



JIMMA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE

SCHOOL OF LAW

**EXAMINING ENFORCEMENT OF DUTY TO COOPERATE
WITH INTERNATIONAL CRIMINAL COURT TO ARREST
SUSPECTS OF CORE INTERNATIONAL CRIMES**

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE
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CRIMINAL LAW**

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Declaration

‘I, the undersigned, declare that this thesis titled ‘Examining enforcement of Duty to Cooperate with International Criminal Court to Arrest Suspects of Core International Crimes’ is my own work that has not been submitted for any degree or examination in any other university, and all the sources I have used or quoted in this research have been acknowledged duly.

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Approval

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Abstract

Core international crimes are the most serious crimes which concerns the international community as a whole. National jurisdictions are obliged to investigate and prosecute the crimes while ICC complements accountability gaps created by the states. States cooperation plays central role in execution of ICC arrest warrant due to absence of its own enforcement agents. This thesis examines enforcement of states obligation to execute ICC arrest warrant. It was conducted with doctrinal type research employing legal analysis of applicable laws of ICC and other sources of international law. The binding nature of obligation to enforce arrest warrant and its enforcement determines ICC's success in ensuring accountability. Under Rome statute, state parties to Rome statute are bound to execute ICC arrest warrant while non-party states obligation is of voluntary nature. Nevertheless, there are circumstances in which non-party states obligation becomes obligatory under general principles of international law. States parties' duty to effect the arrest warrant has been challenged by personal immunity of incumbent head of states of non-party states to Rome statute. When obligation to execute ICC arrest warrant and uphold personal immunity of incumbent senior officials of non-party states are in conflict, it is uneasy to reconcile. The rule of customary international law does not grant personal immunity before ICC and states cooperating with ICC to effect arrests. States immunity becomes restrictive and human rights protection elevates. ICC should not request arrest if it causes breach of immunity and execution of the arrest has to be postponed until removal of the immunities. Immunity may be waived through ratifying the Rome statute, accepting ICC jurisdiction or joining UN. To implement execution of arrest warrant, state parties are obliged to consult and provide information to the Court. Among others, negative perceptions of selective prosecution, Selective UNSC referral of situations without objective criterion, absence of actions taken against uncooperative states impedes states cooperation. Lack of alternatives to complement states cooperation challenges the Court. Thus, UNSC should extend the mandate of peacekeeping missions to effect arrest. It should set and employ consistent and objective criteria in order to refer situations in non-party states to Rome and to actively follow up and assist the ICC in bringing suspects to ICC. Failure to take actions against uncooperative states allow suspects to remain at large and creates injustices to Victims. ASP or UNSC should take coercive actions against uncooperative states to foster cooperation.

Keywords

Execution, arrest warrant, International Criminal Court, non-compliance, requests, enforcement, core international crimes

Acronyms and Abbreviations

AP	Additional Protocol
AC	Appeals Chamber
ASP	Assembly of States Parties
AU	African Union
DRC	Democratic Republic of Congo
ECtHR	European Court of Human Right
IACtHR	Inter-American Court of Human Right
ICC	International Criminal Court
ICCPR	International Covenant on Civil and political Rights
ICJ	International Court of Justice
ICRC	International Committee on Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
IFOR	Implementation Force
IHL	International Humanitarian Law
IMT	International Military Tribunal
IMTFE	International Military Tribunal for Far East
NATO	Northern Atlantic Treaty Organization
RPE	Rules of procedure and Evidence
PTC	Pre Trial Chamber
SCSL	Special Court of Sierra Leone
SFOR	Stabilization Force
PTC	Pre-Trial Chamber
UN	United Nations
UNMIS	United Nations Mission in Sudan
UNMIL	United Nation Mission in Liberia
UNCH	United Nations Charter
UNSC	United Nations Security Council
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on Law of Treaty

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CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

Traditionally, states are subject to rights and duties under international law while individual criminal responsibility for core international crimes developed through time. This principle is recognized by Nuremberg and Tokyo tribunal, ad hoc international criminal tribunals and International criminal Court.

ICC is an independent and permanent court which has complementary jurisdiction over genocide, crimes against humanity, war crimes and aggression with the object of putting impunity to an end for the crimes, to contribute to the prevention of the crimes and to guarantee international justice.¹ These crimes are the concern to the international community as a whole over which the Court has the jurisdiction and are considered as core international crimes.² The crimes threaten peace, security and the well-being of the world.³ The crimes have been proscribed by international laws and considered as *jus cogens* norms from which no derogation is allowed.⁴

Various international law instruments oblige states to prevent and punish perpetrators international crimes including the horrendous one.⁵ Beyond this, states are also required to assist each other to bring suspects to justice.⁶ When states genuinely fail to do so, ICC commences investigations and prosecutions. However, due to lack of its own police force and as the Rome statute does not allow trial in *abstentia*, the court relies on international cooperation.⁷ Execution of ICC arrest warrant is

¹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered in force 1 July 2002), 2187 UNTS 90, (hereinafter referred as Rome statute) Preamble, para 5.

² Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (2nd edn. Cambridge University Press 2010) 4.

³ Rome statute (n 1) para 3.

⁴ M Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 59 *Duke Journal of International Law* 41.

⁵ Convention on the Prevention and Punishment of the Crime of Genocide (adopted Dec. 9, 1948) 102, 78 UNTS 277, art. 1; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949) art. 49; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at the Sea (adopted 12 August 1949) art.50; Geneva Convention Relative to the Treatment of Prisoners of War) art. 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949) art. 146; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984) art 4.

⁶ UNHRC, 'General Comment No.31' on 'the Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) CPR/C/21/Rev.1/Add, para 18.

⁷ Rome statute (n 1) para 4.

one form of cooperation, among others but unless suspects appear voluntarily, arrest cannot be effected without states cooperation. State parties' legal obligation is of mandatory under the statute whenever and wherever the Court decides to bring suspects to justice. But, non-party states obligation is of voluntary nature as it arise from ad hoc arrangements, agreements or other mechanisms under the statute unless they lodge declaration to accept its jurisdiction. However, there is a controversy regarding states obligation to cooperate with ICC in relation to UNSC referral of situations to the Court under chapter VII of UN charter.

There are instances where states withhold and reluctant to cooperate with ICC to execute ICC arrest warrant for genuine concerns or may be deliberately they may refuse cooperation. Refusal to effect arrest is the biggest hindrance to the full implementation of ICC's mandate and ensuring adequate States cooperation, especially to arrest suspects is the biggest challenge to the Court. In practice both parties and non-parties to Rome statute have been resisting cooperation. State parties have been invoking their duty towards non-party states to respect immunity of serving heads of states. Requested state parties' tendency to respect personal immunity of incumbent higher officials of non-party states makes execution of ICC arrest warrant difficult. Additionally, there are also other impediments to states cooperation. Non-party states reliance on only Rome statutes to cooperate also discourages efforts of putting impunity to an end for the crimes.

Under customary international law few serving state officials such as head of state, head of government and minister of foreign affairs are not subject to national criminal jurisdictions abroad even for international core crimes.⁸ Thus, their immunity is inviolable and not subject to foreign criminal jurisdiction including arrest.⁹ Traditionally, head of states are entitled to absolute immunity from foreign jurisdiction but through development immunities under international laws becomes irrelevant before international criminal tribunals and ICC for international crimes.¹⁰ Among others, the 1998 Rome statute, statutes establishing ad hoc criminal tribunals and Nuremberg charter recognized irrelevance of immunities before them.

⁸ Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98(3) *American Journal of International Law* 409-410.

⁹ Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 334.

¹⁰ Guénaél Mettraux, John Dugard and Max du Plessis, 'Heads of State Immunities: International Crimes and President Bashir's Visit to South Africa' (2018) 18 *International Criminal Law Review* 583.

Refusal to arrest suspects may lead to impunity and enable head of states or other higher officials to shelter behind their immunity and to have safe havens. It also impedes holding individuals accountable and creates injustices to victims. On the other hand, arresting ones president, Prime minister or minister of foreign affairs a sensitive area which may cause war as they are public figures who represent concerned states. Thus, the possibility of striking balance between respecting immunity and bringing perpetrators to justice is the thorniest and uneasy issue.

In response to non-compliance ICC's request to arrest, the Court does not take measures rather than making judicial findings and referral or informing noncompliance to ASP and/ or UNSC. ASP may respond by taking actions such as deploying political and diplomatic efforts when the matter has not yet been referred to the ASP if it believes that urgent action prevent the occurrence serious incident of non-compliance of duty to cooperate. UNSC may also take measures which it deems appropriate to bring compliance with decisions of the court. It may interrupt economic relations and means of communication, deploy forces among others, if any. But, if no response is given to states refusal, the number of uncooperative states with ICC may increase; suspects remain at large and victims' cries remain unanswered.

1.2 Statement of the Problem

Primarily, states are obliged to prevent, investigate and punish perpetrators of core international crimes while ICC complements the national jurisdiction if states are unwilling or unable to do so. As both governments on power and other non-state armed groups may commit the crime, bringing those perpetrators at national level is difficult. Government on power may control police or military forces and there may be lack of resources and capacity to bring insurgents to justice. Nevertheless, the Court lacks power to apprehend suspects; compel compliance with its decisions and to sanction uncooperative states directly.¹¹ Thus, state parties to the statute are obliged to execute ICC arrest warrant in order to “guarantee lasting respect for and the enforcement of international justice.”¹² Imposition of such obligation does nothing unless enforced. However,

¹¹Valerie Oosterveld, Mike Perry and John McManus, ‘The Cooperation of states with the International Criminal Court’ (2001) 25(3) Fordham International Law Review Journal 767.

¹² Luis Moreno-Ocampo, ‘The International Criminal Court: Seeking Global Justice’ (2008) 40(1) Case Western Reserve Journal of International Law 224.

mainly, non-cooperation of both Parties and non-party States caused individuals subject to arrest warrants to remain at large.¹³

Unless presence of individuals secured, it is difficult to conduct criminal trial proceedings.¹⁴ Arrest may also be required to prevent commission of further crimes or to prevent disruption of evidences. Securing arrest and detention is challenging and difficult for the court. However, both parties¹⁵ and non-party state¹⁶ are reluctant to execute ICC arrest warrant. In effect, outstanding arrest warrants have not been executed yet. For instance, among 34 arrest warrants issued by ICC judges, 15 suspects remain at large.¹⁷ In this regard, the nature of non-party states obligation is unsettled and debatable. They bear no obligation under Rome statute unless they accepted the jurisdiction of the court and made arrangements or agreements to cooperate. But the legal basis for their obligation to cooperate is not restricted to the statute.

The more problematic issue is arresting serving senior officials of non-party state to Rome statute in compliance with ICC's request. Arrest may hinder effective discharge of interests of the state they represent and deteriorate states relation. Non-execution of arrest warrant allows alleged perpetrators to enjoy impunity for the crimes, opens door to destroy evidences and to commit other crimes. It also prevents the Court from exercising its jurisdiction over the suspects and hinders it from ensuring individual criminal accountability. State parties have been giving priority for their obligation towards immunity of incumbent heads of states of non-party states¹⁸ than execution of arrest warrant while the ICC takes the other side. The legality of non-execution of ICC arrest warrant against serving heads of states of non-party states is open among scholars. Some support

¹³ Human Rights Center, Cooperation and the International Criminal Court (Expert Workshop, Nottingham University, 18-19 September 2014) para 9. At the time this paper is written 15 individuals are at large in which some of them are in forested environments and others have been hosted by states.

¹⁴ *ibid.*

¹⁵ Among other state parties, South Africa, Chad, Kenya, Djibouti, Malawi, DRC and Jordan failed to cooperate with ICC in arresting Omar Al Bashir.

¹⁶ The Assembly of State Parties Bureau, Report on non-cooperation (2018, ICC-ASP/17/31) para 27. "The Federal Democratic Republic of Ethiopia (five visits), the Kingdom of Saudi Arabia (three visits), the State of Kuwait (two visits), the State of Qatar (two visits), the Kingdom of Bahrain, the United Arab Emirates, the Kingdom of Morocco, the Republic of Rwanda, the Russian Federation and the Republic of Turkey" to cooperate with the Court in arresting and Surrendering Al-Bashir when he entered their country raising UNSC resolution 1593 (2005).

¹⁷ The Court Today <<https://www.icc-cpi.int/iccdocs/pids/publications/thecourtodayeng.pdf>> accessed 11 June 2019.

¹⁸ The International Criminal Court, Report of the 2016/17 activities of International criminal Court to United Nations General Assembly (2017, A/72/349, 72nd Session) para. 55. Al Bashir has been remain at large for a longer period of time and currently apprehended and detained in Sudan for corruption cases after removed from power.

non-compliance with request to arrest¹⁹ while others oppose.²⁰ Nevertheless, reconciliation of the two notions is unsettled.

In response to noncompliance with ICC's request to arrest suspects, lack of effective measures taken by ASP or UNSC is also a problem. The 2017 report of ICC shows that 15 notifications of findings of non-cooperation of states to the Security Council have been made but the latter has failed to respond to the communications in any meaningful manner.²¹ Failure to take appropriate measures against uncooperative states at proper time does not advance states cooperation further. Non-execution of arrest warrant prevents the court from exercising its jurisdiction. Apart from this, after referring situations to ICC, UNSC takes no active follow-up to ensure cooperation with the Court to arrest suspects. Additionally, lack of alternative enforcement mechanism such as using peacekeeping missions deployed in concerned states is a problem in relation to effecting arrest.

Failure to respond to states noncompliance exacerbates problems related to advancement states cooperation. This gives chance for suspects to remain at large to commit the crimes again and to destruct evidences. This in turn, creates injustices to victims and threatens to undermine the entire construction of the international criminal justice and a large part of the human rights regime in general.²²

1.3 Research Objectives

1.3.1 General Objective

The general objective of this research is to examine enforcement of states duty to cooperate with International Criminal Court to arrest suspects of core international crimes pursuant to relevant sources of international law in general and applicable laws of ICC in particular.

1.3.2 Specific Objectives

- i. To examine the nature of international legal obligation of non-party states to Rome statute in execution of ICC arrest warrant when requested by ICC.

¹⁹ Mettraux, Dugard and Plessis (n 10). The authors stated that Resolution 1593(2005) which imposed obligation on Sudan to fully cooperate with ICC affects the relationship between ICC and Sudan only but not Sudan and others.

²⁰Akande, The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities (n 9).The author raised that all members of the United Nations are required to base on the Security Council resolution to arrest Al Bashir as his immunity has been removed by the resolution.

²¹The International Criminal Court Report (n 18) para 89.

²²The prosecutor v Omar Hassan Ahmad Al Bashir (Decision on The Prosecutor's Application for a warrant of arrest against Omar Al Bashir) ICC-02/05-01/09, PTC I, 4 March 2009 para 526.

- ii. To analyze legal mechanisms of reconciling competing international obligation of state parties to Rome statute towards non-party states to the statute and International Criminal Court when requested to arrest incumbent senior state officials suspected of core international crimes.
- iii. To appraise the challenges which impede execution of ICC arrest warrants.
- iv. To evaluate the implication of UNSC or ASP failure to respond to states non-compliance with ICC's request to arrest obligation to prevent and punish core international crimes.

1.4 Research Questions

- i. What is the nature of international legal obligation imposed upon states not party to Rome statute to cooperate with ICC in arresting suspects of core international crimes?
- ii. What are legal mechanisms of reconciling ICC parties' duty to respect personal immunity of serving higher officials of non-party states vis-à-vis to execute ICC arrest warrant?
- iii. What are the challenges which impede execution of ICC arrest warrants and how we can resolve them?
- iv. What implications UNSC or ASP's failure to take measures against uncooperative states with ICC in arresting suspects have upon states obligation to prevent and punish core international crimes?

1.5 Literature Review

Numerous literatures show ineffectiveness of ICC due to non-compliance of states to cooperate with it, notably in relation to arresting serving head of states. Arrest and surrender is the very important and resisted one also. Durdevic, has written a paper on legal and political limitations of the ICC enforcement system.²³The paper addresses limitations of enforcement of cooperation by national jurisdiction in general and argues complementary jurisdiction makes the ICC ineffective and challenges its function but has not directed to obligation to execute ICC arrest warrant against officials enjoying immunity specifically. He criticized incorporation of complementary jurisdiction. Complementary regime enables national jurisdiction to prosecute crimes under ICC jurisdiction. As it complements national jurisdictions, when states are willing and have capacity

²³ Zlata Durdevic, 'legal and political limitations of the ICC enforcement system: Blurring the distinctive feature of Criminal Court' (Research paper written under grant agreement as a part of a project Towards an European Criminal Procedure) <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwi9g-yA9HkAhUKQkEAHVdrBYQQFjAAegQIAxAC&url=https%3A%2F%2Fwww.pravo.unizg.hr%2F_download%2Frepository%2FFS_Damaska_-Durdevic.pdf&usg=AOvVaw1hizdbdWfdn97vXTRHic3o > accessed 22 September 2019.

