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The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir

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Abstract

Part I introduces the Rome Statute and highlights the portions of the Rome Statute that leave the ICC vulnerable to member states that violate the Rome Statute without any clear punishment for the violation. In particular, Part I focuses on the expansive jurisdiction and the limited enforcement mechanisms that the Rome Statute bestows upon the ICC. Part II illustrates the ICC's vulnerability under the Rome Statute by using the example of the ICC's indictment of President Al Bashir and examining the existing tension between the ICC and the African Union ("AU"). Part III argues that the ICC must strengthen or expand its enforcement mechanisms in order to become a legitimate force in the international forum. It suggests three possible ways to reach this goal: suspension, expulsion, and implementation of United Nations ("UN") Security Council sanctions.

THE INTERNATIONAL CRIMINAL COURT'S INEFFECTIVE
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PRESIDENT OMAR AL BASHIR

*Gwen P. Barnes**

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INTRODUCTION

On July 21, 2010, Omar Hassan Ahmad Al Bashir, the President of Sudan, stepped off of an airplane and onto the soil of Chad.¹ Idriss Déby, the President of Chad, welcomed him with an embrace.² To some, the cordiality shown by the leaders was a victory over the contentious history between the two countries.³ For the International Criminal Court (“ICC”), of which Sudan is not a member, but Chad is, the apparent reconciliation was not a positive development.⁴

The event was concerning and significant to the ICC because it was the first time President Al Bashir risked visiting a member state since the ICC indicted him in 2009.⁵ The ICC’s

1. See Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about President Omar Al-Bashir’s Recent Visit to the Republic of Chad, at 3 (Int’l Crim. Ct. Aug. 27, 2010) (reporting that President Omar Al Bashir was in Chad from July 21–23, 2010); see also Rebecca Hamilton, *Omar Al Bashir, Fresh Off Press Crackdown in Sudan, Defies ICC in Visit to Chad*, CHRISTIAN SCIENCE MONITOR, July 21, 2010 (stating that President Al Bashir visited Chad on the same day the article was written, July 21, 2010).

2. See, e.g., Jody Clarke, *Chad Urged to Arrest Sudan’s President*, IRISH TIMES, July 23, 2010, at 9 (discussing that, upon President Al Bashir’s arrival to N’Djamena, the capital of Chad, Idriss Déby was there to greet him); see also *Visiting Sudanese Leader Hails Reconciliation with Chad*, BBC MONITORING AFRICA, July 22, 2010 (explaining that Déby welcomed Al Bashir at the Chadian airport).

3. See Fred Oluoch, *ICG Bets on a Return to Peace*, E. AFR. (Nairobi), Aug. 2010 (reporting that President Al Bashir’s visit to Chad gives “reason to hope that relations [between Chad and Sudan] are returning to normal”); see also *Sudanese President Returns from Chad Trip*, SUDAN TRIBUNE, July 24, 2010 (explaining that the meeting between Presidents Al Bashir and Déby was extraordinary because it “ended years of bitter proxy war between the two neighbours”).

4. See *Interview: ICC Prosecutor May Open New Darfur Cases Next Year*, SUDAN TRIBUNE, Dec. 9, 2010 (reporting that the International Criminal Court (“ICC”) prosecutor, Luis Moreno-Ocampo, noted that Kenya and Chad have a duty to arrest President Al Bashir “irrespective of political considerations”); see also *ICC Urges States to Assist in Arresting Suspects Including Sudanese Leader*, BBC MONITORING MIDDLE EAST, Oct. 30, 2010 (stating that an ICC judge expressed disappointment that the ICC has outstanding arrest warrants, particularly referring to President Al Bashir’s visit to Chad).

5. See Hamilton, *supra* note 1 (asserting that President Al Bashir’s trip to Chad is his first trip to a member state of the ICC since being indicted, in March 2009, for war

arrest warrant for President Al Bashir was remarkable because it is the first time the ICC indicted a head of state.⁶ Under the ICC's founding treaty, the Rome Statute of the International Criminal Court ("Rome Statute"), all member states have the duty to cooperate with all ICC arrest warrants.⁷ Therefore, because Chad is a member state, it has the duty to arrest President Al Bashir.⁸

In Chad, President Al Bashir attended a meeting of the leaders of the Community of Sahel-Saharan States.⁹ President Al Bashir remained in Chad for a total of three days.¹⁰ During that time, the European Union, as well as organizations such as Human Rights Watch and Amnesty International, urged Chad to

crimes and crimes against humanity); *see also Summit Rejects 'All Accusations' against Beshir*, DAILY NEWS EGYPT, July 23, 2010 (noting that Chad is the first ICC member state Al Bashir has visited since his indictment and explaining that Chad has a duty to arrest President Al Bashir).

6. Press Release, 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, available at <http://www.haguejusticeportal.net/Docs/ICC/Bashir%20Warrant%20Summary.pdf> [hereinafter Summary on the Prosecutor's Application for a Warrant of Arrest] (emphasizing that this was the first time the ICC indicted a sitting head of state).

7. *See* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir, at 5 (Mar. 6, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc642283.pdf> (reminding the member states of the ICC that they have an "obligation to comply" with the Rome Statute of the International Criminal Court ("Rome Statute")); *see also* Clarke, *supra* note 2, at 9 (explaining that as a member of the ICC, Chad has an obligation to arrest President Al Bashir).

8. *See* Clarke, *supra* note 2, at 9 (reiterating that as a member of the ICC, Chad has an obligation to arrest President Al Bashir).

9. *See* Clarke, *supra* note 2, at 9 (declaring that President Al Bashir is in Chad to attend a summit of the Sahel-Saharan States). The Community of Sahel-Saharan States was established in 1998 in order to promote and achieve economic unity amongst the member states in the Sahel-Saharan region of Africa. *See Regional Economic Communities*, COMMUNITY OF SAHEL-SAHARAN STATES, http://www.africa-union.org/root/au/rccs/cen_sad.htm (last visited June 1, 2010) (describing the Community of Sahel-Saharan States' mission statement); *see also About Cen-Sad*, COMMUNITY OF SAHEL SAHARAN STATES, <http://www.uneca.org/cen-sad/aboutcensad.htm#> (last visited June 1, 2010) (explaining the objectives of the Community of Sahel-Saharan States).

10. Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about President Omar Al-Bashir's Recent Visit to the Republic of Chad (Aug. 27, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc931075.pdf> (stating that President Al Bashir went to Chad on July 21, 2010 and left on July 23, 2010).

arrest President Al Bashir.¹¹ Chad, however, refused.¹² Additionally the African Union (“AU”) expressed concern that the arrest warrant would cause dissension in Africa and asked the UN Security Council to defer the prosecution.¹³

The ICC enforces its arrest warrants exclusively through the cooperation of its member states.¹⁴ Chad’s refusal to arrest President Al Bashir thus illustrates the lack of enforcement mechanisms available to the ICC.¹⁵ The safe travel President Al Bashir enjoyed in Chad exemplifies the impotence of the ICC when its member states refuse to cooperate.¹⁶ This Note argues

11. See Clarke, *supra* note 2, at 9 (noting that the European Union foreign policy chief asked Chad “to respect its obligations under international law to arrest and surrender those indicted by the ICC,” and that a representative from Human Rights Watch expressed that Chad is risking the “shameful” notoriety of “harbour[ing] a suspected war criminal” and urged Chad to arrest him); see also Claire Soares, *Sudan’s Leader Defies Genocide Warrant with Trip to Old Enemy Chad*, INDEP. (London), July 22, 2010, at 22 (discussing that both Amnesty International and Human Rights Watch spoke out to urge Chad to arrest President Al Bashir).

12. See Clarke, *supra* note 2, at 9 (asserting that Chad will not arrest President Al Bashir because it does not believe it has an obligation to do so); see also Soares, *supra* note 11, at 22 (quoting Chad’s Foreign Minister Moussa Faki Mahamat as saying that Chad’s priority “is assuring peace and stability with Sudan” over complying with the Rome Statute).

14. See African Union, Peace and Security Council 207th Meeting at the Level of the Heads of State and Government, *Report of the African Union High-Level Panel on Darfur (AUPD)*, ¶ 242 (Oct. 29, 2009) [hereinafter AU Peace and Security Council] (explaining that the AU asked the ICC to defer President Al Bashir’s prosecution as is allowed by the Rome Statute).

14. See Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections* (shortened and revised version of a paper presented Nov. 4, 1998 at Rotterdam University), in *THE INTERNATIONAL CRIMINAL COURT* 41, 61 (Olympia Bekou & Robert Cryer eds., 2004) (acknowledging that member state cooperation is essential to an effective International Criminal Court); see also Silvia A. Fernández de Gurmendi & Håkan Friman, *The Rules of Procedure and Evidence of the International Criminal Court* (2001), in *THE INTERNATIONAL CRIMINAL COURT* 387, 426 (Olympia Bekou & Robert Cryer eds., 2004) (arguing that the ICC “will not have powers or resources to . . . enforce its orders directly” and thus the ICC must rely on the cooperation of its member states).

15. See Jeff Otiemo, *Sudan’s President Bashir Defies Arrest Warrant*, E. AFR. (Nairobi), Aug. 2010 (contending that the ICC needs its member states’ cooperation in order to execute its indictments); see also Xan Rice Nairobi, *Bashir Mars Landmark Day for Kenya*, GUARDIAN (London), Sept. 3, 2010, at 11 (pointing out that the ICC has no police force and cannot arrest President Al Bashir without member state cooperation).

16. See Otiemo, *supra* note 15 (arguing that member state cooperation is of the utmost importance in order for the ICC to be successful); see also Nairobi, *supra* note 15, at 11 (explaining that the ICC cannot arrest President Al Bashir without the cooperation of ICC member states).

that due to these vulnerabilities, the ICC must strengthen its enforcement mechanisms.

Part I introduces the Rome Statute and highlights the portions of the Rome Statute that leave the ICC vulnerable to member states that violate the Rome Statute without any clear punishment for the violation. In particular, Part I focuses on the expansive jurisdiction and the limited enforcement mechanisms that the Rome Statute bestows upon the ICC. Part II illustrates the ICC's vulnerability under the Rome Statute by using the example of the ICC's indictment of President Al Bashir and examining the existing tension between the ICC and the African Union ("AU"). Part III argues that the ICC must strengthen or expand its enforcement mechanisms in order to become a legitimate force in the international forum. It suggests three possible ways to reach this goal: suspension, expulsion, and implementation of United Nations ("UN") Security Council sanctions.

