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## Sudan's Momentous Summer: How Al-Rahman's Arrest Foretells Sudanese Cooperation with the ICC and What that Means for the Darfur Victims

### I. Introduction:

2019 was the beginning of a momentous two-year period for Sudan. It was the year that the citizens of Sudan overthrew the al-Bashir regime. Both the military and civilians participate in this revolt. Since 2019, Sudan has attempted to begin a democratic transition. Yet, this transition has been fraught with pitfalls and criticisms. There is a question of the military's role in the current government and how to remove their influence. However, this paper focuses on the part of justice in the transitional government. In other words, it wants to look at what these events mean in terms of the International Criminal Court's (ICC) relationship with Sudan and vice versa. It mainly wants to focus on the events of Summer 2020 include the arrest of Al-Rahman and the recent demonstrations in Darfur. The events of Summer 2020 demonstrate that Sudan is willing to legitimize itself through cooperation with the ICC and create better opportunities for victims to be heard, fair and adequate trials and an actual chance for these crimes to be tried.

This argument will be organized as follows. Firstly, it will briefly explore the research done in this field. It will then explore the ICC and the role it plays in the international community. It will then briefly explore and explain the Darfur Situation's beginnings and explain how the situation comes before the Court. The second section will then attempt to contextual the Darfur Situation. It will primarily focus on the fraught relationship between Sudan and the ICC, highlight Sudan's unwillingness to cooperate with the ICC, and the incidents of al-Bashir's travel without arrest. It will then engage in a brief discussion about the legitimacy of the ICC in Darfur, especially in the context of the ICC's reported Africa bias.

The third section will then briefly look at and explain two recent events that will affect

the ICC and Sudan's relationship. This spot in the paper focuses on two events especially. However, multiple events that could indicate a cooperation with the ICC. Firstly, it address the June 9, 2020 arrest and transfer of the alleged leader of the Janjaweed militia, Ali Muhammad Ali Abd-Al-Rahman. It then addresses the demonstrations during Summer 2020 in Darfur and the demand to transfer ICC suspects to the ICC and the government pledge's to the these demonstrates to fulfill these demands.

The next section is where this paper will argue that these events demonstrate a willingness of Sudan to cooperate because it will legitimize Sudan's current government. The fifth section then explores why this is better for Darfuri victims. It explores the statutory language that provides for victims at the ICC. It also explores why trials will be fair and more legitimate at the ICC. Finally, it will examine Sudan's events, as evidence of Sudan's inability to conduct adequate trials. This section will also briefly hit upon how fair and adequate trials at the ICC will legitimization the ICC itself.

#### **A. Prior Research.**

This section briefly explores the prior research that was done on this topic. It specifically highlights the relationship between the ICC and Sudan and the lack of cooperation between the ICC and Sudan. It also hits how non-cooperation affects both the ICC and foreign policy when cooperating with the ICC. It then briefly touches upon the small amount of work surrounding Sudan and Sudan's attempts to legitimize post-revolution. Finally, it briefly explores the scholarly work surrounding victims' role at the ICC and international criminal law.

The relationship between the ICC and Sudan has been explored in great detail. Many believe that the previous relationship between the ICC and Sudan highlights issues of

complementarity, especially since Sudan is not a State Party and resisted ICC jurisdiction<sup>1</sup>. Other scholars have explored the actual obligations Sudan has and what laws apply to a situation like this<sup>2</sup> In his piece, Göran Sluiter suggests that there are "three vital issues for determination [when examining if] Sudan has violated its cooperation duties," including determining the applicable law for requiring cooperation in the Darfur situation.<sup>3</sup> In a later piece, Sluiter answers his question by positing that the Genocide Convention could strengthen cooperation.<sup>4</sup>

This uncooperative nature of the relationship is demonstrated in the Security Council Referral. Scholars like Luigi Condorelli and Annalisa Ciampi suggest that even the Security Council referral was problematic. They believe that Security Council referrals highlight "different obligations to cooperate" between State and non-State Parties, of which Sudan is.<sup>5</sup> Scholarly work has also included examining the ineffectiveness of ICC enforcement in this case.<sup>6</sup>

At the time of the papers discussed above, Sudan was under the rule of a dictator, Omar al-Bashir, who seized power in 1989. However, beginning in December 2018, the Sudanese began to revolt against al Bashir. Al-Bashir was eventually removed from power in April of 2018. There has been some work done with Sudan and the ICC, post-December 2018 Revolution. However, most of it derives itself from examining the merits and pitfalls of cooperation with the ICC.<sup>7</sup> Some believe that Sudan should cooperate with the ICC. Others

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<sup>1</sup> See Erica J. Saxum, *The ICC versus Sudan: How Does the Darfur Case Impact the Principle of Complementarity*, 6 EYES ON THE ICC 1,1 (2009)

<sup>2</sup>.See Göran Sluiter, *Obtaining Cooperation from Sudan – Where is the Law?* 6 J.INT'L CRIM JUST. 871,871 (2008)

<sup>3</sup>*Id.*

<sup>4</sup>See Göran Sluiter, *Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case*, 8 J.INT'L CRIM, JUST 365, 365 (2010)

<sup>5</sup> Luigi Condorelli and Annalisa Ciampi, *Comments on the Security Council Referral of the Situation in Darfur to the ICC*, 3 J. INT'L CRIM JUST. 590, 590 (2005).

<sup>6</sup> See Gwen P. Barnes, *The International Criminal Courts Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir*, 34 FORDHAM INT'L L. J. 1585,1585 (2011)

<sup>7</sup>See Mark Kersten, *Inching Closer: Could Omar al-Bashir finally be prosecuted by the International Criminal Court?*. JUSTICE IN CONFLICT (September 1, 2020) <https://justiceinconflict.org/2020/09/01/inching-closer-could-omar-al-bashir-finally-be-prosecuted-by-the-international-criminal-court/> (arguing that cooperation with the ICC is

believe that cooperation with the ICC for Sudan is not the answer. It has yet to address what the recent arrest of Ali Rahman means for Sudanese cooperation. This gap is where this paper comes in. It wants to take what this arrest and other events happening in Sudan mean. It intends to synthesize the questions posed by these scholars with the actions take over the summer.

The same holds for work done to legitimize Sudan's new government. Policy reports have advised how the rest of the world should interact with the new government.<sup>8</sup> These reports suggest that legitimacy for the new civilian government lies in "the civil component's ability to establish its legitimacy and carry out much-need reform."<sup>9</sup> This legitimacy lies in "meeting the expectations of the Sudanese people and addressing the fundamental grievances behind the revolution."<sup>10</sup> These reports also view an important factor for legitimacy: international aid and the role that donors will play in Sudanese government legitimacy.<sup>11</sup> Yet, like any work done with the new relationship between Sudan and the ICC, it is minimal because the new transitional government is still very young. There is a focus on economics rather than the role justice is playing. Yet, the relationship between Sudan and justice will play a role.

