. 19, op cit 666, p 71.

[686] Debora Forst, op cit, fn. 689, p 13.

[687] Basak Cali et al, op cit, fn. 629, p 14.

[688] Basak Cali et al, *ibid*, p 14.

[689] Basak Cali & Nicola Bruch, *Monitoring The Implementation of Judgments of the European Court of Human Rights: A handbook for Non-Governmental Organisations*, 2011, p 13.

[690] Ibid, p 13

stipulated period, at least, room is available for the state to 'describe the progress that [it] will make (for example, carrying out a domestic referendum by a certain date) and if possible set out a timetable for what will happen after that'[691] to fulfil the judgment of the ECtHR.

5.8.7. Enhanced Procedure of the Human Rights Committee

5. 8.7.1. *Enhanced Procedure with a Debate*

The CoM, during the Human Rights meeting, undertakes a number of actions including noting:

> '[T]he progress achieved so far, call on the State to take specific action, and set timetables. The Secretariat is also given a more proactive role to move implementation forward. This might include providing technical assistance to the State in the preparation of Action Plans, helping the State to decide what kind of measures should be taken, and in complex cases engaging in bilateral or multilateral cooperation programmes (for example, round-table discussions).'[692]

Supervision of compliance takes place before the CoM in the human rights committee, in an enhanced procedure, also known as an enhanced procedure with a debate.[693] This is ideally the principle and common procedure that the CoM uses for supervising judgments of the court.[694] Unless otherwise stipulated, all judgments proceed through the enhanced procedure with a debate and they remain there 'until the High Contracting Party concerned has provided information' regarding implementation of the orders of the Court.[695] In cases where the responsible state 'is not yet in a position to inform the Committee that' it has complied with the ECtHR's judgment, the case remains on the agenda of the Committee until the decision is complied with.[696]

Normally, in an enhanced procedure with a debate, the CoM adopts its decisions by outlining the anticipated execution process and inviting the state concerned to comply. The state concerned is expected to stipulate its implementation plan and if it fails to do so the CoM ensures that clear and concrete reasons are given by the responsible State. The CoM revisits the case at

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[691] Basak Cali & Nicola Bruch, *Ibid*, p 13.

[692] See Basak Cali & Nicola Bruch, 'Monitoring the Implementation of Judgments of the European Court of Human rights, op cit 689, para 27, p 13. also available online at *https://ecthrproject.files.wordpress.com/2011/07/monitoringhandbook_calibruch1.pdf*, last accessed on 23 March 2018.

[693] See Deborah Forst, op cit, fn. 665, p 13.

[694] Debora Forst, *ibid*, p 21.

[695] See Rule 7 (1) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, (adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies and amended on 18 January 2017 at the 1275th meeting of the Ministers' Deputies), also cited in Debora Forst, op cit, fn. 689 p 73. The Rules are available online at *https://rm.coe.int/16806eebf0*, last accessed on 24 March 2018.

[696] Rule 7 (2) ibid; also cited in Debora Forst, *ibid*, p 74

regular intervals to assess the state's compliance with the rulings of the court. The CoM meets four times a year with private deliberations involving the Committee and the state regularly taking place (even though, the agenda for the meetings are made public as well as its decision).[697] The process is closed when the Committee is convinced that there is full compliance.[698] A final adopted resolution by the CoM is conclusive evidence that the state responsible has 'taken all the necessary measures to abide by the judgment or that the terms of the friendly settlement have been exhausted'.[699]

5.8.7.2. *Enhanced Procedure without a Debate*

The other procedure is called the Enhanced Procedure without a Debate. Matters under the enhanced procedure without a debate proceeds in the following way: As soon as the judgment is transmitted to the responsible state, an agenda for the CoM is prepared and the responsible state is invited to provide measures it has taken to ensure implementation. The case remains on the agenda until the CoM reaches its final resolution.[700]

5.8.8. Improvements on Supervision of compliance under the ECtHR

It is generally important to observe that the rules on the conduct of business of the CoM were amended in 2006 with the adoption of Protocol 14. Protocol 14 improved the management of cases under this system. These changes led to the adoption of a number of rules, including the following: 'Rule 4 on priority treatment of judgments';[701] Rule 5 on obligation to produce an annual report;[702] rule 8 which deal with access to information and Rules 10 and 11 which stipulate how a case may fall under Protocol 14 procedure.[703] Since Protocol 14 now imposes an obligation on contracting states to give priority to judgments of the ECtHR, the latter ensures that states do adhere to such obligations under this procedure. There are instances where states still fail to adhere to their obligations for various reasons. In such cases, the CoM is obliged to take drastic measures against the contracting state and ensure that it fulfils its obligations. This takes place at the Human Rights Committee in an enhanced procedure.

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[697] Rule 2 of the Rules of the Committee, op cit.
[698] See Rule 17 of the Rules of the Committee, op cit, also in Debora Forst, op cit, fn. 689, p 80.
[699] Rule 17 of the Rules of the Committee, op cit, also in Debora Forst, *ibid*, p 80.
[700] See Deborah Forst, *ibid*.
[701] See Lambert Abdelgawad, Human Rights Files No. 19, op cit, fn. 666, p 34.
[702] *Ibid.*
[703] See Lambert Abdelgawad, Human Rights Files No. 19, *ibid*, p 34.

5.8.9. Measures against non-complying States

At the Human Rights Committee in an enhanced procedure, the CoM can sometimes take drastic measures, including, the adoption of interim measures against a contracting state. The CoM, for example, can invite the responsible state 'to provide information on the State of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution'.[704] It can also exert pressure on the responsible state, in certain cases, as was the case when it issued an Interim Resolution pertaining to the monitoring of prisoners' correspondence in Italy and also on excessively lengthy proceedings in Greece.[705] The CoM has also issued interim resolutions against Turkey when it urged it to pay money without delay in the case of *Xenedis-Arestis v Turkey*[706].

In certain exceptional cases, the CoM can invoke the threat to partially suspend a member, as was the case with Greece when it was threatened with suspension due to 'excessive length of judicial proceedings before administrative courts, in particular before the Supreme Administrative Court (Council of State).'[707] The CoM also threatened to invoke this measure against Turkey in the case of *Loizidou v Turkey.*[708] In that case, the CoM adopted the following resolution:

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[704] See Rule 16 of the Rules of the Committee, op cit, fn 689; See also the case of *Ben Yaacoub v Belgium, 27 November 1987,* series A no. 127-A Interim Resolution DH (88) 13 of 29 September 1988 and Final Resolution DH (92) 58 of 10 November 1992; *Stran Greek Refineries and Stratis Andreadis case,* The CoM adopted an interim resolution requiring the Greek authorities to make arrangements of payments of just satisfaction by paying a default interest that would guarantee the value of just satisfaction, which was successful; See also an Interim resolution in *the case of Mathews v the United Kingdom,* Interim Resolution ResDH (2001) 79 of 26 June 2001where the Court stated as follows: 'Noting, however, that more than two years after the Court's judgment, …no adequate measures have yet been presented with a view to preventing new similar violations in the future; urges the United Kingdom to take the necessary measures to secure the rights…'. These have also been cited by Elisabeth Lambert-Abdelgawad, op cit, p 40 at fn. 118.

[705] See *Interim Resolution ResDH(2001) 1 78* of 5 December 2001 adopted by the Committee of Ministers on 5 July 2005 at the 933rd meeting of the Ministers' Deputies; *Interim Resolution ResDH (2005)56* concerning the right to an effective remedy against monitoring of prisoners' correspondence and other restrictions imposed on prisoners' rights – general measures in the cases of MESSINA No. 2 (judgment of 28 September 2000, final on 28 December 2000) and 2 other cases against Italy. This resolution is available online at *https://rm.coe.int/168059ddae,* p55, last accessed on 11 November 2017, See also See *Interim Resolution CM/ResDH (2007)74*, adopted by the Committee of Ministers on 6 June 2007, at the 997th meeting of the Ministers' Deputies. available online at *https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d5e8e*, last accessed on 11th November, 2017.

[706] *Xenedis-Arestis v Turkey*, Appl. No. 46347/99, ECtHR 7 December 2006. See also Committee of Ministers, *Interim resolution 'CM/ResDH (2003)174*, 12 November 2003. For the full terms of the Interim resolution visit the Council of Europe's website at *https://rm.coe.int/168059ddae*, p 235. The link was last accessed on 11th November, 2017.

[707] See also Debora First, op cit., fn. 689, p 25.

[708] *Loizidou v Turkey* Appl. No. 15318/89, 18 December 1996, ECHR 1996-VI.

> 'Having regard to the judgment of the European Court of Human Rights ("the Court" below) of 28 July 1998 which ordered Turkey to pay to the applicant before 28 October 1998 specific sums for damages and for costs and expenses;
>
> Recalling its Interim Resolution DH (2000) 105, in which it declared that the refusal of Turkey to execute the judgment of the Court demonstrated a manifest disregard for Turkey's international obligations, both as a High Contracting Party to the Convention and as a member State of the Council of Europe, and strongly insisted that, in view of the gravity of the matter, Turkey comply fully and without any further delay with this judgment;
>
> Very deeply deploring the fact that, to date, Turkey has still not complied with its obligations under this judgment;
>
> Stressing that every Member State of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms;
>
> Stressing that acceptance of the Convention, including the compulsory jurisdiction of the Court and the binding nature of its judgments, has become a requirement for membership of the Organisation;
>
> Stressing that the Convention is a system for the collective enforcement of the rights protected therein,
>
> Declares the Committee's resolve to ensure, with all means available to the Organisation,
>
> Turkey's compliance with its obligations under this judgment,
>
> Calls upon the authorities of the member States to take such action as they deem appropriate to this end.'[709]

In the case of *Ilascu and others v Moldova and the Russian Federation,* the Grand Chamber made the following threat:

> 'the obligation to abide by the judgments of the Court is unconditional and is a requirement for membership of the Council of Europe" as such the Committee declared its "resolve to ensure, with all means available to the Organisation, the compliance by the Russian Federation with its obligations under this judgment" and "calls upon the authorities of the member states to take such action as they deem appropriate to this end'.[710]

[709] Previously the Committee had adopted a resolution which declared 'that the refusal of Turkey to execute the judgment of the Court demonstrates a manifest disregard for its international obligations, both as a High Contracting Party to the Convention and as a member state of the Council of Europe'. The Committee also called 'upon the authorities of the member states to take such action as they deem appropriate to this end.' The text of the resolution can also be accessed online at *https://rm.coe.int/168059ddae*, cited in Lambert Abdelgawad, Human Rights Files No. 19, op cit, p 235. See also European Court of Human rights, Human Rights Information Bulleting No. 53, p 20.

[710] See *Ilascu and others v Moldova and the Russian Federation,* Grand Chamber judgment of 8 July 2004 which had called upon the respondent states to 'take all necessary measures to put an end to the arbitrary detention of the applicants still imprisoned and secure their immediate release' (operative part, s. 22) and also stated that continuation

The CoM can also utilise its powers under Protocol 14 procedures, the Pilot Judgment, to demand from the responsible state to remedy the defect before any similar case or cases are attended to by the ECtHR.[711]

In exceptional circumstances, the CoM can also utilise the provisions of Article 8 of the Statute of the Council of Europe on suspension which stipulate that:

> 'Any Member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such Member does not comply with this request, the Committee may decide that it has ceased to be a Member of the Council as from such date as the Committee may determine.'

Article 3 obliges every member of the Council of Europe to 'accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms'. The provision also obliges Contracting states to 'collaborate sincerely and effectively in the realisation of the aim of the Council'.[712] If a member of the Council of Europe violates the Conventional principles on rule of law and peoples enjoyment of their rights, the CoM may suspend it from membership of the Council of Europe.

However, it is interesting to note that from the wording of Article 8 above, suspension of a member state is possible only when the affected member state has consented to the CoM's request to withdraw from membership. Otherwise one cannot see how a member can withdraw, at least from the reading of the above provision, without consenting to such a request. This provision is sparingly used, as such it would be difficult to see how the CoM can utilise it to enforce its powers under the monitoring mechanism.[713]

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of their detention 'would necessarily entail a serious prolongation of the violation of Article 5…and a breach of the respondent states' obligation under article 46 (1) of the Convention to abide by the Court's judgment'.

[711] See *Interim Resolution ResDH (2006)* 12 of 28 March 2006, *Metropolitan Church of Bessarabia and others v Moldova, (judgment of 13 December 2001), Interim Resolution ResDH (2006) 1* of 8 February 2006 which concerned the supervisory review procedure (Nadzor) in civil proceedings in the Russian Federation, and *CM/ResDH (2007) 74 of 6 June 2007* on excessively lengthy proceedings in Greek administrative courts and the lack of an effective domestic remedy: 'stressing the importance of rapid adoption of such measures in the cases at issue as they reveal structural problems giving rise to a large number for new, similar violations of the Convention'. This has been cited also by Elisabeth Lambert Abdelgawad, op cit., fn. 666, p 43.

[712] The Statute of the Council of Europe can be accessed online at *https://assembly.coe.int/nw/xml/RoP/Statut_CE_2015-EN.pdf*, last accessed on 12 June 2017.

[713] Elisabeth Lambert Abdelgawad, Human Rights Files No. 19, op cit, 666, p 45.

Having that, the CoM once relied on this provision to strongly condemn Turkey when it failed to comply with a decision of the ECtHR in the case of *Loizidou v Turkey*.[714] In that case, the CoM adopted the following resolution:

> 'Deeply deploring the fact that, to date, Turkey has still not complied with its obligations under the judgment delivered by the European Court of Human Rights on 28 July 1998 in the case of Loizidou against Turkey;
>
> Recalling its Interim Resolution DH (99) 680 of 6 October 1999, in which, *inter alia*, the Committee of Ministers strongly urged Turkey to pay the just satisfaction awarded in this case so as to ensure that Turkey, as a High Contracting Party, meets its obligations under the Convention;
>
> Recalling that, subsequently, the Chairman of the Committee of Ministers wrote to his Turkish counterpart recalling that, as for all Contracting Parties, Turkey's obligation to abide by judgments of the Court is unconditional;
>
> Stressing that Turkey has had ample time to fulfil in good faith in the present case its obligations,
>
> Emphasises that the failure on the part of a High Contracting Party to comply with a judgment of the Court is unprecedented;
>
> Declares that the refusal of Turkey to execute the judgment of the Court demonstrates a manifest disregard for its international obligations, both as a High Contracting Party to the Convention and as a member state of the Council of Europe.
>
> In view of the gravity of the matter, strongly insists that turkey comply fully and without any further delay with the European Court of Human Rights' judgment of 28 July 1998.
>
> [d]eclares [its] resolve to ensure, with all means available to the Organisation, Turkey's compliance with its obligations under [the] judgment'.[715]

From the exposition above, it can be argued that although the CoM did not expressly invoke Article 8, it, nevertheless, exerted its pressure on Turkey which could have led to Turkey's expulsion. Although this threat is welcome, the above decision has drawn criticisms from a number of Commentators as demonstrating the CoM's weakness since it did not suspend Turkey, anyway, yet the facts of the case fitted the requirements of that provision.[716] Elisabeth Lambert-Abdelgawad observed that although 'exclusion of the Council of Europe is one response theoretically

[714] Interim resolution of 26 June 2001, Resolution DH (2000) 105.
[715] See Resolution ResDH (2000) 105, concerning the judgments of the European Court of Human Rights of 18 December 1996 and 28 July 1998 in the case of Loizidou vs Turkey, adopted by the CoM on 24 July 2000 at the 716th meeting of the Ministers' Deputies. See also Elisabeth Lambert-Abdelgawad, The Execution of Judgments of the European Court of Human Rights, Volume 88, p 38.
[716] See Elisabeth Lambert-Abdelgawad, *ibid.*

open to European organs where a State categorically refuses to execute a judgment'[717] of the court, 'in practice this is unlikely to happen as the Committee shall always defer implementation to the responsible State.'[718]

5.8.10. Procedure for imposing sanctions

Where a decision has been reached by the CoM to commence Article 8 proceedings or, as they are also known, the 'infringement proceedings', the CoM follows the procedure set down under Rule 11 of the Rules of the Committee of Ministers for the Supervision of the execution of judgments and the terms of friendly settlements. A number of requirements must be fulfilled before the proceedings can be commenced against a non-complying state.[719] First, the ECtHR must serve a formal notice of the 'Committee's intention to bring such proceedings' against the Contracting state.[720] Second, the CoM must adopt a resolution by 'a majority vote of two thirds of the representatives entitled to sit on the Committee'[721] before declaring that a state has failed to fulfil its obligations to comply with the decision of the ECtHR. Third, the formal notice of proceedings must be served on the Contracting state six months before the lodging of proceedings, as a form of interim resolution of the Committee. The resolution itself must also be adopted by a majority vote of two-thirds of the representatives entitled to sit on the Committee.[722]

As the foregoing exposition demonstrates, invoking the provisions of Article 8 of the ECHR, let alone commencing infringement proceedings is a difficult and challenging task. With the coming into force of Protocol 14 of the Convention, however, one would argue that chances are now high that the CoM can utilise its powers and invoke Article 8 provisions. This is because Protocol 14 has greatly broadened the CoM's powers with its ability, to suspend matters until full compliance is attained by a responsible state. Besides, there is nothing that can prevent the ECtHR from invoking other remedies within its discretionary powers. Judicial activism on the part of the ECtHR has increased over the years with the court now enhancing the scope of its

[717] *Ibid, p 44*
[718] . See also Elisabeth Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights*, op cit, fn, 666, Volume 88, p 44,
[719] The Rules can be accessed online at *https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d7e18*, last accessed on 27 November, 2016.
[720] See Rule 11 (1) as read Rule 11 (2) of the Rules of the Committee, op cit.
[721] See Rule 11 (1) of the Rules of the Committee, op cit.
[722] Rule 11 (2) of the Rules of the Committee, op cit, fn 689.

judgments and also clarifying with specificity how states should adhere to them. Unlike its traditional approach, the ECtHR is now prescribing times and means by which states can implement its decisions.[723]

5.8.11. Duty to Investigate and Prosecute Suspected Offenders

The CoM actively scrutinised details of how investigations and prosecution of cases were being conducted by Russia for crimes committed in Chechnya.[724] Since 2005 when the first judgment was handed down by the ECtHR, Russia was found liable and held responsible for various human rights violations committed in Chechnya. The crimes that were allegedly committed by numerous Russian Government forces included,

> 'disappearances, unlawful killings, unacknowledged detentions, torture and ill-treatment and destruction of property attributable to members of the Russian security forces, as well as in respect of the inadequacy of official investigations conducted by the authorities.'[725]

In this case, Russia was found guilty of violating the following Articles of the ECHR: 2, 3, 5, 6 and 8.[726] Despite the victims petitioning the court and the latter ordering the Russian Government to investigate and prosecute suspected offenders who committed the crimes, the government only paid monetary compensations.[727] According to Human Rights Watch, Russia failed to implement the core of the judgments and other essential features,

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[723] See the following decisions: *Huvig v France*, 24 April 1990, Series A no. 176-B, s 34 and Resolution DH (92) 40 of 15 June 1992 where the judgments provided considerable guidance to the national legislature; *Hentrich v France*, 3 July 1995, series A no. 320, about article 50 remedy; *Papamichalopoulos et al v Greece*, 31 October 1995, Series A no. 330-B, s 38 where the Court offered the State an alternative: either make restitution integrum or pay compensation for the pecuniary damage within six months; *Raicu v Romania*, judgment of 19 October 2006 where the Court ordered the State to return the flat failing which it provided for a specific sum of money to be paid; See also the following cases on reopening of domestic legal proceedings: *Abdulla Altun v Turkey*, judgment of 19 October 2006 on violation of article 6; *Zentar v France*, judgment of 13 April 2006 also on article 6*; Majadallah v Italy*, judgment of 19 October 2006, violation of article 6; *Sejdovic v Italy*, judgment of 1 March 2006 on right to due process of the law; See also *Ocalan v Turkey*, judgment of 12 May 2005; *Duran Sekin v Turkey*, judgment of 2 February 2006.

[724] The full memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights (DG-HL) can be accessed online at *http://webcache.googleusercontent.com/search?q=cache:9c7OuovXs-sJ:www.srji.org/files/implementation/CoM%2520info%2520doc%2520gen%2520measures%2520Chechen%2520cases%252027_5_10.doc+&cd=4&hl=en&ct=clnk&gl=za*, last accessed on 12 November, 2017.

[725] See Ministers Deputies, Information Documents CM/Inf/DM(2010) 26, 'Action of the security forces in the Chechen Republic of the Russian Federation: general measures to comply with the judgments of the European Court of Human Rights', online at *http://webcache.googleusercontent.com/search?q=cache:9c7OuovXs-sJ:www.srji.org/files/implementation/CoM%2520info%2520doc%2520gen%2520measures%2520Chechen%2520cases%252027_5_10.doc+&cd=4&hl=en&ct=clnk&gl=za*, last accessed on 12 November 2017.

[726] See Ministers Deputies, Information Documents, *ibid*.

[727] Ministers Deputies, Information Documents, *ibid*.

> 'that follow from the rulings: it ha[d] not taken sufficient steps to ensure effective investigations, hold perpetrators accountable, or prevent similar violations from recurring.'[728]

Considering that it was very clear that the above crimes were committed during or 'in the context of the fight against terrorism in 1999-2003 in the Chechen Republic',[729] state agencies must have been actively involved, the ECtHR ordered Russia to investigate the crimes and bring those responsible to account.[730] In the *Chechnya cases,* the CoM reported about problems with securing the Government of Russia to comply with the ECtHR's order to prosecute suspected offenders on a number of occasions. The CoM reported that the Government of Russia took almost a decade to comply with the decision of the Court.[731]

The foregoing notwithstanding, it is interesting to note that the CoM has been active in ensuring that states comply with their obligation to investigate and prosecute suspected offenders. In supervising Russia's compliance with the ECtHR's decision in these cases, the Committee identified a number of areas to focus on. First, it instructed Russia to improve 'the legal and regulatory framework governing the work of the security forces'.[732] It also directed Russia to prioritise on awareness raising 'and providing training for members of the security forces'[733] on human rights. The Committee also directed Russia to improve its 'domestic remedies in cases of abuse'.[734] Russia was also invited to improve its 'cooperation with the European Court (providing the court with documents, case files, etc).'[735] Regarding investigations on the alleged crimes, the

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[728] See Human Rights Watch, 'Update on European Court of Human Rights Judgments against Russia regarding Cases from Chechnya', online Report, 2009, available at *https://www.hrw.org/news/2009/03/20/update-european-court-human-rights-judgments-against-russia-regarding-cases-chechnya,* last accessed on 14 November, 2017.
[729] *Ibid*
[730] See *Musayev and Others v. Russia* , application no. 57941/00, Judgment of 26 January, 2007, summary of the decision is available online at *https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-2555%22]},* last accessed on 24 March, 2018
[731] See Committee of Ministers, Department for the Execution of Judgments of the European Court of Human Rights, Action of the Security Forces in the Chechen Republic of the Russian Federation: General Measures to Comply with the Judgments of the European Court of Human Rights, CoE Doc. CM/Inf/DH(2010) 26, 27 May, 2010, also available online at *https://wcd.coe.int/ViewDoc.jsp?id=1626557&Site=CM*, last accessed on 16 October, 2017.
[732] Ministers Deputies, Information Documents CM/Inf/DM(2010) 26, 'Action of the security forces in the Chechen Republic of the Russian Federation: general measures to comply with the judgments of the European Court of Human Rights', op cit, fn 666.
[733] Ibid.
[734] Ministers Deputies, Information Documents CM/Inf/DM(2010) 26, op cit, fn 666.
[735] See Human Rights Watch Report, 2009, online, supra.

CoM gave directions to the Government of Russia on how it should go about investigating crimes committed in the Chechnya region and which officials to target for purposes of accountability.[736]

The CoM, thus, gave Russian authorities insights on which area of investigations should the authorities focus in when conducting their work. For example, it has advised them to examine whether 'the issue of responsibility of superior officers' was considered by the investigators'.[737] It also expressed 'deep concern at the lack of any conclusive results in the investigations, in particular in those cases in which members of the security forces may have been involved.'[738] The resolution of the Ministers Deputies was as follows:

> '1. recalled states' obligation to carry out an effective investigation to secure the effective implementation of domestic laws protecting the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility;
>
> 2. recalled further that such investigation must be independent, accessible to the victim's family, carried out with reasonable promptness and expedition, effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances or otherwise unlawful, and afford a sufficient element of public scrutiny of the investigation or its results;
>
> 3. Noted with regret that the information provided by the Russian authorities has not yet demonstrated the effectiveness of the measures adopted so far for conducting investigations in line with the Convention's requirements;
>
> 4. Expressed deep concern at the lack of any conclusive results in the investigations, in particular in those cases in which members of the security forces may have been involved;
>
> …'[739]

[736] Ministers Deputies, Information Documents CM/Inf/DM(2010) 26, op cit, fn 666.