I. *THE ICC AND THE ROME STATUTE*

The ICC is a permanent international court that prosecutes individuals accused of committing serious crimes at an international level.¹⁷ The ICC was founded in 2002 upon the enactment of the Rome Statute.¹⁸ The Rome Statute exposes the ICC to vulnerabilities that cause its enforcement mechanisms to be largely ineffective in the event of a member state breach. Part I.A. details the ICC's purpose and structure. Parts I.A.1. and I.A.2. explains the crimes that are punishable under the Rome Statute and briefly discusses who may be prosecuted. Part I.A.3., then, explores the ICC's jurisdiction and the different ways in which the ICC can prosecute individuals. The possible repercussions facing a member state that breaches the Rome Statute are discussed in Part I.B.1. The enforcement mechanisms of other organizations and tribunals are identified in Part I.B.2. Next, in Part I.B.3., the circumstances that allow a member state to be immune or excused from cooperating with the Rome Statute are outlined. Part I.C. introduces the role of the ICC

17. *See infra* Part I.A. (discussing the history of the ICC and the crimes that the ICC has jurisdiction over).

18. *See infra* Part I.A. (explaining that the Rome Statute is the ICC's founding document and that the ICC is a permanent international court).

prosecutor and the option to defer a prosecution. Finally, Part I.D. presents the possibility and process of amending the Rome Statute.

A. Background

The Rome Statute, the ICC's founding document, entered into force on July 1, 2002.¹⁹ The creation of the ICC was inspired by the International Criminal Tribunals for Rwanda ("ICTR") and the International Criminal Tribunal for the former Yugoslavia ("ICTY"). These were temporary tribunals established in response to atrocities committed in those countries.²⁰ The ICC was founded because both the ICTR and ICTY "were established to try crimes committed only within a specific time-frame and during a specific conflict," and therefore, a permanent criminal court was needed.²¹ Currently 114 states are ICC members.²² Fifteen are Asian states; eighteen are Eastern European; twenty-five are Latin American and Caribbean states; twenty-five are Western European and other states; and thirty-one are from Africa, making Africa the region with the most member states.²³

19. Rome Statute of the International Criminal Court art 1, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (asserting that "an International Criminal Court . . . is hereby established" and "[t]he jurisdiction and functioning of the Court shall be governed by the provisions of this Statute").

20. See *About the Court*, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> (last visited June 1, 2011) (describing the history of the ICC); see also *About ICTR*, INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unict.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (last visited June 1, 2011) (noting that the International Criminal Tribunal for Rwanda was created to prosecute those "responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994"); see also *About the ICTY*, UN ICTY, <http://www.icty.org/sections/AbouttheICTY> (last visited June 1, 2011) (describing the International Criminal Tribunal for the former Yugoslavia ("ICTY") as a court "dealing with war crimes that took place during the conflicts in the Balkans in the 1990's").

21. See *About the Court*, INTERNATIONAL CRIMINAL COURT, *supra* note 20.

22. See *The States Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, <http://www.iccpi.int/Menus/ASP/states+parties/> (last visited June 1, 2011) (listing each of the 114 member states).

23. See *Africa (Sub-Saharan)*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.iccnw.org/?mod=region&idureg=1> (last visited June 1, 2011) (reporting that thirty-one African countries ratified the Rome Statute making it the ICC's "most represented region"); *The States Parties to the Rome Statute*, *supra* note 22 (listing each member state and breaking them down by region).

1. Punishable Crimes

The purposes of the ICC are to punish the most serious crimes committed at an international level and to bring individual perpetrators to justice.²⁴ The ICC has jurisdiction over four categories of crimes: 1) the crime of genocide; 2) crimes against humanity; 3) war crimes; and 4) the crime of aggression.²⁵ Under the Rome Statute, genocide is the commission of an act done with the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”²⁶

The Rome Statute defines crimes against humanity as any of a list of identified acts when “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”²⁷ Additionally, in one of the longest articles, it defines war crimes as crimes “committed as part of a plan or policy or as part of a large-scale commission of such crimes.”²⁸ The Rome Statute then identifies war crimes more specifically, such as “wilful [sic] killing” and “torture or inhuman treatment.”²⁹ The ICC has not yet exercised jurisdiction over the crime of aggression because the crime was not defined until May 2010 at the ICC Review Conference.³⁰ The ICC will not exercise

24. See Rome Statute, *supra* note 19, art. 1, (pointing out that the ICC has the ability to punish individuals that have “committed the most serious crimes of international concern”); see also Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, at 15 (Mar. 4, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf> (reporting that one of the Rome Statute’s main goals is to stop individuals from committing the most serious crimes that affect the international community).

25. See Rome Statute, *supra* note 19, art. 5 (listing the crimes over which the ICC has jurisdiction).

26. *Id.* art. 6. The Rome Statute specifies five acts that an individual engages in to bring about genocide:

“(a) [k]illing members of the group;(b) [c]ausing serious bodily or mental harm to members of the group; (c)[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d)[i]mposing measures intended to prevent births within the group; and (e) [f]orcibly transferring children of the group to another group.”

Id.

27. *Id.* art. 7, at 3–4.

28. *Id.* art. 8(1) at 5.

29. *Id.* art. 8(2)(a) (i–ii).

30. See *id.* art. 5, at 3 (listing the crimes that the ICC has jurisdiction over and stating that the ICC “shall exercise jurisdiction over the crime of aggression once a provision is adopted” and the crime is defined); see also Cassese, *supra* note 14, at 44 (noting that defining aggression is very difficult because it necessitates a decision

jurisdiction over the crime of aggression until 2017 when the member states will have an opportunity to expand the ICC's jurisdiction through an amendment to the Rome Statute.³¹

2. Individual Culpability

The ICC prosecutes individuals, not states, including government officials and heads of states.³² The Rome Statute, however, does not specify whether a charged individual's status as a head of state is irrelevant only when he is a head of a member state or if it applies to all indicted heads of state.³³ The ICC has jurisdiction over individuals who commit crimes directly or indirectly.³⁴ It is sufficient that the individual solicits or induces the commission of the crime or that the individual commits the crime through or with another person, even if that other person is not criminally responsible.³⁵

3. ICC's Jurisdiction

In order to exercise jurisdiction over an individual, the putative crime must be referred to the ICC in one of three ways: 1) the member state in which the crime occurs refers it to the ICC prosecutor; 2) the UN Security Council refers the crime to

whether preemptive self-defense is lawful under the Rome Statute and because any list of crimes of aggression is likely to be incomplete); *see also* COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.iccnw.org/?mod=aggression> (last visited June 1, 2011) (announcing that the ICC Review Conference of 2010 defined aggression).

31. *See* COALITION FOR THE INTERNATIONAL CRIMINAL COURT, *supra* note 30 (reporting that the ICC will not be able to exercise jurisdiction over the crime of aggression until January 1, 2017, when a decision is made by the member states to activate the jurisdiction and amend the Rome Statute).

32. *See* Rome Statute, *supra* note 19, art. 25, at 17–18 (asserting that the ICC has jurisdiction over “natural persons” and “[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment”); *see also* Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, in *THE INTERNATIONAL CRIMINAL COURT* 147, 153 (Olympia Bekou & Robert Cryer eds., 2004) (concluding that the ICC's jurisdictional focus is on individuals); *see also* Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, in *THE INTERNATIONAL CRIMINAL COURT* 225, 247 (Olympia Bekou & Robert Cryer eds., 2004) (observing that the ICC has jurisdiction over state officials).

33. Rome Statute, *supra* note 19, art. 27, at 18 (specifying that the Rome Statute applies “equally to all persons without any distinction based on official capacity”).

34. *Id.* art. 25 at 17–18 (setting forth individual criminal responsibility).

35. *Id.* (explaining individual responsibility when the individual did not explicitly commit the crime himself).

the ICC prosecutor; or 3) the ICC prosecutor himself initiates the investigation.³⁶ The ICC has jurisdiction over crimes that take place in a member state's territory or a crime that is committed by a national of a member state in any territory.³⁷ Thus, member states consent to the powers of the ICC.³⁸ Through this consent, the ICC virtually steps into the shoes of the national government and acquires its power.³⁹ The ICC cannot prosecute an individual, however, if the member state is already prosecuting said person.⁴⁰ The ICC will only prosecute when the member state is "unwilling" or "unable" to prosecute the individual itself.⁴¹ If the individual is from a non-member state, the non-member state may agree to the jurisdiction of the ICC and surrender that individual.⁴²

In special circumstances, the ICC can have jurisdiction over an individual who does not meet any of the above criteria, and those circumstances involve the relationship between the UN and

36. Rome Statute, *supra* note 19, art. 13, at 11 (listing the three instances in which the ICC may exercise its jurisdiction); see Cassese, *supra* note 14, at 58–59 (stating in detail the three-pronged test that regulates the prosecutor's jurisdiction).

37. Rome Statute, *supra* note 19, at 11 (explaining that the ICC may exercise jurisdiction over nationals of member states and non-nationals that commit crimes in member states); see Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits (2001)*, in *THE INTERNATIONAL CRIMINAL COURT* 225–26, 618–19 (Olympia Bekou & Robert Cryer eds., 2004) (stating the jurisdiction of the ICC).

38. See Hans-Peter Kaul & Claus Kreß, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises (1999)*, in *THE INTERNATIONAL CRIMINAL COURT* 191, 205 (Olympia Bekou & Robert Cryer eds., 2004) (arguing that cooperation of the ICC's member states "goes to the heart of an effective Court" because without cooperation, the ICC is left powerless); see also Cassese, *supra* note 14, at 61 (emphasizing that state cooperation is imminently important to the success of the ICC).

39. Rome Statute, *supra* note 19, at 11 (describing situations in which the ICC may exercise its jurisdiction); see Akande, *supra* note 37, at 225–26, 618–19 (explaining the jurisdiction of the ICC).

40. Rome Statute, *supra* note 19, art. 17, at 11 (declaring that the ICC may not investigate or prosecute a case that is "being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution." This concept is known as complementarity); see Akande, *supra* note 37, at 263–66, 671–74 (examining the process of complementarity in the Rome Statute).