ICC is not required to deal with the crimes. Under international laws states have primary responsibility to prevent, investigate and punish perpetrators of core international crimes. This study focuses on execution of ICC request to arrest senior officials of non-party states to the Rome statute exercising this jurisdiction. He discussed nothing about competing international obligations of requested states concerning obligations towards non-party states officials entitled to personal immunity under international law and obligation towards ICC. Additionally, the implication of failure to respond to noncompliance with requests is not part of his work.

Banteka, dealt with a systematic approach to the ICC's arrest warrant enforcement problem stating that politics and states' interests plays a vital role to arrest suspects.²⁴ The role of politics and states interest to apprehend and secure judicial enforcement is the focus his work without analyzing legal frameworks regarding states duty to execute ICC request to arrest and to respect personal immunity of serving highest state officials.

Barnes, addressed ICC's ineffective enforcement mechanisms focusing on the indictment of Omar Al Bashir, the then President of Sudan. He focused on state parties' duty particularly, Chad and Kenya to arrest Al Bashir without focusing on the nature of obligations imposed upon non-party states under international laws and the effect of failure to respond to states non-compliance with ICC's request. He raised tension between ICC and AU but not as a challenge to cooperation obligation with ICC. Expulsion and suspension of states from Rome statute membership are remedies he provides for breach of the statute in light of cooperation.²⁵ However, these remedies are not provided by Rome statute and he made no further legal analysis to secure states cooperation with the Court.

Ciampi, also attempted to deal with current and future scenarios for arrest and surrender to the ICC asserting the absolute nature of ICC state parties' obligation to arrest and surrender suspects.²⁶ However, he didn't clearly address the means of resolving requested states conflicting obligations under the Rome statute and personal immunity of serving higher officials of nonparty states to Rome statute. The author raised absence of enabling legislations as a major obstacle to comply

²⁴ Nadia Banteka, 'Mind the Gap: A Systematic Approach to the International Criminal Court's Arrest Warrants Enforcement Problem' (2016) 49 *Cornel international law Journal* 529.

²⁵ Gwen P. Barnes, 'The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir' (2011) 34(6) *Fordham International Law Journal* 1618.

²⁶ Annalisa Ciampi, 'Current and Future Scenarios for Arrest and Surrender to the ICC' (2006) 66 *Heidelberg Journal of International Law* 721.

with ICC arrest warrant in most cases. But, after referral of Darfur situation, uncompliant states parties has been invoking personal immunity of serving heads of states of non-party states. Thus, the work has not been backed by updated information. He proposed that political pressure to impose sanctions or other enforcement measures against uncooperative state compels cooperation with ICC. Political commitment has a role in pressuring states to cooperate with ICC but putting pressure itself is not free from politics. The implication of failure to take measures against uncooperative states in relation to international core crimes has not been dealt with.

In relation to the ICC arrest warrant decision for the then President Al Bashir of Sudan, one scholar has argued that the ICC “can indict, issue an arrest warrant for and prosecute a serving head of State”, in relation to State party to the Rome Statute or referral of situations to the court under Chapter VII of the UN Charter by UN Security.²⁷ However, apart from indictment, issuance of arrest warrant and prosecution of serving higher officials of state parties or situations referred by UNSC, the author did not address conflicting obligations of state parties in light of executing ICC arrest warrant and respecting personal immunity of officials of non-party states. The author also pointed that further clarification is required in the future regarding states parties’ reliance on article 98 of the Rome statute to justify their non-compliance with the ICC’s request to arrest suspects but ICC ‘s ruling opposes this and he hasn’t addressed these competing obligations of state parties to the Rome statute.

Wirth, argued that modern state practice and *opinio juris* does not grant immunity for incumbent and senior states official except highest states representatives such as heads of states or ministers of foreign Affairs who hold office. The author also argued that personal immunity of the officials should trump over human rights protected by criminal prosecution justifying that prosecution and arrest abroad may give rise to war.²⁸ As his view, in order to strike a balance between protections of states ability to discharge their function effectively in maintaining peace and human rights protection, immunity *ratione personae* of incumbent high ranking officials trumps human rights. And, when the term office of those officials ends, they have to be brought to justice.²⁹ Al most all, his work emphasized on existence of personal immunity of serving highest representatives of states

²⁷ Manisuli Ssenyonjo, ‘The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan’ (2010) 59(1) *The International and Comparative Law Quarterly* 213.

²⁸ Steffen Wirth, ‘Immunity for core crimes? : The ICJ’s Judgment in Congo and Belgium case’ (2002) 13(4) *European Journal of International Law* 888.

²⁹ *ibid* 892.

from prosecution abroad under customary international law. However, nothing has been discussed whether this personal immunity applies for the officials with respect to their arrest by states in accordance with ICC request. Additionally, he stated that ‘risk of war is obvious’ if serving heads of states or governments are prosecuted or arrested by foreign countries. For this reason, he elevated the status of heads of states personal immunity than values protected by prosecution of international core crimes. His argument does not rely on legal basis. Furthermore, the work does not address the nexus of UNSC resolutions to refer situations to the ICC in light of lifting immunities of officials suspected of core crimes and cooperation with ICC.

Wardle, on his article regarding ‘the survival of state immunity before international criminal court’ argued that incumbent heads of state have absolute personal immunity before international courts and tribunals.³⁰ He stated that as long as UNSC resolutions of 1593 and 1970 do not explicitly revoke this immunity, obligation to respect personal immunity of Al Bashir and Gaddafi under Customary international law prevails.³¹ The author further argued that no state party and nonparty states to Rome statute are obliged to arrest those officials. He asserted that pursuant to the languages used in the respective resolutions in relation to other state parties and nonparty states to the Rome statute except for Government of Sudan, Libyan Authorities in the respective situations.³² However, the article fails to address the effect of UNSC referral of situations to ICC in relation states obligation to arrest serving heads of states in compliance with ICC requests and whether the council is legally required to remove immunity or to refer situations pursuant to Rome statute. Additionally, in relation to absolute personal immunity of serving heads of states, he addressed nothing in relation international criminal law and relevant jurisprudences. Also, even if the wording of the respective resolutions differ with respect to obligations of state parties to Rome statute and other non-party states to Rome statute except Sudan and Libyan authorities in respective states, to cooperate with ICC, he pointed nothing regarding states obligations under other international conventions. This is due to absence of binding obligation under Rome statute does not warrant absence of such obligation under other sources of international law.

³⁰ Phillip Wardle, ‘The Survival of Head of State Immunity at the International Criminal Court’ (2011) *Australian International Law Journal* 205.

³¹ *ibid* 201.

³² *ibid* 205.

Mutayab, made an analysis of the cooperation regime of the International Criminal Court and its effectiveness in the court's objective in securing suspects in its ongoing investigations and prosecutions.³³ He argued that the ICC has been largely successful in securing the arrest accused persons by cooperation of state parties referred their situations, non-party states accepting its jurisdiction. However, in the absence of such mechanisms and UNSC referral of situations, nothing has been discussed in light of non-party states legal obligation to execute ICC arrest warrant.

1.6 Scope of the study

This study is limited to examining states legal duty to execute ICC arrest warrant issued against highest official of non-party states to whom personal immunity is accorded under customary international law. It concerns legal analysis in relation to execution of arrest warrant for international core crimes but the study does not involve international relations or politics. The study focuses on cooperation to arrest suspected serving highest officials and focuses on non-state parties' duty to execute arrest warrants issued by ICC.

1.7 Limitations of the Study

In order to effectively complete this thesis on time, shortage of materials and budget to buy the relevant materials constrained me. Additionally, interruption of internet at different times and other hindrances also restricted me in relation to access to resources and submitting the paper on time.

1.8 The significance of the Study

The study has a significance to examine states duty to execute ICC arrest warrant against few incumbent higher officials of non-party states entitled to personal immunity under customary international law. As this matter gives rise to debates among scholars, states and ICC, it appreciates the debates, grounds of refusal and effectiveness of legal mechanisms available for enforcement of duty of states to cooperate with ICC in order to arrest suspects of international core crimes. Likewise, the study also helps to appreciate how international and regional instruments and case laws addressed execution of ICC arrest warrants. Furthermore, the study is used to reveal challenges around enforcement of duty to execute arrest warrant issued by ICC and contributes its role to strengthen states cooperation.

³³ Rita Mutayab, 'An Analysis of the Cooperation Regime of the International Criminal Court and its Effectiveness in the Court's Objective in Securing Suspects in its Ongoing Investigations and Prosecutions'(2012) 12 International Criminal Law Review 937-962.

1.9 Research Methodology

This research examines states' legal obligation to cooperate with ICC to execute its arrest warrant. Thus, international law in general and applicable laws of the Court in particular were analyzed. In this respect, sources of international law as enshrined under article 38(1) of ICJ statute and art. 21 of Rome statute were examined. Thus, relevant international conventional, customary, general principles of law, and judicial decisions and writings of scholars were consulted. Relying on the instruments, states international obligation to execute ICC arrest warrant against incumbent highest officials of non-party states to the Rome statute; obligation to respect personal immunity of the officials and the means of striking their balance is examined. The applicable laws which ICC is obliged to apply while exercising its jurisdiction were also analyzed based on article 21 of Rome statute. From these instruments: the nature of legal duties imposed upon states to cooperate with ICC in arresting suspects of core international crimes, particularly, incumbent heads of states and other related officials of non-party states of the statute were examined. Additionally, the means of resolving conflicts between requested states international obligations towards other states and ICC were examined. Writings of scholars, reports and relevant jurisprudences were employed and appraised in order to disclose challenges which impede enforcement of ICC arrest warrant, failures of taking measures against uncooperative states and the implication of the failure upon states obligation to prevent and punish international core crimes.

Library based research were used and relevant theoretical concepts and information were qualitatively analyzed. Thus, primary and secondary sources were used. Secondary data were collected from the text books, journals, websites, scholarly articles, reports and unpublished thesis while jurisprudences/cases, primary sources of international and regional instruments were used to draw information or facts available on the sources.

1.10 Organization of the Study

The research has five chapters. Chapter one addresses the introductory part while chapter two deals with a general overview obligation of state parties to Rome statute to cooperate with ICC with respect to execution of arrest warrant. Obligations of nonparty states to Rome statute to execute ICC arrest warrant forms chapter three. Chapter four addresses mechanisms of compelling compliance with ICC request and the last chapter provides conclusions.

CHAPTER TWO

OBLIGATION OF STATE PARTIES TO ROME STATUTE TO COOPERATE WITH ICC WITH RESPECT TO EXECUTION OF ARREST WARRANT: GENERAL OVERVIEW

2.1 Introduction

Under International law states bear primary obligation to prohibit, prevent and punish perpetrators of the most serious international crimes.³⁴ This obligation is recognized as *jus cogens* and obligation *erga omnes*.³⁵ When states fail to investigate, prosecute or punish, ICC plays complementary role as it is established with the express goal of ending impunity and preventing the crimes.³⁶ Its establishment is a big outstanding achievement in international human rights and international humanitarian laws.³⁷ Nevertheless, it is vulnerable to absence its own enforcement powers except states cooperation. This threatens to undermine its ability to carry out its functions and to deliver international criminal justice.³⁸ Thus, state parties are obliged to cooperate with ICC. Execution of ICC arrest warrant is the very important but the most resisted form of cooperation. States obligation towards the Court commences from pre-trial to post trial stage. There are also other obligations which accompanies obligation to execute ICC requests to arrest suspects. Under this chapter the nature of state parties' obligation to execute ICC arrest warrant, states conflicting

³⁴ Genocide Convention (n 5) art 4 & 6; 1949 Geneva Conventions (n 5); Convention Against torture (n 5), UNHRC General Comment (n 6) para 18; see The Case Concerning Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) filed by Belgium in the ICJ on 19 February 2009 and decided on 20 July 2012; See Cryer and others (n 2) 54. See also William A. Schabas, 'The International Criminal Court and Non-Party States' (2010) 28(1) Windsor Yearbook of Access to Justice 12. States are duty bound to investigate, prosecute and ensure whether persons responsible for the violations recognized as crimes under international laws including the most serious crimes. The complementary jurisdictions of ICC also shows that national jurisdictions are primarily obliged to investigate and punish core international crimes. Even if contexts in which the acts constituting crimes under international laws matters, states bear primary obligations to prevent, investigate, prosecute and punish under international laws. Cryer and others also consider national prosecution as the primary vehicle and the preferable options. International law commission also affirmed that all States have an interest in the prosecution, punishment and deterrence" of international crimes by virtue of being members of the international community. Also, in Belgium v Senegal case ICJ upheld Senegal's obligation to put a former chad president, Hissene Habré, to bring to justice at national level for alleged gross violation of human rights if it would not extradite him to Belgium.

³⁵ Cryer and others (n 2) 60; Iryna Marchuk, *The fundamental concept of crime in international criminal law: A Comparative Law Analysis* (Springer Heidelberg New York Dordrecht 2014) 70.

³⁶ Nada Ali, 'Bringing Guilty to Justice: Can the ICC be Self-Enforcing?' (2014) 14(2) Chicago Journal of International Law 408 &411.

³⁷ Claude E. Welch and Ashley F. Watkins, 'Extending Enforcement: The Coalition for the International Criminal Court' (2011) 33(4) Human Rights Quarterly 928.

³⁸ The prosecutor v Omar Hassan Ahmad Al Bashir concerning Decision on the Prosecutor's Application for a warrant of arrest against Omar Al Bashir) (n 22)

international obligations with respect to execution of ICC arrest warrant and respecting personal immunity of non-party states are addressed.

Under the subsequent subtitles of this chapter, obligations imposed upon state parties to Rome statute towards international criminal court is discussed. Accordingly, lessons that the Court derives from the experiences of ICTY in filling gaps created by states non-cooperation in arresting and transferring indicted persons is addressed. Furthermore, state parties' obligations which implements duty to execute ICC arrest warrant are discussed. Accordingly, obligations to consult the court and provide information to it when they face obstacles impeding cooperation; their obligation to ensure whether procedures under their national laws are available and obligation to execute arrest warrant issued by ICC are discussed. Additionally, state parties competing obligation to execute ICC arrest warrant in relation to obligation to uphold immunities of non-party states to Rome statute is highlighted. In this respect, the means of striking a balance between the two obligations is part of this discussion.

2.2 International Obligation upon State Parties to Rome Statute Towards ICC

International cooperation is an essential tool for enforcement of decisions and order of international criminal tribunals and ICC. Nuremberg and Tokyo tribunals had no state cooperation regime to arrest suspects while ICTR and ICTY statutes imposed mandatory cooperation obligation.³⁹ The tribunals lack their own police force to arrest and surrender indicted persons. Due to this, ICTY has been labelled as "a giant without arms and legs" which "needs artificial limbs to walk and work".⁴⁰ When suspects are not volunteer to appear before the Court, resorting to arrest is indispensable. Arrest is effected by states or other entities. Among others, state parties to Rome State have an obligation. Their obligation to execute ICC arrest warrant is enshrined under Rome statute and may be under other international instruments. In this respect, ICJ found that through cooperation with the ICTY in general and to arrest General Mladic in particular, state parties to Genocide Convention prevent and punish Genocide.⁴¹ It pointed that Serbia's failure to cooperate with ICTY in arresting fugitives wanted for genocide contributes to commission of the crimes.⁴²

³⁹ Oosterveld, Perry and McManus (n 11) 767.

⁴⁰ Goran Sluiter, 'the Surrender of War Criminals to the International Criminal Court' (2003) 25 *Loy. L.A. Int'l & Comp. L. Rev.* 605.

⁴¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Judgment)* ICJ Reports 1996, para 48.

⁴² *ibid.*

Every states is also obliged to punish genocide as it is a crime under customary international law.⁴³ As international community is interested in prohibition of the crime, preventing and punish genocide is not territorially restricted.⁴⁴ This is what ICJ confirmed through making Serbia internationally responsible by virtue of UNSC resolution which established ICTY and Genocide convention for breach its failure to cooperate with ICTY.⁴⁵ Some argues that art. 6 of the Convention envisioned creation of ICC and ad hoc criminal tribunals.⁴⁶

Also, based on the respective resolutions and statutes establishing the tribunals, all UN member states bear an obligation to cooperate fully.⁴⁷ Thus, decisions and orders of the tribunals bind UN member states due to statutes establishing the tribunals and UN charter. Here, when states international obligations towards each other are in conflict with obligations towards the tribunals, the latter prevails.⁴⁸

When requested states are reluctant to cooperate with tribunals, international forces had played a great role. For instance the forces were authorized to arrest individuals indicted by ICTY.⁴⁹ Dayton peace agreement “authorizes the IFOR to take such actions as required, including the use of necessary force, to ensure compliance with the agreement.”⁵⁰ NATO implementation force which later transformed to Stabilization Force had been arresting persons indicted by ICTY.⁵¹ ICTY also pointed that its statute allows arrest by non-state entities such as international forces and recognized utilization of multinational military forces to arrest suspects.⁵² The SFOR led by NATO

⁴³ Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) 1951 ICJ Rep 15, 23.

⁴⁴ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (n 37).

⁴⁵ *ibid* para 446.

⁴⁶ Joshua Lam, *Contrasting Complementarity: Assessing the International criminal court's Support for Domestic Prosecutions* (The Kenyan Section of the International Commission of Jurists 2014) 3.