[737] See Committee of Ministers, Annotated Agenda and Decisions Adopted, 1115th meeting, (DH), 7-8 June 2011 at p 44.

[738] Committee of Ministers, Annotated Agenda, *ibid*. p 46.

[739] See Resolution of the Ministers Deputies for case No. 22, Cases against the Russian Federation, *Khashiyev and Akayev*, judgment of 24/02/2005, final on 06/07/2005, rectified on 01/09/2005, adopted at the 1115th meeting of the Ministers Deputies of 8 June 2011. The resolution is also available online at *https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805ccaf1*, last accessed on 12 November, 2017. See also Decision of the Ministers Deputies on Case No. 10, case against *Cyprus and the Russian Federation*, *Rantsev*, judgment of 07/01/2010, final on 10/05/2010, at their 1115th meeting held on 8 June 2011. The decision is also available online at *https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805ccaf3*, last visited on 12 November, 2017. Other resolution on failures for various countries can be accessed on this link: *https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016805ccb41*, also last accessed on 12 November, 2017.

When Russia set up a Special Investigating Unit to investigate 'cases which gave rise to applications to the European Court' and a Special Supervising Unit which had the responsibility of discussing the course of the investigations,[740] the CoM released the following report:

> 'The setting-up of such a mechanism appears to be a positive development in finding concrete solutions concerning individual measures required by these judgments.
>
> […]
>
> In any event, the Secretariat recalls that the Committee of Ministers, while welcoming the setting up of the Special Investigative Unit, underlined that *the efficiency of this measure would very much depend on the results which will be achieved by this Unit in dealing with concrete cases*. The Committee accordingly invited the Russian authorities to regularly provide it with reports on the progress of domestic investigations.'[741]

The CoM also provided guidance to the Russian Prosecutor on how it can exert control over the investigations. The CoM's guidance was as follows:

> '27. Following the amendments introduced to the CCP and to the Federal Law "On the *Prokuratura*" (i.e. the reform which created the Investigating Committee), the prosecutors continue to represent the accusation in trial courts as well as to supervise the procedural activities of the investigating bodies.
>
> 28. This supervision is exercised *ex officio* over a number of decisions taken by the investigators. It may also be exercised at any stage of criminal proceedings upon request of the participants in criminal proceedings or other persons whose rights and interests are allegedly infringed by investigators' decisions, actions or omissions.
>
> *1)* Role of the prosecutor in ensuring the effectiveness of domestic investigations
>
> • Prosecutors' control during the investigation
>
> 29. The following most important procedural decisions taken by the investigators are subject to the prosecutors' supervision:
>
> - decisions to initiate criminal proceedings;
> - decisions to terminate criminal proceedings;
> - decisions to suspend criminal proceedings; and
> - refusals to initiate criminal proceedings;
> - decision to apprehend a person suspected of having committed a criminal offence;
> - indictment.
>
> 30. This control is subject to strict time-limits set out either in the legislation or in the internal acts adopted by the Prosecutor General. Should the prosecutor find a decision unlawful or unjustified, he would have to take all necessary measures to ensure that the shortcomings identified are remedied by the investigators. He notifies the decision or injunction to the head of

[740] Alexandre Huneeus, International Criminal by Other means, supra, fn. 610, p 25; See also Jennifer W. Reiss, 'Recent Development Protocol No. 14 ECHR and Russian Non-Ratification: The Current State of Affairs' op cit.

[741] See Ministers Deputies, Information Documents: Action taken by the security forces in the Chechen Republic…op cit, fn 666, online. Emphasis added

> the investigating body and raises the question of annulment of the procedural decision as being unlawful and unjustified as well as the question of the commencement of disciplinary proceedings against the persons responsible, should there be grounds for that. In addition, the prosecutor participates in the court's examination of the investigator's request to place a suspect or an accused person in detention as well as of his/her other requests concerning investigative steps which require a court's authorisation.
>
> 31. In order to increase the effectiveness of the prosecutors' control in the Chechen Republic, 49 circular letters and methodological recommendations were sent to the local prosecutors in the Chechen Republic in 2008.'[742]

Although facing some challenges, the foregoing analysis demonstrates that the ECtHR monitors how contracting states implement its decisions in the investigation and prosecution of crimes.[743] The CoM has guided contracting states on how to conduct their investigations, including, where they had observed lapses in lines or an area of investigation has occurred.[744] As the CoM in the monitoring of the *Chechnya cases* observed, Russia made improvements and started complying with the decision of the ECtHR, albeit inadequate, incomplete, not sufficiently systematic and coordinated,[745] as already stated. Although not directly stipulated, one cannot overrule the influence that the CoM had on the Russian government's decision making as the issue had remained on the table until such improvements were observed by the Committee.

In summary, therefore, an argument could be made that the system of enforcing decisions of the ECtHR differs from the Inter-American system. Under the European system, the CoM, a political body, is responsible for supervising state compliance with decisions of the ECtHR. The record of compliance with decisions of the ECtHR is contributing towards positive state behaviour on cooperation as shown by *the Chechnya cases*.[746] The system of enforcing decisions of the ECtHR under this system presents a good opportunity for the ASP to draw lessons from

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[742] See Ministers Deputies, Information Documents: Action taken by the security forces in the Chechen Republic, *CM/Inf/DH(2010)26*, op cit, online, footnotes omitted. This decision was adopted at the 1086th meeting of the Ministers' Deputies in June 2010, see CM/Del/Dec(2010)1086 Decisions adopted at the meeting. See also Philip Leach, *Taking a Case to the European Court of Human Rights*, 3rd Ed. 2011, p 101, fn 153

[743] For an interesting analysis on this see Alexandra Huneeus, 'International Criminal Law by other means', op cit, fn 609 p 23-27.

[744] See for example Committee of Ministers, Annotated Agenda and Decisions Adopted, 1115th meeting (DH), 7-8 June 2011, p 43, CoE Doc. CM/Del/Dec (2011)1115 (June 10, 2011), *Khashiyev Group v Russian Federation*, at *https://wcd.coe.int/ViewDoc.jsp?id=1799029&Site=CM*, last accessed on 12 November, 2017; See also Committee of Ministers, Department for the Execution of Judgments of the European Court of Human Rights, Action of the Security Forces in the Chechen Republic of the Russian Federation: General Measures to Comply with the Judgments of the European Court of Human Rights, CoE Doc. CM/Inf/DH(2010)26, May 27, 2010, available at *https://wcd.coe.int/ViewDoc.jsp?id=1626557&Site=CM*, last accessed on 12 November, 2017.

[745] See Human Rights Watch Report, 2009, op cit.

[746] *Ibid*.

as, in this system, a political organ is responsible for enforcing decisions of the ECtHR. The CoM is an organ composed of politicians yet it actively supervises the implementation of decisions of the court. There is, therefore, nothing to prevent the ASP from adopting similar approaches including coercive measures for compelling state cooperation with decisions of the ICC. The system of supervising state compliance with decisions of the court is also contained in the legal framework of the AfCHPR as will be elaborated in the next section.

5.9. SUPERVISION OF COMPLIANCE UNDER THE AFRICAN SYSTEM OF HUMAN RIGHTS ENFORCEMENT

5.9.1. Introduction

The AfCHPR was established under the Protocol to the African Charter on Human and Peoples Rights,[747] to ensure the protection and promotion of human and people's rights, freedoms and duties in Africa.[748] According to Article 3 of the Protocol, the AfCHPR has jurisdiction to hear cases and disputes related to human rights violations; the interpretation and application of the African Charter on Human and People's Rights ('African Charter'); the Protocol establishing the AfCHPR; and 'any other relevant Human Rights instrument ratified by the States concerned.' The AfCHPR has both advisory and contentious jurisdiction over any legal matter concerning the African Charter and other relevant issues being examined by the African Commission on Human and Peoples Rights ('African Commission').[749] Ideally, the AfCHPR and the African Commission are meant to complement each other's work.[750] The AfCHPR is obliged to hear matters referred to it by the African Commission and even transfer some matters to the African Commission or e vice versa, where necessary.[751] As at January 2018 the AfCHPR had transferred 4 cases to the African Commission in accordance with Article 6(3) of the Protocol.[752]

[747] The decision to establish the Court was adopted by the Assembly of Heads of State and Government of the OAU in Ouoadougou, Burkina Faso, on 9 June 1998. See OAU Decision OAU/LEG/MIN/AFCHPR/PROT (111). The instrument establishing the Court entered into force on 25 January 2004. The full text of the Protocol can be accessed online at *http://www.african-court.org/en/images/Basic%20Documents/africancourt-humanrights.pd*f, last accessed on 1 November, 2017.

[748] See paragraph 4 of the Preamble to the Protocol.

[749] Article 4 of the Protocol. Also read part V, Rules 68 to 73 of the Rules of the Court on the Procedure for requesting an Advisory Opinion from the Court.

[750] See Article 2 of the Protocol as read with Rule 29 of the Rules of the Court. The Rules can be accessed online at *http://en.african-court.org/images/Protocol-Host%20Agrtmt/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf*, last accessed on 13 January 2018.

[751] See Article 6 (3) of the Protocol. See also the case of *Urban Mkandawire vs. The Republic of Malawi*, communication number 3 of 2003, where the case that was first commenced at the Commission by the applicant was later transferred to the Court where it was decided, accessed online at *http://www.african-court.org/en/images/Cases/Judgment/Judgment%20-%20Application%20003-2011-%20Mkandawire%20v.%20Republic%20of%20Malawi%20English.pdf*, last accessed on 26 February, 2019.

[752] Activity Report of the African Court on Human and Peoples Rights, 1 Jan- 31 Dec. 2017, AU. Doc. EX.CL/1057(XXXII), page 4, para 14.

5.9.2. Access to the Court

According to Article 5 of the Protocol to the African Charter on the Establishment of the AfCHPR, the AfCHPR can be accessed, either directly by an individual, where a state has accepted the compulsory jurisdiction of the AfCHPR, or through the African Commission where a matter has been referred to by the said Commission, as already indicated. In other words, under this system, the African Commission, Contracting states[753] and African Intergovernmental Organizations are all obliged to access and submit cases to the AfCHPR.[754] In certain instances, cases may be transferred from the African Commission to the AfCHPR[755], and in that case the latter 'may request the opinion of the Commission' on whether the case should be admitted or not.[756]

In any event, a party that submits a case to the AfCHPR must satisfy the terms of Article 56 of the African Charter, before they are admitted.[757] Among others, a petitioner must satisfy the AfCHPR that his case is compatible with the African Charter or the Constitutive Act;[758] that all local remedies have been exhausted;[759] and that the case has not already been settled 'in accordance with the principles of the Charter of the United Nations, or the Constitutive Act or the provisions of the present Charter'.[760] Cases or 'communications' as they are usually called before the African Commission, must also satisfy the requirements of article 56 of the African Charter, otherwise they will be dismissed at the admissibility stage if they do not do so.

5.9.3. Enforcement of Cooperation under the African Court

According to article 27(1) of the Protocol, once a judgment of the AfCHPR against a state is delivered, it must be communicated to the responsible state, member states of the AU, the African

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[753] Arts 47-54 of the African Charter as read with Rule 29 of the Rules of the Court

[754] Article 5 of the Protocol. See also arts. 55-59 of the African Charter.

[755] See Rule 29 (2) of the Rules of the Court which lays out the procedure of such a transfer as follows: 'where the Court decides to transfer a case to the Commission pursuant to article 6(3) of the Protocol, it shall transmit to the Commission a copy of the entire pleadings so far filed in the matter accompanied by a summary report. At the request of the Commission, the Court may also transmit the original case.'

[756] Article 6 (1) of the Protocol.

[757] The African Charter can be accessed online at *http://www.african-court.org/en/images/Basic%20Documents/charteang.pdf*, last accessed on 12 November, 2017.

[758] Article 56 (2) of the African Charter requires an applicant to satisfy the court whether the petition is compatible with 'the Charter of the Organization of African unity'. But since this was replaced by the Constitutive Act during the transformation of the OAU to the AU in 2000, it follows, arguably, that an applicant has to satisfy the provisions of the Act.

[759] Article 56 (5) of the African Charter.

[760] Article 56 (7) of the African Charter.

Commission and the Executive Council of Ministers of the AU. The contents of the decision must also be clearly explained to the responsible state.[761] The state is then expected to 'remedy the violation, including the payment of fair compensation or reparation'.[762] In any event, a state is obliged to bring an end to the violation of people's rights in its territory forthwith.

In cases where the circumstances are extremely grave and urgent, such that waiting for the disposal of the case would lead to continued violation of human and people's rights, the AfCHPR is empowered to 'adopt such provisional measures as it deems necessary' to defray any 'irreparable harm to persons'.[763] Otherwise, in normal course of event the AfCHPR is mandated to 'render its judgement within ninety (90) days of having completed its deliberations'[764] stating 'the reasons on which it is based.'[765] Since all states parties to the treaty undertake 'to comply with the judgment' of the AfCHPR and 'to guarantee its execution'[766] upon ratification, it is incumbent upon the responsible State to comply with the decision in good faith. However, it is not all states comply with decisions of the AfCHPR-a point emphasised below.

5.9.4. Procedure for Monitoring State Compliance with decisions of the AfCHPR by the Executive Council

According to Rule 64(2) of the Rules of the AfCHPR, the Executive Council is mandated to monitor the execution of the judgment on behalf of the Assembly.[767] The Executive Council monitors compliance by considering reports submitted to it during its Ordinary and Mid-term Sessions by both the African Commission and the AfCHPR. As compared to the CoM in the European system, and the Inter-American system, whose systems of supervision are carefully elaborated by rules and procedures, the procedure for monitoring compliance with decisions of the AfCHPR is not yet developed or structured.

5.9.5. Legal Framework on Supervision of Compliance under the AfCHPR

Article 30 of the protocol imposes an obligation on all contracting parties to the protocol to comply with the judgment of the AfCHPR 'in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.' However, the AfCHPR faces challenges

[761] Article 29 of the Protocol establishing the Court as read with Rule 64(1) and (2) of the Rules of the Court.
[762] Article 27(1) of the Protocol establishing the Court as read with Rule 63 of the Rules of the Court.
[763] Article 27(2) of the Protocol establishing the Court.
[764] Article 28(1) of the Protocol establishing the Court.
[765] Rule 61 of the Rules of the Court.
[766] Article 30 of the protocol establishing the Court.
[767] See Article 29(2) of the protocol. See also Article 1 read with Articles 10-13 of the Constitutive Act.

as states are not fully complying with its decisions. In order to rectify this problem Nmehielle, says that the [AU] Assembly must adopt 'whatever political measures that is necessary to secure compliance with the Court's judgment'[768] if the integrity of the system is to be protected.

5.9.6. Procedure of Supervision of Compliance

Article 31 imposes an obligation on the AfCHPR to submit 'to each regular session of the Assembly, a report on its work during the previous year.' The contents of the report are required to 'specify, in particular, the cases in which a State has not complied with the Court's judgment.'[769] Although Article 29 of the Protocol provides that the responsibility to supervise compliance with decisions of the AfCHPR rests with the Assembly, in practice, the Executive Council plays a very important role. When the Executive Council considers the reports of the African Commission and the AfCHPR, it proceeds to adopt them with necessary recommendations. Usually the Executive Council just 'notes' the contents of the reports and proceed to adopt them. Once adopted, the reports form part of the Executive Council's decision which are thereafter referred to the Assembly for further consideration and adoption. The report is considered by the Assembly and once adopted is binding on all member states of the AU. In a majority of cases, decisions adopted by the Executive Council are automatically endorsed and adopted by the Assembly. It is very rare for one to find a decision that has been adopted by the Executive Council being rejected by the Assembly. As the Assembly is the supreme body of the AU with supervisory powers over the Executive Council, One would expect that the former would actively scrutinise reports of the Executive Council and, if possible, arrive at a different conclusion than that of the Executive Council.

The Assembly has an obligation to stipulate remedies that will be imposed against a non-complying state, including, the imposing of sanctions under Article 23(2) of the Constitutive Act. The Executive Council can (although it is not clear whether it does) exert pressure on non-complying states to adhere to the AfCHPR's decision.[770] Since the Judgments of the AfCHPR, when reported and adopted by the Assembly constitute AU decisions, a responsible state has an obligation to comply with such decisions, otherwise the Assembly is, arguably, compelled to

[768] V.O. Nmehielle, *The African J Human Rights System-Its Laws, Practices and Institutions,* (2001), p. 304
[769] Article 31 of the Protocol.
[770] Danwood Mzikenge Chirwa, Lillian Chenwi et al, *The Protection of Economic, Social and Cultural Rights in Africa*, op cit, p 266-267, p 266.

impose sanctions.[771] Equally, Annual Activity Reports presented by the African Commission to the Assembly, when adopted by the Assembly, constitute its decisions hence binding on states.

5.9.7. Powers of the Assembly against non-complying States

Article 23 (2) of the Constitutive Act states as follows:

> 'Any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communication links with other Member States, and other measures of political and economic nature to be determined by the Assembly.'

Rule 36 (1) of the Rules of Procedure of the Assembly elaborates the provisions of Article 23 (2) of the Constitutive Act in very clear terms. The Rules provides that:

> 'The Assembly shall approve, upon the recommendation of the Executive Council, the imposition of sanctions under article 23 (2) of the Constitutive Act on a Member State that fails, without good and reasonable cause, to comply with the decisions and policies of the Union.'

The nature of the sanctions anticipated in this instance 'include denial of transport and communication links with other member States and other measures of a political and economic nature to be determined by the Assembly.'[772] The Assembly is also obliged under Article 36 (3) of the Rules of the Assembly to 'stipulate the time frame for compliance and indicate when the failure to comply with that decision will trigger the sanctions regime provided for under Article 23 (2) of the Constitutive Act and this Rules.' According to Rule 36 (4) of the Rules of the Assembly, a member state that is subjected to sanctions has a right to be heard as it is allowed to 'present their case to the Assembly.' It is also interesting to note that the Rules have comprehensively elaborated the nature of the sanctions for 'unconstitutional changes of Government' only and no sanctions for other breaches.[773] This explains why the framers of the Rules take the issue of 'unconstitutional changes of government seriously as compared to States' noncompliance with decisions of the AfCHPR.

> As already observed, one of the functions of the Assembly is to 'monitor the implementation of policies and decisions of the Union as well as ensure compliance by all member States.'[774] The

[771] *Ibid*, p 266; See also article 23(2) of the Constitutive Act of the African Union, adopted in Lome, Togo, on 11 July 2000 and entered into force on 26 May 2001.
[772] Rule 36 (2) of the Rules of the Court.
[773] See Rule 37 of the Rules of Assembly of the Union. The rules can be accessed online at *https://oldsite.issafrica.org/uploads/rules_AssemblyJuly2002.pdf*, last accessed on 27 January, 2018.
[774] Article 9*(1)(e)* of the Constitutive Act.

> Assembly is also obliged to not only 'determine the common policies of the Union'[775] but also 'receive, consider and take decisions on reports and recommendations from other organs of the Union.'[776] It may also 'give directions to the Executive Council on the management of conflicts, war and other emergency situations and the restoration of peace.'[777]

The fact that the Constitutive Act and the Rules of the Assembly do not comprehensively elaborate the nature of sanctions, specifically for failure to comply with decisions of the AfCHPR, in the manner that the Rules did in the case of unconstitutional changes of government, puts in perspective the issue of how the Assembly sees the African Commission and the AfCHPR and indeed human rights protection in general in the Continent. One would easily argue that both the Assembly, as an institution and its member states are not willing to support the AfCHPR and the African Commission in ensuring that states are complying with its decisions.

The AU Assembly, being the supreme organ of the AU, can assist in ensuring state compliance with decisions of the AfCHPR by being actively involved in this initiative. For example, it may, among other things, impose sanctions against non-complying states, where necessary. The sanctions regime must, not only be strong, but also comprehensive enough to enable states' fear their imposition. This, however, cannot be possible if the Assembly or the AU in general does not establish 'an institutionalised follow up mechanism within'[778] the AU structure, preferably the AfCHPR itself.

5.9.8. Movement towards monitoring compliance with decisions of the AfCHPR

It is encouraging to note the initiatives that the AfCHPR has now taken towards enhancing state cooperation. The AfCHPR has now hired a Consultant to undertake a study on Compliance Monitoring and Enforcement Framework with an aim of establishing a proper reporting and monitoring mechanism to ensure effective implementation of its judgments.[779] At the time of presenting its Annual Activity Report for 2017, the AfCHPR indicated that the Consultant's Report had already been validated at a workshop held in Arusha on 25 November, 2017.[780] It is

[775] Article 9*(1)(a)* of the Constitutive Act
[776] Article 9*(1)(b)* of the Constitutive Act.
[777] Article 9*(1)(g)* of the Constitutive Act.
[778] George Mukundi Wachira, 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6(2) *AHRLJ* 465-493.
[779] Activity Report of the African Court on Human and Peoples Rights , 1 January-31 December, 2017, AU Doc. EX.CL/1057(XXXII), page 39, para 44.
[780] Activity Report of the African Court on Human and Peoples Rights , 1 January-31 December, 2017, AU Doc. EX.CL/1057(XXXII), page 39, para 44.

also encouraging to note that this initiative was approved by the Executive Council at its 26th Ordinary Session in January 2015. It is hoped that the initiative:

> '…will facilitate the Executive Council's task of monitoring implementation of judgments of the Court, on behalf of the Assembly, provide State Parties with concrete information and guidance on the implementation of the judgments of the Court and assure African citizens and parties that appear before the Court that there is a proper mechanism in place to ensure State's compliance with the Court's judgments.'[781]

The above initiative is welcome and, hopefully, it will receive the necessary support of the Assembly as the superior Organ of the AU.

In summary, the normative framework for supervising decisions of the AfCHPR has traces of both the Inter-American and European systems of human rights. Traces of the Inter-American style of enforcing human rights are seen through Article 31 of the of the Protocol which resembles Article 65 of the American Convention as both compel the AfCHPR to submit a report on its annual activities to the regular and, sometimes, extra-ordinary sessions of their respective Assemblies. Even the requirements of what should be contained in the reports are also similar as they both require the AfCHPR to specify with particularity cases that states have not complied with.

However, there is a slight difference in the wording of the Article 65 of the Inter-American Convention and Article 31 of the African protocol under which the AfCHPR is expressly mandated to 'make any pertinent recommendations to the Assembly' whereas under the former provision, such recommendation is not so expressly provided for. In other words, the Inter-American system of human rights gives power to the IActHR to formulate recommendations for guiding or inviting the Assembly on how it should compel states to implement the IActHR decisions. The AfCHPR has not yet adopted such approach; however, it appears the AfCHPR is heading towards that direction as it has now appointed a Consultant who is guiding it on how it should formulate its supervisory functions.[782] This is a welcome development and hopefully it will receive the necessary support of the Assembly as not only the superior Organ of the AU but one that has the key for the political support that is needed in this kind of initiatives. The only drawback with the system of enforcing cooperation under the AfCHPR is that it currently does not have procedures

[781] *Ibid*, para 45.
[782] *Ibid*, para 44.

for monitoring compliance, let alone, for empowering it to actively supervise state compliance with its decisions.

The AfCHPR's system of enforcing cooperation is also similar to the European system of enforcing decisions of the ECtHR in that it adopts an enforcement model that is similar to the principle of subsidiarity. This is so because when AfCHPR delivers a judgment against a state, the responsible state is expected to indicate measures that will adopt to satisfy the decision of the AfCHPR. If the state fails or refuses to cooperate, the AfCHPR is empowered to refer the matter to the Executive Council and the Assembly as part of its annual activity reports. It is expected that the Assembly will adopt measures to compel the non-cooperating state to fulfil the decision of the AfCHPR. In that way, the African system, just like the European system, relies on political organs, the Executive Council and the Assembly, to ensure state cooperation with decisions of the respective Tribunals. The Assembly is empowered to receive, note and adopt reports presented by the AfCHPR on state cooperation.