41. See *supra* note 40 and accompanying text.

42. Rome Statute, *supra* note 19, at 11 (identifying situations in which the ICC may exercise its jurisdiction); see Akande, *supra* note 37, at 226, 619 (explaining the jurisdiction of the ICC).

the ICC.⁴³ The ICC is independent from the UN, but the two bodies cooperate.⁴⁴ More specifically, the UN and the ICC have a Relationship Agreement.⁴⁵ Additionally, the UN and the ICC “recognize each other’s mandates and status and agree to cooperate and consult with each other on matters of mutual interest.”⁴⁶ Under Chapter VII of the Charter of the United Nations (“UN Charter”), the UN makes determinations of threats to peace on an international level and recommends or decides what measures shall be taken concerning that threat.⁴⁷ In conjunction with the Rome Statute and the Relationship Agreement, the UN Security Council may refer a breach of international peace, in accordance with Chapter VII of the UN Charter, to the ICC.⁴⁸ The UN Security Council may refer a situation to the ICC even if it involves a national of a non-member state.⁴⁹

B. *Duty to Cooperate*

Member states are required to cooperate with the ICC in its investigations and prosecutions.⁵⁰ If a member state does not

43. Rome Statute, *supra* note 19, art. 13, at 11 (explaining that the prosecutor may investigate and exercise jurisdiction if the United Nations (“UN”) Security Council referred the situation to him); *see* Kaul & KreB, *supra* note 38, at 68, 162 (indicating that after much debate over many jurisdictional elements, the final decision was to have jurisdiction over situations referred by the UN Security Council).

44. Relationship Agreement between the United Nations and the International Criminal Court, Oct. 4, 2004, U.N. Doc. A/58/874, arts. 2, 3 [hereinafter Relationship Agreement] (recognizing that although the ICC is independent, the ICC and the UN cooperate).

45. Rome Statute, *supra* note 19, at 2 (initiating the relationship between the ICC and the UN).

46. *Questions and Answers on the International Criminal Court*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT 4 (2005), http://www.coalitionfortheicc.org/documents/FS_ICC_QA.pdf.

47. U.N. Charter art. 39 (asserting that the UN Security Council “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken”); Relationship Agreement, *supra* note 44, at art. 17(1) (establishing that the UN Security Council refers situations under Chapter VII of the UN Charter to the ICC).

48. U.N. Charter art. 39, *supra* note 47; Relationship Agreement, *supra* note 44, at art. 17(1) (describing how the UN Security Council refers situations to the ICC).

49. *See* Rome Statute, *supra* note 19, art. 13, at 11 (articulating that the UN Security Council may refer a situation to the ICC).

50. Rome Statute, *supra* note 19, art. 86–87, at 60 (asserting that member states must “cooperate fully with the Court in its investigation and prosecution of crimes

cooperate, however, the Rome Statute does not contain a specific repercussion for the offending member.⁵¹ Other organizations, on the other hand, do have specific repercussions listed in their founding documents.⁵² An added source of confusion, beyond the lack of repercussions for member states that do not cooperate, is the unclear nature of immunity or excusal from cooperation for the member states.⁵³

1. ICC Duty to Cooperate

The ICC may request the arrest and surrender of an individual to the ICC.⁵⁴ When the ICC decides to indict an individual, it may issue a request to a member state or states, specifying the manner in which the member state is expected to cooperate.⁵⁵ It will then coordinate with the member state in order to transport the individual from that state to the ICC, which is located in The Hague, Netherlands.⁵⁶ If an individual is convicted, then the Trial Chamber sentences him.⁵⁷ The Trial Chamber can imprison a convicted criminal for up to thirty years in jail or, when justified by the gravity of the crime, a life sentence.⁵⁸

within the jurisdiction of the Court” and that the ICC may make specific requests to the member states asking for cooperation).

51. *See infra* Part B.1. (highlighting that the Rome Statute is almost completely silent in regards to the repercussions of a member state that refuses to comply with the Rome Statute).

52. *See infra* Part B.2. (using examples to describe organizations that do have specific repercussions for member states that do not cooperate with the founding document).

53. *See infra* Part B.3. (explaining the confusing nature of the immunity or excusal from cooperation clause of the Rome Statute).

54. *See id.* (explaining the process for arrest and surrender of an individual to the ICC).

55. *See* Rome Statute, *supra* note 19, art. 89(1), at 61 (indicating that the ICC may request a member state to arrest and surrender an individual that enters its territory).

56. *See id.* art. 89(3), at 61 (describing the logistics of transporting an individual from a state to the ICC).

57. *See id.* art. 76(1), at 53 (setting out the process of sentencing a convicted individual). The Trial Chamber is a division of the ICC that is assigned to the Trial Division of the ICC (as opposed to the Appeals Division or the Pre-Trial Division) and is composed of “not less than six judges” who are assigned “based on the nature of the functions to be performed . . .” *Id.* art. 39(1), at 26.

58. *See id.* art. 77(1), at 54 (specifying the choices the ICC has when sentencing a convicted individual); *see* Marlise Simons, *For International Criminal Court, Frustration and Missteps in Its First Trial*, N.Y. TIMES, Nov. 22, 2010, at A12 (citing that the ICC “has all the trappings of a weighty institution: 18 judges, a large corps of prosecutors, a

If a member state fails to cooperate, however, the Rome Statute is largely silent on the repercussions: when a member state does not cooperate with a request from the ICC, the ICC can “refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.”⁵⁹ The Relationship Agreement reiterates this concept.⁶⁰ It explains that when the UN Security Council originally referred a matter to the ICC, the ICC shall refer the member state’s failure to cooperate with the ICC, back to the UN Security Council.⁶¹

2. A Comparative Approach: Duty to Cooperate under Other Organizations and Tribunals

While the Rome Statute is largely silent concerning repercussions for violations, other international organizations have more definite options regarding violations.⁶² The Organization of American States (“OAS”) was established to achieve among its members “an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence.”⁶³ On June 28, 2009, a military-backed coup removed the President of Honduras, Manuel Zelaya, from office.⁶⁴ The OAS suspended Honduras’ membership for

multimillion-dollar budget and its own prison cells” for prisoners detained during trial). Additionally, the Trial Chamber may order the convicted criminal to pay a fine or forfeit proceeds, property, or assets if those gains were acquired through the crime. *See* Rome Statute, *supra* note 19, art. 77(2), at 54 (elucidating the circumstances under which the Trial Chamber can impose fines upon an individual).

59. *Id.* art. 87(7), at 61; *see* Kaul & Kreß, *supra* note 38, at 217 (arguing that although the Rome Statute gives the ICC the ability to refer to the UN Security Council, there is no “explicit solution” described in the Rome Statute).

60. *See* Relationship Agreement, *supra* note 44, art. 17(3), at 201 (mentioning that the ICC shall refer a breach to the UN Security Council when that situation was originally referred to the ICC by the UN Security Council).

61. *See id.* (describing the process the ICC goes through to refer a breach of the Rome Statute to the UN Security Council).

62. *See infra* notes 66, 70 (pointing out organizations that use specific means to force their member states to cooperate).

63. Charter of the Organization of American States (A-41) art. 1, Apr. 30, 1948, 119 U.N.T.S. 3 [hereinafter OAS Charter].

64. *See* Hannah Strange, *Honduras President Manuel Zelaya Ousted in Military Coup*, *TIMES* (London), June 29, 2009, <http://www.timesonline.co.uk/tol/news/world/usandamericas/article6596689.ece>.

interrupting the democratic order,⁶⁵ which is a violation of the Charter of the Organization of American States (“OAS Charter”).⁶⁶ In order to be suspended, two-thirds of the members must vote affirmatively.⁶⁷ While on suspension, Honduras still has a duty to uphold the OAS Charter.⁶⁸ The suspension may be lifted “by a decision adopted with the approval of two-thirds of the Member States.”⁶⁹

This process is comparable to the UN Charter which allows for “expulsion for persistent violations of the principles of the Charter,” even though no member state has been expelled since its inception in 1945.⁷⁰ The UN allows for suspension first “upon the recommendation” of the UN Security Council and if the principles in the Charter are continuously violated, the UN has the ability to expel a member.⁷¹ In order to expel a member state there must be a two-thirds majority vote and if any UN Security Council member vetoes the expulsion, the member state cannot be expelled.⁷²

65. See OAS Charter, *supra* note 63, art. 2 (asserting that member states will “promote and consolidate representative democracy”); see also Press Release, Org. of Am. States, OAS Suspends Membership of Hond., E-219/09, (July 5, 2009) [hereinafter OAS Suspends Honduras] (describing the coup in Honduras and explaining that the country is in violation of its duty to maintain a democratic country).

66. See OAS Charter, *supra* note 63, art. 2; see also OAS Suspends Honduras, *supra* note 65 (explaining that Honduras was suspended for failing to maintain a democracy and for ousting a democratic government).

67. See OAS Charter, *supra* note 63, art. 9 (describing the process of the decision to suspend a member state and asserting that two-thirds of the member states must vote affirmatively in order for a member state to be suspended).

68. See *id.* (stating that the suspended member state “shall continue to fulfill its obligations to the Organization”).

69. *Id.*

70. See BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS 549–51 (Phillippe Sands & Pierre Klein eds., 5th ed. 2001) (explaining that a UN member state may be expelled and implying that it has not yet happened).

71. UN Charter, *supra* note 47, arts. 5, 6.

72. See *id.* art. 18 (the decision to expel is an important decision and it thus requires a two-thirds majority vote); see also JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 109 (2d ed. 2002) (setting out the UN’s ability to decide to expel a member state and explaining just how difficult it is to actually expel a member state because once the member state is expelled, the UN no longer has control over that state).

3. Immunity or Excusal from Cooperating under the Rome Statute

While the ICC member states are required to cooperate with the ICC in its investigations and prosecutions, under Article 98 of the Rome Statute, there are circumstances in which ICC member states are either immune or excused from cooperation.⁷³ Under Article 98(1), member states are not permitted to cooperate with the ICC if the member state has an international obligation or contract that conflicts with its duties under the Rome Statute in regards to the “State or diplomatic immunity of a person or property of a third State.”⁷⁴ If the immunity is waived, however, the ICC may continue its prosecution.⁷⁵ Under international law, immunity *ratione personae* excuses officials of acts they commit and it applies to very few individuals, including heads of state, and lasts as long as the official is in office.⁷⁶ Another argument is that *ratione personae* does not apply to core crimes such as those covered under the Rome Statute.⁷⁷

Under Article 98(2), the member state also does not have to cooperate if it has a binding international agreement with another state and cooperation would cause the member state to breach that agreement.⁷⁸ Article 98(2) was generally adopted so that member states that had status-of-forces agreements (“SOFAs”) would sign the Rome Statute and would not be in breach of their duty to cooperate with the ICC.⁷⁹ SOFAs are

73. Rome Statute, *supra* note 19, art. 98 (defining cooperation “with respect to waiver of immunity and consent to surrender”).

