

Incompatibility of the Principle of Complementarity and *Sharia* for the Accountability of the Perpetrators of the International Crimes in Sudan's Darfur

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Abstract

This study seeks legal mechanisms on how the alleged individual commissioners of the crimes of genocide crimes against humanity and war crimes against the Fur, Zaghawa and Massaliet ethnic groups in Darfur of Sudan can be accountable to the ICC, after the removal of Al Bashir in April 2019, and remaining without international criminal charges except the domestic ones of Money Laundry and Terrorism in Sudan. Since 2009, the African Union has been resisting the arrest and surrender of Al Bashir to the International Criminal Court (ICC). At present, there is no consensual decision among the Sudanese nationals in power on how to address the arrest warrant issued by the ICC against Al Bashir and other Sudanese nationals. Some reject their accountability and other propose adoption of the principle of complementarity in national judiciaries. The latter suggestion generates conflict of laws, since Sudan is not a Party State to the ICC and its Criminal Act, 1991 with provisions of its Constitution are derived from the *Sharia* (Islamic Law). The study suggests that Sudan adopts either dualistic or monistic system in its judiciaries as alternative legal mechanism for the accountability of Al Bashir and other Sudanese fugitives from justice at the ICC, in The Hague.

Introduction

For a decade, the former President Omar Hassan Ahmad Al Bashir of Sudan with other Sudanese nationals remain fugitives with impunity from justice of the International Criminal Court (ICC). In 2005, the United Nations Security Council (UNSC) adopted resolution 1593, referring the situation in Darfur, Sudan to the Prosecutor of the ICC.² After collection of relevant information, the Prosecutor charged Al-Bashir and others of international crimes. On 4 March 2009, the ICC Pre-Trial Chamber I issued the first warrant of arrest for Al Bashir on the alleged crimes against humanity and war crimes and on 2 July 2010 another was issued for the crimes of genocide and all committed against the Fur, Zaghawa and the Massaliet ethnic groups in Darfur at the remote region of western Sudan.³

Furthermore, on 27 April 2007, other arrest warrants on similar charges against Muhammad Ahmad Harun, Deputy Minister of Interior, the Minister of Defence, Abdel Raheem Muhammad Hussein were issued on 1 March 2012. Since that time to present day, the suspects remain at large⁴ and after thirty years, while practising forced disappearances, summary executions, mass displacements, systematic and wide spread attacks, and destruction of objects of the civilian population of the Sudanese nationals⁵,

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² Security Council Refers Situation in Darfur, Sudan, to the Prosecutor of the International Criminal Court Resolution 1593 (2005) Adopted by Vote of 11 in Favour to None Against, with 4 Abstentions (Algeria, Brazil, China, United States)

³ Omer Hassan Ahmad Al Bashir ICC-02/05-01/09-104 March 2009/ and the second on 12 July 2010 Pretrial Chamber I/Decision Case: The Prosecutor v. Omer Hassan Ahmed Al-Bashir. Situation: Situation in Darfur, Sudan

⁴ Pre-Trial Chamber I/Decision. Case: The prosecutor v. Abdel Raheem Muhammad Hussein <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/12-2>

⁵ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2005 <https://www.un.org/.../report-of-the-international-commission-of-inquiry-on-darfur-to...>

The ‘Sudanese Professional Association for Freedom and Change’⁶ (SPAFC) supported by the Military Command Council (MCC) dislodged Al Bashir from the throne of reign on 11 April 2019.⁷ This research seeks legal mechanism(s) on how the alleged individual commissioners of the crimes of genocide crimes against humanity and war crimes against the Fur, Zaghawa and Massaliet ethnic groups in Darfur of Sudan⁸ can be accountable to the ICC, after the removal of Al Bashir without international criminal charges except the domestic investigation in Sudan. Since 2009, two issues could not permit arrest and surrender of Al Bashir to the ICC. First, the Government of Sudan, under him dismissed cooperation with the ICC claiming that it has no jurisdiction in Sudan, since it is not State Party to it.⁹ Second, the African Union (AU) issued a communique, which rejected cooperation with the ICC to arrest Al Bashir in their territories and surrender him for legal accountability in the seat of the ICC, The Hague.¹⁰ The AU argues that Article 34 of Vienna Convention on the Law of Treaties (VCLT) does not create either obligations or rights for other horizontal third state without consent.¹¹