It is significant to observe that article 23 of the Constitutive Act empowers the Assembly to impose sanctions against any state 'that fails to comply with the decisions and policies of the Union'.[783] Rule 36 of the Rules of Procedure of the Assembly of the Union also provides for the possibility of the Assembly adopting sanctions against a state that fails to comply with decisions and policies of the Assembly. Some of the sanctions that may be adopted by the Assembly include 'the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.'[784] An argument could, therefore, be made that the Assembly could adopt sanctions against a state that fails to cooperate with the decision of the AfCHPR as doing so will be acting against decisions and policies of the Union which is the protection and protection of human rights. In this way, the legal framework for enforcing decisions of the AfCHPR could possibly inform the enforcement of decisions by the ASP under the Statute framework of cooperation. The legal system of enforcing state cooperation under the African human rights system also empowers a political body, the Assembly to supervise how states are fulfilling decisions of the AfCHPR.

As the Assembly has the power to adopt sanctions against states that fails to fulfil decisions of the AfCHPR, the same could be adopted under the work of the ASP. In this regard, the African

[783] Article 23(1) of the Constitutive Act.
[784] Article 23(2) of the Constitutive Act.

system of enforcing decisions of the AfCHPR can contribute positively to the work of the ASP under the Statute framework on cooperation as it may also device ways of adopting and imposing coercive measures against non-cooperating states.

5.9.9. Summary of the System of Enforcement of Cooperation in the Three Regional Human Rights Tribunals

In light of the foregoing discussion, it may be observed that the three regional tribunals of the IActHR and the ECtHR. The AfCHPR's legal framework anticipates the enforcement of decisions in a different way. For the IActHR, the court takes an active role in enforcing states compliance with its decision. Cases of non-compliance are reported to the General Assembly of the OAS by the IActHR but a matter is never closed until fully complied with by a non-cooperating state. As for the ECtHR and the AfCHPR, the responsibility to supervise state compliance with decisions of the respective courts is left in the hands of political bodies, the CoM and the Assembly, respectively. While the African system has provisions dealing with the subject of supervision of compliance, in practise, however, the Assembly, which is the body responsible for supervising state compliance under this system, has not really done much as compared to the ECtHR, where the CoM is very active in this regard. Although this is the case, the legal framework is comprehensive enough and, in effect, mirrors traces of both the IActHR and ECtHR systems of supervising compliance. As the system of enforcing decisions of the AfCHPR, as observed in this thesis, has not fully developed under this system due to unavailability of procedures and governing rules on enforcement, this thesis takes the view that the ICC may not rely on this system to draw lesson for enhancing its system. The above discussion may become relevant in future once the AfCHPR establishes its system for enforcing cooperation.

The foregoing, notwithstanding, this discussion has also demonstrated that if the ASP were to draw lessons from the IActHR and the ECtHR on how it should supervise state compliance with its decisions, it could fully develop practices and a legal framework for supervising state compliance with its decisions. The question that one would consider is why should the ICC draw lessons on supervision of state compliance from human rights institutions when its objective is to fight international crimes and end impunity by individuals?

5.9.10 Why should the ICC draw lessons from the regional tribunal on human rights on

Supervision of Compliance?

One of the pointed criticisms of the proposal that the ASP should supervise state compliance with decisions of the ICC and draw lessons from human rights regional tribunals of the IActHR and the ECtHR focuses on the doctrine of 'investigate and prosecute' which has also been discussed in this chapter. The criticism argue that since these tribunals are human rights enforcement Institutions, 'created to adjudicate the human rights violations of States, not of individuals';[785] they cannot or must not 'monitor judicial processes as they unfold'[786] involving the conduct of criminal proceedings. As it is already noted, both the IActHR and ECtHR (the CoM) supervises state compliance with its orders on criminal investigation and prosecution of offenders. The criticism against this practice is that the IActHR is usurping its powers as a human rights Institution, after all, the two judicial processes have different standards of proof.[787] In other words, it is argued that the 'efficacy of ordering and monitoring prosecutions from the perspective […] of international criminal law as compared to human rights law'[788] would be different especially when one considers that the standard of proof in these two cases are different.

A response to these well founded criticisms is that since supervision of compliance is a post-judgment phase, it would not violate any standard of proof requirements in criminal trials, let alone the *audi alteram partem* rule, as the only issue for contention at this stage of the proceedings is the verification of whether the state's version with regard to compliance with the judgments of the courts are true or not.[789] In any event the state is invited to submit its version of events and in that regard it cannot be heard to say that it was not given a chance, if, for example, it refuses to attend. In cases where the proceedings have not commenced and the ICC has issued a warrant for the arrest and surrender of a suspect, the supervision of compliance stage will only focus on establishing facts on how the said state is going about implementing the request to arrest or surrender the concerned suspect. The ASP, at this stage, will not be admitting evidence pertaining to the case that the indicted individual will have to answer at trial. The lessons that the ASP will, therefore, have to draw from these regional tribunals will be on the manner in which these tribunals go about their business in ensuring that their member states comply with their

[785]See Alexandra Huneeus, op cit, fn. 590, p 12-15; Goran Sluiter, 'Enforcing Cooperation…' op cit, fn. 266.
[786] Alexandra Huneeus, *ibid*, p 12-15.
[787] *Ibid.*
[788] Alexandra Huneeus, op cit, fn. 590, p14.
[789] Alexandra Huneeus, *ibid* p 12-15.

decisions, including those decisions that orders them to investigate and prosecute suspected offenders of international crimes.

5.9.11. Important lessons for the ASP in enforcing state cooperation under the statute

An important lesson that the ASP could draw from the IActHR and CoM is the introduction of the 'dialogue' procedure like the one introduced under the IActHR. The 'dialogic' procedure helps the supervising body to receive 'the input of the state, the victims, and other actors on the progress of the prosecutions, and then makes suggestions and gives new orders in light of that information.'[790] As the procedure is about how a state is implementing the decision of the court, the dialogic procedure would also facilitate the development of relationships between the ASP and the implementing agencies of a state. The ASP will, under this procedure, be able to engage with both contracting and non-contracting states to the Statute (if a matter was referred by the UNSC) and guide the responsible state on how it should implement its requests to arrest and surrender a suspect.

Huneeus argues, correctly in this author's view that the possibility of inviting non-cooperating states to a hearing may be another form of complementarity. He presented his argument in the following way:

> 'Complementarity was meant to be a form of deference to sovereignty: states with working justice systems can keep the ICC at bay by opting to prosecute. But the flip side of complementarity is that it puts the Office of the Prosecutor (OTP) in the position of supervising whether local prosecutions are taking place and, more intrusively, of assessing whether they meet a vaguely articulated standard. Many scholars and, Prosecutor Luis Moreno Ocampo himself have argued that the OTP should interpret complimentarity to allow it to pressure states proactively toward prosecution, threatening to file a case if the states do not undertake certain actions. Under such an approach, the OTP would closely review local justice system decisions over a period of years and exert pressure toward particular procedural standards.'[791]

According to Huneeus, therefore, this type of supervising state compliance with decisions of the IActHR,

> 'offers a different kind of relation between the international community and the national justice system. It is a jurisdictional relation that will likely take on greater importance as the ICC identifies more situations in states…that have justice systems that are able, and claim to be willing, to prosecute the crimes in question.'[792]

[790] Alexandra Huneeus, op cit, fn. 590, p 32
[791] Alexandra Huneeus, *ibid*, p 31
[792] *Ibid*, p 32

Burke-White has also supported the proposal for the ICC to introduce supervision of compliance, as a form of 'proactive complimentarity'[793], in the following way:

> 'By watching domestic proceedings and issuing public statements when necessary, the OTP and its partners may be able to provide on-going pressure to ensure that domestic investigations and prosecutions meet basic standards of due process and represent genuine efforts to bring the accused to justice. Such monitoring may also be able to draw a state's attention to inadvertent inadequacies in its domestic processes at a stage when reform or adjustment is still possible. Taken collectively, these tactics offer a promising means of catalysing domestic prosecutions by at least some initially unwilling states.'[794]

According to William W. Burke-White, for the ICC to successfully 'bring an end to impunity and provide broad-based accountability for international crimes' it must try and 'engage more actively with national governments and must encourage states to undertake their own prosecutions of international crimes.'[795] Zlata Durdevic has also supported these arguments by stating that the ICC would be able to improve State cooperation if it works directly with 'national judicial authorities and not […] the State.'[796] In his view the ICC 'model of international cooperation should be replaced with one of supranational cooperation.'[797] A supranational cooperation, according to him, entails'

> '[D]omestic courts need to become bodies that represent a state in cooperation with the ICC, and at the same time a direct channel between the ICC and domestic courts must be established. The concept of ICC jurisdiction as extension of national jurisdiction will be realised only when domestic courts become the ICC enforcement mechanisms.'[798]

Both William Burke and Zlata Durdevic propose that the ICC must change its ways of doing business and 'make inroads in the states' obligation to cooperate'[799] in the same fashion as the ECtHR has done with its enforcement mechanism. In any event the ICC must adapt and make national 'courts as representatives of the state when it comes to enforcement of criminal Courts decisions from other jurisdictions.'[800] This exposition, therefore, confirms that if the ASP were

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[793] *Ibid*, p 31
[794] See William W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice' (2008) 49 *Harv. Intel L.J. 53,*, p 91
[795] William W. Burke-White, *ibid*, see the abstract.
[796] Zlata Durdevic, 'Legal and Political Limitations of the ICC Enforcement System: Blurring the Distinctive Features of the Criminal Court', in Ackerman, Bruce et al, *Visions of Justice* (2016) p164-198, p 198
[797] Zlata Durdevic, *ibid*, p 198.
[798] Zlata Durdevic, *ibid.*
[799] *Ibid*. p 196
[800] *Ibid*. p 196

to engage with states to actively involve themselves in the prosecution of crimes, which includes, the arrest of suspects, it will not only establish a unique 'supranational enforcement mechanisms'[801] but also improve in its fight against international crimes and ending impunity. The supranational enforcement mechanisms will make the ASP to be in 'direct communication and enforcement of ICC decisions by national judicial authorities without government involvement.'[802] In this way, the ASP would be able to monitor states, for example, 'through compliance reports';[803] keeping with the pace of prosecutions, if the state decides to prosecute nationally and may also ' highlight shortcomings'; 'issue orders and offer suggestions to overcome them'[804] through contact with national judicial authorities.

5.9.12. Chapter Conclusion

This Chapter has discussed supervision of compliance with decisions of three regional human rights tribunals of the IActHR, the ECtHR and the AfCHPR. Generally, supervision of state compliance with judicial determinations is well established in the first two regional human rights systems of the IActHR and the ECtHR. Although the AfCHPR has a legal framework for monitoring state compliance with decisions of the AfCHPR, a clear practice or policy, let alone deliberate follow-up mechanisms to monitor state compliance with decisions of the court has not been fully developed. It appears the system has now realised the need to establish this mechanism with the hiring of a Consultant to advise the AfCHPR on this subject.

The Inter-American system and the European system present very interesting and diverse procedures with well-established and structured practices of supervising compliance. On one hand the Inter-American system of enforcing human rights puts the IActHR at the centre of this process, and on the other hand, the European System utilises the influence of the CoM, a political body, in ensuring states' compliance. The African system of enforcing human rights seems to reflect, somehow, both the Inter-American and European systems of human rights. This is because, under this system, the responsibility to monitor state compliance is left in the hands of a political body, the Assembly of state and Government.[805]The African Charter also gives room

[801] Zlata Durdevic, op cit, fn. 796, p 196
[802] Ibid. p 196
[803] William W. Burke-White, Proactive Complementarity, op cit, fn. 794, see the abstract
[804] Ibid
[805] In practice, however, it is the Executive Council that makes the initial decision on this issue and once made, it is forwarded to the Assembly for endorsement and final approval.

to the AfCHPR to actively engage in supervision of compliance, particularly to supervise recommendations of the African Commission. However, the system does not utilise such options, as is the case under the Inter-American system.

As regards supervision of compliance with orders to investigate and prosecute crimes, this Chapter has disclosed that although challenges still remain in both the Inter-American and European systems, there are nevertheless positive developments taking place where determinations of the regional tribunals are enabling the development of positive behaviour towards compliance with such orders. Under the Inter-American system, the court engages actively with states and advises on how they should conduct investigations including suggesting potential suspects. As for the European System, the CoM has provided some guidance on how the state of Russia must conduct investigation for crimes committed in Chechnya. As for the African system of human rights, the legal framework on criminal enforcement is yet to operationalise and hence it would be difficult to meaningfully evaluate it. The instrument establishing the ACJ is not yet in operation and the expansion of the AfCPHR's jurisdiction to include criminal enforcement powers has not yet received enough support from member states. It can, therefore, be concluded that although the African system of supervising compliance has not yet matured, there is room for the AfCHPR to supervise implementation of its decisions in the current legal framework. In that regard, the system can draw lessons from the two regional courts that have been analysed in this Chapter.

The Chapter has, therefore, argued that the ASP can draw lessons from the three regional human rights tribunal on how to enforce state cooperation with their decisions. The best lessons for the ASP can be taken from the CoM, which is an organ of the ECtHR responsible for enforcing all decisions of the IActHR. The CoM imposes measures against non-cooperating states in the form of suspensions and sanctions. If the ASP were to adopt these approaches the cooperation regime under the Statute could be enhanced.

CHAPTER 6

RECOMMENDATIONS FOR IMPROVING THE REGIME OF STATE COOPERATION UNDER THE STATUTE

6.1. Enhancing the Role of Political Actors in the enforcement of ICC Decisions

Chapter 5 of this thesis has shown that regional human rights tribunals of the IActHR and ECtHR have developed mechanisms for enforcing state cooperation with their decisions by introducing the enforcement of cooperation stage. This Chapter now considers recommendations for improving the cooperation regime of the Statute including lessons that could be drawn from the three regional human rights tribunals discussed in the previous Chapter. To that end, the thesis argues that due to the unique nature of ICC cases, the role of the ASP must be elevated or reviewed so that its political influence and power over states can be utilised during enforcement of cooperation.

The thesis proposes that the role of the ASP under the Statute ought to follow the approach adopted by the two regional human rights bodies of the IActHR and the AfCHPR where the legal framework imposes an obligation on political organs to enforce state cooperation with decisions of respective courts. The ASP could also draw lessons from the ECtHR, particularly in the manner in which it supervises states compliance with its decisions on investigating and prosecuting suspected offenders discussed in Chapter 5.

The CoM has established and developed mechanisms for enforcing cooperation under the European System which is assisting states in fulfilling their treaty obligations. The biggest challenge to this approach is on how to make the political organ responsive to the need for speed and urgency under the ICC. For example, how can the two bodies react at a short notice to the need for enforcing cooperation when they receive information that a suspect is travelling to the territory of contracting state party?

The proposal to involve the ASP in enforcing cooperation under the Statute takes into account the fact that the ICC, let alone its cases are political especially when the request for cooperation involves the arrest and surrender of a suspect who is also a head of state like Al Bashir. In light of the fact that the ICC is a politically sensitive institution, any measures on enhancing cooperation under the Statute must also be responsive to this reality.[806]

[806] Goran Sluiter, Enforcing Cooperation, op cit, fn. 266, p. 400.

In view of the foregoing, this thesis proposes that in order to elevate and make the role of the ASP more proactive, the Statute framework on enforcing cooperation must be 'Europeanised'[807]. According to Judge Trindade, enforcement of cooperation is Europeanised if the OAS General Assembly actively monitors the enforcement of decisions of the court. It also entails the court constantly reporting non-cooperating states to the Assembly.[808] In his view, States can only improve the enforcement of its decisions if political organs take part or are involved in enforcing decisions. This idea, therefore, calls upon all contracting states to the treaty that establishes the tribunal to actively participate in monitoring how states are cooperating with court orders.

As argued by Judge Trindade, 'Europeanisation' of the ICC System, also entails, improving the relationship between the political organs responsible for enforcing cooperation, for example, the ASP and member states.[809] This can be done by using, either procedures for enforcing cooperation that will have to be developed by the ASP itself within its General Assembly.[810] Judge Trindade argued that Europeanisation of the enforcement system of the IActHR also entails incorporating dialogue mechanisms between the IActHR and the General Assembly.[811] His proposal, therefore, recognised the importance of political establishments at both regional and national levels to be involved in ensuring that, after the delivery of judgments, states fulfil them.

Another prominent commentator on this subject, Huneeus, also argued that challenges of state cooperation with decisions of the IActHR are exacerbated because the latter has a poor relationship with public ministries and judiciaries from member states.[812] This suggestion implies that international tribunals should also take a proactive role in reaching out to those 'state actors that are responsible for implementing court decisions at the domestic level.'[813] According to Baluarte, these actors must be called upon,

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[807] Judge Trinidade, was widely reported to favour the adoption, under the inter-American system of enforcement, of For more on this see David Baluarte, op cit., fn. 353, p 281-282.
[808] David C. Baluarte discussing the proposal with respect to the IActHR, *ibid*., p 281-282
[809] *Ibid*
[810] David C. Baluarte *Ibid*
[811] David C. Baluarte discussing the proposal with respect to the IActHR, op cit, fn. 353.
[812] See Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornell Int'l L.J.* 493.
[813] See David C. Baluarte 'Strategising for Compliance: The Evolution of a Compliance Phase of Inter-American Court of Human rights' (2010) 6 *J. Int'l L & Int'l Rel. 35*, p 282, citing Huneeus, 'Courts resisting Courts, op cit, p 590.

> 'to carry out their obligations while being more mindful of how they will receive the decisions and elevating their profile by incorporating them into a regional 'social network' of persons concerned with the rule of law.'[814]

Some commentators have also highlighted the role of advocacy in enforcing decisions of international tribunals. Proponents of this view argue that national implementation mechanisms alone cannot guarantee improvements in performance.[815] They, therefore, call for an improvement in institutional and legal capacity of enforcement framework at national level.[816] These suggestions have informed the recommendations of this Thesis. This thesis, therefore, proposes that the ASP must adopt strong, deliberate and clear measures for improving its relationship with national competent authorities responsible for cooperation.

6.2. Direct engagement with national competent authorities

The thesis argues that the ASP must strive at developing relationships with states, its national competent authorities like ministries of justice. It must also reach 'out to the judicial organs of the nations against whom judgments'[817] are issued. Durdevic proposed that the ICC must engage with national courts to fully appraise itself of a state's level of cooperation and coordinate with national authorities on the execution of its decisions at national level. This thesis proposes that due to the framework of the ICC, this role must be played by the ASP.

As already observed in Chapter 3, a similar approach was adopted by the ICTY when enforcing its decisions against non-cooperating states. If states failed to cooperate, the ICTY had an obligation to refer the non-cooperating state to the UNSC. The UNSC was obliged to adopt 'sanctions and penalties that can be imposed by the authorities of the State where the individual is located; and those that can be imposed by the International Tribunal'.[818] This proposal is somehow akin to enforcement of foreign judgments common in international commercial

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[814] David C. Baluarte, *ibid*, p 282.

[815] See James L. Cavallaro and Emily J. Schaffer, 'Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas, (2004) 56 *Hastings L.J.* 217. See also James L. Cavallaro & Stephanie Erin Brewer, 'Re-evaluating Regional Human Rights Litigation in the Twenty-First Century: The case of the Inter-American Court', (2008) 102 *Am. J. Int'l L.* 768, p 770; c/f Vivian Krsticevic, A Strategy for Improving the level of implementation of judgments in the Inter-American System, (2010) 16 *INTERRIGHTS* Bulletin 91; Michael J. Camilleri & Vivian Krsticevic, *Making International Law Stick: Reflections on Compliance with Judgments in the Inter-American Human Rights System* (2008), p 243-244.

[816] See also Vivian Krsticevic, *Implementation of the Decisions of the Inter-American System of Human Rights: Contribution to the Legislative Process*, 2009; Soraya Long Saborio, 'Successes and Failures of the Inter-American System of Human Rights in the case of *Baena Ricardo et al v Panama* (Case Law 25) (2009) 5 *Revista CEJIL* 38.

[817] Alexandra Huneeus, op cit, fn. 6120, p 526.

[818] *Blaskic Subpoena decision,* op cit. fn. 236, para 57.

disputes where decisions of foreign tribunals may have a force of law nationally, if so permitted. The foreign judgments have a force of law and are enforceable in the same manner as judgments issued by national courts are enforced.[819] As states have an obligation to ensure their national legal framework is in line with the Statute, this proposal allows for domestic enforcement of ICC decisions, including the possibility for the ASP to monitor enforcement of decisions.

The improvement of relationship between the ASP and national actors responsible for implementing decisions on cooperation would facilitate the creation of a healthy relationship between the ASP and states which may also foster mutual understanding and commitment by states to implementing decisions of the ICC.[820] The previous Chapter had clearly indicated that the ASP can foster relationships with states if it reaches out to 'state actors that are responsible for implementing court decisions at the domestic level'[821] including those responsible for the enforcement of foreign judgments and international criminal indictments. The ASP must target these state actors and incorporate them as part of its social network.[822] The incorporation of state actors as part of the social network and the Europeanisation of the enforcement framework also entails empowering and strengthening the capacity of these actors so that they fully understand their role and the obligation of the responsible state under the Statute including consequences for non-cooperation.

The foregoing proposals assume that cooperation of states to decisions of the ASP will be straight forward. However, it is also necessary to consider cases where, regardless of the measures taken by the ASP, a state still fails or deliberately ignores to cooperate with decisions of the ICC. In response to this concern, the thesis proposes that the powers of the UNSC as discussed in Chapter 4 of this thesis must be invoked at all times to enforce cooperation. These powers must be invoked from Chapter VII of the UN Charter where the UNSC can adopt measures including the imposition of sanctions until such a time that the responsible state fulfils decisions of the ICC. As already alluded to, what should determine the UNSC's authorisation of intervention is the need to protect civilians in line with the principle of R2P.

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[819] Ralf Michaels, 'Recognition and Enforcement of Foreign Judgments', (2009) *Max Planck Inst. Comp. Pub. L* and Int'l L., online at *https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2699&context=faculty_scholarship*, last accessed on 2 October, 2018.
[820] Alexandra Huneeus, op cit, fn. 612, p 526.
[821] David C. Baluarte, op cit, fn. 813, p. 282, citing Huneeus 'Courts resisting Courts: Lessons from the Inter-American…', op cit, fn. 610, p 529.
[822] David C. Baluarte, *ibid*. p 282, citing Huneeus 'Courts resisting Courts: Lessons from the Inter-American…' op cit, p. 529.

It is to be observed and, also as argued by Stahn, that there is a synergy between international criminal justice and the R2P principle, for a number of reasons. International criminal justice and the R2P principle originate from similar foundations, 'the sovereignty as responsibility'[823] and also their interaction in certain specific areas or functions, 'such as *atrocity alerts*, norm expressivism and *compliance*'[824]. Both of these have, throughout their history, 'been paired with each other through the focus on atrocity crimes, without deeper reflection on the merger of these distinct traditions.'[825] Stahn, therefore, argues that these the two norms share a similar background 'the R2P could be invoked more systematically to draw attention to, (i) non-cooperation by states […], (ii) need to follow-up by the Council or (iii) to put pressure on States to allow access to territory for investigations and prosecutions for core crimes.'[826] Stahn further observed that 'international criminal justice' could also be a good 'strategy and language' that could appeal 'to the enforcement of R2P'[827] and vice versa. He justified his arguments by observing that international criminal justice,

> 'offers the doctrine a normative grounding in law that mitigates biases against R2P. The use of criminal law semantics shifts the focus from subjective moral and political choices to universally defensible interests. Moreover, it strengthens the very assumption that R2P entails a legal nucleus.'[828]

This, therefore, means that the commission of atrocity crimes against the civilian population could provide a basis for states to intervene in the affairs of another state.

6.3. The procedure to follow in enforcing cooperation

In practice, the above proposals would commence immediately after the ICC has delivered a decision for the arrest and surrender of a suspect. The decision will have to be communicated to the responsible state and, since any contracting party to the statute has an obligation to cooperate with the ICC in fulfilling the same, enforcement of the decision cannot be an option; it must be

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[823] See Carsten Stahn, 'Marital Stress or Grounds for Divorce? Re-thinking the relationship between R2P and the International Criminal Justice' (2015), 26 *Criminal L. Forum*, p 13 (abstract); cf F. Megret, 'ICC, R2P and the International Community's Evolving Interventionist Toolkit' (2010) 21 *Finnish Yearbook of International Law*, 21-51; See also S. Nouwen, 'Complementarity in Practice: Critical Lessons from the ICC for R2P' (2010) 21 *Finnish Yearbook of International Law* 53-64.
[824] Emphasis added, *Ibid*.
[825] Carsten Stahn, 'Marital Stress or Grounds for Divorce?...', op cit, fn. 823, p 16.
[826]See Carsten Stahn, 'Marital Stress or Grounds for Divorce? Re-thinking the relationship between R2P and the International Criminal Justice' (2015), 26 *Criminal L. Forum*, 13-50, p 49.
[827] Carsten Stahn, *Ibid.*
[828] *Ibid*, p 17.

fulfilled within the stipulated time frame. Article 86 of the Statute, which provides for the obligations of states to cooperate, does not stipulate the timeframe within which a contracting state can implement the decision of the ICC. The ASP rules have, however, set down the time frame of 30 days from the time a decision is delivered; this timeframe is reasonable. If the responsible state does not fulfil the request within the stipulated timeframe, the ASP and the UNSC must work with the Permanent Enforcement Unit or any Subsidiary Organ that may be set up by the UNSC for enforcing cooperation.