This paper seeks to feel the gap left by these scholars; it takes the work done by scholars who focus on economics and adds a justice dimension. It begins by suggesting that the Sudanese population viewing the government as achieve justice will legitimize its reforms. This paper

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necessary) *but compare with* Kerstin Carlson, *Al Bashir, and the ICC: there are better ways to achieve justice*. THE CONVERSATION (February 16, 2020, 9:31) <https://theconversation.com/al-bashir-and-the-icc-there-are-better-ways-to-achieve-justice-131850> (stating that the best position for the ICC would be "to monitor and support anti-impunity in Sudan").

<sup>8</sup> For example, Jonathan Tossell, *Consolidating Sudan's transition: A question of legitimacy*, CRU Policy Brief, Clingendael: Netherlands Institute of International Relations. February 2020, 1 [https://www.clingendael.org/sites/default/files/2020-02/Policy\\_Brief\\_Consolidating\\_Sudan\\_transition\\_February\\_2020.pdf](https://www.clingendael.org/sites/default/files/2020-02/Policy_Brief_Consolidating_Sudan_transition_February_2020.pdf)

<sup>9</sup>*Id.*

<sup>10</sup>*Id.* at 7

<sup>11</sup> Kenneth Roth, *Sudan Has a Window of Opportunity. The West Shouldn't Squander It*. FOREIGN POLICY. (March 20, 2020 4:17 AM) <https://foreignpolicy.com/2020/03/20/sudan-democracy-transition-hamdok-hemeti-window-of-opportunity-world-shouldnt-squander-it/>

also seeks to argue that Darfur's justice will play a role in Sudan receiving international aid. It aims to say that without justice for Darfur, especially at the ICC, donors will be unlikely to want to put money into Sudan.

There is also some work done with victims at the ICC. Scholars have suggested that the ICC's victim regime is a novel approach to victim compensation and participation at international criminal tribunals. Much of the scholarly work focuses on reforming the victims' aspect of the ICC statute. Some scholars suggest that victims' role is too significant and interferes with the process of achieving justice.<sup>12</sup> Yet, most agree that the ICC's victim participation aspect is a strength of the system.<sup>13</sup> This work highlights the importance of the ICC being a "victim-sensitive criminal tribunal."<sup>14</sup>

This argument is what this paper tries to extrapolate to the Sudanese case. It wants to argue that Sudan will not create a "victim-sensitive criminal tribunal" in time for the victims to be satisfied.<sup>15</sup> Instead, using the existing scholarly work, the paper will explain how the ICC is a "victim-sensitive criminal tribunal" and why this is better for the victims and why Sudan cannot create such a tribunal<sup>16</sup>.

## **B. The ICC**

The International Criminal Court or the ICC, is an international criminal tribunal located

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<sup>12</sup>See Mirian Damska, *The International Criminal Court between Aspiration and Achievement*, 14 UCLA J. INT'L FOREIGN AFF. 19 (2009) (arguing for removing reparations from the criminal proceedings and reducing victim participants). See also Rachel Goodman and Nokukhanya Mncwabe, *International Criminal Justice in Africa: Neocolonial Agenda or Strengthened Accountability*, African Transitional Justice Research Network Brief (2010) (suggesting that victim participation should be moved out of ICC jurisdiction and directly into regional means)

<sup>13</sup>See Peter Van der Auweraert, *Reparations for Wartime Victims in the Former Yugoslavia: Search of the Way Forward*; International Organization for Migration (IOM), 12 (2013)

<sup>14</sup>René Blattman & Kristen Bowman, *Achievements and Problems for the International Criminal Court*, 6 J. INT'L CRIM. JUST. 711, 711 (2008) quoted in Lana Liuboja, *Justice in an Uncooperative World: ICTY and ICTR Foreshadow ICC Ineffectiveness*, 32 HOUS. J. INT'L L. 767, 767 (2010)

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

in The Hague, Netherlands. Established by statute in July of 2000, it is the first permanent international criminal tribunal. It is a court where “individuals [are tried] for genocide, war crimes, crimes against humanity and aggression.”<sup>17</sup> The ICC is limited in its jurisdiction. Or in other words, the ICC can only exercise its jurisdictions in three ways. The most important exercise for this paper is Security Council referral where “the Security Council acting under [its] Chapter VII” powers refers a situation to the Court, like in the Darfur situation.<sup>18</sup> The ICC is also limited by the State Party restriction it has. The ICC can only involve itself in cases based in or include Parties to the Rome Statute, unless there is consent by a non-state Party.<sup>19</sup>

However, the ICC is not without its criticisms, many of which have played within the Darfur Situation. Firstly, there are accusations of an Africa-bias, which play out during Darfur's referral to the Court, and the arrest warrant of Omar al-Bashir. Secondly, there are questions about the effectiveness of the Court. Thirdly, there is a question about the enforceability of court decisions, as explored below in the context of enforcing an arrest warrant against Omar al-Bashir. Yet the Darfur Situation may allow the ICC to legitimize itself especially if Sudan is going to cooperate, which it looks like will.

### C. *The Darfur Situation*

The Darfur Situation before the Court, is long and complicated and requires a brief explanation of Darfur and the role that the conflict in Darfur played both into what it's before the ICC and the cession of South Sudan. Darfur is a region in western Sudan, that has been the site of enormous atrocities and conflict. Beginning in the early 2000's reports come out of Darfur. These reports described the “mass slaughter and rape of Darfuri men, women and children in

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<sup>17</sup>International Criminal Court, <https://www.icc.cpi.int> (last visited November 10, 2020)

<sup>18</sup>*Id.* at Art. 13 (b).

<sup>19</sup>*See Id.* at Art. 12

Western Sudan.”<sup>20</sup> The violence official began in 2003, but “unrest and violence persist today.”<sup>21</sup>

The Darfur conflict that ultimately would lead to the genocide, began with the decolonization period after the British left in 1956.<sup>22</sup> This conflict often is based along ethnic lines. Sudan is mostly a Muslim and Arab country. However, the south is “largely non-Muslim, non-Arab.”<sup>23</sup> Further complicating the situation is, the discovery of oil in the Darfur region of Western Sudan.