⁴⁷ UNSC Res 827(1993), S/RES/827 (1993) art 4; UNSC Res 955(1994) (S/RES/955 (1994) art 2.

⁴⁸ UN Charter (1945), art.103; Cryer and others (n 2) 408.

⁴⁹ Paola Gaeta, ‘Is NATO authorized or obliged to Arrest Persons Indicted by the International Criminal Tribunal for former Yugoslavia?’ (1998) 9 EJIL 174; See also The General Framework Agreement for Peace in Bosnia and Herzegovina 1995 <<https://www.osce.org/bih/126173?download=true>> accessed 30 May 2019.

⁵⁰ The General Framework Agreement for Peace in Bosnia and Herzegovina, art X and I, para 2(b) of Annex 1-A)

⁵¹ Gaeta ‘Is NATO authorized or obliged to Arrest Persons Indicted by the International Criminal Tribunal for former Yugoslavia?’ (n 49) 146.

⁵² Cryer and others (n 2) 411; Mutyab (n 33) 641.

apprehended and transferred Dokmanovic and Draga Nikolic to ICTY because concerned states were not cooperative.⁵³

Accordingly, ICC draws lessons from the experience of ICTY concerning the very importance of peace keeping forces to fill gaps created by uncooperative states in arresting suspects. However, giving a mandate for UN or regional peace keeping missions to arrest suspects is a prerequisite.⁵⁴ Thus, while referring situations UNSC can give such mandates through resolutions like that of UNMIL or agreements between UN and ICC.⁵⁵ Alternatively, using multi-national organizations as enforcement measure for execution of arrest warrants is invaluable for the ICC.⁵⁶ Nevertheless, when there are sensitive issues which may deteriorate international peace and security, due consideration has to be given because arresting public figures on power may further instabilities and atrocities.

2.2.1 Obligation to Consult and provide information

Parties to Rome statute is more than half of the States in the world but large and influential States are non-parties to Rome statute.⁵⁷ However, at the time of writing this paper around 15 defendant fugitives are at large⁵⁸ while Ex-president of Sudan, Al Bashir is under custody or corruption cases not for atrocity crimes in Darfur. Thus, the role of both parties and non-party states to the statute advances success of the ICC. When requested state parties face challenges which may impede execution of arrest warrant, the statute imposes an obligation to consult the Court⁵⁹ and to provide

⁵³ Persons Indicted for War Crimes by SFOR < <https://www.nato.int/sfor/factsheet/warcrime/t001116i.htm> > accessed 30 May 2019; Michael P. Scharf, 'the tools for enforcing international criminal justice in the new millennium: lessons from the Yugoslavia tribunal' (2000) 49 DePaul L. Rev. 925.

⁵⁴ UNSC Resolution 1638 (2005) which extended the mandate of the United Nations Mission in Liberia (UNMIL) included the mandate and power "to apprehend and detain former President Charles Taylor in the event of a return to Liberia and to transfer him or facilitate his transfer to Sierra Leone for prosecution before the Special Court for Sierra Leone.

⁵⁵ Ciampi (n 26) 735.

⁵⁶ Mutyab (n 33) 642.

⁵⁷ Schabas, 'The International Criminal Court and Non-Party States' (n 34) 1. States such as the United States, the Russian Federation and China, India, Indonesia, Turkey, Egypt, Pakistan and Iran are non-Party.

⁵⁸ International Criminal Court, Trying individuals for genocide, war crimes, crimes against humanity, and aggression < [https://www.icccpi.int/defendants?k=At%20large#Default=%7B"k"%3A"At%20large"%2C"s"%3A11%7D#c6cbd0da-cc12-4701-a455-cb691df92bfd=%7B"k"%3A"At%20large"%7D](https://www.icccpi.int/defendants?k=At%20large#Default=%7B) > accessed 10 October 2019.

⁵⁹ Rome statute (n 1) art. 97(c); see Sluiter, 'The Surrender of War Criminals to the International Criminal Court' (n 40) 627. Requested state parties are obliged to consult the Court when ICC's requests would breach their treaty obligations towards other states in order to enable the Court to eliminate misunderstandings or dilemmas of the requested states and to find and resort to other alternatives.

any relevant information.⁶⁰ Both obligations are useful in implementing ICC arrest warrant and failure to respect the obligations hinders it. Requested states may have genuine concerns as to which obligation they have to perform and concerning the peace processes and their diplomatic relations. In such cases, rather than hijacking the mandate and power of the Court, engaging in consultation and provision of information on their concerns enable the Court to evaluate and address these issues.

Requested states may also face challenges when a person subject to arrest invokes the principle of double jeopardy before national courts.⁶¹ In such cases as per art article 89 (2) of the statute, state concerned are obliged to consult the Court immediately to determine this admissibility issue regarding surrender. This obligation implies that requested states cannot refuse execution of arrest warrant. Until the Court determines the challenge related to the principle of *ne bis in dem* matter, if the admissibility rule is pending, requested state can postpone surrender.⁶² Admissibility challenge may also arise from states as per articles 17-19 of the statute. Accordingly, states having the jurisdiction may challenge requests when national investigation or prosecution is ongoing. When investigation has been carried out but decided not to prosecute unless states are unwilling or unable genuinely there may be challenges to ICC requests. In this respect, state having jurisdiction over a case or a state which accepted the jurisdiction of the Court may bring admissibility challenge. It is the ICC which shall determine these issues. If its determination is pending before the court and under consideration, requested states may postpone execution of the request as provided by article 95 of the Rome statute.

Execution of arrest warrant would also entail breach of already existing obligations arising from treaties made with other States. The statute considers pre-existing treaty obligations of ICC state party with other states as one of the problems which may impede or prevent the execution of the request to arrest.⁶³ Here the concerned requested states are required to consult the Court to resolve it when they face challenges which may hinder them from cooperation.⁶⁴ In this regard article 97(c)

⁶⁰ ICC Rules of Procedure and Evidence art. 195(1) & 181. In relation to cooperation obligation under art. 98 of Rome Statute requested states are obliged to provide information to the Court when a request for arrest and surrender or cooperation with it impedes execution of arrest warrant in respect of article 98 and provisions of information assist the Court State in the application of article 98 of Rome statute.

⁶¹ Rome statute (n 1) art. 89(2).

⁶² *ibid*; see also Sluiter, 'The Surrender of War Criminals to the International Criminal Court' (n 40) 633.

⁶³ Rome statute (n 1) art 97(c).

⁶⁴ *ibid*.

obliges states parties to consult the court when execution of ICC requests would breach the “pre-existing treaty obligation undertaken with respect to another State.” However, they cannot decide not to execute ICC arrest warrant by themselves.⁶⁵ Apart from treaty obligations, execution of ICC requests may breach their obligation under customary international laws, they are required to consult the Court. South Africa and Jordan’s engagement in consultation with the Court in relation to ICC’s request to arrest the ex-president of Sudan, Omar Al Bashir when he was holding office demonstrates this duty.

When execution of ICC arrest warrant breaches requested states’ international obligation with respect to State or diplomatic immunity of third states, requested states cannot refuse to cooperate. Because no legal provisions of ICC statute grants such rights to them.⁶⁶ The scenarios of conflicts of requested states obligation towards the Court and non-party states may be raised here. Article 98(1) of the statute addresses the Court not to proceed with the request if requested states are required to act contrary to these obligations. Also, RPE article 195(1) of the Court obliges requested states to provide information which enables the Court to resolve the issue. So, instead of unilaterally deciding not to arrest suspects by raising immunity of serving head of states, requested states have to bring the matter to ICC. Because article 119 (1) of the statute states that any dispute regarding judicial functions of ICC shall be settled by the decision of the Court.

Consultations with the Court and provision of information may resolve the problems or to request cooperation of third states to waive immunity of persons wanted if not removed. ICC Appeals chamber held that article 98(1) does not entitle state parties to refuse execution of ICC’s requests to arrest and to unilaterally decide not execute ICC arrest warrant.⁶⁷ The chamber also confirmed that the provision does not give rise to right not to comply with requests.⁶⁸

⁶⁵ Prosecutor v Al Bashir (Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court ICC) Case No ICC-02/05-01/09-1, PTC II, 9 April 2014 para 25. (hereinafter referred as DRC non-compliance case) para 52.

⁶⁶ Rome statute (n 1) art. 119(1).

⁶⁷ The Prosecutor v Omar Hassan Ahmad Al-Bashir (Judgment in the Jordan Referral re Al-Bashir Appeal) ICC02/05-01/09 OA26, AC, May 2019 para 135. (Hereinafter referred as Judgment in the Jordan Referral re Al-Bashir Appeal) paras 152.

⁶⁸ *ibid* paras 151-152.

2.2.2 Obligation to Ensure Availability of Procedures under National Laws

State parties are obliged to ensure whether their procedures under their national laws for all forms of cooperation including execution of arrest.⁶⁹ This obligation is enshrined under article 88 of Rome statute which obliges state parties to ensure that their national laws provide procedures and guidelines to execute ICC arrest warrants even before requested to effect arrest.⁷⁰ Accordingly, in order to execute ICC arrest warrant, state parties have to perform this obligation and absence of national laws with this respect would hinder cooperation obligation.⁷¹ But, some requested state parties were raising absence of this procedure under their national law as a ground of non-compliance with requests of the Court.⁷² As they bear an obligation to ensure availability of the procedures, they cannot invoke their domestic laws to justify failure to perform their international obligations as enshrined under article 27 of 1969 VCLT. In effecting arrest requested state parties are duty bound to comply with part 9 of Rome statute and procedures under their national laws.⁷³ Accordingly, rather than raising absence of procedures under their national laws to effect requests of the Court to arrest, requested state parties are obliged to ensure their availability and to amend their domestic laws when necessary.

2.2.3 Obligation to Execute ICC Arrest Warrant

The ICC has no its own enforcement agents unlike national jurisdictions to execute its own arrest warrant.⁷⁴ Arrest and surrender of indicted persons enables the Court to function and exercise its jurisdiction. However, it heavily relies on international cooperation in general and to execute arrest warrant in particular.⁷⁵ When ICC exercises its jurisdiction over nationals of non-party states, their presence before the Court might be secured through either arrest or voluntary appearance. In such

⁶⁹ Rome statute (n 1) art 88.

⁷⁰ Sluiter, 'The Surrender of War Criminals to the International Criminal Court' (n 40) 626

⁷¹ *ibid*

⁷² *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties) ICC-02/05-01/09 PTC II, 11 July 2016, para 6. Here in its submission, Djibouti hosted Al Bashir and raised absence of procedures under its national laws to execute ICC arrest warrant against him.

⁷³ Rome statute (n 1) art. 89(1).

⁷⁴ Patricia M. Wald, 'Apprehending War Criminals: Does International Cooperation Work?' (2012) 27(2) *American University International Law Review* 230.

⁷⁵ Ciampi (n 26) 606.

cases, when voluntary appearance of suspects is unthinkable, resorting to warrant of arrest is legal and laudable.

Arrest warrant is issued under article 58(1) of Rome statute if reasonable grounds for commission of core international crimes and the necessity of arrest exist. Arrest is necessary in order to secure presence for trial, to preserve the integrity of the trial or investigation process and evidences from interference and to prevent the commission of further core or related crimes.⁷⁶ The Court may also request the provisional arrest or the arrest and surrender based on the warrant of arrest based on article 58(5) of Rome statute. On the basis of the warrant, ICC has the authority to request state parties for execution of the warrant as stated under article 87(1) and 89(1). State parties are obliged to cooperate fully with ICC in general and to execute the arrest warrant in particular as per article 86 and 89(1) of the statute.

The legitimacy and credibility of the ICC and the aims of international criminal justice can be sustained through successful prosecutions.⁷⁷ In turn, this is conditional on arrests of perpetrators.⁷⁸ If states cooperation is absent, credibility and effectiveness of the court to bring suspects of core international crimes to justice and to prevent recurrence of the crime is questionable. Like its predecessors, ICC could be considered as "a giant without arms and legs."⁷⁹ States cooperation in apprehension and detention is crucial but cooperation would not happen always.⁸⁰ However, in accordance with international law, States should assist international judicial organs in investigation and prosecution of gross violation of IHRL and serious violations of IHL.⁸¹ Rome statute also imposes mandatory obligation upon party states to cooperate with the Court but securing states cooperation is practically difficult.⁸² Thus, lack of states cooperation is considered as perilous and deleterious for effectiveness of international criminal justice and as principal enforcement

⁷⁶ Rome statute (n 1) art 58 (1) (b).

⁷⁷ Payam Akhavan and others, 'Can International Criminal Justice Prevent Future Atrocities?' (2000) 95 *American Journal of International Law* 77-8.

⁷⁸ *ibid.*

⁷⁹ Sluiter, 'The Surrender of War Criminals to the International Criminal Court' (n 40).

⁸⁰ Antonio Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *European Journal of International Law* 16-17.

⁸¹ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: Committee on Human Rights resolution 2005/35, UN. Doc. E/CN.4/2005/L. 10/Add. 11 (19 April 2005) art 4.

⁸² *ibid.*

problem.⁸³ On top of that, ICC has no mandate to employ UN or regional organizations' peacekeeping operations. Thus, total reliance on states cooperation faces difficulties practically.⁸⁴ Furthermore, Rome statute provides state parties cooperation as an enforcement tool without any other coercive alternatives. For this reason, some consider ICC cooperation scheme closer to inter-State cooperation in some respects.⁸⁵ They justify their position based on reliance of the Court on requests than orders and due to existence of certain grounds for postponement or refusal.⁸⁶ On the other hand, others suggest vertical or hierarchical nature of ICC's arrest and surrender regime considering the power of the Court to determine duty to cooperate and to settle disputes related its judicial functions.⁸⁷

Postponement of requests is not made by unilateral decision of requested states because provisions of the Rome statute require state parties to engage in consultation with the Court immediately. In light of this, ICC also confirmed that every challenges made by states are forwarded to the Court but it is not a ground of refusal granted to states by Rome statute.⁸⁸ The Court has the power to determine whether to withdraw or suspend request for cooperation and how the requested states should cooperate after consultation.⁸⁹ Judicial finding and referral of noncompliance of the Court, and its power to settle disputes raised in relation to its judicial function suggest vertical cooperation.⁹⁰ Ciampi, also confirmed that State ratifying or acceding to Rome statute or non-party states accepted ICC's jurisdiction owe absolute obligation to comply with requests to arrest unlike other forms of cooperation.⁹¹ However, in practice execution of ICC arrest warrant is difficult for various reasons. Uganda, Central Africa Republic, and DRC referred situations in their respective states and also executed ICC arrest warrant issued against suspects while others had also shown

⁸³ See the prosecutor v Omar Hassan Ahmad Al Bashir regarding Decision on the Prosecutor's Application for a warrant of arrest against Omar Al Bashir) (n 22).

⁸⁴ Cryer and others (n 2) 405.

⁸⁵ *ibid* 406.

⁸⁶ *ibid*.

⁸⁷ Sluiter, 'The Surrender of War Criminals to the International Criminal Court' (n 40) 611; see Ciampi, (n 26) 721.

⁸⁸ The Prosecutor v Omar Hassan Ahmad Al-Bashir (Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir) ICC-02/05-01/09, 6 July 2017, para 119-120. (Hereinafter referred as South Africa non-compliance case).

⁸⁹ *ibid* para 120.

⁹⁰ See Sluiter, 'The Surrender of War Criminals to the International Criminal Court' (n 40).

⁹¹ Ciampi (n 26) 721.

their willingness to execute even if suspects are at large.⁹² But, in relation to UNSC referral of situations, ICC faces challenges to carry out its functions.

Failure to bring perpetrators to justice hinders delivery of justice and victims left without remedy while suspects enjoy impunity.⁹³ Additionally, delays in bringing them to justice may create injustice and affects victims. It could diminish the deterrent value of prosecutions, undermine the quality of the evidence, sustains impunity and allow continuation of commission of crimes, discourage and marginalize the victims.⁹⁴ Almost, all requested state parties to the Rome statute were reluctant to effect arrest warrant. They were invoking their obligation towards non-party states in light of immunity attached to serving highest officials. They were raising immunity of incumbent heads of states of non-party states, *inter alia*.⁹⁵ As a rule, they are obliged to perform their international obligations towards both ICC and states not party to Rome statute.⁹⁶ The problem is performance of one of the obligations may give rise to breach of international obligations and the two obligations could not be performed simultaneously. State and diplomatic immunity prevents national courts from issuance and circulation of arrest warrant.⁹⁷ Slobodan Milosevic and Charles Taylor were not serving heads of state when arrested and brought before ICTY and SCSL respectively.⁹⁸

2.2.3.1 Obligation to execute ICC arrest warrant vis-à-vis upholding immunities of non-party states to Rome statute

Execution of ICC arrest warrant and respecting state immunity may overlap. Performing one of them may cause breach of the other. The sovereign equality is a root of state immunity in which

⁹² Mutyab (n 33) 955-962. DRC referred the situation and cooperated with ICC in arresting Thomas Lubanga Dyilo; CAR referred situations in it and Belgian Authorities executed arrest warrant issued against Jean-Pierre Gombo, new government officials of Côte d' Ivoire, arrested the former President of Laurent Gbagbo, after referring the situations.