6.4. Permanent Enforcement Unit and UNSC Subsidiary Organs

6.4.1. *Establishment of a Secretariat to support a Unit of the ASP for Enforcing Cooperation*

The thesis proposes that the ASP and the UNSC must establish a stand-alone section, the Permanent Enforcement Unit ('PEA' or the 'Unit'), and a Subsidiary Organ respectively for enforcing cooperation on arrest and surrender of suspects. The Unit and Subsidiary Organ must take up a permanent role of enforcing decisions of the ICC including remedies imposed by the two organs. This Unit will be similar to the one discussed in Chapter 5 which exists under the European system, the Department for the Execution of Judgments. The Unit will report directly to the special Unit of the ASP responsible for enforcement.

The proposed Permanent Enforcement Unit will focus on enforcement including arrest and surrender of suspects and will have its offices at the seat of the ICC. It is also significant to observe that one of the concerns raised by South Africa, in the *South Africa Cooperation Decision* was that the procedure on cooperation were not established and, if already established, were unclear to contracting parties making it difficult for them to consult with the ICC.[829] The thesis proposes that the Permanent Enforcement Unit ('PEU') must be established within the ASP to constantly liaise with states once a decision has been issued by the ICC.

6.4.2 *Establishment of an Enforcement Unit within the ASP (ASPEU)*

Within the ASP itself, there is also a need to establish a small Unit composed of either Ministers of Foreign Affairs or Ministers of Justice ('the ASPEU') whose role will be dealing with issues of state cooperation. Unlike the CoM which is composed of one representative from each member state (usually a Minister of Foreign Affairs), the composition of the ASPEU must be small and

[829] See *South Africa Cooperation Decision,* op cit., fn. 46, para 7 of the Decision

should reflect the geographical representation of all regions of the world on a rotational basis. The size of the ASPEU will ensure that decisions on cooperation are arrived at with speed. It may be composed of either Ministers of Foreign Affairs or Ministers of Justice as these may have the requisite credentials to act on behalf of a state under international law.

The shortening of the composition of membership for the ASPEU aims at reducing the possibility of turning the Unit into a political club that may lose sight of its specific mandate. This has been the biggest criticism of the ASP that it is a toothless club of state parties that meets annually to present statements at its annual ASP meeting without agreeing on any tangible measures on cooperation. The ASPEU will also ensure that it gets in touch with contracting states and guide them on how they must cooperate with decisions of the ICC at all times. The thesis also proposes that the composition of the ASPEU must rotate among contracting parties to the Statute, probably every two years, to give time for the fulfillment of their mandate. Below is a proposed organogram of the ASP Enforcement mechanism.

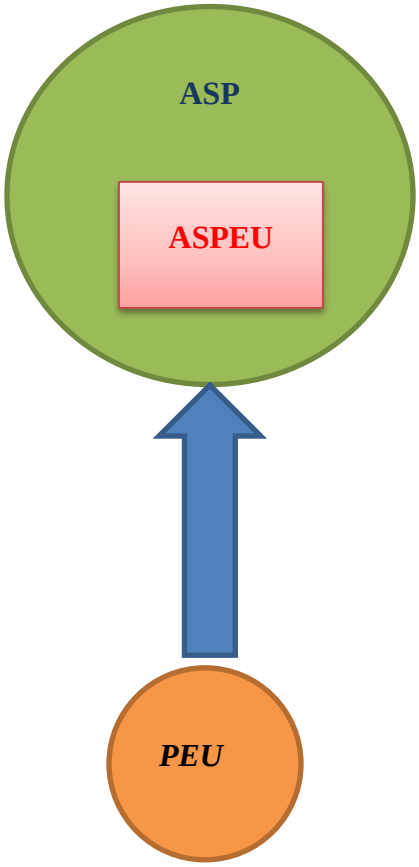


Figure 1: Organogram of the Cooperating cooperation at the ASP

6.5. Secretariat of the Permanent Enforcement Unit (PEU)

The thesis proposes that the Permanent Enforcement Unit (PEU) must act as the Secretariat for enforcing cooperation. The Secretariat will have the capacity to monitor the implementation of decisions of the ICC and remedies imposed by the ASP against non-cooperating states. The PEU must guide states on cooperation throughout the time that a matter is under enforcement procedure (or which is unfulfilled) until the said decision is fully complied with. The PEU must constantly engage with the non-cooperating states and produce reports on a state's level of cooperation, which must be submitted to the ICC. The proposal for the establishment of the PEU will cure the current mischief of having the ASP deal with issues of non-cooperation on *ad hoc* and annual basis.

The thesis proposes that in making changes to the work of the ASP, it must be informed by the work of the CoM under the European system of human rights, as discussed in Chapter 5 above. The CoM actively and regularly monitors states' implementation of ECtHR decisions. The CoM has enormous powers which include the imposition of sanctions against a non-cooperating states and authorising expulsion from the membership of the European Union. The CoM works in conjunction with a Secretariat, the Department for the Enforcement of Judgments, which prepares reports on state cooperation. This model suits the ICC as it ensures that there is a stand-by Unit within the ASP's enforcement mechanisms that is actively involved in the enforcement of ICC decisions.

6.6. Enforcement of cooperation by the UNSC under the Statute

As for the UNSC, the UN Charter already obliges the UNSC to establish subsidiary Organs which assist in its work including the monitoring of state cooperation with its resolutions. The thesis proposes that the PEU should work hand in hand with the UNSC's Subsidiary Organs responsible for enforcing ICC decisions in ensuring that decisions of the ICC are fulfilled. As indicated in Chapter 4, the UNSC is entrusted with the responsibility of maintaining international peace and security. Pursuant to these powers, it investigates disputes or situations before determining the existence of a threat to peace, breach of peace, or an act of aggression. Upon determining that a situation constitutes a threat to peace and international security, the UNSC imposes measures against recalcitrant states with a view of maintaining peace and security. Some of the measures that UNSC has imposed against states over the years include the imposition of sanctions and

various forms of embargos, the ordering of military intervention in Iraq and Libya to protect civilians and freezing of assets. All these measures attest to the existence of wide powers for the UNSC under the Charter. This provides a basis for the UNSC to approach a state with a request or decisions for the arrest and surrender of suspects under the ICC.

6.7. Enforcing a decision for the arrest and surrender of a suspect

One of the crucial issues that the *Al Bashir cases* raises is on how a requested state can execute the arrest and surrender of a person who enjoys immunities like Al Bashir. The issue becomes complex when the indicted person is one coming from a non-contracting state like Sudan. This issue raises the further question of whether the UNSC can exclude immunities that a suspect enjoys under international law as one of its measures for enforcing cooperation.[830] Although the position of the law on this issue is a subject of Appeal at the ICC in the *Jordan Cooperation case*, it has been argued that as long as the UNSC explicitly stipulate in a resolution that all states must take steps to cooperate with the ICC, then all states have an obligation to cooperate with the said resolution. This means that if the UNSC expressly stipulate that states must ignore immunities that a suspect would have otherwise enjoyed, they also have an obligation to cooperate with the decision of the UNSC in line with Article 25 of the UN Charter.[831] In that situation, the UNSC would have displaced such immunities that a suspect enjoys pursuant to its Chapter VII powers of the UN Charter.[832] The above argument conforms to the object and purpose of the UNSC, particularly, when it comes to the enforcement of its decisions under Chapter VII of UN Charter.

It is submitted that the suspension or removal of immunities by the UNSC for purposes of compelling a state to cooperate with the ICC is the very purpose that the UN Charter obliged the UNSC to take measures if the removal will assist in maintaining international peace and security. The foregoing arguments, however, do not still solve the problem that is currently being faced by the ICC in that the UNSC authorized Sudan to cooperate with the ICC but the latter is either refusing or failing to cooperate. In such a case, how can an arrest be executed in practice?

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[830] See a summary of an interesting article on these arguments made by Talita de Souza, 'The 'Security Council Route' to the Derogation from Personal Head of State Immunity in the Al-Bashir Case: How Explicit must Security Council Resolution be?' (2018) *EJIL Analysis*, 19 September, 2018, online at *https://www.ejiltalk.org/the-discussion-of-the-security-council-roots-to-the-derogation-from-personal-immunities-in-the-al-bashir-case-how-explicit-must-security-council-resolutions-be/*, last accessed on 25 January 2019.
[831] See Talita de Souza, *ibid*.
[832] Talita de Souza, op cit, fn. 830.

The starting point to respond to this question is the requested state itself. According to Article 86 of the Statute, every contracting state has an obligation to cooperate with the ICC and arrest the indicted suspect once he or she is in its territory. If this fails then the UNSC must impose measures that will lead to the suspect being arrested. One measure that the UNSC would consider is to authorise the international community to intervene by deploying a mission for purposes of arresting and surrendering the suspect to the ICC. This proposal would work well if the arrest is a means for the protection of civilians and maintenance of international peace and security. It may be reiterated what was said in chapter 4, the UNSC has in recent years been creating mandates aimed at protecting the civilian population by relaxing the restrictions placed on the use of military force by UN peacekeeping forces.[833] Most peace keeping missions that have been deployed by the UNSC in recent years have combined Chapter VII mandate for military intervention and Chapter VI mandate for peace keeping operations. A good example is the missions that have been deployed to the DRC, where mandate for the protection of the civilian population has a caveat for the use or a threat of the use of force.[834]

Holt has discussed the practicalities of protecting civilians in these mandates where she observes that the UN troops sometimes deploys peace keeping operations not in a conventional manner.[835] Some of these unconventional ways include coercive protective 'measures short of coercive force, such as erecting military barriers around civilian populations and the gradual removal of threats through negotiated (and sometimes coerced) disarmament.'[836] These measures may be deployed temporarily depending on a situation and, sometimes for purposes of arresting persons suspected of committing crimes or is perceived to be the leader in the perpetration of violence being committed around the area. This means that the peace keeping mission is taking advantage of the presence of its military mandate to coerce a suspect to surrender. The biggest obstacle to this proposal is the fact that peace keeping missions have to have the blessing or consent of the host state.

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[833] See S.Res. 1590 (2005), (24 Mar. 2005); See Alex J. Bellamy, 'The Responsibility to Protect and the problem of military intervention…', op cit, fn. 376, pp 635-637.
[834] Alex J. Bellamy, *ibid*, p 636.
[835] See Victoria K. Holt et al *The Responsibility to protect: considering the operational capacity for civilian protection*, (2005), 201-224.
[836] Alex J. Bellamy, 'responsibility to Protect and Military Intervention,' op cit, fn. 376, p 636-637; See also Jennifer M. Welsh, 'Norm Contestation and the Responsibility to Protect' (2013) *The Global Responsibility to Protect*, 365-396.

This thesis argues that in cases where a host state is resisting or objecting to any calls for intervention, the UNSC must impose measures including sanctions and intervention short of military intervention that will compel the state to cooperate. Intervention in this regard, will further the R2P principle discussed earlier since it imposes an obligation on the international community to protect the civilian population. This form of intervention must not always mean military intervention as earlier argued. A good example that would clarify this point is the existence of a rebel group in an area where the UN peacekeeping troops are operating or have received information that the said group is terrorizing the civilian population. In order to maintain peace and protect the civilian population, the UN troops commander can deploy his forces near the area and mount roadblocks or even fire warning shots towards the direction of the rebel group, warning the group that military force could be used if they continue to commit illegal activities or atrocities. Using this example, the UN forces can intervene and use force to arrest the suspect so that peace can prevail in the area.

A combination of this example and political intervention would also be used to arrest a person who enjoys immunity as, in most cases, those individuals are people of high standing in society. This example gives an idea of how UN troops authorised by the UNSC can be used to intervene in a state for purposes of arresting a suspect. The above example also shows how, in practice, military or intervening forces would combine measures that involve negotiations or peace operations and coercive action including the use of force for purposes of arresting suspects.

In situations where the indicted person comes from a country that is not hosting any UN peacekeeping operations, the thesis proposes that both the ASP and the UNSC must rely on diplomatic measures of putting pressure on the state to surrender the suspect to the ICC. If the ASP develops strong relationship with competent authorities in the requested state, implementation of this proposal may not be a problem. This proposal would work well if the ASP ensures that all contracting states to the Statute include in their national laws the enforcement of ICC decision through national judicial mechanisms as earlier discussed. If diplomatic intervention fails then it is proposed that the UNSC must authorise intervention. This proposal should apply even in cases where the ICC has indicted a person who enjoys immunities; the UNSC must be able to authorise intervention for purposes of arresting him or her regardless of the fact that he or she enjoys immunities. The intervening forces must be flexible in implementing their mandate as suggested by Holt. This proposal furthers the principle of R2P as

the arrest and surrender of the said suspect will also lead to the protection of civilians and also end impunity.

6.8. The role, nature and scope of remedies for enforcement against non-cooperating States

6.8.1. *The role of the ICC, ASP and the UNSC in Enforcement of Cooperation*

The thesis proposes that the ICC's role must remain judicial; it must issue decisions for the cooperation of states. The responsibility of ensuring that states are cooperating with its decisions will rest in the hands of the ASP and UNSC. The ASP will play a political role of supervising the enforcement of legal measures by states.

6.8.2. *Nature of the Enforcement of State Cooperation*

In terms of the nature of enforcement of cooperation, the thesis proposes that the ASP must work together with national authorities, inspecting and guiding them on how its decisions must be implemented. In this way, enforcement of state cooperation with decisions of the ICC will adopt the practices of the IActHR and ECtHR discussed in the previous Chapter.

6.8.3. *Adversarial hearing on cooperation before the ASP*

The thesis proposes that a framework must be established where the ASPEU may employ adversarial hearings against non-cooperating states. During the hearings, all interested parties including victims of international crimes may attend the hearing to verify whether the state has fully cooperated with the decision of the ICC. Under this process, the ASP must be able to set down timeframes for cooperation by states, which must be adhered to strictly. The hearing can also be open to other interested organisations that can input on the reasons why a finding of non-cooperation should not be entered against the said state. It is also up to the ASP to decide whether the hearings must take place in the open or in camera.

Since this hearing is not a trial, but a process of confirming facts regarding cooperation, the ASP may also hear it in private especially where a suspect has not been arrested. Private hearings could be important at this stage as they would prevent any leakages of information which may lead to suspects interfering with witnesses, let alone running away from the whims of justice.

6.9. Monitoring the Cooperation of non-contracting states to the Statute

The most difficult and controversial issue, as already observed in the thesis, is on how to monitor the cooperation of non-contracting states with decisions of the ICC. To deal with this challenge, it will be important to tie the issue of cooperation by non-contracting states to that of jurisdiction. It bears repeating that as long as a matter has been referred to the ICC by the UNSC, the jurisdiction of the ICC is triggered. This proposition is now settled; what needs clarification, however, is whether by doing so, the UNSC has also imposed an obligation on non-contracting states, and all contracting parties to the Statute to cooperate with the ICC. A response to this problem must come from the UNSC at the time of referring a situation to the ICC. All issues of jurisdiction that the UNSC deals with when referring a situation to the ICC must also include how states will cooperate with the ICC.

In this regard, this thesis proposes that any framework of cooperation established by the UNSC must adopt one of Sluiter's proposed models of cooperation discussed earlier. According to Sluiter, the framework of cooperation must clearly provide for scenarios on how all states will implement the UNSC decision. In other words, the UNSC resolution that refers a situation of a non-contracting state to the ICC must also clearly and explicitly spell out the obligations of non-contracting states to cooperate with the ICC. The framework of cooperation must also provide for the duties or powers of the ICC to enforce state cooperation with its decisions. The framework must identify the ASP and the UNSC as the institutions responsible for prescribing remedies against non-cooperating states, as proposed in this study. As already discussed, the UNSC must be invoked and ready to invoke its Chapter VII of the UN Charter powers if the responsible state is failing to cooperate. The above proposals, therefore, alludes to whether the ASP may need to consider amending the Statute or not. The thesis argues that unlike the ASP, the powers of the UNSC to regulate cooperation of states for a referred situation are inherent in its powers under the UN Charter.

6.10. How can the above system of enforcing cooperation under the ICC be achieved?

This thesis argues that the system of enforcing cooperation under the statute can be established in two ways: first, by the ICC relying on some of the current Statute provisions on cooperation; and secondly, by amending the statute provisions on cooperation. The thesis will start by analysing some of the provisions that could be relied upon in establishing the system of

enforcement of cooperation under the Statute.

6.10.1. Establishing the regime of enforcing cooperation under the Statute using current Statute provisions on cooperation

The starting point for the above proposals to take off is for the establishment of a legal basis that can be relied upon to enforce states cooperation. Utilisation of the current legal framework on cooperation will enable the Statute to be well 'regulated and strengthened.'[837] The Statute framework on cooperation must clarify a number of issues including the exact nature, scope, role and remedies available to the UNSC or the ASP against non-cooperating states.

If the system of enforcement of cooperation is established using the current provisions on cooperation, it will mean that the ICC will have proceeded along the lines of the IActHR which developed its own system of enforcing cooperation in the absence of express provisions in its founding instrument, the American Convention on this subject. As held by the IActHR in the *Baena-Ricardo case,* the ICC may rely on its own jurisdictional functions and the scope of its work as prescribed by the founding legal instrument to establish the scope of its powers to enforce state enforcement.[838] As further held by the IActHR in the *Ricardo-Baena case,* the powers of the IActHR to enforce state cooperation with its decisions are inherent in its own attribution of functions and hence must be exercised diligently.[839] As already alluded to, the legal basis for the UNSC to enforce state cooperation is already inherent in its own functions of maintaining international peace and security under the UN Charter. When art. 87 (7) of the Statute, an argument could be made that it is also inherent in the attributions of functions of the ASP to enforce state cooperation. In that regard, the legal basis must be grounded within the current framework of the Statute as states already mandated the ASP and UNSC to achieve the above objectives.

6.10.2. Amendment of Statute provisions on cooperation

Another option that can be considered in enhancing the regime of cooperation under the Statute is to amend the Statute so that a provision on enforcement of cooperation is incorporated. This provision can be inserted immediately after the provisions of Article 86 of the Statue on general

[837] Goran Sluiter, Enforcing Cooperation, op cit, fn. 266, p. 400
[838] See *Baena-Ricardo case,* Judgment of November 28, 2003, op cit, fn 538.
[839] *Ibid.*

obligations to cooperate. The new provision must provide for the general obligation of the ICC to enforce states cooperation with its decisions. Inserting a provision on enforcement of cooperation will remove the burden for the ICC to justify why it is actively involved in the monitoring of enforcement after delivering a judgment.

6.10.1 *Proposed draft clause on cooperation*

This thesis, therefore, proposes that the clause could be inserted in the Statute which must provide for enforcement of cooperation for the following scenarios:

a. *Where the case has been referred to the ICC by the UNSC acting under Chapter VII of the UN Charter;*

b. *Where the UNSC has imposed obligations on all member states to the UN Charter to cooperate with the decision of the ICC in respect of the situation.*

c. *Where the UNSC's resolution referring the situation to the ICC has expressly indicated that the ICC shall enforce the non-contracting state's cooperation with decisions of both the ICC;*

The clause shall also provide that:

d. *The ASP and the UNSC shall be at liberty to prescribe the time frame within which a state must cooperate with its decisions.*

e. *That the ASP and the UNSC shall enforce states' cooperation with decisions of the ICC until a matter is fully complied with.*

f. *That in the event that the state does not cooperate with the decision of the ICC after the period which the ASP and UNSC has prescribed for non-contracting state to cooperate, the ASP or the UNSC shall prescribe necessary remedies, including but not limited to, the imposition of sanctions, suspension and other measures.*

6.11. Scope and content of remedies available to the UNSC and the ASP Remedies against non-cooperating States

If a state still fails to cooperate with decisions of the ICC in the proposed framework, the UNSC may impose measures to remedy the situation. Some of the measures that can be imposed include sanctions and measures of isolation. Sluiter also proposes that the ASP and UNSC can impose,

> 'administrative sanctions…necessary and proportionate under the circumstances' [depending] on a number of factors including the degree to which the non-cooperation has undermined the functioning of the Court and whether the cooperation could be and has been provided at a later stage'[840]

[840] Goran Sluiter, 'Enforcing Cooperation', op cit. fn. 266, p. 401

Sluiter further proposes that the following measures can be imposed against non-cooperating states: formal warnings; non-election of candidates from the non-cooperating States to positions of the ICC; and imposition of administrative fines like an 'increase in the form of the annual contribution to the Court.'[841] Since states' circumstances for failing to fulfil decisions of the ICC differs, the ASP and UNSC must consider all factors before imposing remedies as discussed below.

6.12. Factors to be considered when imposing Sanctions against non-cooperating states by the UNSC

6.12.1. *Ranking of Offences on non-cooperation*

The ASP and the UNSC must rank the seriousness of offences and frequency of non-cooperation as factors that may be considered when identifying the type of remedy to impose against a state.[842] The ASP and the UNSC should have the capacity to treat non-cooperating states in the same fashion as member states of the UN who violate sanctions or other measures imposed by the UNSC under Chapter VII of the UN Charter. This is because failure by states to cooperate with decisions of the ICC to arrest and surrender a suspect of international crimes is a serious violation of international law, especially if such a situation was referred to the ICC by the UNSC.[843] In the event that a situation was not so referred, the ASP and UNSC would justifiably rely on the nature of the crimes to impose strict remedies against non-cooperating states. These proposals would probably work against contracting states to the Statute but doubtful if they would do so for non-contracting states.

The imposition of sanctions, however, must depend on the circumstance of each case as there are instances where the ICC or the UNSC can dialogue with the concerned state to remedy the defect before imposing them. The ICC can also consider other approaches of 'cooperative problem solving',[844] in order to compel states' cooperation. This may include coordinated ways of solving problems, like capacity building of national institutions which may probably have impacted on the states cooperation with decisions of the ICC like the office of the national prosecutor. In that sense this study proposes for the adoption of a combination of approaches for

[841] Goran Sluiter, 'Enforcing Cooperation' op cit, fn. 266, p. 401.
[842] *Ibid.*
[843] Goran Sluiter, 'Enforcing Cooperation' op cit, fn 266, p. 400
[844] Abraham Chayes & Antonia Handler Chayes, *The New Sovereignty: Enforcement with International Regulatory Agreements*, 1995; Abraham Chayes & Antonia Handler Chayes, 'On Enforcement', (1993) 47 *Int'l Org.* 175.

sanctioning a state. The approach adopted by both the IActHR and the ECtHR would be ideal as these regional tribunals also uses dialogue to exert pressure on non-cooperating states.

6.13. When should remedies be imposed against non-cooperating States?

6.13.1 *Timing for imposing remedies*

Another important issue to consider is the timing of imposing remedies against non-cooperating states. Timing is important because, as already observed, the ASP under its current procedures allows the President of the Bureau to contact a state when a potential violation of the Statute is envisaged. Although this pre-emptive action is understandable, it is, nevertheless, advisable for the ASP to wait for a judicial finding of non-cooperation before taking any action against a State.[845] The ICC working in conjunction with the UNSC must impose remedies against non-cooperating states after the ICC has made a decision and it has referred a situation for non-cooperation to the ASP and UNSC. It is also important for the case to remain open until such a time that the case has been fully complied with.

6.13.2. Responsibility for imposing remedies

The responsibility to impose remedies for failure to cooperate with its decisions by states rests with the ASP and the UNSC. This is because enforcement is a post judgment stage that is beyond adjudicative functions of the ICC. This thesis argues that the two bodies can capitalise on the powers of the UNSC to impose remedies, including sanctions, where appropriate, which would carry weight over all UN member states. The foregoing discussion attests to the fact that the utilisation of the institutions of the UNSC and the ASP in this exercise is of paramount importance.