These tension lead to the first Sudanese civil war that end in 1972. However, in 1983 the then-president, Jaafar Nimeiri, began to introduce Sharia Law and "reigned on [some of] the Addis Ababa [Peace] Agreement<sup>24</sup> The conflict began to draw down in 1989. However, Omar al-Bashir's coup in 1989 further complicated the war, who seized power in 1989.<sup>25</sup> As a result, any peace agreement formed in 1989 was disregarded. Officially, the Second Sudanese Civil War ended in 2005 with a Comprehensive Peace Agreement. However, this agreement “failed to take into account the effects of the war on Darfur.”<sup>26</sup> Furthermore, there were reports of “the government . . . arming Arab tribesmen (aka Janjaweed) to raid non-Arab villages.”<sup>27</sup> This lead to rebel attacks, which lead to government reprisals.<sup>28</sup>

Along with the government reprisals, the raids made up an enormous parts of the human-

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<sup>20</sup> *Darfur Genocide*, world without genocide at Mitchell Hamline School of Law, MITHCELL HAMLINE SCHOOL OF LAW <http://worldwithoutgenocide.org/genocides-and-conflicts/darfur-genocide> (last visited November 10, 2020)

<sup>21</sup>*Id.*

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>"Mollie Zapata, *Sudan: Independence through Civil Wars, 1956-2005*, ENOUGH.ORG (December 13, 2011) <https://enoughproject.org/blog/sudan-brief-history-1956>

<sup>25</sup> *Id.*

<sup>26</sup>*Darfur Genocide*

<sup>27</sup>*Id.*

<sup>28</sup>*See Id.*



rights atrocities in Darfur. These raids were conducted by allegedly “government-armed and found Arab militias known as the Janjaweed (which loosely translates to ‘devils on horseback’).”<sup>29</sup> These raids were systematic and sought to “destroy Darfuris by burning villages, looting economic resources, polluting water sources, and murdering, raping, and torturing civilians.”<sup>30</sup> The UN attempted to intervene by issuing a hybrid United Nations African Union mission, the UNAMID. However, this mission was “blocked and prevented . . . from accessing towns where many of the . . . attacks occurred.”<sup>31</sup> There was also a massive campaign of misinformation and denial by the Sudanese government at the time.<sup>32</sup>

This situation appeared before the Security Council in March of 2005. At this point, it was clear that atrocities were being committed in Darfur. The US declared it genocide on September 9, 2004 when Sect. of State at the time Colin Powell, "argued that events in Darfur could be labeled as such."<sup>33</sup> However, the Sudanese government still denied the atrocities taking place in Darfur. Furthermore, there was controversy surrounding the Security Council's involvement. Yet, the Security Council decide to refer the "situation prevailing in Darfur since July 1 2002 to the Prosecutor of the International Criminal Court"<sup>34</sup> However, this referral was not without its controversy as explored below.

## II. History of the Darfur Situation at The ICC

This section intends to address the Darfur Situation at the ICC from 2005 to now.. First, it begins by discussing the relationship that Sudan has share with the ICC. It starts by describing

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<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

<sup>32</sup>*The Devil Came on Horseback*. BREAKTHRU FILMS . 2007

<sup>33</sup>*United States Declares Genocide in Darfur, September 9, 2004 – Timeline of Events* , UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/learn/timeline-of-events/after-1945/genocide-in-darfur> (Last visited November 10, 2020)

<sup>34</sup>S.C. Res. 1593 para. 1 (March 31, 2005).

and exploring Sudan's unwillingness to cooperate. It then briefly touches upon the incidents involving al-Bashir presence in State Parties, and the non-compliance. It uses the example of Jordan to discuss the trends of non-compliance by State Parties. It then moves to discuss the legitimacy of the ICC in Darfur. It focuses explicitly on three arguments, however there are many more. The three controversies this paper focuses on, is the referral process, the Africa Bias Accusations, and the lack of an effective investigation in Darfur.

The Situation in Darfur has been before at the Court since 2005 when the Security Council referred the situation. Since 2005 the Court initiated six cases of investigation. However, the Court only issued five arrest warrants at the time, including one for Omar al-Bashir<sup>35</sup>. The Court ultimately dismissed the sixth case with a non-confirmation of the charges<sup>36</sup>. The pre-trial chamber declined to confirm the charges on the basis that was a "lack of sufficient evidence substantiating the Prosecution's allegations."<sup>37</sup>

Yet, the situation in Darfur has not been without its pitfalls and failures. It is also has been surrounded by enormous controversy. Turning firstly to the ICC's pitfalls and failures, one only has to turn to Sudan's past relationship with the ICC. Sudan refused to cooperate with the ICC or even allow the ICC to engage in ground investigations. Furthermore, there has been little cooperation with the ICC by State Parties. A clear example of this is the multiple incidents of al-Bashir visiting Party states, but these states did not cooperate with the ICC. This paper will specifically focus on the ICC's experience with Jordan, but Jordan was not the only state guilty

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<sup>35</sup>.See *The Prosecutor v. al-Bashir*, ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, March 4, 2009, *The Prosecutor v. Harun and Abd-Al-Rahman*, ICC-02/05-01/07-2, Warrant of Arrest for Ahmad Harun, April 27, 2007, *The Prosecutor v. Banda*, ICC-02/05-03/09-606, Warrant of Arrest for Abdallah Banda Abakaer Nourian, September 11, 2014, *The Prosecutor v. Hussein*, ICC-02/05-01/12-2 Warrant of Arrest for Abdel Raheem Muhammad Hussein, March 1, 2012, and *The Prosecutor v. Harun and Abd-al Rahman*, ICC-02/05-01/07 – Warrant of Arrest for Ali Kushyab, April 27, 2007

<sup>36</sup>.See *The Prosecutor v. Abu Garda*, ICC-02/05-02/09, Decision on the Confirmation of Charges, February 8, 2010

<sup>37</sup>*Id.* at para. 233

of this lack of cooperation.

There is further controversy surrounding the presence of the ICC in Darfur. There was controversy surrounding the referral to the ICC, especially from non-State parties. The issue of the warrant of arrest against al-Bashir was controversial, and many accused the ICC of perpetuating an Africa bias. A third controversy to be aware of is the effectiveness of the ICC, as a whole and especially within in the Sudan.

### **A. Sudan's Fraught Relationship with the ICC**

As mentioned above, Sudan has not had the most freindly relations with the ICC. For one, there was an arrest warrant against their former leader, al-Bashir. It's no wonder that Sudan did not want to cooperate with the ICC. Furthermore, Sudan for the longest time was ruled by a dictator that refused to recognize the ICC and its role in international criminal and regular international law. Al-Bashir was also a dictator of an Arab states, and there is a tendency of Arab countries to protect each other. In fact, the New York Times suggest back in 2009 that protect al-Bashir was "one cause [Arab states] rall[ied] around."<sup>38</sup> It's no wonder, that Arab states like Jordan did not wish to cooperate with the ICC, when the Court asked for al-Bashir to be transferred over.

#### **a. Unwillingness to Cooperate**

One significant marker of Sudan's past relationship is it unwillingness to cooperate with the ICC. From the moment the Security Council referred the Darfur situation to the Court, Sudan fought ICC jurisdiction and ICC involvement in Darfur. For a long time, al-Bashir saw the Court as a interfering force and refused to cooperate which affected Sudan's willingness to cooperate.

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<sup>38</sup>Michael Slackman and Robert F. Worth, *Often Split, Arab Leaders Unite for Sudan's Chief*, NY TIMES, (March 30, 2009) <https://www.nytimes.com/2009/03/31/world/africa/31arab.html>

Sudan protested ICC jurisdiction multiple times, claiming that at the time "the judiciary [was] able and willing to achieve justice and rights in Sudan"<sup>39</sup>. It also did not help that those accused of ICC crimes remained in power until April 2019.