⁹³ Moses Retselisitsoe phooko, 'How effective the international criminal court has been: evaluating the work and progress of the international criminal court' (2011) 1(1) Notre Dame Journal of International law 183.

⁹⁴ *ibid* 262.

⁹⁵ The Prosecutor v Omar Hassan Ahmad Al Bashir (Decision pursuant to article 87(7) of the Rome statute on the failure by the Republic of Malawi to comply with cooperation request issued by the court with respect to arrest and surrender Omar Hassan Ahmad Al-Bashir) ICC-02/05-01/09, PTC I, 13 December 2011 para 13; South Africa non-compliance case (n 88) para 32. Malawi invoked its national law, its Act on immunities and privileges, among others to accord immunity to the then serving head of state of Sudan, Al Bashir and for its failure to arrest, South Africa also raised its obligation to respect immunity of Al Bashir as sitting head of non-party states which Sudan is required to waive the immunity but which UNSC has not expressly waived his immunity.

⁹⁶ Sluiter, 'The Surrender of War Criminals to the International Criminal Court' (n 40) 609.

⁹⁷ *ibid* 632.

⁹⁸ Jessica Needham, 'Protection or Prosecution for Omar Al Bashir? The Changing State of Immunity in International Criminal Law' (2011) Vol (17) Auckland University Law Review 219.

foreign national courts are prevented from prosecuting each other. This notion causes state immunity to evolve. Functional and personal immunities are derivative of state immunity originated from the principle of *par in parem non habet imperium*. The former is a conduct based immunity which prevents scrutinizing official acts of other states.⁹⁹ It does not apply for Core international crimes as international laws do not protect them as official acts.¹⁰⁰ They protect states sovereignty and effective functioning of international relations between sovereign nations. Personal immunity is status-based which applies to certain state officials in high positions which international law recognize as state representatives solely by virtue of office they hold.¹⁰¹ It is necessary to preserve the dignity of states; to prevent disruptions to the internal structure and functions of states and to enable senior state officials to carry out key sovereign functions.¹⁰² It protects few highest state officials holding office whether travelling or not, abroad for government or personal business.¹⁰³ It belongs to and benefits States but not individual officials. Thus, it is afforded temporarily and available only while officials are in office and states can waive it at any time.¹⁰⁴

Serving head of states enjoy personal immunity from criminal jurisdictions abroad even when they are suspected of core international crimes.¹⁰⁵ Head of state immunity is not codified but widely accepted. ICJ also found that head of state, head of government and Minister of Foreign affairs enjoy personal immunity from arrest by foreign states under customary international law.¹⁰⁶ Art.31 (1) of the 1961 Vienna Convention on Diplomatic Relations entitles serving diplomatic agents to enjoy personal immunity from criminal jurisdictions of receiving states. Diplomatic immunity enables and facilitates efficient performance of diplomatic missions of states represented but does not benefit individuals.¹⁰⁷ However, the Convention does not address whether this immunity

⁹⁹ Salvatore Zappala, 'Does heads of states in office enjoy immunity for international crimes?' The Ghaddafi Case before the French Cour de Cassation (2001) 12(3) European Journal of International law 598.

¹⁰⁰ Steffen Wirth, 'Immunities, Related Problems, and Article 98 of the Rome Statute' (2001) 12 CLF 429.

¹⁰¹ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium, judgment (2002) ICJ Reports 3 para 53. Available on <<https://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-00-EN.pdf>> accessed 06 June 2019.

¹⁰² Jessica Needham (n 98) 229.

¹⁰³ Asad G. Kiyani, 'Al-Bashir & the ICC: The Problem of Head of State Immunity' (2013) 12 Chinese Journal of International Law 472.

¹⁰⁴ *ibid* 474.

¹⁰⁵ Arrest Warrant case (n 101) para paras 53-59.

¹⁰⁶ *ibid* para 51.

¹⁰⁷ Vienna Convention on Diplomatic Relations (adopted Apr. 18, 1961, entered into force on 24 April 1964), 23 UNTS 500, preamble para 4.

extends to ICC and applies for execution of its arrest warrant. This convention does not prohibit arrest and surrender of diplomatic agents for core international crimes when requested by the Court. But, by virtue of 1961 Vienna convention host and transit states cannot arrest them while the agents are in office.¹⁰⁸ Also, participants travelling to take part in meeting of international organizations representing states enjoy personal immunity by virtue of conventions.¹⁰⁹

When personal immunity before domestic courts shelter high ranking state officials behind immunity, they may evade accountability and give rise to public disturbances.¹¹⁰ Thus, the rise of human rights movement and international support for ending impunity impacts boundaries of immunity. Creation of criminal Courts minimizes accountability gap and prosecution of incumbent heads of states by the courts is a recent phenomenon designed to curb the problems.¹¹¹ International Courts are additional mechanisms to combat impunity for core international crimes and provides additional safeguards to human rights protection. They are not equated to sovereign states but impartial institutions acting on behalf of international community.

Personal immunity is under pressure due to priority given to human right protections and removal of immunities by Creation of international criminal Courts. This demonstrates the shift of culture of impunity towards a culture of accountability.¹¹² Accordingly, international priorities shifted in favor of justice and accountability. Additionally, prosecution of core international crimes is a *jus cogens* rule which overrides personal immunity.¹¹³ Bianchi, agree that immunity cannot be invoked in response to alleged crimes of genocide, crimes against humanity and war crimes.

Through waiver of immunity, leaving post, voluntary submission to foreign jurisdictions and prosecution by international criminal Courts derogation from the rule of state immunity is possible.¹¹⁴ ICJ upheld that ‘certain international courts’ having the jurisdiction may prosecute serving heads of states.¹¹⁵ Indictment, issuance of arrest warrant and Prosecution of Milosevic and

¹⁰⁸ *ibid* art 29. This provision states that diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention by the receiving State. See also Arrest warrant case (n 77) para 424.

¹⁰⁹ Arrest warrant case (n 101) para 51.

¹¹⁰ Cryer et al (n 2) 427.

¹¹¹ Firew Tiba, ‘The prosecution of sitting heads of states by the international criminal court’ 21(134) WILLAMETTE J. INT’L L. & Dispute Resolution (2013) 134.

¹¹² Andrea Bianchi, ‘Immunity versus Human Rights: The Pinochet Case’ (1999) 10 European Journal of International Law 237.

¹¹³ *ibid* 265.

¹¹⁴ Arrest warrant case (n 101) para 97.

¹¹⁵ *ibid* para 61.

Taylor while in office by ICTY and SCSL confirm prosecution of serving heads of states for core international crimes.¹¹⁶

State parties ratified or acceded to Rome statute and non-party states accepting ICC's jurisdiction are deemed to relinquish their immunity. Removal of the immunity has horizontal effect. In case of state referral of situations to OTP, they cannot claim their immunity against states cooperating with ICC as they waived their immunity through ratification, acceding to the statute or accepting the jurisdiction of ICC.¹¹⁷ In relation to state parties' obligation to execute ICC arrest warrants issued against highest officials of non-party states, conflict of obligations may exist. When there is conflict of obligations in relation to execution of ICC arrest and respecting state or diplomatic immunity Rome statute addresses it. According to article 98(1) of the statute when request for surrender would breach requested states' obligations related to state or diplomatic immunity towards third states under international law, the Court may not proceed with its request. But, when those states waived these immunities, nothing prevents the Court from proceeding with it. State parties to Rome statute cannot invoke immunity of their high ranking officials of against the Court and other states requested to arrest because they accepted article 27(2) of the statute.¹¹⁸

Whether immunity of states whose situation referred by UNSC retain before requested states by ICC is debatable. Referral of situations by UNSC suggests that sovereignty loses its superior status to human rights protection.¹¹⁹ As ICTY stated invoking states sovereignty in relation to immunity against human rights would be ridiculous and betrayal to the universal need for justice.¹²⁰

Some authors assert that state parties are not to be bound to comply with the ICC request to arrest serving heads of states even when UNSC referred situations to ICC unless the Council explicitly obliges UN member states.¹²¹ For them circulation of requests to arrest is illegal and states breach international law if they executed ICC arrest warrant disregarding personal immunity.¹²² State parties' obligation to execute requests of the Court to arrest is already provided by Rome statute. Imposition of obligations by UNSC upon state party to Rome statute to execute ICC requests does

¹¹⁶ Ssenyonjo (n 27) 214-215.

¹¹⁷ Mettraux, Dugard and Plessis (n 10) 602.

¹¹⁸ Wirth (n 28) 889.

¹¹⁹ Bianchi (n 112) 267.

¹²⁰ *ibid.*

¹²¹ Needham (n 98) 239.

¹²² *ibid* 240.

not alter obligations imposed by Rome statute.¹²³ Furthermore, rule of customary international law does not prevent ICC from circulating arrest warrant and requesting states to execute the warrant.¹²⁴ Additionally, jurisprudences does not support priority of personal immunity over execution of ICC arrest warrant. Referral of situations under UN Charter chapter VII is established in response to a threat to international peace and security to bring perpetrators to justice.¹²⁵ When UNSC used ICC in order to maintain or restore international peace and security, member states of UN are obliged to cooperate with ICC by virtue of membership to UN as per article 25 of UN Charter. But, when UN member states refuses to cooperate with ICC in arresting suspects, the referral has no effect. Thus, arguing for continued existence of personal immunity of serving state officials undermines the purpose of UNSC referral.¹²⁶ UNSC had established ad hoc criminal tribunals wherein UN member states cannot block the goals intended by the Council invoking immunity. Similarly, personal immunity cannot be raised as a ground of refusal in relation to execution of arrest warrant when it refers situations to ICC under chapter VII of UN Charter.¹²⁷ Again, as developments of international conventions and treaties also recognized restrictive application and irrelevance of immunity for human rights protection, claiming its absolute nature does not hold water.¹²⁸

Whether non-party states can invoke their immunity against states cooperating with ICC in arrest of persons is questionable when UNSC refers situations. ICC upheld that immunity of serving heads of states, including that of nonparty states cannot be invoked before international courts.¹²⁹ PTC of the Court pointed that article 27(2) has also horizontal effect including non -party states.¹³⁰ This provision has double effects in relation to state parties' obligation towards ICC and with other states.¹³¹ Vertical effect of the provision indicates state parties' duty to execute arrest warrant

¹²³ In Darfur and Libya situations, UNSC resolutions 1593 and 1970 obliged Government of Sudan and Libya to cooperate fully

¹²⁴ Judgment in the Jordan Referral re Al-Bashir Appeal (n 67) para 1.

¹²⁵ Rome statute (n 1) art 13(b). See also Judgment in the Jordan Referral re Al-Bashir Appeal (n 67) para 6. ICC asserted that article 13(b) of the Statute asserts that rather than creating new ad hoc tribunals, UNSC can use ICC as a tool to maintain or restore international peace and security.

¹²⁶ Sarah Williams and Lena Sherif, 'The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court '(2009) 14(1) Journal of Conflict & Security Law 81.

¹²⁷ Bianchi (n 112) 237 & 265.

¹²⁸ See Genocide Convention (n 5) art 4; HRC GC 31(n 6).

¹²⁹ ICC Decision on the failure by the Republic of Malawi to comply with cooperation request with respect to arrest and surrender Omar Hassan Ahmad Al-Bashir (n 71) para 36.

¹³⁰ *ibid* para 74.

¹³¹ *ibid* para 120.

issued against their own officials and that of other states while in horizontal effect they cannot invoke immunity when other state parties arrest and surrender suspected official belonging to the former.¹³² Thus, no waiver of immunity is required when those states are requested by the Court to arrest sitting heads of states and other related officials of parties.¹³³

Requested state parties were invoking immunity of serving head of states¹³⁴ as grounds of refusal.¹³⁵ In Al Bashir case, immunities accorded to the then serving head of states of Sudan has been raised by requested state parties to justify refusal of execution of arrest warrant. The situations in Darfur and Libya have been referred by UNSC to the ICC acting under Chapter VII of UN Charter. PTC I of ICC issued arrest warrant against Omar Hassan Al Bashir and for crimes against humanity, war crimes and genocide on 4 March 2009 and for on 12 July 2010 for the first two crimes and the latter respectively.¹³⁶ However, Appeals Chamber of ICC confirmed that there is no head of state immunity in the rule of customary international law among states when international court requested their arrest.¹³⁷

2.2.3.2 Striking a Balance Between Obligation to Execute ICC Arrest Warrant and Upholding Personal Immunities

Overlap of obligation towards ICC and non-party states to Rome statute puts requested states in dilemma. Rome statute does not entitle states to refuse execution of the request. In relation to Al Bashir case, requested state parties have been raising immunity of incumbent head of state from arrest invoking article 98(1) of the statute.¹³⁸ The provision precludes the court from proceeding with requests to surrender when the request would breach State or diplomatic immunity of a third States.¹³⁹ Appeals chamber of ICC pointed that the provision does not stipulate and recognize preservation of any immunity but it is a procedural rule that enables the court to consider whether

¹³² *ibid.*

¹³³ *ibid* para 79 & 81.

¹³⁴ Vienna Convention on Diplomatic Relations (n 107) arts 21, 39 & 31.

¹³⁵ The Prosecutor v Omar Hassan Ahmad Al Bashir (Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute) ICC-02/05-01/09, 2017 para 52(2). State parties to the ICC such as Chad, Kenya, Djibouti, Malawi, Nigeria, South Africa, DRC, Uganda, Jordan and others did not arrest and surrender Al Bashir while he was in their territory.

¹³⁶ The Prosecutor v Omar Hassan Ahmad Al Bashir (Second Decision on the Prosecution's Application for a Warrant Arrest ICC-02/05-01/09, PTC I, 12 July 2010, 29.

¹³⁷ Judgment in the Jordan Referral re Al-Bashir Appeal (n 67) para 114.

¹³⁸ The South African non-compliance case (n 88) paras 32-33. Here South Africa raised that ICC was precluded by article 98(1) of the Rome Statute from requesting it.

¹³⁹ Rome statute (n 1) art 98(1&2).

obligation related to immunity of third states under international law avails and how to proceed if exists.¹⁴⁰ Rather than requesting states to act contrary to their international obligations, lifting immunity of non-party states' heads of states is required beforehand.¹⁴¹ The provision prevents the Court from proceeding with request to arrest higher officials of non-party states. But, if the third State cooperates for the waiver of the immunity, state parties to the statute are obliged to comply with requests. As article 27(2) of the statute has vertical and horizontal effect, no waiver of immunity is required.¹⁴² However, state parties are not entitled to accept irrelevance of immunity of heads of state of non-party states.

Tensions between protection of state sovereignty through upholding immunities and human rights protection through prosecuting individuals alleged of committing core international crimes challenges cooperation obligation.¹⁴³ Reconciling these two norms is a key challenge for international criminal law also.¹⁴⁴ No agreement also reached among scholars on striking a balance between the competing obligations. Some believes in respecting immunity *ratione personae* of incumbent senior officials and to bring them to justice when they cease to hold office.¹⁴⁵ This view shows pending execution of ICC arrest warrant during tenure office and effecting their arrest after end of tenure office reconciles protection of states effective function and human rights. Legally, a new development in international Criminal law regarding irrelevance of immunity has not been considered. When officials subject to warrant stick to power to avoid trial, holding them accountable is difficult.¹⁴⁶ So, it can't secure ensuring justice rather it allow suspects to hamper evidences and to commit further crimes. The argument also undermines other circumstances in which officials become accountable during in office. Others consider execution of ICC arrest warrant as treaty based obligation which has no precedence over obligations towards nonparty states unless UNSC referred situations applying UNCH chapter VII.¹⁴⁷ They believe in precedence of obligation to execute ICC arrest warrant over immunities of non-party states when situations

¹⁴⁰ *ibid* para 130.

¹⁴¹ Rome statute (n 1) art 98(1); para 27.

¹⁴² DRC non-compliance case (n 65) para 131.

¹⁴³ International Justice and Human Rights Clinic, 'Accountability in Foreign Courts for State Officials' Serious Illegal Acts: When Do Immunities Apply?' Allard International Justice and Human Rights Clinic (Vancouver: Allard School of Law, December 2016) 28.

¹⁴⁴ Needham (n 98) 220.

¹⁴⁵ Wirth (n 28) 892.

¹⁴⁶ Williams and Sherif (n 126) 92.

¹⁴⁷ Ciampi (n 26)721.

are referred by UNSC. Obligation to execute ICC arrest warrant is not restricted to only Rome statute as the Court exercise its jurisdictions and functions, based on applicable laws enshrined under article 21 of Rome statute. Application and interpretation of the laws have to be consistent with internationally recognized human rights. This suggests relevance of other human right instruments. Concerning South Africa's obligation to cooperate with ICC, some scholars shown 'clear legal obligation' of the State to arrest Al Bashir by virtue of obligations under Rome statute, Genocide Convention and UN Charter.¹⁴⁸ Under Genocide convention official capacities and immunities are disregarded. Core international crimes are crime of *jus cogens* norms which have higher status than other conflicting norms including immunity. Thus, in the absence of UNSC referral requested state may bear obligation to arrest and surrender suspects of core international crimes.