If these arguments are taken on board, this thesis argues that a review of the law on cooperation under the Statute will go a long way in assisting the ICC achieve its objectives. As argued in this thesis, if the ICC is to fight for the attainment of human good then the international community, utilising the institutions of the UNSC and the ASP, must take steps that go beyond respecting state's sovereignty. Once there is evidence and a finding by the ICC, (even at a preliminary stage), that large scale human rights violation are taking place in a state, the

[845] Goran Sluiter, 'Enforcing Cooperation, op cit, fn. 266, p 399-400

international community (arguably working with or through the UNSC and the ASP) must come in and take an active part in assisting the ICC to hold those responsible to account.

6.14. Conclusion

As compared to the three regional human rights tribunals discussed in this thesis, the Statute does not prescribe measures for enforcing state cooperation with its decisions. The Statute is also not clear on the role of enforcement agencies when it comes to enforcement of decisions of the ICC. The Statute is also silent on the scope and nature of remedies that are available to the ASP and UNSC as enforcing organs for states failure to cooperate. Although the Statute provides for obligations of states to cooperate with the ICC, no rules have explicitly stipulated how the two organs responsible for enforcing cooperation under the Statute, the ASP and the UNSC, will enforce states cooperation with decisions. This Chapter has, therefore, attempted to propose ways in which the ICC can adopt and establish its own detailed rules and procedures on enforcement of cooperation under the Statute.

The Chapter has argued that the ASP, while drawing lessons from the practices of the IActHR and the ECtHR, can develop its own practise of enforcement of cooperation. This can be done by, either utilising the current provisions of the Statute to ground this process or, alternatively, amending the Statute so that provisions on enforcement of cooperation are inserted into the Statute. The study has recommended that such a provision can be inserted immediately after Article 86 of the Statute governing the obligation of states to cooperate. A number of proposals have been made including the role of the ASP and the UNSC in this process; the content of enforcement of cooperation including setting down of timeframes on state enforcement; possibility to hear matters on enforcement in an adversarial manner; and granting powers to the UNSC or the ASP to impose remedies against non-cooperating states have been considered. The ICC can also adopt interim resolutions so as to check on the progress of implementation by States. As is the case under the ECtHR, these interim resolutions can go a long way in improving states behaviour towards enforcement with the decisions of the ICC.

CHAPTER 7

CONCLUSION

This thesis has considered ways of enforcing state cooperation with requests and decisions of the ICC. The thesis commenced by critically analysing the regime of cooperation under the Rome Statute with an aim of identifying gaps that may be filled if state cooperation with decisions of the ICC is to be enhanced. The thesis has disclosed that state cooperation with decisions of the ICC has been challenging over the years, especially, after the indictment of Al Bashir. Two main factors have been identified as contributing to this state of affairs, namely, the Statute framework on cooperation and politics.

On the legal framework, the thesis has observed that certain provisions of the Statute dealing with cooperation are weak leading to some states capitalising on their weakness by either failing or refusing to cooperate with decisions of the ICC. The thesis has focused on Article 87 (7) of the Statute as one of the provisions that requires improvement. It has been argued that the provision lacks clarity on the nature, scope, role and remedies that enforcement organs, namely the ASP and UNSC, have when enforcing cooperation. Although the ASP and the UNSC have powers under the Statute (and for the latter also under the UN Charter) to enforce cooperation, they have not invoked any of those powers to compel states to cooperate with the ICC.

On politics, the ICC has not received the support from states who are members of the AU and the UNSC. Some member states of the AU have complied with the AU directive not to cooperate with the ICC. Political differences on how to handle this issue has also been seen at the UNSC level, where some permanent members of the UNSC have taken a hard line against the OTP and the ICC itself. They have also welcomed Al Bashir in their territory in total defiance of the ICC indictments.

In order to find a solution to these challenges, the thesis has done two things. First, it has examined the nature and scope of the powers of the ASP and the UNSC under the Statute to ascertain the role that they play in enforcing state cooperation with ICC requests and decisions. This exercise also entailed exploring how the UNSC and the ASP can compel states to fulfil their Statute obligation to cooperate with the ICC's requests and decisions to arrest and surrender a suspect including those who enjoy immunities. Second, the thesis has provided recommendations to the UNSC and the ASP on how the organs may enforce state cooperation with ICC requests

and decisions pertaining to the arrest and surrender suspects. The thesis has, therefore, argued that in order for the ICC to improve its cooperation regime, the ASP or the UNSC must proactively enforce state compliance with its decisions. In enforcing cooperation under the Statute, the ASP, as a political organ of the ICC, must also innovate and improve its relationship with states by engaging with national competent authorities responsible for enforcing cooperation. Improving the way in which the ASP engages with competent authorities in a state will help the ASP to develop relationship and influence behaviour towards cooperation of ICC decisions.

On the issue of arrest and surrender of suspects to the ICC, the thesis has considered a scenario on how this may be enforced in practise. A special focus was placed on the UNSC where it was argued that the arrest and surrender of a suspect may be enforced by utilising the principle of the R2P which is necessary for the protection of the civilian population. Pursuant to its Chapter VII powers of the UN Charter, the UNSC may authorise intervention of a non-military nature to force a state to surrender a suspect to the ICC. In extreme situations the UNSC may also adopt measures including sanctions to compel cooperation. In this way, the UNSC will be compelling states to fulfil its obligation to investigate and prosecute international crimes.

The thesis has also analysed the three regional human rights tribunals of the IActHR, ECtHR and the AfCHPR to assess how they enforce states cooperation with this obligation. The thesis has shown that some of the regional human rights tribunals have developed mechanisms for enforcing state cooperation with decisions of the ICC including orders to investigate and prosecute crimes. Although challenges still remain, these tribunals have not only assisted states on how to go about fulfilling the above obligation; they have improved states' behaviour towards cooperating with their orders. In the case of the IActHR, it has guided states on how to conduct investigations, even though the tribunal does not have an obligation to investigate and prosecute perpetrators of international crimes. The IActHR has also gone to the extent of naming individuals who should be investigated or prosecuted in certain cases, a practise that has seen national authorities responding to the court by taking steps towards cooperation. Such guidance has been more 'dialogical', which over time seems to be reaping fruitful results. In summary, the IActHR has been proactive in engaging national authorities on how they should fulfil their obligations under the regional human rights mechanism. These are lessons that may inform the work of the ASP under the Statute.

The thesis has recommended that both the ASP and the UNSC must establish a Permanent Enforcement Unit and a subsidiary organ, respectively, responsible for monitoring state cooperation with ICC decisions on arrest and surrender. On how the PEU must operate, the thesis has proposed that the ASP must draw lessons from the system of enforcement of cooperation currently existing in two regional human rights tribunals, the IActHR and the ECtHR. While the AfCHPR has the legal framework to enforce cooperation, it has not yet developed the law to enable analysis. The ECtHR's CoM has strong systems and procedures in place including a Secretariat that assists its work and regularly meets to monitor state cooperation. In extreme cases, the CoM has taken strong measures against non-cooperating states. The ASP could, therefore, draw lessons from the CoM on how it should also establish its own system of enforcing cooperation under the Statute.

The thesis has also considered the critical question of why the ICC should draw lessons from the regional human rights tribunals instead of another international criminal enforcement tribunal. The main issue considered was that since these regional tribunals adjudicate human rights violations of states and not individual criminal responsibilities, it is difficult for the ASP to draw lessons from their work since the ICC focuses on criminal accountability for individuals. In response to this concern, the thesis has argued that since the enforcement of cooperation is a post judgment stage, it can apply in both criminal and non-criminal judicial processes as the enforcing bodies (the ASP and the UNSC) will only be verifying facts as to whether the responsible state's version on cooperation is true or not. The ICC will not be re-opening hearings at this stage of the case and no rights of suspects will even arise. In any event, the state is invited to submit its version of events, as such, it cannot be heard that it was not given a chance, if, for example, it refuses to attend.

The thesis has also considered circumstances where, despite the efforts of the ASP or the ICC in general, states still refuse or fail to cooperate with the decision of the ICC. If a state fails or refuses to cooperate with decisions of the ASP, the Statute must empower the two organs to impose remedies against non-cooperating states in the form of sanctions, suspensions and expulsion from membership of the ICC and the UN. In other words, any failure to cooperate with a binding decision of the ICC must have consequences against the non-cooperating state. In that regard, the thesis proposed that the UNSC can invoke several measures including the use of its Chapter VII powers under the UN Charter and impose remedies including sanctions. The thesis

has argued that since Article 87(7) of the Statute is silent on the nature, role and remedies that both the ASP and the UNSC may impose against non-cooperating states, the UNSC may, therefore, resort to the UN Charter and invoke its Chapter VII powers to enforce cooperation.

BIBLIOGRAPHY

BOOKS

Abraham Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, 1995.

Alex J. Bellamy, *Global Politics and the Responsibility to Protect: From Words to deeds*, 2011

Aoife O'Donoghue *Constitutionalism in Global Constitutionalisation*, (2014).

Arthur Henry Robertson et al, *Human Rights in the World: AN Introduction to the Study of the International Protection of Human rights, (*1996)

Basak Cali and Nicola Bruch, *Monitoring the Implementation of Judgments of the European Court of Human Rights: A HANDBOOK FOR Non-Governmental Organisations*, (2011).

Cardenas, Sonia, *Conflict and Compliance: State Responses to International Human Rights Pressure*, (2007).

CHAPTERS IN BOOKS

Courtney Hillebrecht, *Domestic Politics, International Human Rights Adjudication, and the Problem of Political Will*, (2009).

Danwood Mzikenge Chirwa, Lillian Chenwi et al, *The Protection of Economic, Social and Cultural Rights in Africa* (2016).

Edward C. Luck, *United Nations Security Council: Practice and Promise*, (2006).

Elisabeth Lambert Abdelgawad, *The Execution of judgments of the European Court of Human Rights*, 2ed. volume 88, (2008).

Fatsah Ouguergouz, '*The African Charter of Human and People's Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa,* (2003).

Francis Anthony Boyle, *World Politics and International law*, (1985).

Francis M. Deng, et al, *Sovereignty as Responsibility: Conflict Management in Africa*, (1996).

Gabrielle Kirk McDonald, *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts'* (2000).

Goran Sluitter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, (2006).

Harold Laswell, *Jurisprudence for a Free Society: Studies in Law, Science and Policy,* (1992).

Ilias Bantekas, *International Criminal Law,* 4th ed, (2010).

J.G. Merills and A.H. Robertson, *Human Rights in Europe: A Study of the European Convention on Human Rights,* 4th ed. (2001).

Jan Hendrik Willem Verziji, *International Law in Historical Perspective: The laws of War,* (1978).

Jo. M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human rights,* (2003).

Larissa Van de Herik & Carsten Stahn, *The Diversification & Fragmentation of International Criminal Law (*2012).

Laurence Burgorgue-Larsen, et al, *The Inter-American Court of Human Rights: Cases, Law and Commentary,* (2011).

Louis Henkin, *How Do Nations Behave* 2nd edn, (1979).

Lung-Chu Chen, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective,* (1989).

M. Virally, *Review Essay: Good Faith in Public International Law* (1983).

Malcolm D. Evans, *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000,* (2002).

Marcus Klamert, *the Principle of Loyalty in EU Law*, (2014).

Markus Burgastaller, *Theories of Compliance with international law* (2005).

Michael J. Camilleri & Viviana Krsticevic, *Making International Law Stick: Reflections on Compliance with Judgments in the Inter-American Human Rights System* (2008).

Myres S. McDougal *Jurisprudence for Free Society: Studies in law Science and Policy*, (1992).

Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries*', (2011).

Peter Hilpold, *Responsibility to Protect (R2P): A New Paradigm of International Law?* (2015).

Philip Leach, *Taking a Case to the European Court of Human Rights,* 3rd Ed. (2011).

Philipp Ambach et al, *The Protection of Non-Combatants during Armed Conflict and Safeguarding the Rights of Victims in Post-Conflict Society*, (2015).

Qerim Qerimi, *Developments in International Law-A policy oriented Inquiry*, (2012).

R. J. Vincent, *Non-Intervention and International Order*, (2015) .

R. Murray & M Evans (eds.) *Documents of the African Commission on Human and Peoples Rights: The System in Practice*, 1986-2000 (2002).

R.O. Keoghane, *After Hegemony: Cooperation and Discord in the World Political Economy*, (1984).

Rachel Murray and Debra Long, *The Implementation of the Findings of the African Commission on Human and Peoples Rights*, (2015).

Ramesh Thakur, *The Responsibility To Protect: Norms, Laws and the Use of Force in International Politics*, (2011).

Roberta Cohen and Francis M. Deng, *masses in flight: the global crisis of internal displacement*, (1998).

Ruth B. Russell, *A History of the United Nations Charter: The Role of the United States 1940-1945*, (1958).

Samuel Totten and Eric Markusen, *Genocide in Darfur: Investigating the Atrocities in the Sudan*, (2006).

Stephanie Lagoutte et al, (ed.), *Human Rights in Turmoil: Facing Threats, Consolidating Achievements, Martinus Nijhoff,* (2006).

Steven R. Ratner et al, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 3rd ed., (2009).

T. Buergenthal, et al, *Protecting Human Rights in the Americas: cases & Materials*, (1995).

Thomas G. Weiss, Whither R2P in Thomas G. Weiss and others, *The Responsibility to Protect: Challenges & opportunities in light of the Libyan Intervention*, (2011) *e-international relations*.

Victoria K. Holt et al *The Responsibility to protect: considering the operational capacity for civilian protection,* (2005).

Vincent O. Nmehielle, *The African J Human Rights System-Its Laws, Practices and Institutions,* (2001).

Vivian Krsticevic, *Implementation of the Decisions of the Inter-American System of Human Rights: Contribution to the Legislative Process*, (2009).

Von Bogdandy and R. Wolfrum (eds.) *The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity* 7 *Max Planck Yearbook of United Nations Law* 591-632 (2003).

Ademola Abass, 'Historical and Political Background to the Malabo Protocol' in G. Werle and M. Vormbaum (eds.), *The African Court, International Criminal Justice Series*, (2017) 10.

Alex Stark, 'Introduction', in Thomas G. Weiss, and others, *The Responsibility to Protect: Challenges & opportunities in light of the Libyan intervention", e-international Relations (*2011), 4-6.

Anne-Marie Slaughter, 'International Relations, Principal Theories' IN Wolfrum R. ed. *Max Planck Encyclopaedia of Public Int'l L.* (2011)

Cassese et al, 'Primary versus Complementarity' in *International Criminal Court, and South Africa's Implementation of the Rome Statute', International Criminal law: Cases and Commentary* (2011).

Djacoba Liva Tehindrazanarivelo, 'The African Union Principle on the Fights Against Impunity and the Arrest Warrants for Omar Hassan El-Bashir' in Marcelo Kohen et al, eds. *Perspectives of International Law in the 21st Century*, 2012.

Gerhard Werle, et al 'Introduction: Africa and the International Criminal Court' in Gerhard Werle, Lovell Fernandez and Moritz Vormbaum, (eds.), *Africa and the International Criminal Court*, 2014, 1.

Goran Sluiter and Stanislas Talontsi, 'Credible and Authoritative Enforcement of State Cooperation with the International Criminal Court' in O. Bekou and D. Birkett (eds.) *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (2016), 80-113.

Keba M'baye 'Introduction to the African Charter on Human and Peoples Rights' in Keba M'baye, *The African Charter on Human and Peoples Rights: A Legal Analysis* (1985).

Luigi Condorelli and Santiago Villalpando, 'Referral and Deferral by the Security Council' in Cassese et al (eds.), *The Rome Statute for an International Criminal Court: A Commentary* (2002), 627.

Markus Benzing, 'The Complementarity regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' in A von Bogdandy and R. Wolfrum (eds.), (2003) 7 *Max Planck Yearbook of United Nations Law*, 591-632.

N. Roht-Arriaza, 'Non-treaty Sources of the Obligation to Investigate and Prosecute" in N Roht-Arriaza (ed.) *Impunity and Human Rights in International Law and Practice*, (1995), 40.

Robert Harmsen, 'The Reform of the Convention System: Institutional restructuring and the (geo-politics of human rights', in Jonas Christoffersen, et al (eds.), *The European Court of Human Rights between Law and Politics*, (2011), 135;

Steven R. Ratner 'Between Minimum and Optimum World Public Order: An Ethical Path: An Ethical Path for the Future', in Arsanjani, M.H. & Cogan Jacob (eds.), *Looking to the Future: Essays on International Law in Honour of W. Michael Riesman*, (2010), 195

Williams A. Schabas and Mohamed M. El Zeidy, 'Commentary on Article 17', in O. Triffterer et al (ed.), T*he Rome Statute of the International Criminal Court: A Commentary*, (2016) 781.

Zlata Durdevic, 'Legal and Political Limitations of the ICC Enforcement System: Blurring the Distinctive Features of the Criminal Court', in Ackerman, Bruce et al, *Visions of Justice* (2016), 164-198.

JOURNAL ARTICLES

Abraham Chayes & Antonia Handler Chayes, 'On Compliance', (1993) 47 *Int'l Org.* 175

Ademola Abbas (2013) 24 *European J. Int'l L.*, 933-946

Alex de Waal and Gregory H. Stanton, 'Should President Omar Al Bashir of Sudan be Charged and arrested by the International Criminal Court?' (2009) 4 (3) *Genocide Studies and Prevention*.

Alex J. Bellamy, 'The Responsibility to Protect and the problem of military intervention' (2008) 84 (4) *Int'l Affairs*, 615-639.

Alex Whiting, 'International Criminal prosecution, Justice Delayed can be Justice delivered', (2009) 50 *Harvard Int'l L.J.* 323, 335-336.

Alexander K. A. Greenwalt, 'Introductory Note to the International Criminal Court: Decisions Pursuant to Article 87(7) of the Rome Statute on the Failure of Malawi and the Republic of Chad to comply with the Cooperation Requests by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir and the African Union Response', (2012) 51 (2) *Int'l Legal Materials,* 393;

Alexandra Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornell Int'l L.J.* 493

Alexandra Huneeus, 'International Criminal Law by other means: The Quasi-Criminal Jurisdictions of the Human Rights Courts' (2013) 107 *Amer. J. Int'l L.* 1.

Alexis Demirdjian, 'Armless Giants: Cooperation, State Responsibility and Suggestions for the ICC Review Conference', (2010) 10 *Int'l Crim. L.R* 181-208.

Andrew Dremczewski & Jens Meyer-Ladewig, 'Principal Characteristics of the New ECHR Control Mechanism, as established by Protocol No. 11', signed on 11 May 1994, (1994) 15 *Hum. Rts. L.J.* 81.

Anthony D'Amato, 'The Limits of Legal Realism' (1978) 87 *Yale L.J.* 468-513

Antonio Cassese, 'On current trends towards criminal prosecution and punishment of breaches of International Humanitarian Law' (1998) *European J. Int'l L.* 2.

Antonio Cassese, 'When May Senior State Officials be tried for International Crimes? Some Comments on the Congo v Belgium Case,' (2002) (13) *EJIL* 853-875.

Asad G. Kiyani, 'Al-Bashir & the ICC: The Problem of Head of State Immunity', (2013) 12 *Chinese J. Int'l L.* 467-508.

B. Van Schaack 'State Cooperation and the International Criminal Court' (2011) 3 *Santa Clara Law Digital Commons,* p. 1.

Benedict Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', (1998) (19) *Michigan J. Int'l L.* 345.

Brian D. Tittemore, 'Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes under International Law', (2006) 12 *Sw. J.L & Trade Am*. 429.

C. Anyangwe 'Obligations of States Parties to the African Charter on Human Rights' (1998) 10 *Afr. J. Int'l & Comp. L*. 625.

C. B. Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *J. Int. J. Crim. Justice*, 1067-1088.

Carsten Stahn, 'Marital Stress or Grounds for Divorce? Re-thinking the relationship between R2P and the International Criminal Justice' (2015), 26 *Criminal L. Forum*, 13-50

Catherine Powell, 'United States Human Rights Policy in the 21st Century in an Age of Multilateralism (2002) 46 *St. Louis U. L.J.* 421.

Claudio Grossman, 'The Inter-American System of Human Rights: Challenges for the Future' (2008) 83 (4) *Indiana L.J.* 1267.

Cynthia Soohoo & Suzanne Stolz, 'Bringing Theories of Human Rights Change Home' (2008) 77 *Fordham L. Rev*. 459.

Dapo Akande 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC' (2012) 10 *J. Int'l Crim. J.* 299.

Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', (21)(4) *EU. J. Int'l L*. 815-852.

Dapo Akande, 'The African Union's Response to the ICC's Decisions on Bashir's Immunity: Will the ICJ Get another Immunity Case?' (2012) *EJIL*.

Dapo Akande, The Immunity of Heads of States of Non-parties in the Early Years of the ICC', (2018) *AJIL Unbound*, 112.

Darren Hawkins & Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights' (2010) 6 *J. Int'l L. & Int'l Rel*. 35.

David Baluarte, 'Strategizing for Compliance: The Evolution of a Compliance Phase of Inter-American Court Litigation and the Strategic Imperative for Victims' Representatives', (2012) 27 *Amer. U. Intel L. Rev.* 263;

David Kleimann, 'Positivism, the New Haven School, and the Use of Force in International Law' (2006) (3) *Brussels J. Int'l Stud*. 49.

David Padilla, 'An African Human Rights Court: Reflections from the perspective of the Inter-American System' (2002) 2 *African Human Rts. L. J.* 185.

Debora Forst, 'The Execution of Judgments of the European Court of Human rights: Limits and Ways Ahead', (2013) 7 (3) *ICL Journal* p 13.

Demirdjian, 'Armless Giants: Cooperation, State Responsibility and Suggestions for the ICC Review Conference' (2010) 10 (2) *Intel Crim. L. R.* 181.

Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21 (3) *The Int'l History Review, 569.*

Dia Anagnostou and Alina Mungui-Pippindi, 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Governance Effectiveness Matter', (2014) 25 *EJIL*, 205.

Dire Tladi 'The ICC Decisions on Chad and Malawi: On Cooperation, Immunities and Articles 98' (2013) 11 *J. Int'l Crim. Just*. 199.

Dire Tladi, 'The Duty on South Africa to Arrest and Surrender Al- Bashir under South African and International Law: Attempting to Make a Collage from an Incoherent Framework', undated, online at *http://www.derebus.org.za/wp-content/uploads/2015/07/Dire-Tladi.pdf*, last accessed on 22 February, 2019.

Dire Tladi, 'The ICC Decisions on Chad and Malawi: on Cooperation, Immunities and Article 98' (2013) *J. Int'l Crim. J.* 199.

E. Hunter Taylor, 'H. L. A. Hart's Concept of Law in the Perspective of American Legal Realism' (1972) *Modern L.R.* 606.

Ebru Coban-Otzurk, 'The International Criminal Court, Jurisdiction and the Concept of Sovereignty', (2014) 10 (10) *Eur. Scientific J.* 1857-7881.

Elisabeth Lambert Abdelgawad, 'The Execution of the Judgments of the European Court of Human Rights: Towards a Non-coercive and Participatory Model of Accountability' (2006) (69) *ZaoRV* 12.

Erika de Wet, 'The Implications of President Al-Bashir's visit to South Africa for International and Domestic Law', (2015) 13 (5) *J. Int'l Cr. J.* 1049-1071.

Eti Stamnes, 'The Responsibility to Protect and 'Root Cause' Prevention' (2010) *Norwegian Institute of Int'l Affairs*, 7.

F. B. Schick, 'The Nuremberg Trial and the International Law of the Future' (1947) 41 (4) *Am. J Int'l L* 77-794.

Fernando Basch et al., 'The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions', (2010) 7 (12) *Sur International J. H. Rts*, p 9.

Fernando Felipe Basch, 'The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and its Dangers' (2007) 23 *Amer. Uni. L. R* 195-229.

Ferndinandusse 'improving inter-state cooperation for the national prosecution of international crimes: Towards a new Treaty?' 2014 18 (5) *ASIL Insights* cited in Dire Tladi, 'A Horizontal Treaty on Cooperation in International Criminal Matters: The next step for the evolution of a comprehensive international criminal justice system?', at p 377, fn 54, online at *https://repository.up.ac.za/bitstream/handle/2263/45085/Tladi_Horizontal_2014.pdf;sequence=1*, last accessed on 22 February, 2019.

Francis M. Deng, The Impact of State failure on migration, (2004) 14 (4) *Mediterranean Quarterly*, 18

Francis M. Deng,' From 'Sovereignty as Responsibility' to the 'Responsibility to Protect' (2010) 2 (4) *Global Responsibility to protect*, 353-370.