74. *Id.* art. 98(1) (explaining cooperation with respect to waiver of immunity and consent to surrender).

75. *See id.*

76. *See* Steffen Wirth, *Immunities, Related Problems, and Article 98 of the Rome Statute* (2001), in *THE INTERNATIONAL CRIMINAL COURT* 329, 332 (Olympia Bekou & Robert Cryer eds., 2004) (describing the absolute immunity heads of states enjoy while in office); *see also* Akande, *supra* note 32, at 248–49 (clarifying *ratione personae*).

77. *See* Wirth, *supra* note 76, at 333 (pointing out that, in the past, core crimes, such as those in the ICC, were found to be not covered under the *ratione personae* immunity).

78. *See* Rome Statute, *supra* note 19, art. 98(2) (explaining that a member state may not be requested to “act inconsistently with its obligations under international law”).

79. *See* Akande, *supra* note 32, at 251 (clarifying that Article 98(2) was not adopted to allow member states to shirk their responsibilities under the Rome Statute).

agreements establishing rights and privileges of foreign military personnel present in a host country.⁸⁰

C. *The Role of the Prosecutor*

The ICC is composed of the 1) Presidency, 2) Judges (the Pre-Trial Division, the Trial Division, and the Appeals Division), 3) Office of the Prosecutor, and 4) Registry.⁸¹ The Office of the Prosecutor is separate from the other three organs of the ICC, and is headed by the prosecutor.⁸² The prosecutor is elected by an “absolute majority” of the Assembly of States Parties, comprised of one representative from each member state, through a secret ballot.⁸³ The prosecutor’s main function is to conduct investigations and prosecutions.⁸⁴ On a request from the prosecutor, the Pre-Trial Chamber may issue an arrest warrant or a summons to appear upon an individual if there is reason to believe that he committed the crime.⁸⁵ The prosecutor may, at a later time, request to amend the arrest warrant.⁸⁶ The prosecutor is independent from the ICC and does not need authorization from the Assembly of States Parties before initiating an investigation.⁸⁷ There is some concern that the prosecutor has

80. See *Military, Status-of-Forces Agreement [SOFA]*, GLOBAL SECURITY <http://www.globalsecurity.org/military/facility/sofa.htm> (last visited June 1, 2011) (presenting the function and purpose of Status-of-Forces Agreements).

81. Rome Statute, *supra* note 19, art. 34, (listing the four organs of the ICC).

82. See *id.* art. 42(1) (“The Office of the Prosecutor shall act independently as a separate organ of the Court”); see also Cassese, *supra* note 14, at 58 (discussing the contentious struggle that decided whether the prosecutor should have the ability to be independent).

83. See Rome Statute, *supra* note 19, art. 42(4) (“The [p]rosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties.”); *id.* art. 112(1) (defining the Assembly of States Parties, the makeup of the Assembly, and its role).

84. See *id.* art. 42(1), at 27 (asserting that the prosecutor “is “responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court”).

85. *Id.* art. 58(1) (discussing that “the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied” that the individual committed the crime and his arrest is necessary).

86. *Id.* art. 58(6) (“The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein.”).

87. See John R. Bolton, *The Risks and the Weaknesses of the International Criminal Court from America’s Perspective*, in *THE INTERNATIONAL CRIMINAL COURT* 459, 461–62 (Olympia Bekou & Robert Cryer eds., 2004) (explaining the United States’ reluctance to sign the

too much power and that, depending on who becomes the prosecutor, unsupervised power could prove dangerous.⁸⁸

The Rome Statute includes an option to defer the prosecution for twelve months, which begins once the request to defer is made.⁸⁹ In order to defer, the UN Security Council must issue a request to the ICC.⁹⁰ Once the UN Security Council has requested the deferral, the ICC must comply.⁹¹ The deferral may be continuously renewed every twelve months through requests from the UN Security Council.⁹²

D. *Amending the Rome Statute.*

The Rome Statute may be amended. In order to amend the Rome Statute, the amendment must be proposed by either a member state, the judges acting by an absolute majority, or the prosecutor.⁹³ The amendments are adopted by a two-thirds majority vote of the Assembly of States Parties.⁹⁴ The Assembly of States Parties will vote on the proposal at the next meeting as long as it occurs at least three months after the amendment was

Rome Statute because the prosecutor has no political accountability); *see also* William A. Schabas, *International Criminal Court: The Secret of its Success*, in *THE LIBRARY OF ESSAYS IN INTERNATIONAL LAW: THE INTERNATIONAL CRIMINAL COURT* 69, 79 (Olympia Bekou & Robert Cryer eds., 2004) (arguing that the prosecutor has to be politically savvy in determining which cases to bring before the ICC).

88. *See* Schabas, *supra* note 87, at 79–80 (examining the political nature of the ICC prosecutor's position).

89. *See* Rome Statute, *supra* note 19, art. 16 (providing for a twelve-month deferral upon request from the UN Security Council).

90. *See id.*

91. *See* Relationship Agreement, *supra* note 44, art. 17(2) (setting forth the deferral process and explaining that the ICC must comply with the deferral once it is requested).

92. *See* Rome Statute, *supra* note 19, art. 16 (noting that, if the Security Council defers an investigation, the prosecutor may not investigate or prosecute for twelve months); *see also* Akande, *supra* note 32, at 253–54 (describing the process of deferral and arguing that the existence of this process could persuade states to seek authorization from the UN Security Council before commencing military action).

93. *See* Rome Statute, *supra* note 19, art. 121(1) (granting member states the ability to propose amendments).

94. *See id.*, art. 121(3) (“The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.”).

proposed.⁹⁵ The Assembly of States Parties meets once a year and, when necessary, it also holds special sessions.⁹⁶

In summary, the Rome Statute creates a jurisdiction that allows the ICC to indict any person that is referred to the prosecutor by the UN Security Council. It is, however, only capable of arresting individuals through the help of the ICC member states. Therefore, in order to arrest an indicted individual who is not a national of a member state, the indicted person must travel to a member state.

The member state then has an obligation to arrest him under the Rome Statute. If the member state fails to comply with the Rome Statute, the recourse for the ICC is unclear. The ICC may refer the matter to the UN Security Council. Beyond that option, however, the Rome Statute is silent on the matter.

The Rome Statute has two further problematic provisions. The first is that it specifies that a head of state is not immune from prosecution but it does not specify whether this applies only to nationals of member states or if it applies to all indicted individuals, such as heads of states who are not members. Additionally, although the Rome Statute specifies that heads of states do not have immunity, it also states that there is diplomatic immunity, which could be read as meaning heads of state.

The second is the possibility to have immunity or an excusal from cooperation because of an existing agreement with a third party. The Rome Statute, however, does not at all specify what type of agreement justifies a breach. Therefore, it is not clear under what circumstances a member state has breached the Rome Statute and under what circumstances the member state is excused or the individual is immune. Additionally, while there is a process to amend confusing provisions such as those mentioned above, it has only happened once in the history of the ICC.

95. *See id.* art. 121(2), at 79 (“No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal.”).

96. *See id.* art. 112(6) (specifying the Assembly of States Parties’ frequency of meetings).

II. AN EXAMPLE: THE ICC'S INDICTMENT OF PRESIDENT OMAR AL BASHIR

The weaknesses that exist in the Rome Statute, presented in Part I, are exemplified in the case study of the ICC's indictment of President Al Bashir. Part II.A. explains the process of the indictment. Part II.B. then describes the history of Sudan and the conflict in Darfur that led to President Al-Bashir's indictment. Part II.C. discusses government and multinational organizational responses to President Al Bashir's indictment. Part II.D., in comparison, explores the AU's concern over the indictment and the refusal of Chad and Kenya to arrest him.

A. *Indictment of President Al Bashir*

On March 31, 2005, the UN Security Council referred the situation regarding Sudan, a non-member state of the ICC, to the ICC Prosecutor, Luis Moreno-Ocampo, pursuant to Article 13(b) of the Rome Statute.⁹⁷ On June 1, 2005, the prosecutor elected to investigate the situation in accordance with Article 53 of the Rome Statute.⁹⁸ After investigating, Moreno-Ocampo requested arrest warrants for six individuals involved in the Darfur situation, including President Al Bashir.⁹⁹ Out of the six, five individuals were indicted.¹⁰⁰ Two of the five appeared at The Hague voluntarily, the other three remain at large.¹⁰¹

On July 14, 2008, Moreno-Ocampo requested an arrest warrant for President Al Bashir for genocide, crimes against humanity, and war crimes against members of the Fur, Masalit, and Zaghawa groups from 2003 to 2008.¹⁰² President Al Bashir

97. *See* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 1 (March 4, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf> (reporting that on March 31, 2005, the UN Security Council referred the matter in Darfur to the Prosecutor of the ICC).

98. *See id.* ¶ 3 (stating that the prosecutor informed the Chamber that it intended to initiate an investigation into the Darfur situation).

99. *See* Situation in Darfur, Sudan, INTERNATIONAL CRIMINAL COURT, <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205> (last visited June 1, 2011) (listing the individuals that were indicted in relation to Darfur, Sudan).

100. *See id.* (reporting that warrants of arrest were issued to all six of the men).

101. *See id.* (indicating the status of each of the indicted men).

102. *See* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al

was indicted on March 4, 2009 as an indirect perpetrator.¹⁰³ The ICC found that there was enough evidence that President Al Bashir used the Sudanese military as well as Sudan's Government to carry out criminal activity.¹⁰⁴ He was indicted for committing five counts of crimes against humanity¹⁰⁵ and two counts of war crimes;¹⁰⁶ however, the ICC did not find that enough evidence existed to indict him for genocide.¹⁰⁷ Notably, this was the first time that the ICC issued an arrest warrant for a sitting head of state.¹⁰⁸

On March 5, 2009, the ICC requested that Sudan arrest and surrender President Al Bashir.¹⁰⁹ The next day, pursuant to Article 89(1) of the Rome Statute, the ICC requested that member states arrest and surrender President Al Bashir if presented with the opportunity to do so.¹¹⁰

Bashir, ¶ 4 (March 4, 2009) (noting that Moreno-Ocampo filed this request under Article 58 of the Rome Statute).