Underlying rationales for personal immunity is irrelevant before states cooperating with ICC to effect arrest warrants.¹⁴⁹ The principle of sovereign equality and protection of officials acts prevent sovereign states but not ICC from interfering in activities of internal affairs of other states. Cryer et al also argued that obligation to cooperate with ICC prevails if the Council imposes obligations to cooperate while referring a situation to the Court acting under Chapter VII of the UN Charter.¹⁵⁰ Existence of such obligations strengthens states cooperation with ICC but absence of imposition of obligations should not be construed as inexistence of obligation under other international laws.

The Court has to apply article 98 (1) of the statute to strike a balance between the obligation to execute ICC arrest warrant and accord personal immunity of incumbent officials of non-party states.¹⁵¹ Execution of arrest warrant enables the court to hold them accountable while upholding immunity officials suspect ted of core international crimes undermines fundamental values protected by international laws.

¹⁴⁸ Jadranka Petrovic, Dale Stephens and Vasko Nasteovski, 'To Arrest or not to arrest the Incumbent Head of State: The Bashir Case and the Interplay between Law and Politics' (2017) 42(3) Monash University Law Review 743.

¹⁴⁹ Sophie Papillon 'Has the United Nations Security Council Implicitly Removed Al Bashir's Immunity?' (2010) 10 Int. CLR 281.

¹⁵⁰ Cryer and others (n 2) 409.

¹⁵¹ Rome statute (n 1) art 98(1). "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."

Some also confirmed that conflicts of execution of requests for cooperation and immunities towards third states are addressed by article 98(1) of the statute.¹⁵² It restricts the Court from requesting states to execute its arrest warrant against serving senior officials of third states if execution of the request causes breach of their immunity. Thus, if the officials enjoy personal immunity before domestic courts of requested states, the Court is prevented from proceeding with requests. However, cooperation of third states with ICC in waiving their immunity enables the court to issue request. In Al Bashir case, Gaeta asserted that the Court breached article 98(1) of the statute by issuing arrest warrant.¹⁵³ In execution of ICC arrest warrant against Al Bashir, he takes a view that lawful circulation of requests for his arrest and to effect arrest requires voluntary surrender of the suspect, or surrender by Sudan and expiry of his tenure office.¹⁵⁴ As his view, the Court and requested states have to wait for occurrence of the above mentioned instances.

There are different approaches concerning the effect of UNSC referral of situations to ICC on personal immunities of serving senior officials state whose situation referred. Gaeta argue that the referral does not go beyond triggering ICC's jurisdiction and does not affect personal immunities of incumbent high ranking officials before domestic courts of other states. The author agree that a new rule of customary international law removes immunity of serving senior officials before ICC while they enjoy absolute immunity before domestic courts of other states. But this line of argument undermines a notion of effectiveness of international criminal justice to ensure accountability for the horrendous crimes. It also makes referral of UNSC meaningless and ineffective. Others believe that referral of situations by UNSC has the effect of removal of immunity. In Darfur situations, Akande argue that personal immunity of the then president of Sudan is removed before domestic Courts of all UN member states.¹⁵⁵ As to him, UNSC decision to trigger ICC's jurisdiction operates article 27 of the statute as the Council's decision implicitly relies on article 25 UN Charter.¹⁵⁶ In such instances, there is no conflict of international obligations under article 98 (1) of the statute. Additionally, Papillon reasoned that through joining UN, states implicitly removed their immunity and this enables UNSC to remove immunity of states official

¹⁵² Cryer and others (n 2) 409.

¹⁵³ Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' (2009) 7*Journal of International Criminal Justice* 315.

¹⁵⁴ *ibid* 331-32; Needham (n 98) 240.

¹⁵⁵ Akande, 'The Legal Nature of Security Council Referrals to the ICC and its impact on Al Bashir's Immunities' (n 9) 340-42.

¹⁵⁶*ibid* 336.

acting under Chapter VII of UN charter.¹⁵⁷ Accordingly, article 25 of UN charter obliges UN member states to accept and carry out the Council's decision. Thus, referral of situations by UNSC resolutions causes UN member states to execute ICC arrest warrant. Both Akande and Papillon believe in implied removal of immunity. Their argument is consistent with new developments of immunity laws. Personal immunity of high ranking officials shifted from absolute and complete immunity to accountability and restrictive application. State sovereignty which is the foundation of personal immunity is diminished and restricted by international legal norms including international human rights and criminal law. Thus, the original purpose of the immunity is not deflected when states cooperate with ICC to ensure accountability of the officials suspected of core international crimes.

On the bases of article 98(1) of Rome statute, ICC is limited from requesting states to arrest incumbent officials of non-party states. Under this provision, non-party states which have not accepted ICC's jurisdiction and whose situations have not been referred by UNSC are given right to cooperate in waiver of their immunity beforehand. Third state refers to non-party states to the statute. But, non-party states which accepted the jurisdiction of the Court removed immunity attached to their officials. Additionally, states whose situations are referred by UNSC to ICC under UN charter chapter VII are not entitled to immunity due to their obligation under UN charter to ensure accountability of those responsible. Here, there is no conflict of obligations.

Thus, conflict of international obligations is not a ground for refusal and if the Court still insists on the request, states have to execute arrest warrant.¹⁵⁸ It does not entitle states to refuse execution of arrest warrant but they are obliged to provide any relevant information to assist the Court to resolve the conflict of international obligations and to consult the court concerning any problems they confronted to execute the warrant.¹⁵⁹ The Court has a final say to determine whether requesting for cooperation would breach states international legal obligation to respect personal immunity of serving state officials.¹⁶⁰ The reason is that International criminal Courts are entitled to "interpret and determine the duties of cooperation."¹⁶¹ Accordingly, when requested states owe

¹⁵⁷ Papillon (n 149) 279-280; Needham (n 98) 242.

¹⁵⁸ Cryer and others (n 2) 409.

¹⁵⁹ Rome statute (n 1) art 97(c) & RPE art 195(1).

¹⁶⁰ Nerina Boschiero, 'ICC Judicial Finding on Non-cooperation against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593' (2015) 13 *Journal of International Criminal Justice* 632.

¹⁶¹ Sluiter 'The Surrender of War Criminals to the International Criminal Court' (n 40) 614.

obligation towards non-party states in relation to personal immunities of their high ranking officials, the ICC has to pend to issue request for arrest until cooperation of the concerned states is obtained. However, when there is no such immunity, requested states are obliged to execute requests of the Court. For the purpose of maintaining *jus cogens* norms and fundamental human rights, and achieving justice for core international crimes, UN members agree to remove immunity of their officials when required due to their membership to UN. State immunities become restrictive and a shift towards accountability through prosecution of core international crimes.

2.3 Chapter summary

Core international crimes are considered as the concerns of the international community and peremptory norms of international laws. ICC is a court of last resort to investigate, prosecute and punish them when states fail to do so. Under the Rome statute state parties' cooperation is considered as the tool to enforce ICC's decision including effecting arrest. They have mandatory obligation to execute ICC arrest warrant. Thus, cooperation with the Court reinforces the *erga omnes* obligation. In addition to primary sources of applicable laws of ICC, under principles of international law, state parties may be obliged to cooperate. Thus, searching for other relevant sources strengthen cooperation. When obligation to execute ICC arrest warrant is in conflict with obligation to respect personal immunity of senior serving states officials of non-party states, states have been hesitant to comply with ICC requests. Immunities are disregarded before ICC. When UNSC refers situations in non-party states using chapter VII of UN charter, UN member states have to respect their obligations under UN charter and have to execute ICC arrest warrant. When personal immunities of officials have not been lifted, the Court should not proceed with requests to arrest. Additionally, when the ICC has a jurisdiction to try situations in non-party states no immunity could be invoked. Thus, through restrictive application of immunities it is possible to strike a balance.

CHAPTER THREE

OBLIGATIONS OF NONPARTY STATES TO ROME STATUTE TO EXECUTE ICC ARREST WARRANT

3.1 Introduction

Ordinarily, States not party to Rome statute are not obliged to execute ICC arrest warrant without their consent.¹⁶² Their cooperation obligation under the Rome statute also depends on acceptance of ICC's jurisdiction and ad hoc cooperation agreements made voluntarily.¹⁶³ But, when they accept its jurisdiction, they are obliged to cooperate. The Court may also invite them to cooperate accordingly. For instance ICC invited US to arrest Al Bashir if he arrives to New York to visit the UN General Assembly.¹⁶⁴ Absence of nonparty states obligation to cooperate under the statute does not imply absence of international obligation under other sources of international law. All States are interested in prosecution, punishment and deterrence of international crimes including those under ICC jurisdiction "as members of the international community".¹⁶⁵ Thus, non-party states may be required to execute ICC arrest warrant because aggression, genocide, crimes against humanity, war crimes are *jus cogens* as legal literature discloses. There may be also circumstances under which they are their obligation to effect arrest become obligatory.

As ratification or acceding to treaties relies on interests of states, the most powerful and influential countries of this world are not party to Rome statute. Even three UNSC permanent members, namely, US, Russia and China are not party to ICC statute.¹⁶⁶ The 28 December 2018 report of ASP Bureau shows that nonparty states invited by ICC failed to comply with ICC's request even if ICC invited them to cooperate in President Al-Bashir's arrest.¹⁶⁷ However, cooperation obligation with ICC has to be established by international laws.

3.2 Sources of International Obligation to Execute ICC Arrest Warrant

¹⁶² Vienna Convention on the Law of Treaties (adopted 23 May, 1969, entered in to force 27 January, 1980), 1155 UNTS 331 art 34 (hereinafter referred as Vienna Convention on the Law of Treaties); Akande 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC' (n 60) 305.

¹⁶³ Rome statute (n 1) art.12 (3) and 87(5) respectively; Sluiter 'The International Criminal Court and Non-Party States' (n 40) 609.

¹⁶⁴ Kiyani (n 103) 469.

¹⁶⁵ Schabas 'The International Criminal Court and Non-Party States' (n 34) 12.

¹⁶⁶ Among permanent members of UNSC US, China and Russia are not party to ICC statute but they play significant roles in referring situations in Nonparty states among their authorities under the statute.

¹⁶⁷ ASP Bureau of Report (n 16) 5.

ICC is established to put impunity to end for core international crimes and to contribute for their prevention.¹⁶⁸ Article 1 of Rome statute enshrines binding nature of Rome Statute provisions upon the Court while exercising its jurisdictions and carrying out its functions. Pursuant to article 21 of the statute Rome Statute, Elements of Crimes and Rules of Procedure and Evidence of the Court are applied primarily. If they have a lacuna which cannot be filled by interpretation, the Court is governed by other applicable treaties, principles and rules of international law in the second place. It also applies general principles of law derived by the Court from national laws when the first two sources are not useful. Thus, it is possible to draw hierarchy of applicable laws of the Court as primary, secondary and tertiary. It may also apply rules of law and principles interpreted in its previous case laws. As per article 21(3) the application and interpretation of the laws must be consistent with internationally recognized human rights. Article 38 of the ICJ Statute is also widely considered as the most authoritative sources of international law, including international criminal law.

3.2.1 Obligations under Rome Statute

As a general rule of treaty law, treaties do not bind third states without their consent.¹⁶⁹ Unless rules laid in a treaty reflects customary rule of international law and recognized as such, they cannot govern third states.¹⁷⁰ On the basis of this principle, non-party states to the 1998 Rome statutes are not bound by this statute and under no obligation to cooperate with ICC to arrest suspects unless they accepted the jurisdiction of the Court.¹⁷¹ If they made declaration to accept its jurisdiction, non-party states shall cooperate with the Court pursuant to part 9 of the statute.¹⁷² When they make ad hoc arrangement, agreement or other means of assistance, the Court may invite them to cooperate based on article 87(5) (a) of the statute. The term ‘invitation’ suggests voluntary nature of obligation to cooperate. If the obligation is of mandatory nature, this provision does not apply. Article 89 (1) of the statute stipulates the possibility of transmitting request for the arrest to any state which the person wanted may be found. But, the Court shall request the cooperation of any

¹⁶⁸ Rome statute (n 1).

¹⁶⁹ Vienna Convention on the Law of Treaties (n 162) art 34; Akande ‘The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC’ (n 60) 305.

¹⁷⁰ Vienna Convention on the Law of Treaties (n 162) art 38.

¹⁷¹ Schabas ‘The International Criminal Court and Non-Party States’ (n 40)12.

¹⁷² Rome statute (n 1) art 12(3); Mutayab (n 33) 961. Côte d’Ivoire was not party to Rome statute but made declaration to accept its jurisdiction and referred situations in itself.

state including non-party states.¹⁷³ Accepting its jurisdiction entails mandatory obligation upon the concerned states but the provision compels only parties to the statute to comply with the request.

Article 13(b) of the statute does not refer applicable laws in relation to cooperation regime in instances of UNSC referral. It authorizes UNSC to refer situation to the Prosecutor of ICC under UN charter Chapter VII when one or more of core international crimes under article 5 of the statute have been committed. It is jurisdictional triggering provision in which the Council may extend the jurisdiction of the Court to non-party states. The Court is bound to exercise its jurisdiction and discharge its mandates as per Rome statute. Primarily, it applies Rome statute, RPE and Elements of Crime as asserted by article 21(1) (a) and it resorts to other applicable laws if these laws have gap which cannot be settled by interpretation. But, as article 13(b) provides one means by which the jurisdiction of the Court may trigger and article 1 and 21(1) (a) bind the Court to exercise its jurisdiction and exercise its function according to the statute. In the absence of voluntary arrangements, the Statute does not compel non-party states to cooperate. But, in order to hit the object and purpose of referral of situations by UNSC, UN member states are obliged to accept and carry out decision adopted by the Council under Chapter VII of UN charter. This obligation is carried out through bringing perpetrators to ICC as decided by the Council while failure to arrest suspects tantamount to breach of obligations under UN Charter.

3.2.2 Obligation under the 1948 Genocide Convention

The 1948 Genocide Convention obliges contracting parties to prevent and punish Genocide.¹⁷⁴ Regardless of their status, persons committing Genocide shall be punished according to article 1 and 4 of the Convention. The tribunals of states in the territory of which the crime was committed, or ‘international penal tribunals’ having jurisdiction over contracting parties accepting jurisdiction of the tribunals are the fora which try the persons by virtue of article 6. Whatever forum it is, the preamble of the convention elucidates the importance of international cooperation to bring persons suspected of Genocide to justice.

At the time of its adoption, no ad hoc international criminal tribunals and ICC established. ICC is a court of last resort in prosecution of core international crimes, including Genocide in which state parties to the convention have to cooperate with. But, provisions of the Convention do not

¹⁷³ *ibid* art 89(1).

¹⁷⁴ Genocide convention (n 5) arts 1, 8.

explicitly impose such obligation. But on the basis of the object and purpose of the convention through case laws international criminal court has been considered as envisioned by the convention. Article 1 of the Convention provides obligation to prevent and punish genocide. In Jordan's appeal case, ICC Appeals chamber confirmed that Jordan is under obligation to arrest Al Bashir, for crime of Genocide due to being party to Genocide convention but not only as state party to the statute.¹⁷⁵ In the application of the Genocide Convention case ICJ extensively interpreted art.VI of Genocide Convention and pointed that obligation to punish encompasses transfer of perpetrators to ICTY.¹⁷⁶ It confirmed that handing over indicted persons for genocide to ICTY is compatible with the Genocide Convention.¹⁷⁷ It stated that Serbia had an obligation to punish under the convention by transferring Ratko Mladic to ICTY for crime of genocide and found that due to its failure to transfer the suspects, it had violated its cooperation obligation with that tribunal under the Convention.¹⁷⁸ This case law also applies for states obligation towards ICC to arrest suspects of Genocide crime. Scholars also agree that obligation to cooperate with ICC in arresting suspects of Genocide serves the object and purpose of the convention and achieves international cooperation to prevent and punish.¹⁷⁹ Pursuant to the Convention, issuance of arrest warrant by ICC for genocide gives rise to an obligation to execute arrest warrant.¹⁸⁰ Some argued that non-party states to Rome Statute bear no obligation under the convention if the UN Security Council does not create an obligation to cooperate.¹⁸¹ However, this argument contradicts with the object and purpose of effective punishment of the crime of genocide. Due to this, some criticized this restrictive interpretation because of its inconsistency with the convention.¹⁸² For them, the Genocide convention can be used as the sole instrument creating the duty to cooperate in relation to state parties to the convention.¹⁸³ If the jurisdiction of the court triggers, applying Genocide Convention strengthens ICC cooperation regime. Gillett also agree that whether parties to Rome statute or not, UN member states are bound to execute ICC arrest warrant against Al Bashir as party to Genocide Convention due to activation of their obligation under the convention through

¹⁷⁵ Judgment in the Jordan Referral re Al-Bashir Appeal (n 67) para 161.