Yet, it was more than just the fact accused remained in power that prevented Sudan from cooperating with the ICC. Much of it turned on the inability of the ICC to enforce cooperation. Sudan is not a party to the ICC Statute, and therefore the law of cooperation remains murky, and it is precisely unclear what duty Sudan had to cooperate<sup>40</sup>. This ambiguity allowed for al-Bashir to claim that there was no duty to cooperate. Sudan's unwillingness to cooperate with the ICC also affects State Parties' reluctance to cooperate with the ICC, as evidenced below.

**b. *The Al-Bashir Incidents***

Yet, even despite Sudan's unwillingness to cooperate, it was more startling to see state parties refusal to turn over al-Bashir to the ICC. In a way, Sudan's unwillingness to cooperate was not surprising but the refusal over other states to compel with ICC requirements. It calls into question the ability of the ICC to enforce its rule of law. The clearest example of this is in Jordan, but other states participated in this behavior too<sup>41</sup>. The incident in Jordan took place in 2017. During this period of time, al-Bashir had visited Jordan as part of Arab League<sup>42</sup>.

Al Bashir also visited other nations, in an attempt to "maintain legitimacy – and flout the

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<sup>39</sup> See Dawn Yamane Hewett, *Sudan's Courts and Oplemmtarity in the Face of Dafur* 31 YALE J. INT'L L, 276, 278 (Winter 2006) quoted in Saxum, , 8

<sup>40</sup>See Sluiter, *supra* note 2

<sup>41</sup>See *The Prosecutor v. al-Bashir*, ICC-02/05-01/09-309, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, December 12, 2017, or *The Prosecutor v. al Bashir*, ICC-02/05-01/09-267, Decision on the non-compliance by the Republic of Uganda with the request arrest and surrender Omar al-Bashir to the Court and referring the matter to the United Nations Security and the Assembly of State Parties to the Rome Statu, July 17, 2016.

<sup>42</sup>See *ICC: Jordan Was Required to Arrest Sudan's Bashir*, Human Rights Watch (May 6, 2019 5:33 AM) <https://www.hrw.org/news/2019/05/06/icc-jordan-was-required-arrest-sudans-bashir#>

ICC – by traveling abroad while subject to arrest warrants”<sup>43</sup> Nations reacted differently to al-Bashir’s visits, “some countries, both members and non-members of the ICC, hosted him [Jordan being a prime of example of this.<sup>44</sup> Others made clear he was not welcome on their territories or rescheduled meetings to avoid his presence.”<sup>45</sup> Many of the states that hosted al-Bashir at the time, claimed that was no obligation “to arrest al-Bashir given his status as a head of state [especially] of an non-ICC member.”<sup>46</sup>

Jordan fell into the distinction of state that hosted al-Bashir and refused to arrest him, claiming his status as head of state afforded him immunity. The pre-trial chamber eventually ruled which was further affirmed by the appeals chamber, that “Jordan **was** required to arrest al-Bashir when he was on Jordanian territory.”<sup>47</sup> It further affirmed the ruling that “there is no immunity for heads of state before an international criminal court with authority.”<sup>48</sup> The appeals chamber, ultimately found the Security Council referral grant the ICC authority. Therefore, Jordan was in violation of its obligations as a party to the Rome Statute. The importance of this, lies in in the trend that the Jordan incident representation. It suggested that this trend emerged as a way for those who question the legitimacy of the ICC to protest the ICC role in Darfur.<sup>49</sup>

### **B. The Question of the ICC’s Legitimacy in Darfur**

Questions of Legitimacy in the ICC's Darfur situation have plagued it since the beginning. Firstly, there was controversy surrounding its Security council referral, especially in the question

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<sup>43</sup>*Id.*

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup> *Id.*

<sup>47</sup>*Id.* (emphasis added)

<sup>48</sup>*Id.*

<sup>49</sup>Yousif Mansour Ahmed Abdalla AlZarouni, *Why Sudan won't hand over former president al-Bashir to the International Criminal Court*, THE CONVERSATION (May 28, 2019 5:04 AM) <https://theconversation.com/why-sudan-wont-hand-over-former-president-al-bashir-to-the-international-criminal-court-117810>

of the US's abstention and the African Union's reconsideration request. There also have been questions if this situation is further evidence of the Court's African bias. Finally, there are real concerns about how effective the ICC prosecution is in these cases.

*a. Security Council Controversy*

The referral of Darfur to the ICC was not without its controversy, especially when it becomes apparent when some of the members of the Security Council did not support the referral to the ICC. A critical state that abstained from the vote was the US.<sup>50</sup> However, this abstention comes in the late-hours of the referral, due to a reported "late-hour compromise adding language to the resolution addressing US concerns about the ICC's jurisdiction over nonparties."<sup>51</sup> The US said that they believe that "the better mechanism would have been a hybrid tribunal in Africa."<sup>52</sup> Yet, they understood the need for "the international community [to] speak with one voice in order to help promote effective accountability."<sup>53</sup>

This US hesitation marks much of the history of the Darfur situation at the Court. The US is one of and was "an important contributor to the peacekeeping and related humanitarian efforts in Sudan"<sup>54</sup> As a result, at the time, any situation involving Darfur would also affect the US aid in Sudan. The US and the ICC have an adversarial relationship that can be openly hostile to ambivalent depending on the administration. However, that relationship is beyond the scope of this piece. Instead, the critical relevant aspect is how this relationship affected Darfur's referral to the ICC. Among others who protested the referral was the AU, the reasons why explored directly

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<sup>50</sup> See *United States Abstains on Security Council Resolution Authorizing Referral of Darfur Atrocities to International Criminal Court*, 99 AM. J. INT'L L. 691, 691 (2005).

<sup>51</sup>*Id.*

<sup>52</sup>*Id.* (quoting Ambassador Anne Patterson, acting US representative to the United Nations)

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*

below.

*b. Africa Bias Accusations*

The Darfur Situation has also become a vehicle for those who argue that the ICC has an African basis. The African Union has especially criticized the role that the ICC plays in Darfur and if it means that the ICC has continued is Africa bias.<sup>55</sup> The AU has accused the ICC of using the Darfur situation to continue a European colonial agenda.<sup>56</sup>The AU further leveled accusations at the Court after the indictment of then sitting President Omar-al-Bashir.

Not only has the African Union accused the ICC of an African bias in the Darfur Situation, but so has South Africa directly. South Africa, like the US, shares an interesting relationship with the ICC. However, not as hostile as the US's relationship with the ICC, South Africa, and the ICC have a fraught history. Like the US, South Africa does not necessarily see the ICC as a legitimate institution. Like the AU, South Africa argues that Darfur represents further attempts to "victimize" Africa using European justice notions.<sup>57</sup> This AU-ICC disagreement creates an effectiveness problem, as explored below.

*c. Effectiveness*

Ineffectiveness marks the Darfur situation when it comes to prosecuting those responsible and enforcement issues. As mentioned above, bringing those guilty of crimes in Darfur before the Court has been difficult. There are cases where countries host guilty crimes yet refuse to turn them over to ICC jurisdiction. As a result, the ICC suffers from real questions about if it is an ineffective tribunal.