Frans Viljoen 'A Human Rights Court for Africa, and Africans' (2004) 30 *Brooklyn J. Int'l L.* 13

Frans Viljoen and Lirette Louw, 'State Compliance with the recommendations of the African Commission on Human and Peoples Rights, 1993-2004', (2007) 101 *Amer. J. Int'l L*. 1-34.

Frans Viljoen and Lirette Louw, 'The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation' (2004) 48 *J. African L.* 1-22.

George Mukundi Wachira et al, Twenty years of elusive enforcement of the Recommendations of the African Commission on Human Peoples Rights: A possible remedy' (2006) 6(2) *AHRLJ*, 465-493.

George P. Fletcher and Jens David Ohlin, 'The ICC-Two Courts in One?' (2006) 4 *J. Int'l Crim. Just.* 428.

Gerald L. Neumann, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights', (2008) 19 *Eur. J. Int'l L.* 101.

Gerald Mukundi Wachira 'A Critical Examination of the African Charter on Human and Peoples Rights: Towards Strengthening the African Human Rights System to enable it effectively to meet the needs of the African population' (2006) 3 *Judiciary watch Report* 12.

Gerhard Werle & Moritz Vormbaum, 'The African Criminal Court: A Commentary on the Malabo Protocol' (2017) *International Criminal Justice Series,* p 12-14.

Goran Sluiter 'Obtaining Cooperation from Sudan-where is the Law?' (2008) 6 *JCIL,* 876-877

Goran Sluiter, 'Enforcing Cooperation: Did the Drafters Approach it the Wrong way? (2018(16 *J. Int'l Crim. Just.* 383-402.

Goran Sluiter, 'The surrender of war criminals to the international criminal court' (2002-2003) 25 *Loyola Los Angeles Int'l *& Comp. L. Rev,* 605

H. Aufricht, 'Supersession of Treaties in International Law', (1952) 37 (2) *Cornell L. R.* 655.

H. Lasswell and M. McDougal 'Legal Education and Public Policy: professional Training in the Public Interest' (1943) *Yale L.J.* 203,.

Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale L.J.* 2599, 2600

Henry G. Schermers, Adaptation of the 11th Protocol to the European Convention on Human Rights, (1995) 20 *Eur. L. Rev*. 559.

Hooman Movassah 'A Critique of Policy-Oriented Jurisprudence' (2007) *Iranian Yearbk Int'l Compa. L* 123-183

Jennifer M. Welsh, 'Norm Contestation and the Responsibility to Protect' (2013) *The Global Responsibility to Protect,* 365-396.

Jennifer Welsh, Carolin Thielking & S. Neill Macfarlane, 'The Responsibility to Protect: Assessing the report of the International Commission on Intervention and State Sovereignty', (2002) 4 *International Journal*, p 489-512.

Jide Martyns Okeke, 'Contextualising the 'Responsibility to Protect' in Darfur' (2010) 5 *Int'l J. of African Renaissance Studies-Multi-, Inter- and Transdisciplinary,* 65-81.

OG Mwangi, 'State collapse, peace enforcement and the responsibility to protect in Somalia', (2015) *The Int'l J. Human Rts.* 1227-1239.

Roberta Cohen, 'The building principles on internal displacement: an innovation in international standard setting' (2004) 3 *Global Governance* 10.

Ruben Reike, 'Libya and the Responsibility to Protect: Lessons for the Prevention of Mass Atrocities, (2012) 8 St Anthony's *Int'l Rev*. 1.

Yoojin Rhee, 'North Korea and the Responsibility to Protect: Challenges and Opportunities" (2012) *St Anthony's Int'l Rev*. 1

Electronic Journal Sources

Abel Knottnerus, 'The Immunity of al-Bashir: The Latest Turn in the Jurisprudence of the ICC', (2018) *EJIL: Talk!* 15 November, 2017, online at *https://www.ejiltalk.org/the-immunity-of-al-bashir-the-latest-turn-in-the-jurisprudence-of-the-icc/*, last accessed on 12 August 2018.

Alex J. Bellamy, 'The Responsibility to Protect-Five Years on' (2010) (24) (2) *Ethics & International Affairs*, 143-169, online at *http://responsibilitytoprotect.org/Bellamy.pdf*, last accessed on 1 January 2018.

Anna Dolidze 'African Court on Human and Peoples' Rights-Response to the Situation in Libya' (2011) 15 (20) *Insights, Amer. Soc'ty Int'l L*. online at *https://www.asil.org/insights/volume/15/issue/20/african-court-human-and-peoples%E2%80%99-rights-%E2%80%93-response-situation-libya#_edn1*, last accessed on 20 March 2018

Carsten Stahn, 'R2P, the ICC and the Libyan arrests' (2011) *The Hague Justice Portal*, 24 November, 2011.

Damian A. Gonzalez-Salzberg, 'Do States comply with the compulsory judgments of the Inter-American Court on Human Rights? An Empirical study of the compliance with 330 measures of reparation' (2014) *Revista do Instituto de Direitos Humanos*, online at *http://eprints.whiterose.ac.uk/97890/12/JBIHR%2520-%2520States%2520compliance%2520with%2520the%2520IACtHR.pdf*, last accessed on 22 February, 2019.

Dapo Akande, 'The Bashir Appeal at the ICC', (2018) *EJIL Analysis*, 10 September, 2018, online at *https://www.ejiltalk.org/the-bashir-appeal-at-the-icc/*, last accessed on 22 February, 2019.

Dire Tladi and Max Du Plessis, 'The ICC's immunity debate-the need for finality' (2017), *EJIL Analysis*, 11 August, 2017, online at *https://www.ejiltalk.org/the-iccs-immunity-debate-the-need-for-finality/*, last accessed on 22 February, 2019

Dov Jacobs 'A Sad homage to Antonio Cassese: The ICC's confused pronouncements on State Compliance and Head of State Immunity', 15 December, 2011, online at *https://dovjacobs.com/2011/12/15/a-sad-hommage-to-antonio-cassese-the-iccs-confused-*

pronouncements-on-state-compliance-and-head-of-state-immunity/, last accessed on 22 February, 2019

Ed Bates, 'The Continue Failure to Implement Hirst v UK', (2015) *EJIL Talk*, 15 December, 2015, online at *https://www.ejiltalk.org/the-continued-failure-to-implement-hirst-v-uk/*, last accessed on 22 February, 2019.

Frederic Megret, 'ICC, R2P and the International Community's evolving Interventionalist Toolkit', electronic copy available at *http://ssrn.com/abstract=1933111*, last accessed on 27 March, 2018.

Goran Sluiter 'Some Thoughts and suggestions with respect to legal assistance to the ICC', (1997), Unpubl. online, p 4 at *https://www.legal-tools.org/doc/990968/pdf/*, last accessed on 5 October 2018.

Gwen P. Barnes, 'The International Criminal Court's Ineffective Enforcement Mechanisms: the Indictment of President Omar Al Bashir', (2011) 34 (6) *Fordham Int'l L.J.* P 1585-1619, also available online at *http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2313&context=ilj*, last accessed on 16 March 2017

Talita de Souza, 'The 'Security Council Route' to the Derogation from Personal Head of State Immunity in the Al-Bashir Case: How Explicit must Security Council Resolution be?' (2018) *EJIL Analysis*, 19 September, 2018, online at *https://www.ejiltalk.org/the-discussion-of-the-security-council-roots-to-the-derogation-from-personal-immunities-in-the-al-bashir-case-how-explicit-must-security-council-resolutions-be/*, last accessed on 22 February, 2019.

REPORTS, RESOLUTIONS, DECLARATION OF VARIOUS INTERNATIONAL ORGANISATIONS

United Nations Sources

UN 'International Criminal Court Promises Universal Justice, Secretary General tells International Bar Association' 12 June 1997, UN Doc. SG/SM/6257, online at *https://www.un.org/press/en/1997/19970612.sgsm6257.html*, last accessed on 27 March 2018

UN General Assembly, Report of the Secretary General, Addendum, 'In larger freedom: towards development, security and human rights for all' UN.Doc. A/59/2005

UN Security Council, Security Council Resolution 1566 (2004) *Threats to International Peace and security caused by terrorist* acts, S/RES/1566 (2004), 8 October 2004.

UN Security Council, Security Council Resolution 1585 (2005), 10 March 2005, *Reports of the Secretary-General on the Sudan,* S/RES/1585 (2005)

UN Security Council, Security Council Resolution 1588 (2005), *Reports of the Secretary-General on the Sudan,* S/RES 1588 (2005) 17 March 2005.

UN Security Council, Security Council Resolution 1590 (2005), *Reports of the Secretary-General on the Sudan,* 24 March 2005, S/RES/1590 (2005)

UN Security Council, Security Council Resolution 1591 (2005), 29 March 2005, S/RES/1591(2005)

UN Security Council, Security Council Resolution 1593 (2005), *Referral of the Sudan Situation to the International Criminal Court*, 31 March, 2005, S/RES/1593 (2005)

UN Security Council, Security Council Resolution 827 (1993), *Tribunal (Former Yugoslavia),* S/RES/ 827 (1993), (25 May 1993).

UN Security Council, Security Council Resolution 955 (1994), *Establishment of an International Tribunal and adoption of the Statute of the tribunal*, S/RES/ 955 (1994), (8 November, 1994

UN Security Council, Security Council Resolution, 1547 (2004), *Report of the Secretary-General on the Sudan*, S/RES/1547 (2004), 11 June 2004.

UN Security Council, Security Council Resolution, 1556 (2004), *Report of the Secretary-General on the Sudan,* S/RES/1556 (2004), 30 July 2004

UN Security Council, Security Council Resolution, 1564 (2004), *Report of the secretary-General on the* Sudan, S/RES/1564 (2005), 18 September 2004,

UN Security Council, Security Council Resolution, 1574 (2004), *Reports of the Secretary-General on the Sudan*, S/RES/1574 (2005), 19 November 2004.

UN, 'High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility', 2004, para 203. See the Full Report online, doc. A/59/565

UN, 'Report of the Study Group of International Law Commission, ILC, Fifty-eight session, 1 May-9 June and 3 July-11 August 2006, UN doc. A/CN.4/L.682,

UNGA, 'Draft resolution referred to the High-level Plenary Meeting of the General Assembly by the General Assembly at its fifty-ninth session: 2005 World Summit Outcome', UN Doc. A/60/L.1

UNGA, 'Integrated and coordinated implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic, social and related fields, Follow-up to

the outcome of the Millennium Summit-Implementing the responsibility to protect: Report of the Secretary-General' UN Doc A/63/677

United Nations Commission on Human Rights (UNCHR), 'Report of the United Nations High Commissioner for Human Rights and follow-up to the World Conference on Human Rights: Situation of Human Rights in the Darfur Region of the Sudan' UN Doc. E/CN.4/2005/3, 7 May 2004

United Nations Office on drugs and Crime (UNODC) Manual on mutual Legal Assistance and Extradition, (2012) also available online at *https://www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf,* last visited 28 February, 2018.

United Nations Security Council 'Culture of Impunity Must End for Justice to Prevail in Darfur, International Criminal Court Prosecutor Tells Security Council', UN Doc. SC/12863, 8 June 107, available online at *https://www.un.org/press/en/2017/sc12863,* last accessed on 19 January 2017.

United Nations Security Council Resolution 1564 (2004), *Report of the Secretary-General on the Sudan,* S/RES/1564 (2004).

United Nations, 'As ICC Arrest Warrant issued for Sudan's President, Secretary-General says United Nations Vital Peacekeeping, Humanitarian Work in Country will continue', UN Doc. SG/SM/12123-AFR/1820-L/3140, 4 March 2009, available at *https://www.un.org/press/en/2009/sgsm12123.doc.htm,* last accessed on 16 February, 2019.

United Nations, 'Establishment of the International Criminal Court', online at *http://legal.un.org/icc/general/overview.htm,* last accessed on 20 September, 2017.

United Nations, 'International Criminal Court Promises Universal Justice, Secretary General Tells International Bar Association', UN.Doc SG/SM/6257, 11 June 1997, available online at *http://www.un.org/press/en/1997/19970612.sgsm6257.html,* last accessed on 22 May 2017.

United Nations, 'Reports of the Secretary General on the Sudan and South Sudan', (9th June 2016), UN Doc. S/PV.7710

United Nations, 'UN Meetings Coverage and Press Release, 'International Criminal Court Promises Universal Justice, Secretary General Tells International Bar Association' 12 June 1997, UN Doc. SG/SM/6257, online at *https://www.un.org/press/en/1997/19970612.sgsm6257.html,* last accessed on 27 March 2018.

United Nations, Office of the Legal Counsel, 'Rome Statute of the International Criminal Court-Overview', (1998-1999) online at *http://legal.un.org/icc/general/overview.htm,* last accessed on 30 September, 2017.

United States Holocaust memorial Museum, 'International Military Tribunal at Nuremberg, online at *https://www.ushmm.org/wlc/en/article.php?ModuleId=10007069,* last accessed on 12 January 2

UNSC 'Annex to the letter dated 4 February 2013 from the Permanent Representative of the Republic of Korea to the United Nations addressed to the Secretary-General- Concept note for the Security Council open debate on the protection of civilians in armed conflict, 12 February 2013' UN Doc. S/2013/75

UNSC, 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September, 2004', UN Doc. S/2005/60, online at *http://www2.ohchr.org/english/darfur.htm,*

UNSC, 'Report of the Secretary-General pursuant to paragraph 2 of the Security Council Resolution 808 (1993)', presented on 3 May 1993, UN Doc. S/25704 (1993)

Other International Organisations

International Commission on Intervention and State Sovereignty, (ICISS) 'Report of the International Commission on Intervention and State Sovereignty, 'Responsibility to Protect', December, 2001

RESOLUTIONS

UN Security Council

UNSC Res. 47 (1948), (29th April 1948), UN Doc. S/RES/47/1948

UNSC Res. 50 (1948), (29th May 1948) UN Doc. S/RES/50/1948;

UNSC Res. 1946 (1946), (4th April 1946), UN Doc. S/RES/3/1946

UNSC Res. 54 (1948), (15 July 1948), UN Doc. S/RES/54/1948

UNSC Res. 84 (1950), (7 July 1950), UN Doc. S/RES/84/1950

UNSC Res. 161 (1961), (21st February 1961), UN Doc. S/RES/161/1961;

UNSC Res. 169 (1961), (24th November 1961), UN Doc S/RES/169/1961;

UNSC Res. 178 (1963), (24th April 1963), UN Doc. S/RES/178/1963;

UNSC Res 217 (1965), (20th November 1965), UN Doc. S/RES/217/1965.

UNSC Res. 217 (1965), (20th November 1965); UN Doc. S/RES/217/1965

UNSC Res 216 (1965) (12th November 1965), UN Doc. S/RES/216/1965;

UNSC Res. 283 (1970), (29 July 1970), UN Doc. S/RES/283/1970

UNSC Res. 418 (1977), (4 November, 1977), UN Doc. S/res/418/1977

UNSC Res. 421 (1977), (9 December 1977), UN Doc. S/RES/421/1977

UNSC Res. 479 (1980), (28th September 1980), UN Doc. S/RES/660/1990;

UNSC Res. 554 (198), (17 August 1984), UN Doc. S/RES/554/1984

UNSC Res 661(1990), (6th August 1990), UN Doc. S/RES/661/1990;

UNSC Res. 660 (1990), (2nd August 1990), UN Doc. S/RES/660/1990;

UNSC Res. 661(1990), (6 August 1990), UN Doc. S/RES/661/1990

UNSC Res. 674 (1990), (29th October 1990), UN Doc. S/RES/674/1990

UNSC Res. 677 (1990), (28th November 1990), UN Doc. S/RES/677/1990

UNSC Res. 678 (1990) (29 November, 1990), UN Doc. S/RES/678/1990

UNSC Res. 678 (1990) (29 November, 1990), UN Doc. S/RES/678/1990

UNSC Res. 713 (1991) (25 September, 1991), UN Doc. S/RES/713/1991

UNS Res. 733 (1992) (23 Jan. 1992), UN Doc. S/RES/733/1992

UNSC Res. 748 (1992), (31 March 1992), UN Doc. S/RES/748/1992

UNSC Res. 788 (1992) (19 Nov. 1992), UN Doc. S/RES/788/1992

UNSC Res. 827 (1993), (25 May 1993) UN Doc. S/RES/827(1993)

UNSC Res. 841 (1993), (16 June 1993), UN Doc. S/RES/841/1993

UNSC Res. 864 (1993), (15 Sept, 1993), UN Doc. S/RES/864/1993

UNSC Res. 918 (1994), (17 May 1994), UN Doc. S/RES/918/1994

UNS Res. 955 (1994) (8 November, 1994) UN Doc. S/RES/955(1994)

UNSC Res. 1040 (1996), 29 January 1996), UN Doc. S/RES/1040/1996

UNSC Res. 1072 (1996), (24 July 1996), UN Doc. S/1072/996

UNSC Res. 1074 (1996) (1 October, 1996), UN Doc. Res. S/RES/1074/1996

See UNSC Res. 1132 (1997), (8 Oct. 1997), UN Doc. S/1132/1997

UNSC Res. 1160(1998) (31 March 1998), UN Doc. S/RES/1160/1998

UNSC Res. 1171 (1998), (5 June 1998), UN Doc. S/RES/1171/1998

UNSC 1192 (1998), (27 August 1998), UN DOC. Res. S/RES/1192/1998

UNSC Res. 1298 (17 May 2000), UN Doc. S/RES/1298/2000
UNSC Res. 1368 (2001), (12th September 2001), UN Doc. S/RES/1368 (2001)
UNSC. Res. 1373 (2001), (28 September, 2001), U.N. Doc. S/RES/1373
UNSC Res. 1533 (2004), (12 March, 2004), UN Doc. S/RES/1533/2004
UNSC Res. 1539 (2004), (22 April, 2004), UN Doc. S/Res/1539/2004
UNSC Res. 1540 (2004), (Apr. 28, 2004), U.N. Doc. S/RES/1540/2004
UNSC Res. 1556 (2004), (30 July 2004) UN Doc S/RES/1556
UNSC 1564 (2005) (18 Sept. 2004), UN Doc. S/RES/1564
UNSC Res. 1572 (2004), (15 Nov. 2004), UND Doc. S/RES/1572/2004
UNSC Res. 1591 (2005), (29 March, 2005), UN Doc. S/RES/1591
UNSC Res. 1593 (2005), (31 March 2005), UN Doc. S/RES/1593 (2005)
UNSC Res. 1636 (2005), (Oct. 31, 2005), U.N. Doc. S/RES/1636/2005
UNSC Res. 1701 (2006), (Aug., 11, 2006 U.N. Doc. S/RES/1701/2006
UNSC Res. 1737 (2006), (Dec. 27, 2006), U.N. Doc. S/RES/1737/2006
UNSC Res.1803 (2008), (Mar. 3, 2008) U.N. Doc. S/RES/1803/2008
UNSC Res. 1970 (2011), (26 February, 2011), UN Doc. S/RES/1970

United Nations General Assembly

UNGA GA Res 260, (9 December 1948), *Prevention and Punishment of the Crime of Genocide*, UN Doc. A/260/48.
UNGA G.A. Res. 217A, (Dec. 12, 1948) *Universal Declaration of Human Rights*, U.N. Doc. A/810, p 71, reprinted in 43 *Am. J. Int'l L. Supp* 127 (1949).
UNGA, Res 489 (V)/50, (12 December 1950), *International Criminal jurisdiction*, UN Doc. A/RES/489(V)/50.

International Criminal Court Reports and Documents

Assembly of State Parties to the International Criminal Court, 'Report of the Bureau on non-cooperation', ICC Doc. ICC-ASP/14/38, fourteenth session, The Hague, 18-26 November, 2015.
Assembly of States Parties, 'report of the Bureau on Cooperation', Seventeenth session, The Hague, 5-12 November, 2018, (Toolkit) Annex III, p 14 of the Report, ICC doc. ICC-ASP/17/31

International Criminal Court 'Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), 12 December, 2017

International Criminal Court Assembly of States Parties, 'Report of the Bureau on non-cooperation: Note to the Secretariat', ICC Doc. ICC-ASP/11/29, 1 November, 2012

International Criminal Court, 'Al Bashir case: ICC Appeals Chamber hearing submissions on legal matters raised by Jordan from 10 to 14 September 2018', 4 September 2018

International Criminal Court, 'Al Bashir case: The Prosecutor v Omar Hassan Ahmad Al Bashir: ICC prosecutor's Summary to the application for a Warrant of Arrest' ICC Doc. ICC-02/05-01/09, online at *https://www.icc-cpi.int/darfur/albashir*, last accessed on 28 September, 2017.

International Criminal Court, 'Al-Bashir case: ICC Appeals Chamber hearing submissions on legal matters raised by Jordan from 10 to 14 September 2018', 4 September, 2018, online at *https://www.icc-cpi.int/Pages/item.aspx?name=ma232*, last accessed on 21 February, 2019.

International Criminal Court, 'ASP Non-Cooperation Paper on Toolkit 15 June 2015, circulated by the Secretariat of the Assembly of States Parties on 22 June 2015', Annex I to the Report of the Bureau on non-cooperation, ASP fourteenth session, 18-26 September, 2015, ICC Doc. ICC-ASP/14/38, online at *https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-38-ENG.pdf*, last accessed on 21 February, 2019.

International Criminal Court, 'Assembly Procedures Relating to Non-Cooperation, in Strengthening the International Criminal Court and the Assembly of States Parties', *Resolution ICC-ASP/10/Res.5*, November 2011 (Adopted at the 9th plenary session on 21 December 2011) accessed online at *https://asp.icc-cpi.int/iccdocs/asp_docs/Non-coop/ICC-ASP-10-Res.5-extract-annex-ENG.pdf*, last accessed at 22 June, 2017.

International Criminal Court, 'Eleventh Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 17 June 2010, online at *https://www.icc-cpi.int/NR/rdonlyres/A250ECCD-D9E5-433B-90BB-76C068ED58A3/282160/11thUNSCReportENG1.pdf*, last accessed on 21 February, 2019.

International Criminal Court, 'Ninth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), undated, online at *https://www.icc-cpi.int/NR/rdonlyres/C6FE9E52-4845-41BA-A45D-75BA41D8647C/280448/9th_UNSCReport_Eng1.pdf*, last accessed on 21 February, 2019.

International Criminal Court, 'Official Records of the tenth session of the assembly of State Parties', ICC Doc. ICC-ASP/10/20, Vol. I, Part III, ICC-ASP/10/Res.5.

International Criminal Court, 'Official Records of the tenth session of the assembly of State Parties', ICC-ASP/10/20, Vol. I, Part III, ICC-ASP/10/Res.5., 12-21 December, 2011, online at *https://asp.icc-cpi.int/iccdocs/asp_docs/ASP10/OR/ICC-ASP-10-20-vol.I-ENG.pdf*, last accessed on 21 February, 2019.

International Criminal Court, 'Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council pursuant to UNSCR 1593 (2005)', , 5 June 2008, online at *https://www.icc-cpi.int/NR/rdonlyres/71FC0D56-11FC-41B9-BF39-33FC54F2C2A1/223633/ICCOTPST20080605ENG6.pdf*, last accessed on 21 February, 2019.

International Criminal Court, 'Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)', 5th December, 2007, online at *https://www.icc-cpi.int/NR/rdonlyres/D084A825-A985-4068-8320-5724AA894430/277791/OTPRP20071205UNSCENG.pdf,* last accessed on 21 February, 2019.

International Criminal Court, 'Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)', 14 June 2006, online at *https://www.icc-cpi.int/NR/rdonlyres/E61D7F34-7D21-44B9-8840-53B254172AF7/0/OTP_ReportUNSC_3Darfur_English.pdf*, last accessed on 21 February, 2019.

International Criminal Court, 'Twenty-sixth report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005)', 12 December 2017

International Criminal Court, Assembly of States Parties, *Assembly procedures relating to non-cooperation*, ICC-ASP/10/Res.5 annex, 10 December 2010

International Criminal Court, Official website, *Understanding the International Criminal Court,* online at *https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf*, last visited on 12 June, 2016.

Council of Europe Reports and Documents

Committee of Ministers, Annotated Agenda and Decisions Adopted, 1115th meeting (DH), 7-8 June 2011, p 43, CoE Doc. CM/Del/Dec (2011)1115 (10 June, 2011)

Committee of Ministers, Department for the Execution of Judgments of the European Court of Human Rights, *Action of the Security Forces in the Chechen Republic of the Russian Federation: General Measures to Comply with the Judgments of the European Court of Human Rights*, CoE Doc. CM/Inf/DH(2010) 26, (27 May, 2010).