¹⁷⁶ Application of the Convention on the Prevention and Punishment of the Crime of Genocide case (n 41) para 445.

¹⁷⁷ *ibid* para. 48

¹⁷⁸ *ibid* paras 449-50.

¹⁷⁹ Matthew Gillett, 'the call for justice: Obligations under the Genocide Convention to cooperate with International Criminal Court' (2012) 1 *springer* 63.

¹⁸⁰ Sluiter 'the Surrender of War Criminals to the International Criminal Court' (n 40) 371.

¹⁸¹ *ibid* 371.

¹⁸² *ibid*.

¹⁸³ *ibid* 371-72.

UNSC referral.¹⁸⁴ Appeals Chamber of ICC also confirmed the applicability of Genocide Convention to both parties and non-party states to Rome statute's obligation to execute ICC arrest warrant against serving heads of states of non-party states suspected of genocide.¹⁸⁵

The ICC has the jurisdiction over non-party states accepting its jurisdiction or non-party states whose situations referred by UNSC. Thus, non-party states have to cooperate with the Court to punish individuals suspected of Genocide as the object and purpose of the convention, prevention and punishment of genocide is achieved through international cooperation. Accordingly, contracting parties to the Convention including non-party states to Rome statute are obliged to cooperate with ICC to prevent and punish genocide based on the Convention.

3.2.3 Obligations under UN Charter

The UN charter embodies principles of sovereign equality and independence of States, non-interference in the domestic affairs of States, and universal respect and observance of human rights *inter alia*. Maintenance or restoration of international peace and security, and achieving international cooperation are some of the purpose of UN as stated under article 1 UN charter. As per article 24(1) UNSC is responsible for maintenance of international peace and security. By virtue of article 25, UN members also agree to accept and carry out decisions of the Council. As provided by article 39 of the Charter, the Council has the mandate to determine the existence of any threat or breach of peace and to take non-military or military measures in maintaining or restoring international peace and security. In response to conflicts in former Yugoslavia and Rwanda, it established ICTY and ICTR respectively under chapter VII of UN charter. Instead of establishing further ad hoc tribunals, the Council can decide to refer situations to ICC. Article 13(b) also authorized the Council to refer situations to ICC under Chapter VII of the Charter when there is threat or breach of international peace and security. Serious violations of international humanitarian law and gross violation of human rights and aggression could constitute threat to international peace. None of UN charter provisions suggest cooperation with ICC but in order to make UNSC decision effective, they are under obligation to accept and to carry out its decision. When the Council decides to bring perpetrators of core international crimes to the jurisdiction of ICC restores international peace and security, through executing ICC arrest warrant UN member

¹⁸⁴ Gillett (n 179).

¹⁸⁵ Judgment in the Jordan Referral re Al-Bashir Appeal (n 67) para 161.

states achieve the goal intended by the Council. Thus, due to UNSC referral of situations to ICC, non-party states to Rome statute owe mandatory obligation to execute ICC arrest warrant. Appeals Chamber of ICC also applied UN charter while addressing obligation of Sudan and Jordan to cooperate with it.

3.2.4 Obligation under UNSC Resolution

UNSC has a mandate to take either forcible or non-forcible measures to restore or maintain international peace and security. The Council adhered to the latter by establishing ICTY and ICTR in 1990s. Similarly, it may also opt to refer situations to ICC when threat to international peace and security appears to have been committed. Views of most states took that more appropriateness of referring situations to the ICC by the Council instead of creating further ad hoc tribunals.¹⁸⁶

UNSC has adopted resolution 1593(2005) and 1970(2011) to refer situations in Darfur and Libya respectively. As it had established tribunals, the Council can also use ICC to bring perpetrators of core international crimes to justice. It may also impose supplementary obligations upon states. Mandatory obligations imposed upon Sudan and Libya, “to cooperate fully with the Court and prosecutor” indicates imposition of binding obligations by UNSC resolutions.¹⁸⁷ The resolutions do not oblige nonparty states to Rome statute except Sudan Government and Libyan authorities to cooperate with the ICC and prosecutor. Measures which the Council takes under chapter VII of UN charter bind Sudan and Libya. In case conflict of obligations exists, obligation under UN charter overrides according to article 103 of the Charter. The scope of the obligation imposed by Paragraph 2 of the resolutions is unclear. However in Jordan’s Appeal case, Appeals Chamber of ICC found that its effect under resolution 1593 is that cooperation regime of state parties to the Statute applies to Sudan’s cooperation.¹⁸⁸ The same works for Libya. UNSC ‘urged’ nonparty states to Rome statute to cooperate with ICC as the resolutions indicate except Sudan and Libya. The word ‘urge’ does not suggest imposition of mandatory obligation to cooperate but it is about encouragement or recommendation to cooperate fully with the court. Under the resolutions, Sudan

¹⁸⁶ Nigel White and Robert Cryer, ‘*The ICC and the Security Council: An Uncomfortable Relationship*’ in José Doria *et al* (eds.) ‘*The Legal Regime of the International Criminal Court. Essays in Honour of Professor Igor Blishchenko*’ (Martinus Nijhoff Publishers 2009) 460.

¹⁸⁷ UN Security Council Resolution 1593 and 1970 paras 2 and 5 reads “...*the Government of Sudan* and all other parties to the conflict in Darfur, *shall cooperate fully with* and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while *recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States to cooperate fully*...”emphasis added

¹⁸⁸ Judgment in the Jordan Referral re Al-Bashir Appeal (n 67) para 146.

and Libya's obligations is stronger than that of other non-party states urged to cooperate.¹⁸⁹ But, this does suggest absence of mandatory obligation under other applicable laws.

3.2.4.1 The Effect of UNSC Referral of Situations on Non-party States Obligation

Under chapter VII of UN charter, UNSC had decided to establish ad hoc criminal tribunals. Today, instead of establishing further tribunals, the Council has a mandate to refer situations to ICC for the interest of international peace and security. In order to maintain justice, to reaffirm faith in fundamental human rights, to achieve the dignity and worth of the human person and to save future generations from suffering, *inter alia*, UN members are consented to unite their strength in maintaining international peace and security. They give the mandate of maintaining or restoring international peace and security to UNSC. The Council can take measures to prevent and remove threats to the peace, and to suppress acts of aggression or other breaches of the peace resorting to non-forcible actions. Establishment of ad hoc criminal tribunals and referral of situations to ICC under Chapter VII of UN charter are one of the actions. UN member states are obliged to accept and discharge decisions of the Council.

However, the nature of Rome statute's non-party states obligation to execute ICC arrest warrant in relation to UNSC referral of situations to ICC under Chapter VII of UN charter is unsettled issue. When it refers situations, the Council is convicted that trials of persons responsible for the gross human rights violations will enable restoration of peace and stability.¹⁹⁰ UNSC referred Darfur situations to the Court and PTC of ICC also decided to request all states including non-parties to the statute to arrest Al Bashir, after issuing arrest warrant for crimes against humanity, war crimes and genocide. For effectiveness of the referral, states cooperation in executing ICC arrest warrant is important but no non-party states complied with the ICC's requests. Some believe that unless UNSC expressly imposes cooperation obligation with ICC, UN member states are not obliged to comply with requests of the Court.¹⁹¹ With this view, in the absence of such imposition, the mere referral of situations only triggers jurisdiction. In referral of Darfur and Libya situations, Resolution 1593 and 1970 oblige only Sudan and Libya to cooperate with ICC respectively.

¹⁸⁹ *ibid* para 140.

¹⁹⁰ Charles C. Jalloh, Dapo Akande and Max du Plessis, 'Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court' (2011) 4 African Journal of Legal Studies 6.

¹⁹¹ Gaeta, 'Does President Al Bashir enjoy immunity?' (n 153) 324.

Wenki, argued that when the Council asks all UN members to cooperate, non-party to the Rome statute are also obliged to comply with ICC's requests.¹⁹² Only Government of Sudan and Libyan Authorities had been obliged to arrest Al- Bashir and Gaddafi when they were on power as the resolutions "urge" other states to cooperate according to the argument. Due to this, Akande argue absence of legal obligation to force non-party states to Rome statute to arrest Al Bashir.¹⁹³ The first argument does not consider how UNSC referral becomes effective in the absence of imposition of cooperation obligation by the Council. It also disregarded applicable laws of ICC to exercise its jurisdiction and carry out its function. It also causes interference of the Council in the Court's independence. The second argument considers UNSC resolutions as the only source of states obligation to capture suspects of core international crimes.

While exercising its principal function of maintaining international peace and security, UNSC may also resort to non-forcible actions such as referral of situations to the ICC under chapter VII of the UN Charter. Through joining UN, decisions of the Council bind all UN members because of its authority under UN charter. Thus, UN Charter and UNSC resolutions also become applicable in relation to their cooperation with Court.¹⁹⁴ UNSC resolutions 1593 and 1970 adopted to refer situations in Darfur, Sudan and Libya Arab Jamahiriya recognized that non-party States to the Rome Statute have no obligation under the Statute and urged all States to cooperate.¹⁹⁵ However, the resolutions obliged Government of Sudan and Libyan Authorities to cooperate. Imposition of this obligation shows scenario of non-party states duty towards the Court by virtue of the resolutions and UN charter.¹⁹⁶ The Resolutions could be used as legal ground for UN members to cooperate with ICC due to their obligation under UN charter to accept and carry out its decision. It may also impose supplementary obligation to cooperate with the ICC.¹⁹⁷ The obligations created by the resolutions bind UN member states to cooperate with the court in order to maintain or restore international peace and security.

¹⁹² Zhu Wenki, 'On cooperation by states not party to the international criminal court' (2006) 88(861) *International Review of the Red Cross* 92.

¹⁹³ Akande, 'legal Nature of Security referrals to ICC and its impact on Al Bashir's immunity' (n 9) 334.

¹⁹⁴ Akande 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC' (n 60) 312.

¹⁹⁵ UNSC Resolution 1593(31 March 2005) UN Doc S/RES/1593 para 2; UNSC Resolution 1970(26 February 2011) UN Doc S/RES/1970 para 5.

¹⁹⁶ Goran Sluiter, 'Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case', (2010) 8 *Journal of International Criminal Justice* 368.

¹⁹⁷ UNSC 1593(2005); UNSC Res 1970(2011) para 2 (n 174); Cryer and others (n 2) 410.

Whether the cooperation obligation imposed upon Sudan and Libya by UNSC resolutions is regulated by Rome statute or not is unclear. The ICC has taken the view that Rome statute is the applicable law on cooperation obligation of Sudan¹⁹⁸ which also applies for Libya. But, the statute does not provide detail cooperation obligation of non-party states in case of the referral of situations by the Council. The resolutions do not provide procedures of investigation and prosecution. As some argued, the better view is referral of the Security Council gives rise to operation of Rome statute which the Court applies primarily when it discharges its mandate.¹⁹⁹ Akande, also confirmed that cooperation obligation imposed on Sudan and Libya toward the ICC should be considered as an obligation to cooperate with the Court pursuant to Rome Statute.²⁰⁰ Imposition of mandatory obligation upon Sudan and Libya does not suggest preclusion of other UN members from cooperating with the Court under other international laws.²⁰¹ Nevertheless, practically, the Government of Sudan refused to cooperate with the Court saying that “cooperating with the ICC is synonymous with relinquishing their national sovereignty.”²⁰² Furthermore, other non-party states were also hosting Al-Bashir, the then president of Sudan instead of bringing to justice.

3.2.5 Obligation under 1949 Geneva Conventions

Common article 1 of the 12 August 1949 Geneva Conventions and article 1 of AP I confers an obligation “to respect and ensure respect” for the Geneva conventions and the protocol “in all circumstances” upon contracting parties. The obligation concerns third states which are not party to the conflict. The obligation to respect and ensure respect relates to grave breaches and serious violation of IHL rules over which Rome statute grants jurisdiction to ICC. The scope of obligations may include refraining or taking actions. As ICJ pointed obligation not to encourage violations of IHL suggests an obligation to refrain.²⁰³ The obligation to take actions is referred from article 89 of AP I. It shows states undertaking to act individually, jointly or in co-operation with the United Nations in situations of serious violations of the Conventions or the Protocol.

¹⁹⁸ Judgment in the Jordan Referral re Al-Bashir Appeal (n 67).

¹⁹⁹ Akande ‘The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC’ (n 194) 310.

²⁰⁰ *ibid* 299.

²⁰¹ Sluiter, ‘Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case’ (n 196) 628.

²⁰² Mutyab (n 33) 957.

²⁰³ Wenki (n 192) 92.

As these Conventions have customary international law status, obligation under CA1 obliges all states. In order to meet the obligation to ensure respect for IHL, there is no hard and fast rule regarding what third States are required to do and abstain from doing. The measures may include but not limited to stopping trade of arms, imposing economic sanctions against the offending State and not to encourage conflict. Thus, the obligation may also include ensuring absence of impunity for war crimes. To ensure compliance with IHL, EU adopted guideline which requires its member states to ensure that perpetrators brought to justice before their national courts or surrendered to ICC for trial.²⁰⁴ When there are grave breaches or serious violations of IHL rules, all states are obliged to take actions by virtue of CA1. As states agreed to take actions individually or in cooperation with UN, when UNSC refers situations to ICC, UN member states have to cooperate with the Court in order to make referral effective. When ICC exercises its jurisdiction over war crimes blocking the Court from discharging its mandate is incompatible with CA1. One of the objectives of establishing the ICC is pursuing serious violations of the 1949 Geneva Conventions. Therefore, obligation to respect and ensure respect should be extensively interpreted to extend obligation to cooperate with ICC in arresting suspects of war crimes. Some authors confirmed third states obligation to take actions in response to serious violations IHL and grave breaches in cooperation with UN.²⁰⁵ As establishment of ICC is one of the means of pursuing serious violations, Parties to Geneva Conventions but not necessarily to Rome statute are obliged “to ensure respect in all circumstances”.²⁰⁶ This obligation extends to obligation to cooperate with ICC.²⁰⁷ With this respect, nonparty states to the statute are required to make their own efforts not to block action taken by ICC to punish and prevent serious violations of Geneva Conventions.²⁰⁸ This shows obligatory nature of ICC non-party states even if no binding cooperation obligation is imposed by UNSC or Rome statute.²⁰⁹

3.3 Chapter Summary

Under the statute, non-party states cooperation obligation is of voluntary nature unless accepted the jurisdiction of the Court. Based on ad hoc agreements the court may invite them to cooperate.

²⁰⁴European Union Guidelines 2005/C 327/04 of 23 December 2005 promoting compliance with international humanitarian law (2005) OJ C 327/4 art 14.

²⁰⁵ Wenki (n 192) 93.

²⁰⁶ *ibid.*

²⁰⁷ *ibid* 94.

²⁰⁸ *ibid.*

²⁰⁹ *ibid* 108.

Nonparty states to Rome statute have no mandatory obligation to execute ICC arrest warrant under the Rome statute unless they accepted its jurisdiction or agreed to cooperate. In relation to suspects against whom arrest warrant issued for genocide, non-party to Rome statute are obliged to cooperate in execution of ICC arrest warrant. UN charter obliges states to bring perpetrators of core international crimes to ICC when UNSC refer situations in non-party states to ICC based on chapter VII of the charter. Under the chapter, when UNSC impose supplementary obligations to cooperate with ICC, the concerned states including non-party states to Rome statute are obliged to cooperate. When its jurisdiction triggers to try crimes of genocide, state parties to 1948 Genocide Convention are obliged to comply with ICC's request to arrest. Obligation to ensure respect provided by the 1949 Geneva Convention is also broadly interpreted to extend the obligation to cooperate with ICC concerning war crimes. An obligation under CA1 of the 1949 Geneva Conventions to ensure respect is extensively interpreted to include the duty to cooperate with ICC to punish war criminals. Additionally, cooperating with ICC reinforces all states *erga omnes* obligation to prohibit, prevent and punish core international crimes.

CHAPTER FOUR

MECHANISMS OF COMPELLING COMPLIANCE WITH ICC REQUEST

4.1 Introduction

States failure to cooperate with ICC in execution of ICC arrest warrant undermines ensuring accountability. Nevertheless, it is not only failure to cooperate but also failure to compel states compliance with their obligation to cooperate exacerbates the problem. Additionally, execution of ICC arrest warrant may be impeded because of various reasons. Thus, this chapter sheds light on challenges impeding execution of ICC arrest, mechanisms under Rome statute to compel states compliance and the Implication of Failure to take actions against uncooperative States with ICC.

4.2 Challenges Impeding Execution of ICC Arrest Warrant

States may confront hurdles impeding states compliance to arrest suspects. In practice, because of keeping inter-state relations it is hard to imagine that state parties would apprehend and hand over suspect who are national of other states for the most serious international crimes.²¹⁰ Arresting their own national would also be impracticable, may be for lack of willingness or capacity. Even, when requested states have willingness, suspects would elude capture due to lack of capacity. In this regard, after referring situations in its territory, Uganda had a willing to arrest Joseph Kony and other suspect but due to lack of resources, they escaped arrest.²¹¹ Practically, arresting heads of states or head of governments controlling police force and army of their respective country is difficult.²¹² In Al-Bashir case, when he was in control of these enforcement agents, obliging Sudan to execute ICC arrest warrant is unimaginable. In such manner alternative enforcement mechanisms have to be utilized.