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<sup>55</sup> See Chinedu Thomas Ekwealor, *The African Union and the International Criminal Court: Lessons from Sudan for Africa*, 7 J. AFR. UNI. STUD. 33,31, (2018).

<sup>56</sup> *Id.*

<sup>57</sup> See *Id.* See also Christopher J. Piranio, *The International Criminal Court and African 'Victimhood'* Contemporary Review.

The African bias further contributes to the ineffectiveness. As raised above, Sudan cases are trigger points for the tensions between the ICC and the AU. The AU has indicated that "AU member states would not cooperate with the arrest and surrender of President Al-Bashir"<sup>58</sup> Many of the Arab states reflected similar sentiments as well. Ultimately, scholars questioned the ICC's efficiency when it attempted to prosecute those responsible for the Darfur situation.

As demonstrated in the section above, Sudan and the ICC's relationship is fraught with controversy and non-cooperation. Firstly, the Sudanese have been very anti-ICC and claimed that the ICC had no place in Sudanese affairs. Secondly, other states have been unwilling to cooperate with the ICC, as demonstrated by the Jordan case. There are also questions over the legitimacy of the ICC in Sudan, mostly since the Security Council Referral was controversial. The Darfur situation also has suffered from African Bias accusations and effectiveness accusations. Yet, things are changing, as demonstrated below.

### III. Recent Events

This section briefly describes the past two years in Sudan. It begins by briefly touching up the events that led up to December 2018. It briefly touches upon December 2018 to April 2019, when the citizens and the military removed al-Bashir from power. It then briefly describes the brief military government of Sudan from April 2019 to August 2019. Finally, it discusses the Sudanese government from August 2019 to now. The section then describes the arrest of Al Muhammad Ali Abd-Al-Rahman. Finally, it discusses the protests of summer 2020, focusing on the protests in the Darfur region.

Yet, there has been a change in the relationship between Sudan and the ICC. A

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<sup>58</sup> Assembly of the African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII) para. 8, quoted in Barnes, 1608.



significant factor in this removal of al-Bashir from power. In December of 2018, a movement began in the streets of Sudan which led to al-Bashir's removal from power and the installation of a new transitional government.<sup>59</sup> This movement included both civilian and military personnel. As a result, when al-Bashir was “overthrown by fellow military officers” in April 2019 the new government began as a military-run government. There were continuous protests, resulting in the Khartoum sit-in massacre and ‘hundreds of additional deaths.’<sup>60</sup> Ultimately the military government “stepped down in favour of civilian-led transitional government.”<sup>61</sup> Currently, this new government is struggling.

A big moment came in February of 2020, when the Sudanese government announced that it would be willing to hand al-Bashir to the ICC.<sup>62</sup> Yet, there has been hemming and hawing since February to actual transfer al-Bashir to the ICC.<sup>63</sup> But there is renewed hope that al-Bashir will be transferred over to the ICC. Prime Minister Abdalla Hamdok, himself said that “the government is fully prepared to cooperate with the ICC to facilitate access to those accused of war crimes and crimes against humanity.”<sup>64</sup> This statement comes as a “regular and repeated declaration of support . . . [mak]ing it harder for [the government] to backtrack on their pledge[s].”<sup>65</sup> Furthermore, there have been actions taken to back up the pledges made by the transitional government. These actions include the arrest and transfer of Ali Muhammad Ali Abd-Al Rahman and the governmental response to the Darfur demonstrations.

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<sup>59</sup>Stephen Zunes, *How the people of Sudan pulled off an improbable revolution*, THE CONVERSATION (March 24, 2020 10:09 AM) <https://theconversation.com/how-the-people-of-sudan-pulled-off-an-improbable-revolution-132808>

<sup>60</sup>*Id.*

<sup>61</sup>*Id.*

<sup>62</sup>Omar al-Bashir: Sudan agrees ex-president must face ICC, BBC NEWS (February 11, 2020) <https://www.bbc.com/news/world-africa-51462613>

<sup>63</sup>AG: ICC suspects could be tried in Sudan, Radio Dabanga (June 16, 2020) <https://www.dabangasudan.org/en/all-news/article/ag-icc-suspects-could-be-tried-in-sudan>.

<sup>64</sup>Abdalla Hamdok, Prime Minister of Sudan, quoted in Kersten, *supra* note 1

<sup>65</sup>Kersten, *supra* note 7.

### **A. The Arrest and Transfer of Ali Muhammad Ali Abd-Al-Rahman.**

In June of 2020, a momentous event happened. Al Muhammad Ali Ab-Al-Rahman (Ali Kushyab), an ICC fugitive wanted for connection with crimes committed in Darfur, was arrested in the Central African Republic on June 9.<sup>66</sup> Al-Rahman was then transferred to the ICC, the same day.<sup>67</sup> Mr. Al-Rahman is the allegedly commander of the Janjaweed, the Arab militia. After his arrest, he made his first appearance before the Court on June 15, 2020.<sup>68</sup> His confirmation of charges hearing was initially schedule to be in December. However it has since been moved to February 22, 2021.<sup>69</sup>

There are two arrest warrants currently active against him. The first warrant was deliver on April 27, 2007 and listed 50 counts of crimes including 22 counts of crimes against humanity and 28 counts of war crimes.<sup>70</sup> The second warrant was released on June 11, 2020 after the arrest and transfer of Mr. Al-Rahman. This warrant includes an additional 53 counts “on the basis of his individual criminal responsibly for war crimes and crimes against humanity allegedly committed.”<sup>71</sup> His arrest led to calls for the other suspects to be transferred.

### **B. Demonstrations in Darfur Calling for Transfer of Suspects to the ICC and the Government Response**

Along with this summer's arrest of Al-Rhaman, there have been demonstrations throughout Sudan, especially in the Darfur region. Beginning in July of 2020, demonstrators in Sudan have

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<sup>66</sup> International Criminal Court Press Release ICC-CPI-220609-PR1525, Situation in Darfur(Sudan): Ali Kusyhab is in ICC custody (June 9, 2020)

<sup>67</sup>*Id.*

<sup>68</sup>Ab-Al-Rahman Case, International Criminal Court, <https://www.icc-cpi.int/darfur/abd-al-rahman> (last visited November 10, 2020)

<sup>69</sup>*Id.*

<sup>70</sup> *The Prosecutor v. Hauran and Rahman*, ICC-02/05-02/07, Warrant of Arrest for Ali Kushayb.

<sup>71</sup>*See The Prosecutor v. Harun and Rahman*, ICC-02/05-01/07-74-Red, Public redacted version of “Second warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushyab”), January 16 2018, ICC-02/05-0/07-74-Secret-Exp”, June 11, 2020.

protested the military's continued involvement in the government and the effect they say it has on the government.<sup>72</sup> They are also protesting what they see as the lack of justice for atrocities committed during the al-Bashir regime and the revolution.<sup>73</sup>

Nowhere is this more so in the Darfur region of Sudan. Within the Darfur region of Sudan, violence is still occurring. As a result, the Darfuri are protesting against this violence. But more importantly, they are also protesting for those who are accused of committing crimes in Darfur to be transferred to the ICC<sup>74</sup>. The government promised to honor these requests, indicating hope for these suspects to be transferred to custody.<sup>75</sup>

These recent events have led to a situation where there is a possibility that Sudan will cooperate with the ICC. However, this is still a question if this will happen. Yet, these events demonstrate that Sudan will likely cooperate because it will legitimize its government. As shown in the above section, many Sudanese people want individuals to be tried before the Court. Therefore, cooperation with the ICC will be an excellent way to legitimize itself, as explored below.