103. *See id.* at ¶¶ 92–93 (announcing the ICC's decision to indict President Al Bashir).

104. *See id.* at ¶¶ 55–109 (examining the history leading up to President Al Bashir's indictment).

105. *Id.* at 92. Specifically, President Al Bashir was indicted for 1) murder, 2) extermination, 3) forcible transfer, 4) torture and 5) rape under Article 7, which defines crimes against humanity. *Id.*

106. *See id.* President Al Bashir was indicted under Article 8 for 1) intentionally directing attacks against the civilian population or against individual civilians not taking direct part in hostilities, and 2) pillaging. *Id.* (stating the crimes that the ICC found that enough evidence existed to indict President Al Bashir).

107. *See id.* at ¶¶ 206–07 (holding that there is not enough evidence to indict President Al Bashir for genocide, but the prosecutor may amend the request pursuant to Article 58(6) of the Rome Statute if he finds more evidence).

108. *See* Press Release, 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, *available at* <http://www.haguejusticeportal.net/Docs/ICC/Bashir%20Warrant%20Summary.pdf> (pointing out that this is the first time the ICC has indicted a sitting head of state).

109. *See* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Request to the Republic of the Sudan for the Arrest and Surrender of Omar Al Bashir, at 4 (Mar. 5, 2009), <http://212.159.242.180/iccdocs/doc/doc639772.pdf> (requesting that Sudan, in accordance with its duties as a member of the UN, surrender President Al Bashir pursuant to UN Security Council resolution 1593).

110. *See* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir, at 3–4 (Mar. 6, 2009), *available at* <http://212.159.242.180/iccdocs/doc/doc642283.pdf> (asking that all member states participate in the arrest and prosecution of President Al Bashir).

B. *Background on President Al Bashir's Indictment: the Conflict in Darfur*

President Al Bashir came to power in Sudan in 1989 after leading a military coup that overthrew the former Sudanese Government.¹¹¹ In early 2003, a conflict emerged in the Darfur region when the Sudanese Liberation Movement/Army (“SLM/A”) and the Justice and Equality Movement (“JEM”) attacked the El Fasher airport as an act against the Sudanese Government.¹¹² In response, the Sudan People’s Armed Forces and their militia the Janjaweed Militia, the Sudanese Police Forces, the National Intelligence and Security Service, and the Humanitarian Aid Commission led a counter-insurgency against the SLM/A, the JEM, and other armed groups opposing the Government of Sudan, President Al Bashir’s Government.¹¹³ The groups opposed to President Al Bashir were mostly composed of individuals from the Fur, Masalit, and Zaghawa tribes.¹¹⁴

Although the conflict formally began in 2003, the problems started much earlier. Darfur was once independent but became a part of what was then British Sudan in 1917.¹¹⁵ The integration led “to the economic and political marginalisation of

111. See Howard LaFranchi, *New Violence in Sudan, Darfur One Year after the Indictment of Bashir*, CHRISTIAN SCI. MONITOR, Mar. 4, 2010 (stating that President Al Bashir came to power through a 1989 coup where he overthrew Sadiq Al Mahdi); see also *The Darfur Dilemma*, CANBERRA TIMES (Canberra, Austl.), June 8, 2009 (asserting that President Al Bashir was a former army general who seized power in a 1989 coup).

112. See Summary on the Prosecutor’s Application for a Warrant of Arrest, *supra* note 6 (explaining that the Justice and Equality Movement (“JEM”) and the Sudanese Liberation Movement/Army (“SLM/A”) started to resort to violence in 2002 and then in April 2003 attacked the El Fasher airport); see also African Union, Peace and Security Council 207th Meeting at the Level of the Heads of State and Government, *Report of the African Union High-Level Panel on Darfur (AUPD)*, ¶ 93 (Oct. 29, 2009) [hereinafter AU Peace and Security Council] (describing the rebel attack on El Fasher airport).

113. AU Peace and Security Council, *supra* note 112, at 21 (Oct. 29, 2009) (explicating the counter-insurgency by Al Bashir’s Government against the rebel groups); see also *id.* at xiv (describing the counter-insurgency by the Sudanese military and militia groups).

114. See Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 56 (March 4, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf> (noting that the Sudanese Government’s forces attacked towns and villages inhabited by the Fur, Masalit, and Zaghawa groups).

115. See AU Peace and Security Council, *supra* note 112, ¶ 47 (Oct. 29, 2009) (asserting that Darfur was the “last independent territory in Africa to be annexed by the British, on 1 January 1917”).

Darfurians.”¹¹⁶ The airport attack was a response to historic marginalization that has been continued by current and recent governments.¹¹⁷ For example, in 1980, the government appointed a non-Darfurian to be the governor of Darfur, causing the Darfurians to fear that their interests would not be represented.¹¹⁸ Then, in 1994, President Al Bashir divided Darfur into three states, rendering the Fur tribe minorities in each territory.¹¹⁹ In 1995, the governor of Darfur enacted a reform that shifted the power of the electoral college in West Darfur so the majority were non-Masalits.¹²⁰ Significantly, this change gave the Masalits’ majority position to non-Masalits, which made it possible for a non-Masalit to become the Sultan of Dar-Masalit and for other tribes to exert more power over the Masalit tribe’s land.¹²¹

Once the war started, the military, backed by President Al Bashir’s Government, burned hundreds of villages and displaced over one million people.¹²² The UN estimates the death toll to be about 300,000 individuals.¹²³ Some sources report that a minimum of 35,000 civilians were killed between 2003 and 2004

116. *See id.* ¶ 55.

117. *See id.* ¶¶ 49–54 (establishing the historical marginalization that the rebel groups felt and their frustration which led to the attacks).

118. *See id.* ¶ 19 (describing the protest that followed the appointment of an outsider to office).

119. *See* Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 166 (March 4, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf> (setting forth that President Al Bashir issued a decree in 1994 that split up the three states, making the Fur a minority in each state). The Fur is an ethnic group in the Darfur region of western Sudan, indeed “Darfur” means “the domain of the fur.” *See* AU Peace and Security Council, *supra* note 112, ¶¶ 42–43 (Oct. 29, 2009).

120. *See* Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 166 (Mar. 4, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf> (setting out that President Al Bashir issued a decree in 1994 that split up the three states, making the Fur a minority in each state).

121. *See id.* (outlining the actions of Governor Muhammad Ahmad Al Fadul that led to a conflict and years of fighting before the attack on El Fasher airport); *see also* AU Peace and Security Council, *supra* note 112, at 20 (Oct. 29, 2009) (describing the conflict in 1995 and reporting the backlash of the change in the electoral college).

122. *See* AU Peace and Security Council, *supra* note 112, ¶ 94 (describing the conflict between President Al Bashir’s Government and the rebels).

123. *See id.* ¶ 95 (reporting estimates of the displacements’ death toll in Darfur).

alone.¹²⁴ There was a ceasefire in April 2004 but violence broke out again between June 2004 and January 2005.¹²⁵ Since then, the violence has subsided, although the problems are still present.¹²⁶

C. Response to Al Bashir's Indictment

From January 9 to January 15, 2011, there was a referendum in Sudan to determine whether Southern Sudan, which does not include Darfur, will secede from the rest of the country.¹²⁷ The results were released on February 7, 2011, with almost ninety-nine percent voting for independence.¹²⁸ On July 9, 2011, Southern Sudan became an independent country.¹²⁹

Despite the independence and referendum's ultimate success, there was anticipation and fear that a civil war would break out.¹³⁰ There is now concern regarding the resulting government's ability to effectively rule, and there remains some concern that North Sudan will provoke fighting.¹³¹

Given the precarious nature of peace in Sudan, President Al Bashir's indictment was met with some criticism internationally

124. See *id.* (establishing that the majority of civilian deaths were committed by President Al Bashir's Government).

125. See *id.* ¶ 96 (observing that there was a brief cease fire in Darfur but the violence resumed shortly thereafter).

126. See *id.* ¶ 9 ("Because of the breakdown of law and order, characterised by banditry, and fueled by the free flow of weapons within the community, weak formal policing, and the ineffectiveness of local governance structures, the problems still persist.").

127. See Alex Thurston, *Some Optimism about Sudan Referendum after Months of Doubts*, CHRISTIAN SCI. MONITOR, Jan. 4, 2011, <http://www.csmonitor.com/World/Africa/Africa-Monitor/2011/0104/Some-optimism-about-Sudan-referendum-after-months-of-doubts> (describing the concern regarding the upcoming referendum); see also Ali Shuaib & Christian Lowe, *EU and Africa Urge Peaceful Sudan Referendum*, REUTERS (Nov. 30, 2010), <http://www.reuters.com/article/2010/11/30/us-cu-africa-summit-draft-idUSTRE6AT3EI20101130> (discussing the upcoming referendum).

128. See Josh Kron, *Sudan Leader to Accept Secession of South*, N.Y. TIMES, Feb. 7, 2011, at A7 ("98.83 percent of the more than 3.8 million registered voters in southern Sudan chose to separate from the north.").

129. See *Juba Accuses Khartoum of Blocking Trade Routes*, AFP (stating that South Sudan became a new country on July 9, 2011).

130. See Thurston, *supra* note 127 (expressing the relief of officials that the likelihood of another civil war is diminishing); see also Shuaib & Lowe, *supra* note 127 (explaining that the referendum could result in conflict).

131. See Thurston, *supra* note 127 (describing concern with the outcome of the referendum).

by the AU, China, and others.¹³² One reason for the criticism is that there was fear the indictment would cause the government to be less likely to cooperate with peace agreements.¹³³ Although the referendum and independence succeeded, there was extreme concern that the arrest warrant would hinder the progress.¹³⁴ A second concern over the indictment is that the ICC indicted a head of state, which interferes with Sudan's national sovereignty.¹³⁵ Under this argument, President Al Bashir should be immune under Article 98(1) of the Rome Statute.¹³⁶ The indictment has been called an attack by the west against Africa, as the ICC has investigated situations in Africa only.¹³⁷ For example, AU Chairman Jean Ping said “[it] seems Africa has become a laboratory to test the new international law.”¹³⁸ As discussed in Part I, however, there are also individuals that believe that immunity for a head of state does not apply to core crimes.¹³⁹

The AU also had reservations over the ICC's capability to handle a situation like Darfur because the ICC cannot conduct a wide enough prosecution in order to truly bring justice to the region.¹⁴⁰ The ICC is slow, generally prosecutes each individual

132. See Rumbidzai Maweni, *Sudan's President Omar Hassan al-Bashir Indicted by the ICC; What's Next*, CITIZENS FOR GLOBAL SOLUTIONS (Jan. 4, 2011), http://archive2.globalsolutions.org/issues/sudans_president_omar_hassan_al_bashir_indicted_icc_what_s_next (recognizing that various groups and countries such as the AU, the International Crisis Group, and the United States expressed concern regarding the indictment).