Political interpretation of ICC decision also obstacles execution of ICC arrest warrant. The Court is criticized for its selective prosecution against individuals of few regions such as Africa and is

²¹⁰ Cenap Çakmak, 'The International Criminal Court in World Politics' (2006) XXIII (1) International Journal on World Peace 20.

²¹¹ Christopher D. Totten and Nicholas Tyler, 'Arguing for an Integrated Approach to Resolving the Crisis in Darfur: The Challenges of Complementarity, Enforcement, and Related Issues in the International Criminal Court' (2008) 98 J. Crim. L. & Criminology 1082.

²¹² Phooko (n 93)187.

considered as the hegemony of western countries. It has been accused of only targeting the African continent.²¹³ The negative perceptions of selective prosecutions cause erosion of its legitimacy. Some scholars also argue selectivity employed by the ICC in its exclusive attention to African leaders is likely to result in substantial legitimacy costs and might hamper its efforts in the continent.²¹⁴ But, unless interest of justice justifies OTP commences investigation and prosecution based on Rome statute which applies equally for all states. The interest of justice provided by the statute is also regulated by the prosecutor's policy paper. So, it is selective referral of UNSC and collision between AU and UNSC affects cooperation regime.

Politically driven decisions of the Council may undermine the independence and credibility of the Court. The most powerful states of this world protect interests of states with which they have close economic, political, or security interests. Referral of Darfur and Libya without any objection²¹⁵ and rejection of Syria referral by Russian and Chinese veto power²¹⁶ realizes this. In effect, ICC is perceived as a tool of UNSC targeting weaker states.²¹⁷ Resolutions of the Council referring situations in non-party states to ICC without any consistent and objective criteria, affects legitimacy and credibility of the Court.²¹⁸ Thus, Absence of objective criterion may lead to the inconsistency of UNSC's practice which may open door for abuse of power and may affect the perception of states towards the council and the court. Setting and recognizing the criteria may advance the predictability of its decisions and build its credibility. Thus, in sixty sixth session of UNGA discussion on reports of international Criminal Court, the importance of 'an independent impartial assessment' to refer and setting criterion is discussed. Accordingly, existence of credible evidence of commission of core international crimes; unwillingness or inability to bring perpetrators to justice at the domestic or regional level and existence of a threat to international peace and security are criterion set to refer situations to ICC.²¹⁹ The UNSC refers situations but no individual cases as selection of individual cases belong to the prosecutor. And, for its selective

²¹³ *ibid* 182.

²¹⁴ Charles C. Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction' (2010) 21 CRIM. L.F. 1. 58.

²¹⁵ Rhona Smith, 'To see themselves as others see them: The Five Permanent Members of the Security Council and the Human Rights Council's Universal Periodic Review' (2013) 35(1) The Johns Hopkins University Press 2.

²¹⁶ Kamari Maxine Clarke and others, 'The Legal Politics of the Article 16 Decision: The International Criminal Court, the UN Security Council and Ontologies of a Contemporary Compromise' (2014) 7African Journal of Legal Studies 297.

²¹⁷ W Schabas, 'The Banality of International Justice' (2013) 11 Journal of International Criminal Justice 545–51

²¹⁸ Smith (n 215) 4

²¹⁹ The International Criminal Court Report (n 18).

referral of situations, UNSC could be responsible. So, the allegation against the Court has no legal ground and not persuasive.

Lack of UNSC meaningful follow up and support after referral also impacts execution of ICC requests. The Council has not adopted any subsequent resolutions to support the referrals and has failed to respond to judicial findings of non-cooperation by UN Member States. This also has the impact on states compliance with ICC requests to arrest suspects. Furthermore, as Bassiouni observed, absence of consequences for breaching the duty to cooperate entails rare compliance with obligations to assist ICTs in reality.²²⁰ In this case, the Rome Statute provides no detailed consequences of breach of duty to cooperate except finding of non-compliance and referral of the matter to the Assembly of State Parties or the United Nations Security Council.²²¹ Absence of alternative enforcement mechanism such as use of multinational force could exacerbate the challenges. In its resolutions, the UN Security council could order forces invoking article VII of UN chapter to cooperate with ICC in searching and arresting suspects.²²²

Tension between search for Peace and demand for justice may also impede cooperation. Referral of situations to ICC suggests that lasting peace requires justice but the timing or progress of particular peace processes have to be considered. Thus, deferral of investigations or prosecutions is recognized for the latter purpose. AU's concern about peacemaking initiatives in Sudan and impact of Al Bashir's prosecution on the process confirms that the issue impacts international accountability efforts. As to them, Because of the Concern, AU requested UNSC to suspend criminal processes but the latter failed to accede to the request. Temporary suspension of investigation or prosecution by ICC reconciles both peacemaking and ensuring accountability.²²³ Some international criminal lawyers observed that if suspension of criminal proceedings allow conclusion of peace treaty, precedence should be given for demand of peace.²²⁴ But failure to accede to request led to AU's call not to cooperate with the court in arresting Al Bashir.²²⁵

²²⁰ Bassiouni (n 4), Ali (n 36) 416

²²¹ Cryer et al (n 2).

²²² Elizabeth C. Minogue, 'Increasing the Effectiveness of the Security Council's Chapter VII Authority in the Current Situations before the International Criminal Court' (2008) 61 VAND. L. REV. 656.

²²³ Jalloh, Akande and Plessis (n 190) 12.

²²⁴ *ibid* 18. China considered AU's request to defer ICC criminal proceeding against Al Bashir as reasonable arguing that his indictment impedes peace process and fragile security situations in Darfur.

²²⁵ The African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec. 245(XIII) 2 (July 3, 2009).

Consequently, African states refused to comply with ICC's request to arrest Al Bashir.²²⁶ They were invoking AU's decision not cooperate with ICC in arresting Al Bashir as grounds of noncompliance.²²⁷

Absence of national laws and procedures were also grounds invoked by few requested states. This would impair assistance and that is why a duty to enact, if necessary, laws allowing the provision of legal assistance.²²⁸ Absence of national laws or procedures may impede implementation of arrest. For this reason ICC state imposed an obligation to ensure availability of the national procedures. But absence of the laws and procedures cannot be used as a ground for excusal of failures to perform the duties.²²⁹

Obligation to respect personal immunity of non-party states also creates challenge to execution of arrest warrant. In Al Bashir case, almost all, requested states parties have been invoking personal immunity towards Sudan to refuse cooperation. Legally speaking, the mere existence of conflicting obligations cannot entail unilateral refusal. The Court addresses whether execution of arrest warrant breaches personal or diplomatic immunity. The court may not proceed with the request or sustain it. The requested state's failure to consult the court and to share information in order to resolve the problems they encounter hinders the implementation of cooperation duty.²³⁰ Consultation facilitates the means of arrest and surrender of suspects and it is the power of the court to determine how the states should cooperate.²³¹ In this respect, states failed to comply with ICC's request to cooperate raised these issues to justify their noncompliance rather than engaging with the court beforehand in order to resolve the alleged problems. Requested state parties may

²²⁶ Jalloh, Akande and Plessis (n 190) 5.

²²⁷ The Prosecutor v Omar Hassan Ahmad Al Bashir (Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute) ICC-02/05-01/09 PTC, 11 July 2016 para 6. Here in its submission, Djibouti raised absence of lack of national procedure, AU's decision not to cooperate with ICC concerning immunity of Al Bashir at that moment as head of state and his immunity under international law. See also, The Prosecutor v Omar Hassan Ahmad Al Bashir (Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute) ICC-02/05-01/09, PTC II, 11 July 2016 para 7. Uganda also raised AU's decision not cooperate with ICC in arresting serving heads of states of AU member states as a ground of its non-compliance with ICC request to arrest Al Bashir.

²²⁸ Sluiter, 'Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case' (n 196) 626.

²²⁹ *ibid* 627.

²³⁰ Sluiter, 'The Surrender of War Criminals to the International Criminal Court' (n 40) 627-28.

²³¹ *ibid* 628.

confront challenges which may impede execution of arrest warrant when requested. In such instances, the statute imposes an obligation to consult the Court and to provide any relevant information. However, they are not at discretion to refuse by their own determinations.

Requested states may face challenge when a person subject to arrest a challenge of the principle of double jeopardy before national courts of states which arrested him/her. In accordance with article 89 (2) of the statute the state concerned is obliged to consult the Court immediately to determine this admissibility issue but cannot refuse execution of arrest warrant. Additionally, postponement of execution by the requested state is allowed after consultation with the Court. Until the Court determines the matter, if the admissibility rule is pending, requested state can postpone. Additionally, admissibility challenge may arise from states as per article 17-19 of the statute. Accordingly, states having the jurisdiction may challenge requests when investigation or prosecution is ongoing or has investigated but decided not prosecute unless they are unwilling or unable to do so genuinely. With these respect, State which has jurisdiction over a case or a State from which acceptance of jurisdiction is required under article 12 may bring admissibly challenge. The court shall determine these issues but if its determination pending before the court and under consideration requested states may postpone execution of the request as provided by article 96 of the statute.

Execution of arrest warrant would entail breach of already existing obligations arising from treaties made with other States. The statute considers pre-existing treaty obligations of ICC state party with other states as one of the problems which may impede or prevent the execution of the request to arrest. Here the concerned requested states are required to consult the Court to resolve it.²³² Requested state parties are obliged to consult when they face challenges which may hinder them from cooperation. In this regard article 97(c) obliges requested states parties to consult the court when execution of ICC requests would breach the “pre-existing treaty obligation undertaken with respect to another State.” However, they cannot decide not execute arrest ICC suspects by themselves.²³³

Furthermore, when execution of arrest warrant causes breach requested states’ international obligation with respect to the State or diplomatic immunity of third states under international law,

²³² Rome statute (n 1) art 97(c).

²³³ DRC non-compliance case (n 65) para 52.

requested states cannot refuse cooperation. Article 98(1) of the statute addresses the Court not proceed with the request if requested states are required to act contrary to these obligations. RPE article 195(1) of the Court obliges requested states to provide information which enables the Court to resolve this issue. Requested states obligation towards the Court and non-party states may be in conflict. So, instead of unilaterally deciding not to arrest suspects raising immunity of serving head of states, requested states have to bring the matter to ICC. Because article 119 (1) of the statute states that any dispute regarding judicial functions of ICC shall be settled by the decision of the Court.

Consultations with the Court and provision of information facilitates to solve the problems and to provide the means of securing arrest or to request cooperation of third states to waive immunity of persons wanted if not removed. ICC Appeals chamber held that article 98(1) does not entitle state parties not to comply with the Court's request to arrest suspects and to unilaterally decide not execute ICC arrest warrant.²³⁴ The chamber confirmed that the provision is directed at the court itself but it does not give rise to right not to comply with requests.²³⁵

The Sudanese government, under Al Bashir, refused to cooperate with the Court invoking Sudan's Sovereignty. Sudan alleged violation of its sovereignty even by referral of UNSC and ICC's implementation of the decision.²³⁶ That is why Sudanese Authorities considered cooperation with ICC as relinquishing their national sovereignty.²³⁷ Concerning arrest of Al Bashir, in response to Kenya High Court's ruling to arrest Al Bashir, Sudan had taken measures to sever diplomatic relations and economic ties with Kenya.²³⁸ As a result, Attorney General of Kenya appealed against the ruling rather than willing to arrest him at the cost of diplomatic relations and economic ties. Thus, when state prioritizes their economic and diplomatic interests over the interests of justice it impedes execution of arrest warrant. Thus, fear of severance of diplomatic relations and economic ties between states may be one of the interests deriving states not to arrest indicted

²³⁴ Judgment in the Jordan Referral re Al-Bashir Appeal (n 67) paras 152.

²³⁵ *ibid* paras 151-152

²³⁶ Jalloh, Akande and Plessis (n 190) 7.

²³⁷ Mutyab (n 33) 953.

²³⁸ Pa Pamela Chepkemei, 'Kenya: AG to Steer Appeal after Bashir Arrest' Daily Nation on the Web <<http://allafrica.com/stories/201202171165.html>> accessed 20 July 2019.

persons. After toppled from power, Al- Bashir was under custody of military and faced prosecution for corruption in Sudan rather than surrendering him to ICC for atrocity crimes committed.²³⁹

4.3 Mechanisms under Rome Statute to Compel States Compliance

International law commonly suffers from lack of enforcement. However, the development of international criminal law minimizes the impact of this weakness as far as international criminal tribunals or courts safeguard fundamental values of human rights and international peace and security through prosecution of perpetrators.²⁴⁰

When suspects fail to appear voluntarily, arrest of suspects secures their presence. But, issuance of arrest warrant serves nothing unless executed. Execution of arrest warrant enables the ICC to carry out its function effectively. However, as long as international cooperation is an enforcement mechanism, lack of cooperation makes ensuring individual criminal responsibility rhetoric. The non-execution of Court requests has negative impact on the ability of the Court to discharge its mandate. Imposition of duties serves no purpose unless effective enforcement methods are available to compel compliance. The Commentary on International Law Articles on Responsibility of States for Internationally Wrongful Acts also asserted that providing protection from sanctions imposed by the international community entails legal responsibility for violators.²⁴¹

Compelling state cooperation itself requires an enforcement mechanism to execute ICC arrest warrant. Accordingly, states duty to cooperate with ICC in execution of arrest warrant needs effective mechanisms when they breach their duty.²⁴² When states are compelled to comply, the ICC is able to safeguard fundamental values of human rights and international peace and security. Therefore, compelling states to execute ICC arrest warrant is very important for the realization of the Court's mandate. Unless and otherwise the purpose for which arrest warrant has been issued could not be served and ICC would not exercise its function.

²³⁹Naz Khan, 'Recent Events in Sudan and the ICC: The Prosecutor v Omar Al-Bashir' <<http://www.mjilonline.org/recent-events-in-sudan-and-the-icc-the-prosecutor-v-omar-al-bashir/>> accessed 25 September 2012.

²⁴⁰ CHAO Yi, 'The Role of International Criminal Law in the Global Legal Order', Torkel Opsahl Academic Publisher' (2015) 46 FICHL Policy Brief Series 4.

²⁴¹ ILC, 'Report of the International Law Commission on Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries on the work of its 53rd Session'(2001) UN. Doc. A/56/10 paras 154–55.(hereinafter referred as ILC Draft Articles)

²⁴² Sluiter, 'Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case' (n 196) 615.

Judicial finding of the ICC on states noncompliance with requests is an enforcement measure which induces compliance. It is also prerequisite to submit the failures to the attention of designated institutional bodies.²⁴³ ICC has no power to sanction uncooperative states and cannot recommend or suggest to measures to be taken. It may refer non-compliance to ASP or UNSC which remedies non-compliance to foster and obtain cooperation.²⁴⁴ The statute is also silent on the measures to be imposed. When requested states parties to the statute fail to comply with ICC's requests, first the Court makes a judicial finding of non-cooperation of a State Party and refers the matter to the Assembly of States or the Security Council if the Security Council referred the matter to the Court.²⁴⁵ In case the Court enters into ad-hoc arrangements with nonparty states to ensure cooperation and those states fail to cooperate, it informs the Assembly of State Parties or the Security Council if the Security Council.²⁴⁶

Referral of non-compliance to ASP and/or UNSC is discretionary power of the Court but not mandatory. But, discretionary power may be abused by the chambers of the Court. In referring noncompliance, states have to be treated likely for similar circumstances.²⁴⁷ Appeals Chamber of ICC noted that a discretion to refer noncompliance of state parties under article 87(7) is subject to conditions of failure "to comply with a request to cooperate; and, gravity of non-compliance to prevent the Court from exercising its functions and powers under the Statute."²⁴⁸

Article 112(2) (f) of Rome statute obliges ASP to consider any question related to non-cooperation of states by virtue of article 87(5 & 7). ASP deploys political and diplomatic efforts to promote cooperation and respond to non-cooperation. It may take urgent actions to bring states cooperation based on ICC'S referral where it is possible to achieve cooperation.²⁴⁹ This scenario requires formal responses triggered by ICC's decision related to non-cooperation.²⁵⁰ Exceptionally, where the court has not yet refer states non-cooperation, it may take actions when there are reasons to believe that a specific and serious incident of non-cooperation to arrest and surrender is about to

²⁴³ *ibid.*

²⁴⁴ ILC Draft Articles(n 242) para 183

²⁴⁵ Rome Statute (n 1) art 87(7).

²⁴⁶ *ibid* art 87(5) (b); Mutayab (n 33) 953.

²⁴⁷ Judgment in the Jordan Referral re Al-Bashir Appeal (n 67) para 211.

²⁴⁸ *ibid* para184.

²⁴⁹ Assembly procedures relating to non-cooperation, ICC-ASP/10/Res.5 art 7(a).