#### IV. LEGTIMIZATING SUDAN (WHY THIS MEANS COOPERATION)

This section focuses on cooperation at the ICC as a legitimizer for the Sudanese transitionally government and why that means cooperation. Firstly, it address the domestic angle of Sudanese legitimization and how demands by the population for transfer, have created

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<sup>72</sup> See *Sudanese protest a year after a power-sharing deal with the army*, ALJAZEERA (August 17, 2020) <https://www.aljazeera.com/news/2020/08/sudanese-protest-year-power-sharing-deal-army-200817163531098.html>.

<sup>73</sup> "Frustration at inertia as Sudan marks anniversary of massacre" 2020. RADIO DABANGA May 24. <https://www.dabangasudan.org/en/all-news/article/frustration-at-inertia-as-sudan-marks-anniversary-of-massacre>

<sup>74</sup> *Protests against insecurity growing in Darfur*, RADIO DABANGA (July 2, 2020) <https://www.dabangasudan.org/en/all-news/article/darfur-protests-against-insecurity-growing>. See also *Central Darfur resistance committees present memo of demands to Wali*, RADIO DABANGA (August 13, 2020) <https://www.dabangasudan.org/en/all-news/article/central-darfur-resistance-committees-present-memo-of-demands-to-wali>.

<sup>75</sup> See Abdalla Hamdok, Prime Minister of Sudan, quoted in Kersten, *supra* note 1

pressure for the Sudanese government. It then extrapolates this pressure and places it on the international stage, exploring how the Sudanese government seeks to distance itself from the al-Bashir regime. Finally, this section refutes the argument that there is no legitimization in cooperation with the ICC, and instead that there must be a direct Sudanese tribunal.

Sudan has a very young government. As a result, it is suffering from growing pains. It is faces threats to its legitimacy from all sides, domestically and from an international community. Sudan is attempting to separate itself from these two previous governments, and cooperation with the ICC provides an excellent way to do this both domestically and internationally.

#### **A. Domestically**

A government like the current transitional government of Sudan relies upon its legitimacy, especially in its citizens' eyes. Without any legitimacy, such a government will fail. Yet, the current government in Sudan is facing constant legitimacy questions from its citizens. There are worries about it being to provide for its citizens and answer the needs of citizens. Much of this is economic<sup>76</sup> Yet, there are also questions about the government's accountability ability.

There are already calls and demands for justice within Sudan by its citizens. During the revolution in June 2019, citizens held peaceful sit-in protest. Yet, they were met with violence. Though numbers differ, depending on the source, about 120 people were killed<sup>77</sup> This incident became known as the Khartoum sit-in massacre. Citizens have called for justice. Yet, the governments' slowness to respond to these have called into question the government's willingness and ability to act and seek justice.

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<sup>76</sup>.See Tossell, *supra* note 8

<sup>77</sup>.Sudan's Violent Crackdown on Protesters in Khartoum." 2019. HUMAN RIGHTS WATCH. November 17. <https://www.hrw.org/report/2019/11/18/they-were-shouting-kill-them/sudans-violent-crackdown-protesters-khartoum>

In a broader sense, these are questions about the government's legitimacy in the eyes of its citizens. If a democratic government like Sudan's transitional government is unable to meet its people's demands, despite its promises to them, what does it mean about its legitimacy<sup>78</sup> There are also questions about the military's role (rumored to be involved in the Khartoum sit-in massacre) plays in this new government. Cooperation with the ICC would answer these questions and prove to the citizens that the Sudanese government is respectful and answering their demands for justice. By turning over the accused to a court of law like the ICC, Sudan's government will demonstrate its commitment to prosecute those guilty of atrocity crimes. From this, Sudan can begin to legitimize itself internationally too.

### **B. Internationally**

In terms of international legitimacy, Sudan needs to separate itself from its past. Cooperation with the ICC can provide this separation. Under the al-Bashir regime, Sudan was a state that sponsored terrorism. It was a state that allowed and participated in human rights atrocities and viewed the ICC as an interfering force that had no place in Sudan. However, the international world's government needs to see that it is separate from this al-Bashir regime. It also needs to separate itself from the brief military government that has also been accused of committing human rights atrocities as demonstrated by accusations that the military participated in the Khartoum sit-in massacre, explored further below.

In other words, Sudan needs to establish itself as a democracy that respects human rights and punishes those guilty of human rights abuses. When it does this, international donors will likely like to be more interested in supporting a Sudanese government that wants to respect the rule of law and justice for victims. There is a want in the international community for the suspects to be

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tried before the ICC. Cooperation with the ICC will also serve as a sign that Sudan will keep its promises to the international community. Since Feb 2020, Sudan has promised to transfer suspects to ICC jurisdiction.<sup>79</sup> However, until the transfer of Ali-Rahman, Sudan had not moved in that direction. But there are concerns over ICC legitimization, and that will affect Sudanese legitimization.

It is true that a Sudanese hybrid- tribunal could be a legitimizer for the Sudanese government. There have been discussions about creating such a tribunal<sup>80</sup>. A hybrid-tribunal could provide means for the Sudanese government to address the Darfuri atrocities while maintaining a local element. It would create opportunities for local individuals to get involved and perhaps make it easier to gather evidence and interview witnesses. However, hybrid-tribunals have been hounded by accusations of corruption and bias.

Take, for example, the Extraordinary Chambers in the Courts of Cambodia. This hybrid-tribunal founded to deal with the Khmer Rouge regime's ramifications in Cambodia has plagued corruption charges since its inception<sup>81</sup>. Take, for example, the tendency for voting to be drawn upon international and domestic lines<sup>82</sup>. Who is to say that a Sudanese hybrid-tribunals would not be the same, especially if a member of the al-Bashir regime remain in a position of power.

The ICC has suffered from a crisis of legitimacy, which has affected how it can effectively bring justice for the victims. There are suggestions that the ICC is not legitimate in several vital parts of the world. In other words, despite its legitimacy in multiple places in the

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<sup>79</sup>See Jen Kirby, *Sudan's former dictator may finally face justice for the Darfur genocide*, VOX (February 11, 2020) <https://www.vox.com/2020/2/11/21133429/sudan-al-bashir-icc-genocide-darfur>.

<sup>80</sup> AG: *ICC suspects could be tried in Sudan*, *supra* note 74.