133. See *id.* (reiterating one concern that President Al Bashir's Government will be less likely to negotiate and participate in peace processes).

134. See *id.* (contending that even though there was a lot of skepticism, the referendum appears to be going forward).

135. See *id.* (noting that President Al Bashir's sympathizers have called the indictment “an affront to African sovereignty”).

136. See *id.* (examining the more widespread argument for why there is criticism of the ICC's indictment of President Al Bashir, which is that it is a breach of Sudan's sovereignty); see also Rome Statute, *supra* note 19, art. 98(1) (describing that the ICC may not request that a state violates diplomatic immunity of an individual).

137. See *Vow to Pursue Sudan over 'Crimes'*, BBC NEWS (Sept. 27, 2008), <http://news.bbc.co.uk/2/hi/africa/7639046.stm>. (stating that AU Chairman Jean Ping said that it is “unfair that all those indicted by the ICC so far” are African).

138. *Id.*

139. See *supra* note 77 and accompanying text (contending that immunity for heads of state only applies when the core crimes are not at issue).

140. See AU Peace and Security Council, *supra* note 12, ¶¶ 244–45 (arguing that the ICC does not have the capability of using a widespread approach to arrests and pointing out that it is only able to arrest one individual at a time).

separately, and is concerned with international implications.¹⁴¹ Therefore, the ICC will not prosecute every responsible individual and may prosecute some that should not be prosecuted.¹⁴² Thus, many of those criminally responsible will go unpunished.¹⁴³ Instead, the AU suggests that the proper remedy is to strengthen Sudan's legal system internally.¹⁴⁴ It recommends that Sudan "draw upon an established and diverse legal heritage, encompassing common law, customary and Islamic laws" to bring the region the justice, peace, and healing that it needs.¹⁴⁵

Thus, on July 21, 2008, the AU Peace and Security Council requested that the UN Security Council defer the prosecution against President Al Bashir for twelve months pursuant to Article 16 of the Rome Statute.¹⁴⁶ The Security Council was not responsive to the request, as Moreno-Ocampo proceeded with the prosecution.¹⁴⁷

Disheartened and concerned over the lack of action from the Security Council, the AU issued a decision to all of its member states regarding the indictment of President Al Bashir in July 2009.¹⁴⁸ The AU decision expressed regrets that the request for deferral was ignored and asked the UN Security Council to reconsider its decision.¹⁴⁹ The AU thus decided that, pursuant to

141. *See id.* (emphasizing the AU's concerns about the ICC's ability to prosecute crimes, such as those that occurred in Darfur).

142. *See id.* (discussing the ICC's limitations).

143. *See id.* (stating that many crimes will go unpunished because of the ICC's limitations).

144. *See id.* ¶ 18 (claiming that it would be more advantageous for Sudan and the Sudanese people if the Sudanese Government prosecutes the crimes itself).

145. *Id.*

146. *See id.* ¶ 62 (reporting that the AU requested that the UN defer the prosecution of President Al Bashir pursuant to the Rome Statute); *ICC Urges States to Assist in Arresting Suspects Including Sudanese Leader*, BBC MONITORING: MIDDLE EAST, Oct. 30, 2010 (stating that the AU requested that the UN Security Council delay President Al Bashir's prosecution for one year).

147. *See* AU Peace and Security Council, *supra* note 112, ¶ 242 (reporting that the AU attempted to ask the UN to defer the prosecution according to the Rome Statute, but the Council did not reply "positively").

148. *See* Assembly of the Africa Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII) ¶ 8 (July 8, 2009) (discussing the AU's concern that the ICC has not deferred the indictment against President Al Bashir).

149. *See id.* ¶ 10 (explaining that the AU regrets that the UN Security Council has not deferred the proceedings against President Al Bashir and reiterates its request for deferral to the UN Security Council).

Article 98 of the Rome Statute, AU member states would not cooperate with the arrest and surrender of President Al Bashir.¹⁵⁰

D. *Conflict between the ICC and the AU*

Despite the AU's decision and interpretation of Article 98 of the Rome Statute, the ICC issued a second warrant for President Al Bashir's arrest on July 12, 2010.¹⁵¹ The second indictment was for three counts of genocide.¹⁵² Between the two warrants, he is accused of five counts of crimes against humanity, two counts of war crimes, and three counts of genocide for a total ten counts against him.¹⁵³ On July 21, 2010, the ICC issued supplementary requests to Sudan and to members of the ICC to arrest and surrender President Al Bashir.¹⁵⁴

On July 16, 2010, the AU issued a statement in response to the ICC's indictment of President Al Bashir for genocide.¹⁵⁵ The

150. *See id.* ¶ 8 (indicating that because the ICC has failed to act on the AU's request, AU member states are not to participate in the arrest and surrender of the President of Sudan).

151. *See* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (July 12, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf> (dating the indictment July 12, 2010).

152. *See id.*, at 8 (reporting that President Al Bashir was indicted under Article 6 for genocide by 1) killing, 2) causing serious bodily or mental harm, and 3) deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction).

153. *See id.*; *supra* notes 102–03 and accompanying text (mentioning that President Al Bashir's first indictment was for genocide, crimes against humanity, and war crimes against members of the Fur, Masalit, and Zaghawa groups).

154. *See* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Supplementary Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 4 (July 21, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc910850.pdf> (reiterating the duty of the member states to cooperate with the warrant to arrest President Al Bashir); *see also* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Supplementary Request for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir to States that were United Nations Security Council Members on 4 March 2009 and Are Not States Parties to the Rome Statute, at 4–5 (July 21, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc911440.pdf> (requesting that states cooperate in the surrender and arrest of Al Bashir pursuant to the Rules); *see also* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Supplementary Request to the Republic of the Sudan for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, at 4–6 (July 21, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc911445.pdf> (requesting that Sudan arrest and surrender President Al Bashir in accordance with the rules of the UN).

155. *See* Press Release, African Union, The Chairperson of the Commission Expresses Deep Concern about the New Decision of the ICC Pre-Trial Chamber I on Sudan and Its Impact on the Ongoing Peace Processes in Sudan, (July 16, 2010), available at <http://reliefweb.int/node/362006>.

AU expressed that the new indictment was issued at a particularly vulnerable time for Sudan because Sudan is transitioning to become more peaceful and democratic and the new warrant could disrupt that peace.¹⁵⁶ The AU worried that the new indictment would act to disrupt the stability in Sudan and Africa, generally.¹⁵⁷ The AU again asked the UN Security Council to defer the prosecution.¹⁵⁸

E. *Chad and Kenya's Response to President Al Bashir's Indictment*

The ICC issued the second indictment directly before President Al Bashir's visit to Chad, but Chad did not rescind its invitation to the Sudanese President and he arrived on July 21, 2010.¹⁵⁹ The relationship between Chad and Sudan soured during the Darfurian conflict.¹⁶⁰ Therefore, when President Al Bashir traveled to Chad on July 21, 2010, the AU was pleased with the developments.¹⁶¹ The ICC, the European Union, Human Rights Watch, and Amnesty International, however, were concerned with the events and called on Chad to arrest President Al Bashir, but Chad refused.¹⁶²

156. *See id.* (explaining that Sudan is beginning its democratic transformation and steps towards peace, reconciliation, and the new warrant is counterproductive to these positive changes).

157. *See id.* (indicating that if Sudan becomes instable it will have far reaching consequences across all of Africa).

158. *See id.* (urging the UN Security Council "to assume its responsibilities and act on the call for the deferral of the process initiated" against President Al Bashir).

159. *See* Prosecutor v. Omar Al Bashir, Case No. ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, (July 12, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf> (indicting President Al Bashir for genocide on July 12, 2010); *see also* Hamilton, *supra* note 1 and accompanying text (reporting that President Al Bashir arrived in Chad on July 21, 2010).

160. *See* AU Peace and Security Council, *supra* note 112, ¶ 193 (explicating that the two countries "accuse[d] each other of supporting and harbouring rebels hostile to the other").

161. *See* Press Release, African Union, On the Decision of the Pre-Trial Chamber of the ICC Informing the UN Security Council and the Assembly of the State Parties to the Rome Statute about the Presence of President Omar Hassan Al Bashir of the Sudan in the Territories of the Republic of Chad and the Republic of Kenya (Aug. 29, 2010) [hereinafter Press Release, African Union, Decision of the Pre-Trial Chamber of the ICC] (arguing that as a neighbor of Sudan, it is important for Chad to engage Sudan to ensure peace and stability).

162. *See supra* note 11 (referring to the ICC, the European Union, Human Rights Watch, and Amnesty International's requests that the countries turn President Al Bashir over to the ICC).

Then, on August 28, 2010, President Al Bashir traveled to Kenya, also a member of the ICC.¹⁶³ The Government of Kenya invited President Al Bashir to attend a signing ceremony to honor Kenya's new constitution.¹⁶⁴ Once again, the defiant president was permitted to leave a free man.¹⁶⁵ The Kenyan Government claimed that it could not arrest President Al Bashir because it would have been detrimental to the Sudanese peace process.¹⁶⁶ Even if that were unimportant, the AU instructed all member states not to participate in the arrest and prosecution of President Al Bashir and, as a member of the AU, Kenya had a duty to obey.¹⁶⁷

In reply to the defiance of its members, the ICC filed a decision regarding President Al Bashir's visit to Chad.¹⁶⁸ The ICC noted that President Al Bashir visited Chad from July 21–23, 2010 and that the arrest warrants against him are outstanding.¹⁶⁹ The ICC found that Chad had a duty under the Rome Statute to arrest President Al Bashir and, because it did not, the ICC decided to inform the UN Security Council and the Assembly of States Parties so that they may "take any action they may deem

163. Julian Borger, *Court Censures Commonwealth Chief as Rift Deepens over War Crimes Suspects: Sharma 'Questions Duty' of States to Hand Over to ICC: Row Began over Kenya Refusal to Arrest Bashir*, *THE GUARDIAN* (London), Oct. 28, 2010, at 22 (reporting that President Al Bashir caused an "uproar" by traveling to Kenya, an ICC signatory).