Council of Europe, Committee of Ministers, Interim Resolution *CM/ResDH (2007)74, Interim Resolution on excessively lengthy proceedings in Greek administrative courts and the lack of an effective domestic remedy, concerning the judgment of European Court of Human Rights of 11 June 2004 in the case of Group of cases MANIOS and 84 other cases,* adopted by the Committee of Ministers on 6 June 2007, at the 997th meeting of the Ministers' Deputies.

Council of Europe, Committee of Ministers, *Interim Resolution CM/ResDH (2007) 74 of 6 June 2007 concerning the Action of the Security Forces in Northern Ireland (Case of McKERR against the United Kingdom and five similar cases*.

Council of Europe, Committee of Ministers, Interim resolution DH (99) 680, *concerning the Judgment of the European Court of Human Rights of 28 July 1998 in the case of Loizidou against Turkey,* adopted by the Committee of Ministers on 6 October 1999 at the 682nd meeting of the Ministers' Deputies)

Council of Europe, Committee of Ministers, *Interim resolution in the case of Mathews v the United Kingdom,* Interim Resolution ResDH (2001) 79, (26 June 2001).

Council of Europe, Committee of Ministers, Interim Resolution ResDH (2000) 105, *concerning Judgment of the European Court of Human Rights of 28 July 1998 in the case of Loizidou vs. Turkey*, adopted by the Committee of Ministers on 24 July 2000 at the 716th meeting of the Ministers' Deputies.

Council of Europe, Committee of Ministers, *Interim Resolution ResDH (2001) 1 78* of 5 December 2001 adopted by the Committee of Ministers on 5 July 2005.

Council of Europe, Committee of Ministers, *Interim Resolution ResDH (2005)56 concerning the right to an effective remedy against monitoring of prisoners' correspondence and other restrictions imposed on prisoners' rights – general measures in the cases of MESSINA No. 2* (judgment of 28 September 2000, final on 28 December 2000) and 2 other cases against Italy.

Council of Europe, Committee of Ministers, *Interim Resolution ResDH (2006)* 12 of 28 March 2006, *Metropolitan Church of Bessarabia and others v Moldova, (judgment of 13 December 2001),*

Council of Europe, Committee of Ministers, *Interim Resolution ResDH (2006) 1 concerning the violations of the principle of legal certainty through the supervisory review procedure ("nadzor") in civil proceedings in the Russian Federation-general measures adopted and outstanding issues,* adopted by the Committee of Ministers on *8* February 2006.

Council of Europe, Committee of Ministers, Resolution CM/ResDH(2015)230, *Execution of the judgments of the European Court of Human Rights, Vassilios Athanasiou and others v Greece and 205 cases of length of proceedings before administrative courts,* adopted by the Committee of Ministers on 9 December 2015 at the 1243rd meeting of the Ministers Deputies)

Decision of the Ministers Deputies on Case No. 10, case against *Cyprus and the Russian Federation, Rantsev*, judgment of 07/01/2010, final on 10/05/2010, at their 1115th meeting held on 8 June 2011.

European Commission for Democracy Through Law (Venice Commission), 53rd plenary Session, Venice, 13-14 December 2002 *Opinion on the Implementation of the Judgments of the European Court of Human Rights*, 76, Op. No. 209/2002, CDL-AD (2002)034, 18 December, 2002

Ministers Deputies, Information Documents CM/Inf/DM(2010) 26, 'Action of the security forces in the Chechen Republic of the Russian Federation: general measures to comply with the judgments of the European Court of Human Rights'

Ministers Deputies, Information Documents: Action taken by the security forces in the Chechen Republic, *CM/Inf/DH(2010)26,* OPCIT, online, footnotes omitted. This decision was adopted at the 1086th meeting of the Ministers' Deputies in June 2010, see CM/Del/Dec(2010)1086 Decisions adopted at the meeting. See also Philip Leach, *Taking a Case to the European Court of Human Rights,* 3rd Ed. 2011, p 101, fn 153

Resolution of the Ministers Deputies for case No. 22, Cases against the Russian Federation, *Khashiyev and Akayev*, judgment of 24/02/2005, final on 06/07/2005, rectified on 01/09/2005, adopted at the 1115th meeting of the Ministers Deputies of 8 June 2011.

Organization of American States General Assembly Resolutions

IActHR, 'Observations and Recommendations on the Annual Report of the Inter-American Court of Human Rights', AG/RES. 2500 (XXXIX-O/09), *4 June 2009*

IActHR, 'Observations and Recommendations on the Annual Report of the Inter-American Court of Human Rights', AG/RES. 2523 (XXXIX-O/09).

Inter-American Court of Human Rights, Resolution of the General Assembly, 2005, *Supervision of Compliance with Sentences (Applicability of Article 65 of the American Convention on Human Rights, Inter-Amer. Ct. H*R, 29 June, 2005.

OAS GA's resolution AG/RES. 2292 (XXXVII-O/07) Order of the General Assembly of the OAS passed on the fourth plenary session, celebrated on June 5, 2007, titled *Observations and Recommendations to the Annual Report of the Inter-American Court of Human Rights*

OAS GA's resolution AG/RES. 2408 (XXXVIII-O/08) Order of the General Assembly of the OAS passed on the fourth plenary session, celebrated on 3 June, 2008, titled *Observations and Recommendations to the Annual Report of the Inter-American Court of Human Rights*

OAS resolution of the General Assembly, titled *Observations and recommendations concerning the annual report of the Inter-American Court of Human Rights*, AG/Res.1330 (XXV-O/95), 9 June, 1995

OAS resolution of the General Assembly, titled *Observations and Recommendations to the Annual Report of the Inter-American Court of Human Rights*, AG/RES.2500 (XXXIX-O/09), 4 June, 2009

OAS, resolution of the General Assembly, titled *Observations and Recommendations to the Annual Report of the Inter-American Court of Human Rights*, AG/RES. 2292 (XXXVII-O/07).

Organization of American States, Resolutions of the General Assembly titled, *Observations and Recommendations concerning the Annual Report of the Inter-American Court of Human Rights*, AG/RES.1330 (XXV-O/95), 9 June, 1995.

Resolution of the General Assembly, 2005 titled *Supervision of Compliance with Sentences (Applicability of Article 65 of the American Convention on Human Rights, Inter-Amer. Ct. H*R, 29 June, 2005

Resolutions of the General Assembly of the Organisation of American States: AG/RES.1330 (XXV-O/95) of June 9, 1995

African Union Reports/Resolutions/Decisions

African Union, 'Activity Report of the African Court on Human and Peoples Rights,' Executive Council, AU Doc. EX.CL/1057(XXXII), 1 January-31 December, 2017

African Union 'Activity Report of the African Commission on Human and Peoples' Rights to the Executive Council', AU Doc. EX.CL/856(XXV), 20-24 June 2014.

African Union, 'Decision on the Implementation of the Decisions on the International Criminal Court (ICC) -Doc. EX.CL/639(XVIII), Assembly Doc. 334(XVI), 30-31 January 2011,

African Union, 'Activity Report of the African Court on Human and Peoples Rights', Executive Council, AU Doc. EX.CL/1057(XXXII), 1 Jan- 31 Dec. 2017

African Union, 'Decision of the Assembly of the Union', Assembly, AU Doc. Assembly/AU/Dec.665-689 (XXX), Assembly/AU/Decl.1-4 (XXX), Assembly/AU/Res.1 (XXX), 28-29 January 2018

African Union, 'Decision of the Meeting of State Parties to the Rome Statute of the International Criminal ICC', AU Doc. Assembly/AU/13(XIII), 1-3 July, 2009.

African Union, 'Decision on the Draft Protocol of Justice of the African Union-Doc.EX/CL/59 (III)', Assembly, AU. Doc. Assembly/AU/Dec.25 (II). 10-12 July 2003.

African Union, 'Decision on the Draft Protocol of the Court of Justice' Executive Council Decisions, AU Doc. EX/CL/59(III) & EX/CL/Dec.58(III), Executive Council Decision 4-8 July 2003.

African Union, 'Decision on the Draft Protocol of the Court of Justice', Executive Council, AU Doc. EX/CL/59(III), 4-8 July 2003

African Union, 'Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction', AU Doc. Assembly/AU/3 (XII), Assembly/AU/Dec.213 (XII), 1-3 February, 2012

African Union, 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal ICC (ICC)', AU Doc. Assembly/AU/13(XIII), 8 July, 2009

African Union, 'Decision on the Meeting of African States Parties to the Statute of the International Criminal Court (ICC)', Assembly, AU Doc. Assembly/AU/13(XIII), Assembly/AU/Dec.245 (XIII) Rev.1, 1-3 July 2009.

African Union, 'Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC)', AU Doc. EX.CL/710(XX), Assembly/AU/Dec.397 (XVIII) (2012), 29-30 January 2012.

African Union, 'Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC)', Assembly, AU/Dec 245 (XIII), 1-3 July 2009.

African Union, 'Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the International Criminal Court (ICC)' Assembly, AU Doc. Assembly/AU/8(XIV) and Assembly/AU/Dec.270 (XIV), 2 February 2010

African Union, 'Draft decision of the Mid-Term Activity Report of the African Court on Human and Peoples' Rights', Executive Council, AU Doc. EX.CL/1029(XXXI), 27 June- 1 July 2017.

African Union, 'Final Communiqué of the 142nd Meeting of Peace and Security Council', Communique' AU Peace and Security Council, AU Doc. PSC/Min/Comm. (CXLII), 21 July 2008,

African Union, 'Report of Mid-Term Activities of the African Court on Human and People's Rights to the Executive Council', Executive Council, AU.Doc EX.CL/1029(XXXI, 27 June-1 July 2017.

African Union, 'Report of Mid-Term Activities of the African Court on Human and Peoples' Rights (AfCHPR)', Executive Council, AU Doc. EX.CL/1029(XXXI) 27 June- 1 July 2017,.

African Union, 'Report of the Activities of the African Court on Human and Peoples' Rights', AU Doc. EX.CL/857(XXV), 20-24 June 2014.

African Union, 'Report of the Activities of the African Court on Human and People's Rights (AfCHPR) to the Executive Council', AU Doc EX.CL/922(XXVII),7-12 June 2015.

African Union, 'Report of the PRC, Thirty-Fifth Ordinary Session', AU Doc. PRC/Rpt(XXXV)Rev.1, 25-26 January 2018.

African Union, 'Report on the Activities of the African Court on Human and People's Rights to the Executive Council', AU. Doc EX.CL/783(XXII), 21-25 January 2013,

African Union, Assembly 'Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)', Assembly, AU Doc. Assembly/AU/Dec.245(XIII) Rev. 1, of 3 July 2009.

African Union, Assembly, 'Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270 (XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC)', Assembly, AU Doc. Assembly/AU/10(XV), Assembly/AU/Dec.296 (xv) 27 July 2010;

African Union, on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC)', Assembly, AU Doc. Assembly/AU/Dec.391-415 (XVIII), 29-30 January 2012.

African Union. 'Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)', Assembly, AU Doc. Assembly/AU/Dec.245 (XIII) of 3 July 2009.

Organization of African Unity, 'Decision on the African Charter', OAU Doc. AHG/Dec. 141 (XXXV) (1999), 12-14 July 1999.

Organization of African Unity, 'Decision on the Implementation of the Sirte Summit Decision on the African Union', OAU Doc. AHG/Dec. 1 (XXXVII) (2001), 9-11 July, 2001.

Organization of African Unity, 'Declaration on the Framework for an OAU response to Unconstitutional Changes of government', OAU Doc. AHG/Dec. 142 (XXXV) 12-14 July 1999.

THESES

Abiyola Ayinla '*From Durban to Maputo: An Interim assessment of the state of human rights under the African Union* LLM thesis, Makerere University', online, p 450 accessible at *https://repository.up.ac.za/bitstream/handle/2263/984/ayinla_ar_1.pdf;sequence=1,* last accessed on 9 October 2018.

Etienne Mutabazi, *The United Nations ad hoc Tribunals' effectiveness in prosecuting international crimes*, (Doctoral Theses, UNISA, 2014), also available online at *http://uir.unisa.ac.za/bitstream/handle/10500/14130/thesis_mutabazi_e.pdf?sequence=1&isAllowed=y*, last accessed on 12 January 2018.

Lirette Louw, *An Analysis of State Compliance with the Recommendations of the African Commission on Human and People's Rights*, (unpublished PhD Thesis, University of Pretoria, 2005, at *https://repository.up.ac.za/bitstream/handle/2263/29798/Complete.pdf?sequence%3D5*, last visited on 18 March, 2018.

WORKING PAPERS, SEMINAR PAPERS, CONFERENCE, LECTURES, STATEMENTS/ADDRESS

Anthony D'Amato, *The Limits of Legal Realism*, Faculty Working Paper 106 (2010).

Antonio Augusto Cancado Trindade 'Compliance with judgments and decisions- The experience of the Inter-American Court of Human Rights: a reassessment', paper presented at a seminar of judges of the European Court of Human Rights titled '*Dialogue between Judges, European Court*

of Human Rights 'Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility?', *Proceedings of the Seminar*, 31 January, 2014, p 10.

Antonio Cassese, *Affirmation of the Principles of International Law recognised by the Charter of the Nurnberg Tribunal General Assembly Resolution 95(I)*, Introductory Note, United Nations, 11 December 1946.

Christopher Keith Hall *The First proposal for a permanent international criminal court*, International Review of the Red Cross, No. 322, 1998.

Dean Spielman, President of the European Court of Human Rights, Opening Address at a seminar of judges of the European Court of Human Rights titled '*Dialogue between Judges, European Court of Human Rights 'Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility?'*, Proceedings of the Seminar, 31 January, 2014, p 5.

Dire Tladi, 'Complementarity and Cooperation in International Criminal Justice: A Role for the United States?' *ISS Paper 277*, November 2014

Edward C. Luck, 'Reforming the United Nations: Lessons from a History in Progress', *Occasional Paper No.1*, (2003);

European Commission for Democracy Through Law (Venice Commission), 53rd plenary Session, Venice, 13-14 December 2002 *Opinion on the Implementation of the Judgments of the European Court of Human Rights*, 76, Op. No. 209/2002, CDL-AD (2002)034, 18 December, 2002.

F. Tulkens, 'Execution and Effects of Judgments of the European Court of Human Rights: the role of the Judiciary, in Dialogue *between Judges*, *Council of Europe*, Strasbourg, 2006, 12.

Garth Abraham, 'R2P, the International Criminal Court and the Prevention of Mass Atrocities in Africa', *Policy Briefing 132*, (2015).

Joanne Foakes, 'Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts' (2011) *Briefing Paper*, International Law Programme, IL BP 2011/02.

Judge Antonio Augusto Cancado Trinidade, 'compliance with judgments and decisions-The experience of the Inter-American court of Human Rights: a reassessment', statement presented at a seminar of judges of the European Court of Human Rights titled '*Dialogue between Judges, European Court of Human Rights 'Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility?*', Proceedings of the Seminar, 31 January, 2014, p 10-17.

Judge Linos-Alexandre Sicilianos, 'From the point of view of the Court: its role in the implementation of its judgments, powers and limits' statement presented at a seminar of judges of the European Court of Human Rights titled '*Dialogue between Judges, European Court of Human Rights 'Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility?*', *Proceedings of the Seminar*, 31 January, 2014, p 18-21

Julie Flint, *Rhetoric and Reality: The Failure to Resolve the Darfur Conflict,* Smalls Arms Survey *HSBA Working Paper* 19, January 2010.

Korwa Gombe Adar, '*The International Criminal Court and the Indictment of Omar al-Bashir: Implications for Sudan*', Policy Briefing Number 10, African Institute of South Africa, 2010.

Marco Bocchi, 'The Effectiveness of the pilot judgment procedure: A Comparative case-study on inhuman and degrading treatment against detainees in Russia and Italy' *Paper presented at a Workshop on the ECtHR Tampere University,* Italy 2015.

Marina Aksenova, 'Complicity in International Law: A Case for Clarification', *Working paper* presented at the inaugural conference of the American Society of Comparative Law (Young Comparativists Committee), (20 April 2012).

Matthias Dembinski and Theresa Reinold, 'Libya and the Future of the Responsibility to Protect-African and European Perspective', *Peace Research Institute Frankfurt,* (2011).

Max du Plessis, 'Implications of the AU decision to give the African Court jurisdiction over international crimes', *ISS Paper No. 25* (June, 2012).

Myres S. McDougal and Michael W. Riesman, 'Theories about International Law: Prologues to a Configurative Jurisprudence', *Faculty Scholarship Series. Paper 2577*, (1968.

Nadir Edul Dalal, 'The R2P is Dead. Long Live the R2P. Libya, Syria, and the Responsibility to Protect Law', *School Student Scholarship Paper 208*, (2013).

Nick Grono, 'Briefing: Darfur: The International Community's Failure to Protect' (2006) 105 (421) *African Affairs* 621-631.

P. Apiko, et al, 'The International Criminal Court, Africa and the African Union: What way forward?' *Discussion Paper 201*, (November, 2016).

Richard W. Williamson, 'Sudan and the Implications for Responsibility to Protect', *Policy Analysis Brief* (2009).

S. McDougal, 'Jurisprudence for a Free Society', *Faculty Scholarship Series paper 2583*(1966).

Simon Adams, *Libya and the Responsibility to Protect* (2012) Occasional Paper Series No. 3, (October 2012).

Steven D. Roper and Lilian A. Barria, *Judgments of the European Court of Human Rights: A Test Case for Enforcement and Managerial Theories of State Compliance'*, p 6, paper delivered at the 2011 Annual Meeting of the American Political Science Association, (1-4 September, 2011).

Theodora A. Christou & Juan Pablo Raymond, 'European Court of Human Rights: Remedies and Execution of Judgments', *Issue 6 of occasional paper,* British Institute of International and Comparative Law, 2005;

Vivian Krsticevic, *A strategy for improving the level of implementation of judgments in the Inter-American System,* (2010) 16 INTERIGHTS Bulletin 91.

JUDICIAL DECISIONS

The International Criminal Court Judgments

Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, 13 December 2011, ICC-02/05-01/09.

Decision Following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under obligation to immediately arrest and surrender Omar Al Bashir, The Prosecutor v Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber II, 13 June 2015 (ICC-02/05-01/09).

Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, Pre-Trial Chamber I, 13 May 2011 ICC-02/05-01/09-129.

Decision on the (Prosecutor's Request for a Ruling on Jurisdiction under article 19(3) of the Statute), Pre-Trial Chamber I, 6 September 2018, ICC-RoC46 (3)-01/18-37.

Prosecutor v Abdallah Banda Abakaer Nourain, (Decision on 'Defence Application pursuant to articles 57(3) (b) & 64(6) (a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan) Trial Chamber, 1 July 2011, ICC-02/05/-03/09-169.

Prosecutor v Abdallah Banda Abubaker Nourain, (Corrigendum of the Decision on the Confirmation of Charges), Pre-Trial Chamber I, 13 March 2011, ICC-02/05-03/09-121-Corr-Red*;*

Prosecutor v Abdel Raheem Muhammad Hussein (Public redacted version of "Decision on the Prosecutor's application under article 58 relating to Abdel Raheem Muhammad Hussein), Pre-Trial Chamber I, 1 March 2012, *ICC-02/05-01/12.*

Prosecutor v Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") (Decision on the Prosecution Application under Article 58(7) of the Statute (2)), Pre-Trial Chamber, 29 April, 2007, ICC-02/05-01/07-1-Corr

Prosecutor v Al Bashir (Decision Regarding Omar Al Bashir Travel to the State of Kuwait), Pre-Trial Chamber II, 18 November, 2013. ICC-02/05-01/09.

Prosecutor v Jean-Pierre Bemba Gombo, Trial Chamber II, ICC-01/05-01/08.

Prosecutor v Omar Hassan Ahmad Al Bashir (Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya), Pre-Trial Chamber I, 27 August 2010, ICC-02/05-01/09.

Prosecutor v Omar Hassan Ahmad Al Bashir (Decision on Application under Rule 103), Pre-Trial Chamber I, 4 February 2009, ICC-02/05-189.

Prosecutor v Omar Hassan Ahmad Al Bashir (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court), Pre-Trial Chamber II, 9 April 2014 ICC-02/05-01/09.

Prosecutor v Omar Hassan Ahmad Al Bashir (Decision on the Cooperation of the Federal Republic of Nigeria regarding Omar Al-Bashir's Arrest and Surrender to the Court), Pre-Trial Chamber I, 5 September 2013, ICC-02/05-01/09-159.

Prosecutor v Omar Hassan Ahmad Al Bashir (Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests issued by the Court Regarding the arrest and surrender of Omar Hassan Ahmad Al-Bashir), Pre-Trial Chamber I, 26 March 2013, ICC-02/05-01/09-151.

Prosecutor v Omar Hassan Ahmad Al Bashir (Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute), Pre-Trial Chamber II, 11 July 2016, ICC-02/05-01/09-267.

Prosecutor v Omar Hassan Ahmad Al Bashir (Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir), 11 December, 2017, ICC-02/05-01/09-309.

Prosecutor v Omar Hassan Ahmad Al Bashir (Second Decision on the Prosecution's Application for a Warrant of Arrest), Pre-Trial Chamber I, 12 July 2010, ICC-02/05-01/09-94.

Prosecutor v Omar Hassan Ahmad Al-Bashir (Decision Regarding Omar Al- Bashir's Potential Travel to the United States of America), Pre-Trial Chamber II, 18 September, 2013, ICC-02/05-01/09.

Prosecutor v Omar Hassan Ahmad Bashir, (Decision on the Prosecutor's Request for a Finding of Non-Compliance against the Republic of the Sudan), 9 March 2015, ICC-02/05-01/09-227.

Prosecutor v Saif Al-Islam Gaddafi (Formerly *The Prosecutor v Muammar Mohammed Abuminyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber,27 June 2011, I*CC*-01/11-01/11.

Prosecutor v Uhuru Muigai Kenyatta, (Decision on Prosecution's application for a finding of non-compliance under Article 87 (7) of the Statute), Trial Chamber V (B), 19 August 2015, ICC-01/09-02/11 OA 5.

Prosecutor v. Al Bashir (*Decision Regarding Omar Al Bashir's Potential Travel to the Federal Republic of Ethiopia and the Kingdom of Saudi Arabia*), 10 October, 2013, ICC-02/05-01/09.

International Court Of Justice

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), ICJ Advisory opinion [1971] ICJ Reports 53.

Arrest Warrant case of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 14 February 2002, [2002] I.C.J. Reports 1.

Barcelona Traction Case, ICJ, Barcelona Traction, light and Power Co. case (Belgium v Spain), 5 February 1970, 1970 ICJ Reports 3.

Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v Rwanda) (Separate Opinion of Judge Ad Hoc Dugard) [2006] ICJ Reports 6.
Nuclear tests (Australia v France), Judgment, [1974] I.C.J. Reports 253.
Certain Expenses of the United Nations, [1962] ICJ Reports 151.

International Criminal Tribunal for Rwanda

The Prosecutor v Kanyabashi, Decision on Jurisdiction, Case No. ICTR-96-15-T

International Criminal Tribunal for the Former Yugoslavia.

Prosecutor v Tihomir Blaskic, Case No. IT-95-14/2, (Appeals Chamber), Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997.
Case of Alisic and Others v Bosnia and Herzegovina, Croatia, Serbia, Slovenia and The Former Yugoslav Republic of Macedonia, Application No. 60642/08, Application No. 60642/08, Judgment of 16 July 2014.

Military Tribunals

France and others v Goring (Herman) and others, (1946 22 International Military Tribunal, (IMT) 203.
The Trial of Germany Major War Criminals (HMSO) Judgment (Lawrence LJ), 30 September 1946-1 October 19046, para 41-42.

Cases from the Inter-American Court on Human Rights

Aloeboetoe et al v Suriname, (Reparations and Costs), (Se. C. No. 15) (Judgment of 10 September 1993).
Bamaca-Velasquez v Guatemala, reparations and Costs, judgment, Inter-Am. Ct. H.R., (Ser. C. No. 91), (Judgment of 22 February, 2002).
Barrios Altos v Peru, Monitoring Compliance with Judgment, Inter-Am. Ct. H.R., (Judgment of 28 November, 2003).
Barrios Altos v Peru, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., Ser. C, No. 87, (Judgment of 30 November, 2011).

Cantoral Benavides v Peru, Merits Judgment, Inter-Am. Ct. H.R., (ser. C, No. 88), (Judgment of 3 December, 2001).

Case of Baena-Ricardo et al v Panama, (Merits, Reparations and Costs), (ser. C. No 72), (Judgment of 2 February, 2001).