<sup>81</sup>.See BETH VAN SCHAACK & RONALD C. SLYE, *International Criminal Law and Its Enforcement* 174, (4<sup>th</sup> ed. 2020),

<sup>82</sup>.See *Id.*

international community, it's not legitimate enough in the areas where it matters, such as in the US, China, or Russia. As a result, Sudanese cooperation with the ICC would not legitimize the government in the way suggested above. There are also concerns that the ICC has operated by bargaining with human rights abuses, which prevent it from being seen as legitimate<sup>83</sup> In other words, it becomes counterproductive if the ICC is bargaining with those it seeks to prosecute.

However, it is legitimate in enough parts of the world to influence Sudan's international stage position. Further, Sudan calls to turn the suspects over to the International Court, both by the victims and other nations. Furthermore, there are similar concerns of bargaining with human rights abusers in a Sudanese tribunal, if not more because of problems due to the government's al-Bashir regime's presence. Not everyone from the al-Bashir rule has been removed from a position of power.

Another critical element of this legitimatization period addresses the victims' wants and needs, as explored below. The Sudanese have demonstrated that they care about the interest of the victims. Therefore, it becomes crucial that the victims are considered. When the victims are considered, there are implications for international criminal justice and the ICC.

#### V. WHY IS THIS SO IMPORTANT FOR THE VICTIMS?

This section provides three reasons why it becomes so crucial for the ICC to hear these cases. It begins by address the victims scheme within the ICC Statute, and why this provides a better option for the victims. It then moves into the trial's themselves, and briefly touches upon the bias that may exist which will prevent the trails from being fair, and that trials at the ICC

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<sup>83</sup> Kerstin Carlson, *Al Bashir, and the ICC. There are better ways to achieve justice*. THE CONVERSATION (February 16, 2020, 9:31) <https://theconversation.com/al-bashir-and-the-icc-there-are-better-ways-to-achieve-justice-131850> (stating that the best position for the ICC would be "to monitor and support anti-impunity in Sudan").

will be more equitable and legitimate because of the lack of bias. Prosecuting the accused in the Darfur situation at the ICC with Sudanese cooperation sets a precedent for both the ICC and international criminal justice. It then presents the case, using the Khartoum sit-in massacre as an example, why Sudan is not able to conduct adequate trials. Finally, it addresses the argument that justice and the victims would be better served by conducting local prosecutions.

One of the most critical parts of any atrocity prosecution is justice for the victims. There is something to be said that there is a role for punishing the perpetrators. Yet, there is a considerable role for restorative and transitional justice in international criminal law<sup>84</sup>. This concept is very true for the ICC. Within its very statute the ICC, elevates the concerns of victims.<sup>85</sup> The ICC sought to establish itself as a “victim-centered criminal tribunal”. This is why and where many of the victims come in. There is an important aspect of international criminal law, that focuses on making the victims of atrocity crimes feel heard and made whole. It is necessary to recognize the victims of these crimes, and the ICC provides a desirable option for this, especially in the Darfuri context.

#### **A. The process of Victim Representation and Reparations at the ICC will likely be better at the ICC**

The ICC provides a statutory scheme for victims to participate and receive reparations at the ICC. There are three significant pieces of the statute that focus on the victims. The first is Article 68, which provides the statutory requirements of Victim Participation at the ICC. Its official designation is “Protection of the victims and witness and their participation in the

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<sup>84</sup> Louis Bickford, “Transitional Justice”, *The Encyclopedia of Genocide and Crimes Against Humanity* (Macmillan Reference USA, 2004) (vol. 3, 1045)

<sup>85</sup> Rome Statute, Preamble. (stating that “States Parties to this Statute... [are] mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”).



proceedings.”<sup>86</sup> It specifically seeks to protect victims and witness and their rights to participate at trial.<sup>87</sup> The most relevant paragraph of this statute is Paragraph 3. Paragraph 3 states that:

where the personal interests for the victims are affected, the Court shall permit there views and concerns to be presented and considered at the stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>88</sup>

Paragraph 3 of Art 68 is the direct statutory provision that allows for victim participation at the ICC. The other sections surrounding it serve to create provisions that protect these victims and witness. In other words, it makes victim participations a requirement of cases at the ICC.

These requirement participation means that victims are heard and also provides reasoning for a the ICC reparations system. These is covered in the two remaining relevant article of the statue.

These two articles specifically deal with the ICC’s reparations schemes. They are Article 75 and Article 79. Article 75 governs reparations as part of the trial. It is the article that governs “Reparations to victims.”<sup>89</sup> Article 75 para 1 states that

The Court shall establish principles relating to reparations to, or in respect of victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in expectational circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.<sup>90</sup>

Article 79, then provides the statutory authorization for the Trust Fund for Victims. The Trust Fund for Victims is an organization authorized under the Rome Statute but separate from the ICC. It provides programs for the Victims and also steps in when the situation where a convicted individual is indigent and provide funds for reparations. Article 79, sates explicitly that:

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction, and of the families of such victims.
2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

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<sup>86</sup>Rome Statue, Art. 68.

<sup>87</sup>*See Id.* at Art 68, para 1 -6.

<sup>88</sup>*Id.* at Art 68, para. 3

<sup>89</sup>*Id.* at Art 75

<sup>90</sup>*Id.* at Art. 75, para 1 .

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.<sup>91</sup>

All of these articles provide examples of the statutory rights afford to victims at the ICC. There is no indication that a similar statutory right exists in Sudan or will exist in the near future. Instead, Sudan has placed its focused on economic reforms and attracting money from donors in order to repair its falling economy. Although this not necessarily a justice focused concern, it does become necessary, especially if Sudan wants to create a means for victims to be awarded reparations eventually. What it does mean is that create a system for victims is low on the Sudan priorities.

This lack of a victim system is where the ICC comes in. As discussed above, the ICC already has a system to allow victims to participate and be awarded reparations. If Sudan cooperates with the ICC, victims will have access to this system. They will also have a better chance to receive reparations. Yes, reparations within the ICC are limited. Yet, there is a possibility for reparations at the ICC, which do not exists in Sudan right now. Sudan is currently suffering economically. This economic suffering means like none of its financial resources will go towards victim participation or reparations.

However, perhaps the victims will be better served through a local tribunal<sup>92</sup>. There are concerns that if the ICC got involved, it would hamper the peace and reconciliation process and affect current systems in place that are helping victims now<sup>93</sup>. For example, after the indictment, al Bashir "expelled most of the major international aid organizations that had been operating in the country providing much needed" aid<sup>94</sup>. Who's to say that a similar action would not happen,

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<sup>91</sup>*Id.* at 79

<sup>92</sup>*See Schaack*, 544

<sup>93</sup>*See Id.*

<sup>94</sup>*Id.*

and the victims would be left without much-needed aid while the trial took place.

Yet, there is no victim system in place within Sudan. Furthermore, many of the victims want the cases to be tried at the ICC<sup>95</sup>. Also, there is a commitment to protect the victims that did not exist during the al-Bashir regime.<sup>96</sup> Therefore, if Sudan truly wants to be seen as a country that respects the rule of law, address the ramifications of atrocities, and holds the perpetrators accountable, it must appreciate what the victims of these atrocities want. In this case, it is prosecutions before the ICC. By paying attention to victims' concerns, the trials will be fairer and more legitimate for the reasons described below.