164. *See* Nairobi, *supra* note 15, at 11 (arguing that President Al Bashir "tarnished" Kenya's triumphant day with his visit to the country); *see also* Jody Clarke, *Kenya's Historic Day Overshadowed by Presence of Sudanese Leader Bashir*, *IR. TIMES*, Aug. 28, 2010, at 9 (declaring that the ceremony celebrating Kenya's new constitution was "overshadowed by the presence of Sudanese president Omar al-Bashir").

165. *See* Nairobi, *supra* note 15, at 11 (indicating that President Al Bashir was not arrested on his visit).

166. *See id.* at 11 (indicating that the Kenyan Government argued that arresting President Al Bashir could have affected the Sudanese peace process).

167. *See* Borger, *supra* note 163 (claiming that Kenya could not turn President Al Bashir over to the ICC because the AU "instructed its members to defy the ICC and not apprehend Sudan's president").

168. *See* Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about President Omar Al-Bashir's Recent Visit to the Republic of Chad (Aug. 27, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc931075.pdf> (noting that President Al Bashir recently visited Chad and Kenya).

169. *See id.* at 3 (reporting that President Al Bashir visited Chad from July 21–23, 2010 to attend the Sahel-Saharan summit and that the warrants against President Al Bashir are still outstanding).

appropriate”¹⁷⁰ On the same day, the ICC issued a similar decision regarding President Al Bashir’s visit to Kenya.¹⁷¹ As in the decision to Chad, the ICC reiterated the duty Kenya had to arrest President Al Bashir and decided to refer the matter to the UN Security Council and the Assembly of States Parties.¹⁷²

The AU responded to the ICC’s decisions regarding Kenya and Chad and expressed its concern.¹⁷³ It reiterated that it attempted to abide by the Rome Statute by requesting a deferral of proceedings.¹⁷⁴ But, because Chad and Kenya are neighbors of Sudan, both countries must do what they can to promote peace and encourage the government and elected leaders, including President Al Bashir.¹⁷⁵ The press release argues that the ICC placed the AU in a position that furthered its own initiative without concern for the potentially costly repercussions on the African states.¹⁷⁶

In September 2010, the President of Kenya announced an Intergovernmental Authority on Development (“IGAD”) special summit on Sudan to be held in Kenya and he mentioned that

170. *See id.* at 3 (reciting Chad’s obligation to assist in the arrest of President Al Bashir under the Rome Statute and announcing the recourse it is taking in response to Chad’s defiance).

171. *See* Prosecutor v. Al Bashir, Case No. 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 Presence in the Territory of the Republic of Kenya, 3 (Aug. 27, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc930979.pdf> (indicating that Al Bashir visited Kenya).

172. *See id.* at 3 (noting that Kenya had the duty to arrest President Al Bashir under the Rome Statute and deciding to refer the situation to the UN Security Council and the Assembly of States Parties).

173. *See* Press Release, African Union, Decision of the Pre-Trial Chamber of the ICC *supra* note 161, at 1 (relaying its “deep regret that both the statements and the decisions grossly ignore and make no reference whatsoever to the obligations of the two countries” to the AU since Chad and Kenya are members of the AU).

174. *See id.* (indicating that the AU tried to get a deferral but the ICC did not respond).

175. *See id.* (describing the AU’s frustration that the ICC has not been receptive to its request for a deferral and explaining the difficult position that Chad and Kenya are in as Sudan’s neighbors).

176. *See id.* (arguing the decisions against Chad and Kenya were nothing more than an attempt to coerce African countries to support the ICC “irrespective of the complex dynamics on the ground[,] which require a fine balance between peace and justice and, in this regard, the AU shall oppose any attempt to coerce African Countries to undermine the common African position”).

President Al Bashir could be invited to attend.¹⁷⁷ On October 25, 2010, the ICC requested that Kenya inform the ICC about “any problem which would impede or prevent the arrest and surrender” of President Al Bashir should he travel to Kenya a second time.¹⁷⁸ On October 28, 2010, the Attorney General of Kenya replied to the ICC explaining that the IGAD meeting would no longer be in Kenya and, therefore, President Al Bashir would not be traveling there.¹⁷⁹

Other member states seem to be getting around the conflict of deciding whether or not to arrest President Al Bashir by openly warning him that they will arrest him should he attempt to visit.¹⁸⁰ The general pattern the member states take is to invite him to an event and then ask that he not come.¹⁸¹ Moreno-Ocampo argues that this is a positive development because it renders President Al Bashir more and more isolated.¹⁸²

Despite Moreno-Ocampo’s optimism, however, in 2011 President Al Bashir visited two member states of the ICC. He traveled to Djibouti for the Djibouti President’s May 8, 2011,

177. See *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Prosecution Notification of Possible Travel to a State Party in the Case of *The Prosecutor v Omar Al Bashir*, at ¶ 9 (Oct. 22, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc957405.pdf> (reporting that the President of Kenya announced a second Intergovernmental Authority on Development (“IGAD”) special summit on Sudan in November in Kenya and the President indicated that President Al Bashir could be invited).

178. See *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Transmission of the Reply from the Republic of Kenya, at 3 (Oct. 29, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc959475.pdf> (quoting the ICC’s request).

179. See *id.* ¶ 3 (citing the Attorney General of Kenya’s statement).

180. See, e.g., Julius Barigaba, *We’ll Get Bashir, Kony Soon, Says International Criminal Court*, E. AFR. (Nairobi), June 14, 2010, <http://www.theeastafrican.co.ke/news/-/2558/937546/-/pdvbwz/-/index.html> (reporting that Turkey warned Al Bashir that it would arrest him if he attended an upcoming Islamic Conference to be hosted in Turkey); see also *Sudan’s Bashir Unlikely to Attend AU Summit in Uganda, Says Malwal*, SUDAN TRIBUNE, June 9, 2010 <http://www.sudantribune.com/Sudan-s-Bashir-unlikely-to-attend,35333> (explaining that Uganda invited President Al Bashir to the country to attend the AU summit but equivocating with an official statement that Al Bashir was not invited and that other Sudan officials will attend in his stead).

181. See *Sudan’s Bashir Unlikely to Attend AU Summit in Uganda, Says Malwal*, *supra* note 180 (quoting an ICC official as saying “[t]he consistent position of all States Parties to the ICC has been to hand invitations to president Bashir and warn him at the same time that should he travel to their territory, they would abide by their ICC obligations”).

182. See Barigaba, *supra* note 180 (quoting Moreno-Ocampo as saying “[a]rresting Bashir is a matter of time . . . More and more, President Bashir is isolated.”).

inauguration ceremony.¹⁸³ Then, on August 7, President Al Bashir went to Chad for the inauguration ceremony of Chad's Head of State, Idriss Deby.¹⁸⁴ The ICC issued a Decision to the UN Security Council and the Assembly of States Parties to the Rome Statute regarding President Al-Bashir's presence in Djibouti and asked that they take whatever action they deem appropriate.¹⁸⁵ The ICC issued an additional Decision on August 18, 2011, requesting observations about President Al Bashir's second visit to Chad.¹⁸⁶ The ICC specifically asked that Chad respond to the charge that it has allowed President Al Bashir into its country without arresting him on two occasions.¹⁸⁷

III. *RECOMMENDATIONS FOR INCREASED ENFORCEMENT MECHANISMS IN THE ICC*

The Rome Statute contains weaknesses that make it vulnerable to misinterpretations and abuse. Part III.A. reviews the weaknesses in the Rome Statute, particularly applying the case study of President Al Bashir to illustrate how detrimental specific provisions are to the ICC. Part III.A. particularly focuses on two problematic portions of the Rome Statute. The first is the lack of

183. *See* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision Informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, at 3 (May 12, 2011) (explaining that "according to the media information available, Omar Al Bashir had attended the inauguration ceremony of Djibouti's President Ismael Omar Guelleh on May 8 2011").

184. *See* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision Requesting Observations about Omar Al-Bashir's Recent Visit to the Republic of Chad, at 4 (Aug. 18, 2011) (describing the background of President Al-Bashir's visits to Chad and explaining that he was there from August seventh through the eighth, 2011 to attend the inauguration ceremony for Idriss Deby).

185. *See* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision Informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti, at 3 (May 12, 2011) (informing the Assembly of States Parties to the Rome Statute and the UN Security Council of President Al Bashir's presence in Djibouti "in order for them to take any action they may deem appropriate").

186. *See* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision Requesting Observations about Omar Al-Bashir's Recent Visit to the Republic of Chad, at 1 (Aug. 18, 2011).

187. *See* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision Requesting Observations about Omar Al-Bashir's Recent Visit to the Republic of Chad, at 5-6 (Aug. 18, 2011) (stating that there are allegations that President Al Bashir traveled to Chad twice without being arrested and asking that Chad respond with an explanation for their failure to comply with the Rome Statute no later than September 9, 2011).

repercussions in the Rome Statute for member states that are in breach. The second is the unclear provisions regarding immunity and excusal to cooperate. Then, Part III.B. offers solutions to help strengthen the Rome Statute. It particularly addresses the two problematic provisions outlined in Part III.A. by offering possible repercussions for member states that are in breach and suggesting that the provisions regarding immunity and excusal be clarified.

A. *Weaknesses in the Rome Statute*

The weaknesses in the Rome Statute are illustrated by the case study of the ICC's indictment of President Al Bashir.¹⁸⁸ The Rome Statute allows the prosecutor to indict an individual that 1) is a national of a member state; 2) commits a crime on the soil of a member state; or 3) is a national of a non-member state when the UN Security Council referred the situation to the prosecutor.¹⁸⁹

The UN Security Council referred the Darfur situation to Prosecutor Moreno-Ocampo, and he indicted President Al Bashir for war crimes, crimes against humanity, and later for genocide for President Al Bashir's part in the atrocities that occurred in Darfur.¹⁹⁰ If the UN Security Council had not referred the Darfur situation to Moreno-Ocampo, the ICC would not have jurisdiction over President Al Bashir because Sudan is not a member state of the ICC and President Al Bashir committed the alleged crimes in Sudan.¹⁹¹

The ICC has no ability to bring President Al Bashir to The Hague without the assistance of its member states, and because Sudan is not a member state, the ICC has more difficulty arresting him.¹⁹² Under the Rome Statute, the ICC has the ability to arrest President Al Bashir if he travels to a member state

188. *See supra* note 14 (noting that without cooperation from Chad and Kenya, or another member state, the ICC has no ability to arrest President Al Bashir).