²⁵⁰ *ibid* art 9 (a).

occur or is currently ongoing.²⁵¹ This scenario requires urgent and informal responses diplomatically and politically.²⁵² The formal response are taken only after the court decided failure to cooperate. Actions taken in formal responses include emergency Bureau meeting, an open letter from the President of the ASP, open dialogue with the State concerned and others.²⁵³ But, the effectiveness of the Assembly's responses to requested states failure to cooperate with the court is questionable.²⁵⁴ Although the Security Council has the power to impose mandatory sanctions upon uncooperative States, the ASP has no powers of enforcement.²⁵⁵

Notifications made to UNSC puts political pressure upon uncooperative states to implement cooperation requests but if no measures are imposed, this enforcement mechanism could not be effective.²⁵⁶ The 2017 ICC report discloses absence of meaningful responses by UNSC upon 15 notifications of the Court concerning states noncooperation.²⁵⁷ In Sudan's non-compliance case, the PTC of ICC also invited the Council to take any action it deems necessary after deciding that Sudan had failed to comply with its obligations to cooperate with the Court.²⁵⁸ Notification made to the council is to implement measures of ensuring compliance with cooperation requests but without imposition of measures, the effectiveness of this enforcement mechanism is under question.²⁵⁹ So far, the UNSC has made referrals to the ICC without any strong follow-up steps to enforce compliance with requests of the Court.²⁶⁰ However, its role should be effective and more active in imposing sanctions such as "travel restrictions, economic sanctions and diplomatic sanctions" on states which refuses arrest and provide safe haven for suspects.²⁶¹

Continued refusal to execute ICC arrest warrant and protecting suspects from arrest may give rise to commission of other core crimes. In order to curb these problems, UNSC may take non-military measures such as economic sanctions, interruption of means of communication, and severance of diplomatic relations pursuant to articles 41 and 42 of UN Charter. It is also possible to resort to

²⁵¹ *ibid* art 7(b).

²⁵² *ibid* art 9(b).

²⁵³ *ibid* art 15.

²⁵⁴ Sluiter (n 40) 616.

²⁵⁵ Cryer and others (n 2) 139.

²⁵⁶ Mutyab (n 33) 953.

²⁵⁷ The International Criminal Court Report (n 18) para 89.

²⁵⁸ Prosecutor v Ahmad Harun and Ali Kushayb (Decision informing the Security Council about the lack of cooperation by the Republic of Sudan) ICC-02/05-01/02, PTC, May 25, 2010; Jalloh, Akande and Plessis (n 190)7.

²⁵⁹ Mutyab (n 33) 943.

²⁶⁰ Minogue (n 222).

²⁶¹ Phooko (n 93) 209.

use of force to execute the warrant through UNMIS²⁶² or peace keeping missions deployed by regional Organizations.

Under resolution 1593, UNSC decided that situation in Sudan continues to constitute a threat to international peace and security. It also decides that ensuring accountability restores peace and security. Unless those responsible for crimes are held accountable, only referral does not maintain or restore international peace and security. For this purpose, the council needs to take measures upon uncooperative states in order to advance cooperation and respond to non-compliance. While referring situations in Libya, the council noted its responsibility for the maintenance of international peace and security under the UN Charter. Accordingly, for achievement of its primary responsibility the sole referral is not sufficient unless states respect its decision to bring those responsible to justice. Additionally, in case of breach of duties taking measures advances cooperation and enables the Court to function effectively.

In order to avert problems related to compelling states compliance, some authors forward coercive measures such as the imposition of sanctions, withholding aid, or use of force as allowed under the United Nations mandate.²⁶³ Thus, imposition of enforceable sanctions will deter potential non-compliance.²⁶⁴ Akhavan confirmed that the success of ‘the international criminal justice project’ relies on the use of military, economic, and political powers to force states in arresting and surrendering individuals wanted by the court.²⁶⁵ Ciampi also admitted that through imposition or threat of sanctions or other enforcement measures, uncooperative states are compelled to cooperate with the ICC.²⁶⁶ Others argue that imposition of such sanctions alone does not suffice to secure presence of the suspects but ICC is required to enter cooperation agreements with multinational forces to apprehend suspects.²⁶⁷

ICC is not the first institution which faces noncooperation challenge to arrest suspects because ICTY also faced the same challenge with respect to arresting indicted persons. However, the latter

²⁶² Totten and Tyler (n 211)1111.

²⁶² The Office of the prosecutor of ICC, ‘Twenty-seventh report of the prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005)’ (20 June 2018) para 4.

²⁶³ Michael P. Scharf, ‘The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal’ (2000) 49 DEPAU L. REV 925,927.

²⁶⁴ Ali (n 36) 414.

²⁶⁵ *ibid* 30-31.

²⁶⁶ Ciampi (n 26) 736.

²⁶⁷ Mutayab (n 33) 944.

resorted to multinational forces when states refused to effect arrest. There were also instances where UNSC extends mandates of UN missions to apprehend suspects. Here, the Council extended the mandate of UNMIL to apprehend, detain Charles Taylor for his prosecution²⁶⁸ whereas the UNMIS has restrictive mandates and not authorized to make arrests. Mandatory obligation imposed upon the UNMIL to arrest Charles Taylor to SCSL by UNSC through Resolution 1638 (2005) shows the significance of peace keeping missions to bring suspects to justice.²⁶⁹ Some authors also believe that the future success of the ICC will depend on cooperation by multilateral measures such as “enlarging the mandates of Security Council or inter-governmental peacekeeping missions deployed in concerned states.”²⁷⁰ Furthermore, using regional bodies and International organizations to secure arrests of suspects could be used as alternative enforcement mechanisms.²⁷¹

4.4 The Implication of Failure to take actions against uncooperative States with ICC

States bear primary obligation to investigate and punish violation of core international crimes. Bringing perpetrators to justice could be considered as one of the reparations to victims of the crimes. Investigation and punishment of perpetrators of core international crimes constitute victims right to effective remedy.²⁷² Apart from investigation and punishment, states failure to cooperate with the ICC to bring suspects to justice is a distinct and separate breach of their duty. Lack of cooperation paralyses the Court to deliver justice to victims efficiently. In effect, failure to respond to states refusal to execute ICC arrest warrant has negative impact in deterring noncompliance with ICC requests, redressing victims of core international crimes and ensuring accountability. In its 27th report to UNSC, OTP called the Council to ensure that requested States Parties to the Rome Statute secured the arrest and surrender of the Darfur suspects if justice to Darfur victims is to be done.²⁷³ Others also take a view that UNSC may compel non-party states to surrender suspects upon the ICC's request or by using force under chapter VII of UN charter, when a non- party state, like Sudan, has custody.²⁷⁴ This suggest the very importance of compelling states cooperation in order to do justice for victims. Failure to compel compliance exacerbates the

²⁶⁸ UNSC Resolution 1638(11 November 2005) UN Doc S/RES/1638 para 1.

²⁶⁹ Williams and Sherif (n 126) 81.

²⁷⁰ Cryer and others (n 2) 139.

²⁷¹ Mutyab (n 33) 954.

²⁷² General Comment No. 31(n 10).

²⁷³The Office of the prosecutor of ICC, ‘Twenty-seventh report of the prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005)’ (20 June 2018) para 4.

²⁷⁴ Totten and Tyler (n 211) 1080.

problems. It also encourages others not to cooperate in the future when no deterrence measures are taken. When uncooperative states are not sanctioned others learn nothing. It makes suspects to enjoy impunity and creates injustices to victims. It is not only states refusal to cooperate but also failure to take measures upon non-compliant states negatively impacts the purpose for which arrest is required and the mandate of the court. That is why the prosecutor called the UN Security Council to find ways to give substantive effect to the referrals of the ICC's decisions upon states non-compliance with their obligations to arrest suspects in the Darfur situation.²⁷⁵ It also shown that the council has to take effective measures against States Parties referred to it for their noncompliance and related to referrals in order to enable the Court to discharge its mandate.²⁷⁶

Thus, securing presence of the suspects before the court to ensure the commission of the crime he/she is allegedly charged with is unlikely. This, in turn, obstacles commencement of trial proceeding. Remaining at large opens door for suspects to perpetrate other crimes; to endanger evidences or witnesses or to impede ongoing investigation. In effect this creates injustices to victims. Numerous international human rights instruments and IHL provides victims right to remedy. If no reparation is made, no obligation to provide an effective remedy is discharged.²⁷⁷

4.5 Chapter Summary

Even if lack of enforcement is a common weakness of international law, national and international prosecution of core international crimes minimizes the impact of the weakness. International prosecution by ICC relies on states cooperation to effect arrest. However, successful states cooperation to execute ICC arrest warrant faces challenges. Among others, negative perceptions, selective referrals of situations, immunities and Failure to respond to non-compliance and to compel states cooperation challenges cooperation regime and absence of alternative enforcement mechanisms impact ICC mandate. UNSC has the power to take measures upon uncooperative States while the Assembly of state parties has no effective powers of enforcement. However, ASP may take actions collectively to foster cooperation and to respond to refusal if they want to compel states cooperation. UNSC does not follow up to ensure that suspects are brought to justice. It also took no actions against uncooperative states even if ICC has made notifications of non-compliance. Coercive measures compel states cooperation and deter states refusal in the future.

²⁷⁵ The Office of the Prosecutor report (n 273).

²⁷⁶ *ibid* para 37.

²⁷⁷ General Comment No. 31 (n 6) para 16.

CHAPTER FIVE

CONCLUSION

Obligations conferred upon state parties to Rome statute to execute ICC arrest warrant binding. Nevertheless, because of genuine concerns or deliberate refusal of requested states, cooperation obligation faces challenge in this respect. In resolving the impact of accountability gaps created by states failure to carry out national prosecution, the Court may face challenges when requested states invoke personal immunity of incumbent high ranking officials of non-party states. When request to arrest causes breach of states immunity, the Rome statute itself obliges the Court not to proceed with the request unless cooperation is obtained from the concerned states to waive their immunity. Here, it does not impose one sided obligation as requested states are also obliged to provide necessary information to the court in order to enable the latter to settle concerns which may impede cooperation and to search for other way outs. When states ratify or accede to the Rome statute and accept the jurisdiction of the Court, immunity under international law is inapplicable vertically and horizontally. When UNSC deciding to bring perpetrators of core international crimes to justice before ICC restore international peace and security, acting under chapter VII of UN charter, requested states are obliged to effect arrest by virtue of their obligation under UN charter. Also, as Rome statute is not the sole applicable law to prevent and prosecute perpetrators of core international crimes, through application and interpretation of UN charter, Genocide Convention, 1949 Geneva conventions and Additional protocols, it is possible to strengthen cooperation obligation.

No rule of customary international law and underlying justifications of personal immunity bind ICC and states cooperating with ICC to respect personal immunity of serving senior officials of non-party states at the cost of accountability for core international crimes. When UNSC decides to use ICC, UN member states cannot invoke their immunity to deflect decisions of UNSC made under chapter VII of UN Charter after joining UN. Genocide Convention also disregards the position of perpetrators in general while Rome statute addresses irrelevance of personal immunity. States immunity has no *jus cogens* status as it is subject to derogation in various instances such as waiver, prosecution by international criminal Court having the jurisdiction among others. Thus, it has no precedence over prohibition, prevention and prosecution of core international crimes. In instances of UNSC referral of situations of non-party states to ICC acting under chapter VII of UN

charter, state parties are obliged to execute ICC arrest warrant not only due to Rome statute but also UN charter, Genocide Conventions and 1949 Geneva Conventions.

When requested states have genuine concerns, regarding competing obligations towards the Court and non-party states, article 98(1) of the statutes applies. When there is a dilemma concerning whether to uphold states immunity and to ensure accountability for core international crimes, both ICC and requested states are required to rely on applicable laws. Immunity of states ratified, acceded to Rome statute or made declaration to accept ICC's jurisdiction does not exist before ICC and states cooperating with the Court. Similarly, when non-party waived immunity attached to their officials, there is no such immunity. Through joining UN, states agreed to waive their immunity in case of gross human rights violation and maintenance and restoration of international peace and security. Thus, when UNSC decides to hold perpetrators accountable via referring situations ICC, requested states does not bear an obligation to uphold immunity of suspected officials. This suggests absence of conflict of obligations. However, when requested states are not sure of these issues, they have to consult the Court and provide information on these issues. Nevertheless, failure consult and provide information suggests deliberate refusal to effect arrest.

In order to strike a balance, states should not deflect the original underlying justification for personal immunity of incumbent high ranking officials considering their international obligations to prohibit acts constituting international crimes including those which have jus cogens status. As arrest and surrender also constitutes obligation to prevent, they should not block ICC's complementary jurisdiction. However, when they do have concerns, instead of taking ICC's jurisdiction in their own hands, engagement in consultation and provision of information of impediments is required from them. When there is a dispute between state parties and non-party states, ICJ may settle the disputes and it pointed that irrelevance of immunity before ICC when its jurisdiction triggers. On the other hand, ICC required to apply article 98 of Rome statute to address concerns of the requested states but personal immunity of high ranking serving officials of non-party states is required to be applied restrictively.

When officials of non-party states which haven't accepted ICC's jurisdiction or those which have not cooperated with ICC to lift immunity attached to their officials or whose situation has not referred by UNSC, there is conflict of obligations. In such circumstances, requested states have the obligation to respect the immunity and execution of ICC arrest warrant causes breach of the

obligation. In such cases, the Court has to pend requesting for arrest. But, if the Court requested its execution, states have to consult the Court and provide information to settle the matter. However, existence of international obligation to respect immunity cannot be a ground of refusal because the statute does not allow states' unilateral decision to refuse cooperation.

Under the Rome statute, non-party states execute ICC arrest warrant if they are volunteer. But, if they accept ICC's jurisdiction; UNSC referred situations under UN charter chapter VII or the Council imposes an obligation to execute arrest warrant becomes obligatory. Reliance on only the Rome statute alone and RPE regarding their obligation to execute ICC arrest warrant does not strengthen cooperation.

When UNSC decides to refer situations in non-party states to the Rome statute relying on chapter VII of UN charter, UN member states are obliged to bring perpetrators to justice based on obligation under the charter to accept and implement the decision of the council. When it imposes supplementary obligation to cooperate with ICC while referring situations, the concerned states are obliged to act in such manner due to membership to UN.

Non-party states have mandatory obligation under 1948 Genocide Convention to cooperate with ICC in executing arrest warrant for crimes of Genocide, when the court has a jurisdiction over it. Furthermore, duty to 'ensure respect' under CA1 of the 1949 Geneva Conventions is extensively interpreted to extend executing ICC arrest warrant. As the means of ensuring is not legally restricted, effecting arrest is considered as one means. Punishment of core international crimes have the *jus cogens* status and causes *erga omnes* obligations to bring perpetrators to justice. This obligation of all states towards international community to bring suspects to justice contributes for holding responsible persons accountable and redressing victims.

Almost all uncooperative state parties were tending to their obligation to respect personal immunity of serving heads of states without consulting ICC on the matter and they have been providing no information which enables the court to settle the problems. This shows that immunity attached to incumbent officials of states impedes execution of ICC arrest warrant. Absence of national procedures may also challenge compliance with requests. But, it cannot be invoked as a ground to justify their failure to perform their international obligation. Furthermore, UNSC's selective referral of situations to ICC seriously undermines the credibility of the court and causes

refusal to comply with requests of the court. Due to this, negative perceptions towards the Court impacts cooperation.

Absence of UNSC's follow up of implementation of situations referred also impedes execution of arrest warrant. When ICC notifies or informs states noncompliance, its failure to take actions in order to compel the compliance and to deter non-compliance makes undermines ICC's cooperation regime. Consequently, suspects are allowed to enjoy impunity at the cost of victims' right. Furthermore, responses by ASP upon non-compliance are not effective due to lack of coercive measures. These problems seriously affect execution of ICC arrest warrant and suggest ineffectiveness of enforcement mechanism cooperation obligation. This is because obligation which cannot be backed by meaningful and coercive measures to compel cooperation to effect arrest serves nothing. On top of this, the mandate of multinational forces deployed in order to keep peace and security does not extend to execution of ICC arrest warrant. In turn, it would make the suspects of core international crimes to move freely and safely without any fear. Thus, safeguarding fundamental values of human rights and international peace and security through prosecution of core international crimes is at peril.

Therefore, State parties to Rome statute which are obliged to consult the ICC when they face challenges which may impede the execution of the request to settle the problems they encounter and to provide information to the Court to assist the court in addressing conflicting international obligations. Also, in relation to non-party states to the Rome statute obligation to execute ICC arrest warrant, ICC has to apply other international laws beside the statute to strengthen and advance cooperation in order to bring suspects to justice. Furthermore, UNSC should set and employ consistent and objective criteria in order to refer situations in non-party states to Rome statute to the ICC in order to avoid political bias and self-interests. As only UNSC referral of situations is to hold the responsible persons accountable does not restore or maintain international peace and security, the Council is required to actively follow up and assist the ICC in bringing suspects to justice at international level. When states allow suspects to enjoy impunity, UNSC should extend the mandate of peacekeeping forces deployed in concerned states in execution of ICC arrest warrant considering situations in concerned states. In order to compel states compliance with ICC's request to arrest suspects and to deter potential non-compliance ASP or UNSC should take coercive actions against uncooperative states.

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