### **B. The trial will be fairer and more legitimate**

There is the possibility for bias in Sudanese trials. It is highly likely that any trial conducted in a country with such a history of trauma and conflict, that a bias will exist in society for a long time. That is not to say that there will not be a bias at the ICC. As mentioned above, there will be accusations of an African bias. Yet, it is unlikely for there to be the bias of remaining al-Bashir individuals that remain part of the military and government. These individuals that remain could prevent justice from being achieved. It could be argued that the Khartoum sit-in massacre is evidence of this. In other words, those still in power are trying to protect themselves from prosecution. Further, the African bias may not necessarily affect the process of justice the same way that a punitive bias would affect prosecutions of al-Bashir.

There is also the removal of the “justice bias”, in other words focusing on the most punitive damage that could exist. It is highly likely that if a trial were conducted on punitive basis, two situations would occur. Firstly, there will be accusations of victor’s justice, or that the

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<sup>95</sup>.See Kirby, (referencing Sadiq Abadlla Mokhtar, an official in Darfur, statement that "as [al-Bashir's] victims we should have the right to say how and where he is tried, and to us that is only the ICC").

<sup>96</sup>See Abdalla Hamdok, Prime Minister of Sudan, quoted in Kersten, *supra* note 1

need to punish will interfere with the ability to conduct a fair trial. An example of this can be found in the Tokyo Tribunal<sup>97</sup>. Secondly, a punitive trial will interfere with the victims ability to get a trial that focuses on their concerns. Instead, it will focus on achieving the greatest punishments for the perpetrators.

Some say that this reported bias does not exist in Sudanese courts. On the other note, is the argument if there is a bias, it will be easily manageable or less than the bias at the ICC. Many believe that Sudan's justice system will address this bias and create a fair and adequate system as part of the healing process. They also think that Sudan can avoid the accusations of victors justice that plague many tribunals, and that in fact, the ICC is more of an example of victor's justice.

But it is clear that bias still runs rampant within the Sudanese justice system. There are still tensions that ran flush within Sudan. Furthermore, the Sudanese likely want to see these individuals will prevent fair trials. Incidents of trauma have ramifications that last long past the end of the conflict. One could argue that the Darfur conflict is still ongoing. Furthermore, many of those responsible for these crimes in positions of power show that Sudan cannot conduct adequate trials.

### **C. Sudan has not demonstrated ability to conduct adequate trials.**

Sudan has not prosecuted any of the ICC suspects for ICC crimes despite conducting trials and convicting ICC suspects of corruption charges. Take, for example, the recent trial of Omar al-Bashir. This trial has focused on additional corruption charges and convicted Omar-al Bashir of these charges instead of prosecuting the ICC crimes. Omar-al Bashir has already been

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<sup>97</sup> See *The United States of America v. Akaki, Sadao et al.*, International Military Tribunal for the Far East (IMFTE)

convicted of corruption<sup>98</sup>. Yet, the Sudanese government seems to insist on charging al-Bashir on umpteenth charges of corruption. Also, the Sudanese government has not addressed its domestic atrocities. Take, for example, the Khartoum sit-in massacre. However, those killed have still yet to receive justice, and the government has been slow in pushing for justice. Instead, citizens prompted the process. Who is to say that this will not affect any Darfuri prosecution.

It may be too soon to tell where or not Sudan will not conduct adequate trials. There is a possibility that as Sudan's government gets more secure, it will begin to create a tribunal that will address these questions of justice. If Sudan can do this, the ICC is prevented from interfering, under the principle of complementarity. The principle of complementarity means that if a "State is ... willing or ... able genuinely to carry out [an] investigation or prosecution" of ICC criminals, then ICC will not get involved.<sup>99</sup>

However, Sudan has conducted trials of the ICC suspects within the last two years. Yet, they have not addressed the ICC crimes, instead of focusing on the coup's corruption charges. They have also indicated very little willingness to address atrocity crimes efficiently. Take, for example, the Khartoum massacre sit-in and the lack of justice that these victims have received. Or the fact that the citizenry had to push for investigations into the Khartoum massacre. Both these events have demonstrated that Sudan's government is unwilling to take the necessary steps to prosecute these criminals for the ICC crimes. As a result, the principle of complementarity will be satisfied. Therefore, the ICC can and should prosecute.

There is a growing role of victims in international criminal law and international criminal justice. It also demonstrates why it becomes essential for the cases to be tried before the ICC and not a

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<sup>98</sup>. "Omar al-Bashir: Sudan ex leader sentenced for corruption," BBC NEWS (December 14, 2019), <https://www.bbc.com/news/world-africa-50794096>

<sup>99</sup> Rome Statute, Art. 17

court in Sudan in this ICC prosecution. This growing role is positive for Sudan and the ICC.

## VI. CONCLUSION

Cooperation with the ICC will be critical in the future for the Darfur victims, the Sudanese, and the ICC. All three groups or organizations will gain more on domestic and international stages if they continue cooperating with the ICC. In other words, there is more benefit in cooperation with the ICC. There is also the pressure put on Sudan faces pressure by its people to cooperate by its people. Yet, this cooperation's effect can be broken down into three major groups, the Darfur victims, the Sudanese people and government, and the ICC itself.

In terms of Darfur, the victims will significantly benefit from this. As mentioned above, the ICC will be better for victims. It allows them access to existing statutory rights. It provides them with a court that will likely be fairer and less biased than a Sudanese court. The victims will benefit from this fairness. Finally, there is no sign that Sudan is likely to provide adequate means to prosecute the suspects for ICC crimes. Therefore, the ICC remains the most viable option for these victims if they want to be heard. For the longest time, the world and Sudan ignored the plight of these victims. These victims now can receive justice and be vindicated to create a more just Sudanese society.

In terms of Sudan, this provides a legitimization route for Sudan. As mentioned above, Sudan is a very young government; the civilian government, itself, is only a year and a half old, forming only in August 2019. It faces the problems that any new transitional government faces, legitimizing itself, especially after years of a dictatorship under al-Bashir, and a military government for several months. There are questions of the rule of law that the government will have to implement reforms, specifically judicial reforms. ICC cooperation allows these questions to be answered. It legitimizes the government in people, and the international community's eyes

provide for the possibility for reform and aid to flow into the country. It means that they will have a government that can provide for them in terms of the people.

Cooperation with ICC also has ramifications for the ICC itself. The ICC suffers from legitimacy issues. It has been accused of being ineffective in prosecutions. It also has been charged with targeted witch-hunts against particular countries. A further criticism, which is relevant in this paper, is the accusation of African bias. However, Sudanese cooperation may change this view. Firstly, it will combat the allegations of ICC ineffectiveness by allowing the Court to get on the ground and conduct investigations, moving the case along. Secondly, it will provide an example of an African nation participating and cooperating with the ICC and serve as an example for other African countries. Perhaps it will show that the ICC is not guilty of Africa bias, and African nations will participate more fully.