This situation creates likely a conflict of laws, since, Article 27 (2) of the ICC reiterates that a presidential, legislature, ministerial or any position does not bar a person from criminal accountability, but immunity expressly attests at Article 98 (1) (2) of the ICC does not urge a requested state to surrender a person to the requesting state, if that conduct is inconsistent to its international obligations, under international law.¹² At present moment, AL Bashir is out from power and it is incumbent upon the African Union (AU) as it promised at its Peace and Security Council (PSC) 175th meeting on 5 March 2009, that it determines ‘to continue to do whatever is in its power to mobilise the necessary effort’ resolving the case of Al Bashir with the ICC.¹³ At present, the AU and other international human rights organs need to heed and listen from the successor(s) of Al Bashir in search for legal mechanism(s) of justice to redress the serious alleged international criminal offences AL Bashir with other Sudanese nationals had committed within the scope of their rule.¹⁴ The MCC in power and other potential political parties to power offer divergent legal mechanisms for accountability. First, the Chairman of the MCC, Lieutenant General Abdel Fattah Al-Burhan Abdelrahman in command of responsibility of the Sudan’s state argues that Al Bashir will not be surrendered to the ICC, since there is a fair judiciary system in Sudan, unless it is incapable¹⁵ to prosecute him, then the next elected civilian government will decide his legal direction.¹⁶ Similarly, Jalaluddin Sheikh, a Member of the MCC echoes the same mechanism that the extradition of Al Bashir to the ICC rests on the next elected civilian government democratically¹⁷, but the other former Spokesman for the MCC General Omer Zain Abedeen, claims that the extradition of Al Bashir transfigures ‘an ugly mark on Sudan’¹⁸ and urges for resolving the case through domestic legal remedies and not mechanism of the ICC.¹⁹

⁶ Sudan Sit-in Protestors Sudan Sit-in: How Protestors Picked a Spot and Made It Theirs –Africa (April 2019) <https://africanarguments.org/.../sudan-sit-in-how-protesters-picked-a-spot-and-made-it...>

⁷The Mass Movement That Toppled Omar Al-Bashir, Dissent Magazine (April 2019) [onlinehttps://www.dissentmagazine.org/.../the-mass-movement-that-toppled-omar-al-bashir](https://www.dissentmagazine.org/.../the-mass-movement-that-toppled-omar-al-bashir)

⁸ The Prosecutor v. Omar Hassan Ahmad Al Bashir ICC-02/05-01/09

⁹Sudan: Judiciary Challenges ICC over Darfur <https://www.globalpolicy.org/intljustice/icc/2005/0624collaborate.htm>

¹⁰Peace and Security of the African Union www.peaceau.org/uploads/icc-arrest-warrant-eng.pdf

¹¹ Vienna convention on the Law of Treaties (with Annex). Concluded at Vienna on 23 May 1969

¹²Rome Statute of the International Criminal Court Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, Vol. 2187, No. 38844

¹³Peace and Security of the African Union www.peaceau.org/uploads/icc-arrest-warrant-eng.pdf

¹⁴T. Dan and M. Duane L.L.P., Personal Immunity and President Omar Al-Bashir: An Analysis under Customary International Law and Security Council Resolution 1593, (16) UCLA Journal of International Law Foreign Affairs (November 2013 rev), 279

¹⁵Chairman’s Sudan Transitional military Council Lt. General Abdel Fattah al-Burhan BBC World Service Hard Talk,(April 2019) <https://52/chairman-sudan-transitional-military-council-lt-general-abdel-fattah-al-burhan>

¹⁶Ibid

¹⁷Al Bashir Extradition to the ICC up to Civilian Government, Sudan’s Junta Says, (April 2019) <https://www.thecitizen.co.tz/News>

¹⁸ Sudan’s Army Rejects extradition of Al Bashir to The Hague <https://www.chronicle.co.zw/sudan-army-removes-leader-rejects-al-bashir-extradition/>

¹⁹Ibid

Absence of unified legal mechanisms from the Sudanese in power for prosecution of Al Bashir and other defendants is woeful and distressing to the human rights agencies, nonetheless, is a referential and potential victory of the universal criminal justice system that can one time in anywhere in the same manner may prosecute the perpetrators of the international crimes domestically or internationally. First, the fact that the Sudanese nationals can admit criminality of Al Bashir and propose their national judiciaries to prosecute him in their jurisdiction represents a paving way of legal mechanism. It conforms legally to Article 1 of the ICC Statute defines as a 'complementary to national jurisdictions'²⁰, nevertheless, it generates a conflict of laws. McClean and Ruiz Abou-Nigh define conflict of laws as the presence of part of legal system with cases manifesting cross border element in nature and carrying facts of universal international norms.²¹ There are emasculating and irreconcilable provisions between the ICC Statute and the current Sudan's constitution and consequently interdicts or debars the application of the principle of complementarity and automatically the hypothesis becomes incongruous, pseudo and irrelevant. Article 1 of the Rome's Statute stresses conditionally that the ICC shall be complementary to national jurisdictions but, the provisions of its Statute govern the jurisdiction and functioning of the court.²²

First, Sudan is not State Party to the Rome Statute, so that it adopts its provisions in legal accountability against the alleged individual Sudanese nationals for the international crimes, neither its current Interim National Constitution of the Republic of Sudan (INCRS), 2005 provides adequate provisions, which conform to the ICC Statute. Particularly part one, Article 3 of the INCRS asserts its supremacy as a law of the land²³ and contrastively, Article 21 of the ICC Statute expressly attests its supremacy on the national laws.²⁴ Second, the INCRP derives its sources from the *Sharia* (Islamic law)²⁵ with capital punishment attributable to Article 27 of Penal Code, 1991. The legal sources of this code are derived entirely from the *Sharia*, which prescribes death penalty for the offences of murder²⁶ in contradiction with the ICC that obtains its sources from the Statute, elements of crimes, rules of procedure and evidence, applicable treaties, rules of the international law, national laws in consistent with the ICC Statute and finally, the recognised norms and standards internationally. Moreover, Article 77 of the ICC Statute repudiates death penalty and imposes terms of imprisonment in accordance to the level of gravity of an offence committed by perpetrator(s).²⁷