189. *See Rome Statute, supra* note 19, art. 12(2), 13, at 11 (listing and describing the ICC's jurisdiction).

190. *See supra* notes 98, 109–11 and accompanying text (describing the process by which President Al Bashir was indicted).

191. *See Rome Statute, supra* note 19, arts. 12, 13, at 11 (explaining the instances where the ICC does have jurisdiction).

192. *See supra* note 14 (emphasizing that the ICC cannot arrest President Al Bashir without member state cooperation).

because member states are obligated to cooperate with the ICC's requests.¹⁹³ The ICC twice requested that all member states arrest and surrender President Al Bashir.¹⁹⁴

The opportunity to bring the fugitive to justice presented itself twice:¹⁹⁵ the first, when he traveled to Chad and the second when he went to Kenya.¹⁹⁶ Both countries refused to arrest him.¹⁹⁷ Prior to his visit to both countries, the AU issued a decision to its member states (Chad and Kenya are both AU members) that insisted that they refuse to comply with the ICC's indictment of President Al Bashir.¹⁹⁸

The AU cited Article 98 of the Rome Statute for justification that the AU states do not have to comply with the ICC's request.¹⁹⁹ The AU claimed that under Article 98, President Al Bashir has immunity as a sitting head of state and, therefore, cannot be prosecuted.²⁰⁰ Although the Rome Statute specifies that heads of state do not have immunity, it does not specify whether the provision only applies to member states.²⁰¹ It is confusing because the Rome Statute includes that there is both no immunity for heads of state and that there can be diplomatic immunity under Article 98(1). Additionally, Article 98(2) provides that states do not have to comply with the ICC when they have prior agreements.²⁰² Because Chad and Kenya are members of the AU, they have an agreement with the AU. Chad and Kenya can argue that because the AU's position conflicts with the ICC, they do not have to follow the ICC's requests. The

193. See *supra* note 7 and accompanying text (noting that member states have a duty to cooperate with ICC arrest warrants).

194. See *supra* notes 5, 151 and accompanying text (noting that the ICC issued two warrants for arrest).

195. See *supra* notes 1, 163 and accompanying text (reporting that President Al Bashir traveled to Chad and Kenya and neither member state arrested him).

196. See *supra* notes 1, 163 and accompanying text.

197. See generally *supra* notes 10, 164–67 (mentioning that President Al Bashir visited Chad and Kenya).

198. See *supra* note 148 and accompanying text (citing the AU's decision).

199. See *supra* note 148 and accompanying text (referring to the AU's reasoning for its decision).

200. See *supra* note 148 and accompanying text (describing the immunity afforded to a head of state).

201. See Rome Statute, *supra* note 19, art. 27(1), at 18 (explaining that the Rome Statute does not allow immunity for heads of states or governmental officials).

202. See *supra* notes 78–79 and accompanying text (laying out the immunities and excuses member states enjoy under Article 98(2) of the Rome Statute).

Rome Statute is vague in regard to immunity and leaves its member states with little certainty and a lot of flexibility.

In addition to the member states having little knowledge as to whether they must cooperate, the Rome Statute is also largely silent on repercussions for member states that are in breach of the Rome Statute.²⁰³ The Rome Statute merely says that the situation will be referred to the UN Security Council, but there is no further explanation.²⁰⁴ Even if Chad and Kenya thought they had the duty to comply with the ICC's requests, the lack of guidance they received from the Rome Statute made it possible for them to believe that there would be no consequences upon a breach. When faced with the choice of refusing to arrest Al Bashir with no clear repercussions or arresting him and facing the possibility of further instability in the region and tension from Sudan, the choice seems obvious.

B. *Possible Solutions*

As is articulated above, Article 98 causes confusion. Thus, Article 98 should be amended to indicate specifically what constitutes immunity and excusal in its provisions. The confusion is so problematic, however, that member states are using it to make excuses not to cooperate.²⁰⁵ As discussed above, Chad and Kenya can claim that President Al Bashir has immunity from prosecution as a head of state under Article 98(1). Additionally, as Rome Statute Article 98(2) seems to say, both countries are excused from cooperating because of their obligations as members of the AU, which had requested they not cooperate with President Al Bashir's arrest and surrender to the ICC. Thus, an amendment is necessary to clarify the priority of the ICC in the hierarchy of a country's international obligation.

Even when a member state does know that it is breaching the Rome Statute, however, there is no defined repercussion for that breach. Therefore, merely amending Article 98 is not enough. There must be defined repercussions for states that refuse to cooperate with the ICC's requests. The ICC must create

203. *See supra* note 59 (emphasizing the sparse section devoted to enforcement mechanisms in the Rome Statute).

204. *See supra* note 59 (pointing out the lack of enforcement mechanisms).

205. *See supra* notes 93, 147 (describing the amendment process and the AU's reasoning for its decision).

incentives for States to follow through with their obligations under the Rome Statute because it has no power without that cooperation.²⁰⁶

Three possible options for the ICC to adopt as repercussions for breaching the Rome Statute are: 1) suspension;²⁰⁷ 2) expulsion;²⁰⁸ or 3) United Nations Security Council sanctions.²⁰⁹ The ICC could suspend a member state like the OAS did to Honduras.²¹⁰ It is an attractive option, but it would require the ICC to amend the Rome Statute.²¹¹ The situation with Chad and Kenya is different from that of Honduras. Honduras was suspended for staging a coup and not for failing to do something.²¹² Further, the terms set by the OAS concerned what Honduras had to do to be reinstated.²¹³ Chad and Kenya, however, would be placed on probation for *failing* to arrest President al Bashir, not for something they actively did. This situation is more difficult because it is hard to know if a member state is going to breach the Rome Statute again if it has no opportunity to do so. Therefore, the ICC should suggest that if the member states do not violate the Rome Statute for a period of six months or a year they may be reinstated. The attractive aspect of suspension is that it puts member states on notice that there is a possible repercussion but it is not permanent and it is not very severe. It is important to include a repercussion that is not overly severe because the ICC alienated Africa by only indicting Africans.²¹⁴ Thus, the ICC must be careful of punishing African countries too severely.

206. *See supra* note 38 (arguing that member state cooperation is important).

207. *See supra* note 66 and accompanying text (introducing member state suspension through the example of the OAS).

208. *See supra* note 70 and accompanying text (explaining expulsion through the UN Charter).

209. *See supra* note 48 and accompanying text (defining the process in which a breach is referred to the UN Security Council).

210. *See supra* note 65 and accompanying text (stating that Honduras was suspended by the OAS).

211. *See supra* note 66 and accompanying text (noting that another international body has placed a member state on suspension).

212. *See supra* note 64 (discussing that Honduras was suspended for disrupting democracy by staging a coup and ousting former President Zelaya).

213. *See supra* note 64.

214. *See supra* note 138 (stating that Africa is becoming angry with the ICC because only Africans have been indicted).

The option of expulsion is more risky. It again would require the ICC to amend the Rome Statute. The UN has expulsion as a possible option for breach of the UN Charter, but it is extremely difficult to actually expel a country and it is only used for a continuous breach.²¹⁵ Expulsion should not be used on Chad and Kenya solely for the single violation because that is a very severe repercussion and it is not in the ICC's interest to lose member states and automatic jurisdiction over their nationals. The ICC is in a similar position as the UN in regard to expulsion because it desires the member states to cooperate with its requests but it does not want to lose members because that would make it less powerful. It can amend the Rome Statute to allow for expulsion and require a unanimous vote (excluding the country being considered for expulsion) from the Assembly of States Parties in order to expel a member. Simply amending the Rome Statute and adding expulsion as an option is likely to cause the member states to think twice before breaching the Rome Statute.

The third option is UN Security Council sanctions. This option is appealing because it is already in the Rome Statute and would not require the ratification of an amendment.²¹⁶ Under the Rome Statute, the UN Security Council may do what it deems appropriate. The ICC did actually request this when President al Bashir was first indicted and the UN Security Council has not yet responded.²¹⁷ The concern with this option is that the states will not take it seriously and the UN Security Council will not impose effective sanctions. Further, without specific ramifications the member states are not likely to be held accountable.

The most attractive option is to amend the Rome Statute to clarify Articles 98(1) and 98(2) regarding immunity and excusal from cooperation. Additionally, the Rome Statute should be amended to include the option to suspend and the option to expel, but both should be used sparingly. It should be almost impossible to expel a member state so that only an egregious breach will call for expulsion. The option of UN Security Council

215. *See supra* note 70 (explaining that expulsion is described in the UN Charter as being reserved for continuous breaches of the Charter and it can be vetoed by one vote).

216. *See supra* note 59 (describing UN Security Council referrals).

217. *See supra* notes 170, 172 (describing the referral the ICC made regarding Chad and Kenya to the UN Security Council).

sanctions does not carry much weight and since the current, unamended Rome Statute is not very effective, it is not a viable option.

CONCLUSION

The ICC is in a position that could make it either obsolete or a viable international court because the recent events in Kenya and Chad have exposed the cracks existing in the Rome Statute. The ICC must fill in these cracks in order to move forward as a legitimate tribunal. Because the ICC has to rely completely upon its member states in order to enforce its indictments and arrest warrants, the ICC must have mechanisms at its disposal to force the member states to enforce the indictments. The ICC should first amend the Rome Statute to clarify Article 98(1) so that countries like Chad and Kenya cannot use it as an excuse for their non-compliance. Additionally, the ICC should adopt one of three enforcement mechanisms: 1) suspension; 2) expulsion; or 3) referral to the UN Security Council for sanctions. UN Security Council sanctions are vague and unpersuasive, as is exemplified by the way Chad and Kenya completely ignored their duties as ICC signatories. In this particular situation, the best solution is to modify the Rome Statute to include both suspension and expulsion so that member states are aware that their breach will have consequences. Both suspension and expulsion are powerful tools to place in the Rome Statute as they will give the enforcement mechanisms legitimacy even if expulsion is never actually utilized.