Case of Baena-Ricardo et al. v. Panama, (Competence), (Ser. C. No. 104), (Judgment of 28 November, 2003)

Case of Cantos v Argentina, (Monitoring Compliance with Judgment), (Judgment of August 26, 2010).

Case of Godinez-Cruz v Honduras, (Merits), (Ser. C No. 5), (Judgment of 20 January 20, 1989).

Case of Godinez-Cruz v Honduras, 1989 (Reparations and Costs), (Judgment of July 21).

*Case of the La Rochela Massacre v Colombia, (*Judgment, Merits, reparations, and Costs), *(*Judgment of 11 May 2007).

El Amparo v Venezuela, (Monitoring Compliance with Judgment, Reparations and Costs), (ser. C. No. 28), (Judgment of 14 September, 1996).

*Gangaram-panday v Suriname, (Merits, Reparations and Costs), (*ser. C No. 16), (Judgment of 21 January, 1994).

Godinez-Cruz v Honduras, (Reparations & Costs), (ser. C No. 8), (Judgment of 21 July, 1989).

La Rochela Massacre v Colombia, *Monitoring Compliance with Judgment*, (Ser. C No. 26, (Judgment of 26 Aug. 2010)

Loayza Tamayo v Peru, Merits, Judgment, Inter-American Ct. H. R. (ser. C No. 33), (Judgment of 17 September, 1997).

Request of the Republic of Colombia, *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*, (Advisory Opinion), (Ser. A, No. 10), (Judgment of 14 July, 1989).

Ugarte v Peru, (*Reparations and Costs, judgment),* (Ser. C, No. 89), (Judgment of 3 December, 2001).

Velasquez Rodriguez v Honduras, (*Reparations and Costs, Compliance with Judgment),* (Series C No. 4) (Decision of 10 September, 1996).

Velasquez Rodriguez v Honduras, (*Reparations and Costs, Judgment),* (ser. C, No. 1), (Decision of 21 July 1989).

Cases and Decisions of the European Court Of Human Rights and CoM

*Abdulla Altun v Turkey, no. 24561/94 (*Judgment of 1 June 2004).

Ben Yaacoub v Belgium, 27 November 1987, series A no. 127-A Interim Resolution DH (88) 13 of 29 September 1988 and Final Resolution DH (92) 58 of 10 November 1992.

Case of Broniowski v Poland, no. 31443/96, (Judgment of 22 June 2004).

Case of *Hutten-Czapska v Poland,* no. 35014/97, (Judgment of 19 June 2006).

Duran Sekin v Turkey, no. 41968/98, (Judgment of 2 February 2006).

Glykantzi v Greece, no. 40150/09, (Judgment of 30 October 2012).

Hentrich v France, 3 July 1995, (Interpretation), no. 13616/88, (Judgment of 3 July 1997).

Hirst (No. 2) v U.K., no. 74025/01, (Judgment of 6th October 2005).

Hornsby v Greece, no. 18357/91, (Judgment of 19 March 1997).

Huvig v France, no. 11105/84, (series A no. 176-B), (24 April 1990).

Ireland v United Kingdom, 25 Eur. Ct. H.R.(no. 5310/71, ser. A), (Judgment of 18 January, 1978).

Khashiyev and Akayev, no. 5794/00(Judgment of 24/02/2005), (final on 06/07/2005), (rectified on 01/09/2005), adopted at the 1115th meeting of the Ministers Deputies decision of 8 June 2011.

Loizidou v Turkey no. 15318/89, (Judgment of 18 December 1996).

M.T. and Greens v U.K., no. 60041/08 and 60054/08, (decision of 23 Nov. 2010).

Majadallah v Italy, Judgment no. 62094/00, (Decision of 19 October 2006).

Mamatkulov & Askarov v Turkey, app nos. 46827/99, 46951/99, (Judgment of 4 Feb., 2005).

Marckx v Belgium no.00006833/74, (Judgment of 13June 1979).

Michelioudakis v Greece, no. 54447/10, (3 April 2012).

Musayev and Others v. Russia , no. 57941/00 (Judgment of 26 July, 2007).

Ocalan v Turkey, no. 46221/99, (Judgment of 12 May 2005).

Papamichalopoulos et al v Greece, no. 14556/89, (Judgment of 31 October 1995).

Paudicio v Italy, no. 77605/01 (Judgment of 24 May 2007).

Raicu v Romania, no. 28104/03, (Judgment of 19 October 2006*).*

Sejdovic v Italy, no. 56581/00, (Judgment of 1 March 2006).

Stran Greek Refineries and Stratis Andreadis case, no. 22/1993/417/496, (Judgment of 9 December 1994).

Vermeire v Belgium, no. 12849/87 (29 November, 1991).

Xenedis-Arestis v Turkey, no. 46347/99, (Judgment of 7 December 2006).

Zentar v France, no. 17902/02 (Judgment of 13 April 2006).

Cases of the African Court of Human and People's Rights

African Commission on Human and People's Rights v. Libya, Application 002/2013

Alfred Agbesi Woyome v Republic of Ghana, Application No. 001/2017.

Dexter Eddie Johnson v Republic of Ghana, application number 016 of 2017.

Leon Mugesera v Republic of Rwanda, application number 012 of 2017.

Norbert Zongo & others v Burkina Faso, Application Number 013/2011.

Urban Mkandawire vs. The Republic of Malawi, communication number 3 of 2003

Domestic Cases

South Africa

Law Society of South Africa et al v President of SA et al, CCT 01/18, [2018] ZACC 51.

National Commissioner of Police v South African Human Rights Litigation Centre & Another (CCT 02/14) [2014] ZACC 30; 2015 (1) SA 315 (CC).

The Minister of Justice and Constitutional Development and others v The Southern African Litigation Centre (867/15) [2016] ZASCA 17.

Kenya

AG et al vs. The Kenyan Section of International Commission of Jurists, Civil App. No 105 of 2012 as consolidated with Crim. App. No. 105 of 2012 (unrep.), page 25, Judgment delivered on 16th February, 2018 (The soft copy of the Judgment is on file with the author of this study). However, the High Court decision on this case can be accessed online at *http://kenyalaw.org/Downloads_FreeCases/84203.pdf*, last accessed on 23 March 2018.

United States of America

Ntakirutimana v Reno, 184 F.3d 419, 430 (5th Cir.1999)

Prosecutor v Furundzija case no IT-95-17/1 (10 December 1998).

NEWSPAPERS, BLOGS, ONLINE PUBLICATIONS

UN News, 'ICC requests Central African republic to arrest Sudan's president on visit' 1 December, 2010, *UN News*, online at *https://news.un.org/en/story/2010/12/360582-icc-requests-central-african-republic-arrest-sudans-president-visit*, last accessed on 3 September, 2018.

BBC, 'China defends visit by Sudan president Omar al-Bashir' *BBC News online*, 21 June, 2011, accessed at *https://www.bbc.co.uk/news/world-africa-13857894*, last accessed on 29 August 2018.

Carien du Plessis, 'Decision to withdraw from the ICC still stands, says ANC' *News24*, 11th June, 2017, online at *http://www.news24.com/SouthAfrica/News/decision-to-withdraw-from-icc-still-stands-says-anc-20170611*, last visited on 30 September, 2017.

David Hoile and Angela Madukuti, "Is the ICC racist? *New International Magazine*, December 1, 2014, available online at *https://newint.org/sections/argument/2014/12/01/international-criminal-court-racist*, last accessed on 30 November, 2016.

Edna Molewa, Head of the ANC's International Relations Subcommittee, 'ANC Decision to quit ICC is valid: Comment & Analysis', *Mail & Guardian*, 4th to 10th November, 2016, p 30. Also available online at *https://www.pressreader.com/south-africa/mail-guardian/20161104/281913067672358*, last accessed on 30 September, 2017.

Ghana Web, 'Supreme Court ignores African Court ruling on Woyome' s GHC51.2M judgment debt', *Ghana Web*, 29 November, 2017, online *at https://www.ghanaweb.com/GhanaHomePage/pressreleases/Supreme-Court-ignores-African-Court-ruling-on-Woyome-s-GHC51-2m-judgment-debt-604973*, last accessed on 22 March 2018.

GhanaWeb, 'African Human Rights Court's decision on Woyome case suspicious-Deputy A-G', *Ghanaweb*, 3 December, 2017, online at *https://www.ghanaweb.com/GhanaHomePage/pressreleases/African-Human-Rights-Court-s-decision-on-Woyome-case-suspicious-Deputy-A-G-606095*, last accessed on 22 March 2018.

Howard LaFranchi, 'New Violence in Sudan, Darfur, One Years after the Indictment of Bashir', *Christian Science Monitor*, 4 March, 2010, online at *https://www.csmonitor.com/USA/Foreign-Policy/2010/0304/New-violence-in-Sudan-Darfur-one-year-after-indictment-of-Bashir*, last accessed on 19 March, 2018.

Jane Kokan, 'The Perils of Regime Change…Libya: A Nation Engulfed in Chaos' *Risk Hedge*, (9 June 2017) online at *https://www.riskhedge.com/post/perils-regime-change-libya-nation-engulfed-chaos,* last accessed on 11 February, 2018.

John Hirst, 'Prisoner Voting and the Rule of Law: The Irony of Non-Compliance', *Oxford Human Rights Hub*, 20 March 2013, online at *http://ohrh.law.ox.ac.uk/prisoner-voting-and-the-rule-of-law-the-irony-of-non-compliance/*, last accessed on 18 October, 2017.

Josh Kron, 'Sudan Leader to Accept Secession of South', *N.Y. Times*, 7 February, 2011, online at *http://www.nytimes.com/2011/02/08/world/africa/08sudan.html*, last accessed on 19 March 2018.

Nabil M. Orina, 'Should the ICJ render an advisory opinion on the immunity question re Articles 27 and 98 of the Rome Statute?', *ICJ Africa*, 24 March 2018, online at *https://www.icjafrica.com/single-post/2018/03/24/Should-the-ICJ-render-an-advisory-opinion-on-the-immunity-question-re-Articles-27-98-of-the-Rome-Statute,* last accessed on 29 August 2018.

Sudan Tribune, 'Sudan's President arrives in Libya holds talks with NTC', *Sudan Tribune, 8 January 2012,* online at *http://www.sudantribune.com/spip.php?article41220*, last accessed on 3 May 2017.

The Sudan Tribune, 'Sudan's al-Bashir to visit China in September', *The Sudan Tribune*, 9 June 2018, online accessed at *http://www.sudantribune.com/spip.php?article65602*, last visited on 29 August, 2018.

PRESS/MEDIA RELEASES

International Criminal Court

International Criminal Court, 'Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)', *Press Release,* 20 June 2018,

International Criminal Court, 'Rome Statute of the International Criminal Court: Overview', *Press Statement,* online at *http://legal.un.org/icc/general/overview.htm,* last accessed on 28 March 2018.

International Criminal Court, 'Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)', *Press Statement* 20 June 2018, online at

https://www.icc-cpi.int/Pages/item.aspx?name=180620-otp-stat, last accessed on 29 August 2018.

International Criminal Court, 'Summary of the Decision of Pre-Trial Chamber I on the Prosecution's Application for a Warrant of Arrest for Omar Hassan Ahmad Al Bashir', *Press Statement* 9 May 2017, online at *https://www.icc-cpi.int/legalAidConsultations?name=pr494,* last accessed on 16 March 2017.

International Criminal Court 'Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)', *Press Statement*, 12 December, 2017, online at *https://www.icc-cpi.int/Pages/item.aspx?name=171212-otp-stat-UNSC*, last accessed on 2 July 2017.

International Criminal Court Assembly of State Parties, 'ICC-President of the Assembly meets Minister of Foreign Affairs of Kenya', *Press Statement*, 21 September, 2010, ICC doc. ICC-ASP-200100921-PR575, online at *https://asp.icc-cpi.int/en_menus/asp/press%20releases/press%20releases%202010/Pages/president%20of%20the%20assembly%20meets%20minister%20of%20foreign%20affairs%20of%20kenya.aspx*, last accessed on 21 February, 2019.

International Criminal Court, 'AL Bashir case: ICC Appeals Chamber hearing submissions on legal matters raised by Jordan from 10 to 14 September 2018', *Press Statement,* 4 September, 2018, online at *https://www.icc-cpi.int/Pages/item.aspx?name=ma232*, last accessed on 5 October 2018.

International Criminal Court, 'Assembly of States Parties' *online brief*, available at *https://www.icc-cpi.int/asp, fact file*, last accessed on 9 September, 2018.

International Criminal Court, 'Statement to the United Nations Security Council on the situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005)', *Press Statement,* 11 June 2010, online at *https://www.icc-cpi.int/NR/rdonlyres/04E2CEA3-2338-4C9C-8803-A73E2C8359CE/282156/FinalformattedspeechUNSC_11062010postdeliveryclean.pdf*, last accessed on 10 March 2017.

International Criminal Court, *Understanding the International Criminal Court*, 2010, *Fact file*, online at *https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf,* last accessed on 30 September, 2017.

International Criminal Court, 'Pre-Trial Chamber II requests Nigeria to immediately arrest Omar Al Bashir', *Press Release* 16 July 2013, online at *https://www.icc-cpi.int/legalAidConsultations?name=pr93,* last accessed on 25 September, 2017.
International Criminal ICC, 'Pre-Trial Chamber II requests Nigeria to immediately arrest Omar Al Bashir', *Press Release* 16 July 2013,
United Nations, 'As ICC Arrest Warrant issued for Sudan's President, Secretary-General says United Nations Vital Peacekeeping, Humanitarian Work in Country will continue', Press Release, 4 March 2009, UN Doc. SG/SM/12123-AFR/1820-L/3140

Coalition of the ICC

Coalition for the International Criminal Court, 'AU seeks ICJ Opinion on head of state immunities Witnesses take stand in two ICC trials' *Press* Release, 1 February, 2018

Inter-American Court of Human Rights

Inter-American Commission on Human Rights: Strategic Plan 2011-2015, 2016, available online at *https://www.oas.org/en/iachr/docs/pdf/iachrstrategicplan20112015.pdf*, last accessed on 20 August, 2017.
Inter-American Court on Human Rights, *Judgment on merits*, accessed online at *http://www.javier-leon-diaz.com/enforced_disappearances/Duran%20and%20Ugarte%20case.pdf*, last accessed on 12 February 2018.
Inter-American Court of Human Rights, 'I/A Court History', *Press Release*, online at *http://www.corteidh.or.cr/index.php/en/about-us/historia-de-la-corteidh*, last accessed on 22 February, 2019

Council of Europe

Council of Europe, 'Human Rights Information Bulleting No. 53' (March-June 2001), September, 2001.
European Court of Human Rights, 'Pilot Judgment: fact sheet', online at *http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf*

European Court of Human Rights, 'Fact sheet-Pilot Judgments', online at *https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf,* last accessed on 24 March 2018.

Committee of Ministers of the Council of Europe, 'Supervision of the Execution of judgments and decisions of the European Court of Human Rights: Implementation of the Interlaken Action Plan-Modalities for a twin-track supervision system', online at *http://www.coe.int/en/web/execution/rules-and-working-methods,* last accessed on 24th July 2016.

Committee of Ministers, Department for the Execution of Judgments of the European Court of Human Rights, 'Action of the Security Forces in the Chechen Republic of the Russian Federation: General Measures to Comply with the Judgments of the European Court of Human Rights', CoE Doc. CM/Inf/DH(2010) 26, 27 May, 2010, also available online at *https://wcd.coe.int/ViewDoc.jsp?id=1626557&Site=CM,* last accessed on 16 October, 2017.

ECtHR, 'The ECHR IN 50 Questions', online at *http://www.echr.coe.int/Documents/50Questions_ENG.pdf,* last visited on 6 September 2016.

Council of Europe, Committee of Legal Affairs and Human Rights, 'Implementation of judgments of the European ICC of Human Rights: 8th Report: Stock-taking and proposals by the Rapporteur' *Press Release,* 10 May 2005

Council of Europe, Committee on Legal Affairs and Human Rights 'Implementation of judgments of the European ICC of Human Rights: 9th Report', *Press* Release, 18 May 2017

Klaas de Vries, 'Committee on Legal Affairs: Implementation of judgments of the European Court of Human Rights, 8th Report', 2015, available online at *http://website-pace.net/documents/19838/1085720/20150623-ImplementationJudgements8-EN.pdf/67c5cb2a-3032-4183-9f3e-45c668257ede,* last accessed on 12 September, 2016.

African Union

African Union, 'On the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the alleged failure by the Republic of Chad and the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of President Omar Hassan Al Bashir of the Republic of Sudan', *Press Release No. 002/2012,* 9 January, 2012

African Union, '211th Meeting of the peace and the Security Council, AU Doc. PSC/PR/BR(CCXI)', *Press Statement,* 7 December, 2009,
AfCHPR, 'Order for Provisional Measures against Libya', *Press Release,* 30 March, 2011.

International Human Rights Organisations

Global Centre for Responsibility to Protect

Global Centre for the Responsibility to protect, *Resolution 1894 (POC) S/RES/1894,* (11 November 2009), online at *http://www.globalr2p.org/resources/331*, last accessed on 21 March 2018.

International Federation for Human Rights, (FIDH)

FIDH, *'Victims' Rights before the ICC- the Evolution of Victims Access to Justice'*, p 3, online at *https://www.fidh.org/IMG/pdf/4-CH-I_Background.pdf*, last accessed on 12 July 2016.
FDH Press Release *'China: Open Letter to Chinese Authorities Concerning President Omar Al Bashir's visit to China'* (29 August 2015), accessed online at *https://www.fidh.org/en/region/asia/china/china-open-letter-to-chinese-authorities-concerning-president-omar-al*, last accessed on 29 August 2018.

Amnesty International

Amnesty International, 'Central African Republic must arrest Omar al-Bashir during visit', *Press Release*, 1 December, 2010, online at *https://www.amnesty.org/en/latest/news/2010/12/republica-centroafricana-detener-omar-al-bashir/,* last accessed on 1 September, 2018.
Amnesty International, *International Criminal Court*: *Updated Checklist for Effective Implementation,* 2010, online at *https://www.amnesty.org/download/Documents/40000/ior530092010en.pdf,* last accessed on 1 January, 2019.
Amnesty International, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded Court*, online at

http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/amnesty_international-africa-malabo_protocol-2017.pdf, last accessed on 12 January, 2018.

Coalition for the ICC

Coalition for the International Criminal Court, 'AU seeks ICJ Opinion on head of state immunities Witnesses take stand in two ICC trials', online at *http://coalitionfortheicc.org/news/20180201/globaljustice-weekly-au-seeks-icj-opinion-head-state-immunities-witnesses-take-stand*, last visited on 28 February, 2018.

Coalition for the International Criminal Court, *The Crime of Aggression* online at *http://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression*, last accessed on 29 August 2018.

Human Rights Watch

Human Rights Watch, 'Kosovo Atrocities Recounted in Detail' Human Rights Watch official website, online, (26 July 1999), available at *https://www.hrw.org/news/1999/07/26/kosovo-atrocities-recounted-detail*, last accessed on 20 March 2018.

Human Rights Watch, 'shattered lives: sexual violence during the Rwanda Genocide and its Aftermath', Human Rights Watch, 1996, online at *https://www.hrw.org/legacy/reports/1996/Rwanda.htm*, last visited on 20 March 2018.

Human Rights Watch, 'So Much to Fear: War Crimes and the Devastation of Somalia', Human Rights Watch, 8 December, 2008, Human Rights Watch online at *https://www.hrw.org/report/2008/12/08/so-much-fear/war-crimes-and-devastation-somalia*, last accessed on 20 March 2018.

Human Rights Watch, 'Update on European Court of Human Rights Judgments against Russia regarding Cases from Chechnya', online Report, 2009, available at *https://www.hrw.org/news/2009/03/20/update-european-court-human-rights-judgments-against-russia-regarding-cases-chechnya*, last accessed on 14 November, 2017.

International Herald Tribune, 'Sudan announces it will suspend cooperation with International Criminal Court', 18 March 2007.

TREATIES

United Nations and Other International Organisations

Charter of the United Nations, signed at San Francisco on 26 June 1945, entry into force 24 October 1945, in accordance with article 110. 59 Stat. 1031, T.S. 993, 3 Bevans 1153

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A 39/46, annex 39, U.N. GAOR Supp (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force on 26 June 1987.

Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December, 1948, entered into force on 12 January 1951, UN. Treaty Ser. 278 of 1951

U.N. Charter: U.N. S.C., Provisional Rules of Procedure of the Security Council, U.N. Doc. S/96 (June 27, 1946)

United Nations Office on drugs and Crime, Manual on mutual Legal Assistance and Extradition, (September, 2012).

United Nations, Provisional Rules of Procedure of the Security Council (Adopted by the Security Council at its 1st meeting and amended at its 31st, 41st, 42nd, 44th and 48th meeting, on 9th April, 16 and 17 June 1946; 138th and 222nd meetings, on 4th June and 9th December 1947; 468th meeting, on 28th February 1950; 1463rd meeting on 24th January 1969; 1761st meeting on 1 January 1974; and 2410th meeting, on 21st December 1982. Previous versions of the Provisional Rules of Procedure were issued under the Symbols S/96 and Rev. 1-6.

Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948), reprinted in 43 Am. J. Int'l L. Supp 127 (1949)

Vienna Convention on the Law of Treaties, adopted on 22 May 1969 and opened for signature on 23 May 1969 by the United Nations Conference on the Law of Treaties, 331, 8 International legal Matters 679, entered into force on 27 January 1980.

Nuremburg

Special Proclamation by the Supreme Commander for the Allied Powers on the Establishment of International Military Tribunal for the Far East, Tokyo, January 19, 1946, Charter dated January

19, 1946; amended charter dated April 26, 1946, Treaties and Other International Acts Series 1589,

International Ad Hoc Tribunals

UNSC, Statute of the International Criminal Tribunal for Yugoslavia, adopted on 25 May 1993 by Resolution 827.

UNSC, Statute of the International Criminal tribunal for Rwanda, adopted on 8 November, 1994 by resolution 955 (1994) (as last amended on 13 October 2006 by resolution 1717 (2006))

International Criminal Court

Rules of Evidence and Procedure of the ICC, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, 3-10 September, 2000*, ICC-ASP/1/3 and Corr.1), part II. A.

Rome Statute of the International Criminal Court, adopted on 17 July 1998, entered into force on 1 July 2002, UN Doc. A/CONF183/9(17 July 1998).

Inter-American Court Of Human Rights

American Convention on Human Rights, 22 November, 1969, 1114 UNT 123,

American Convention on Human Rights, adopted on 22 November, 1969, entered into force 18 July 1978

American Declaration on the Rights and Duties of Man, adopted on 2 May, 1948

Inter-American Convention on Mutual Assistance in Criminal Matters (adopted on 23th May 1992, entered into force on 14th April, 1996) 75 Treaty Series, OAS

Organization of American States (OAS) *Charter of Organisation of American States*, adopted on 30 April 1948, Entered into force on 13 December, 1951, UN Treaty Series No. 1609

Rules of Procedure of the Inter-American Court on Human Rights, approved by the Court at its forty-ninth Regular Session, 16-25 November, 2000.

Statute of the Inter-American Court of Human Rights adopted by the OAS GA 1 October, 1979, entered into force on 1 January, 1980)

European Union

Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature on 4 November, 1950, 213 U.N.T. S. 221.

Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established thereby, 1 Nov. 1998, Strasbourg, 11.V.1991, *European Treaty Series-No. 155*.

Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the control system of the Convention, opened for signature on 13 May, 2004, entered into force on 1st June 2010, Strasbourg, 13.V.2004, *Council of Europe Treaty Series No. 194*

Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000

African Union

African Charter on Human and People's Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

Constitutive Act of the African Union, adopted in Lome, Togo, on 11 July 2000 and entered into force on 26 May 2001 OAU Doc. CAB/LEG/23.15, *entered into force* May 26, 2001.

Protocol to the African Charter on Human and Peoples' Rights, OAU Doc. OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997), *entered into force* January 25, 2004.

Protocol of the Court of Justice of the African Union, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (13 September, 2000); *reprinted in* 1 Afr. Hum. Rts. L.J. 40, *entered into force* on 25 November, 2005.

Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted on 1 July 2008, yet to enter into force.

Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

Rules of Procedure of the African Commission on Human and Peoples' Rights, *adopted on* October 6, 1995.

DOMESTIC STATUTES

South Africa

Implementation of the Rome Statute of the International Criminal Court Act number 27 of 2002.

Malawi

Immunities and Privileges Act, Chapter 16:01 of the Laws of Malawi

Kenya

International Crimes Act, 2003.