This incompatibility vindicates 'incapability' of the national judiciary of Sudan virtually to adopt the principle of complementarity of the ICC and prosecute the international crimes falling within the jurisdiction of the ICC in its domestic jurisdiction and it coerces researchers for the search of other mechanism(s). Sadiq Al-Mahdi, Former Prime Minister of Sudan and heads the National *Umma* Party currently and potential Presidential candidate in next democratic elections in Sudan, after the end of three years of the transitional tenure of the MCC presses for the ratification of the Rome Statute of the ICC. He argues, Sudan was a member in *travaux* and a signatory on 17 July 1998 in Rome Statute, but disdains and refuses to ratify it recklessly and now, after detention of Al Bashir, Sudan needs to ratify it immediately.²⁸

Despite the divergence of the proposed legal mechanisms by the Sudanese nationals for accountability of the commissioners of the international crimes in Sudan, it is important to underline three significant change of facts in law of Sudan. First, Al Bashir culpability was a criminal offence for the last thirty years²⁹ and today, his legal status is attenuated and his culpability is decriminalised from the penal code of Sudan finally.

²⁰Rome Statute of the International Criminal Court done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 3844, Depository: Secretary-General of the United Nations <http://treaties.un.org>.

²¹M. David and R. A. Veronica, *Conflict of Laws* (9th ed), Sweet & Maxwell: Wales (2016)

²²Ibid

²³Interim National Constitution of the Republic of the Sudan <https://www.wipo.int/edocs/lexdocs/laws/en/sd/sd003en.pdf>

²⁴ Rome Statute Article 4 (2), the court shall have international legal personality; Article 21 (a) (b), the court applies Statute, elements of crimes, applicable treaties, principles and rules of international law

²⁵ Article 5 (1), part one of the Interim National Constitution of the Republic of Sudan, 2005 states 'Islamic *Sharia* and popular consensus' are sources of legislation in Sudan www.wipo.int/edocs/lexdocs/laws/en/sd/sd003en.pdf

²⁶Death penalty in Sudan's criminal code www.deathpenaltyworldwide.org/country-search-post.cfm?country=sudan

²⁷Rome Statute of the ICC online <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

²⁸'Opposition Chief Demands Sudan Joins ICC as Talks Held on Civilian Rule (April 2019) online <https://www.journalducameroun.com/.../opposition-chief-demands-sudan-join-icc-as-t...>

²⁹ Sudan Criminal Act 1991, Article 3 injury means any hurt illegally inflicted upon a person in... honour... or reputation. Culpable to the President is an offence, under Article 8 (3) and punishable in Sudan Criminal Act 1991.

Second, one from the two legal proposed mechanisms of prosecution for AL Bashir and other suspects in national judiciaries of Sudan or ratification of the Rome Statute of the ICC to create compatibility of the ICC principle of complementarity with the national laws of Sudan and prosecute them subsequently will prevail for the interest of justice.

1. COMPLEMENTARIY and EXTRADITION in SUDAN

The Former President of Sudan and some Ministers remain at large and fugitives from the ICC for the alleged international crimes committed against the Fur, Zaghawa and the Massaliet ethnic groups in the western Sudan, since 1 July 2002. The United Nations Security Council (UNSC), under the Charter of the UN referred the situation of Darfur, Sudan, under resolution 1593, to the ICC Prosecutor³⁰ and in compliance with Article 15 of the Rome Statute, the Prosecutor concluded that there was a reasonable basis to proceed with investigation, *proprio motu* and, hence, the Pre-Trial Chamber of the ICC approved the request. On 4 March 2009, the Pre-Trial Chamber I issued the first warrant of arrest against Al Bashir on the alleged crimes against humanity and war crimes and on 2 July 2010, second one was issued for the crimes of genocide all committed against the Fur, Zaghawa and Massaliet ethnic groups in Darfur at remote western Sudan³¹ and on 27 April 2007, other warrants of arrest on similar charges were issued against Muhammad Ahmad Harun, Deputy Minister of Interior, and the Minister of Defence, Abdel Raheem Muhammad Hussein on 1 March 2012, and since that time to present day, the suspects remain at large³², but out from power and face domestic charges.³³

In search of relevant legal mechanism for accountability, the research suggests two hypotheses. First, adoption of the principle of complementarity, a principle that prioritises initially the primacy of the states' national courts to prosecute defendants of the international crimes subject to the jurisdiction of the ICC, unless such state is unwilling or genuinely unable to act with assumption that the committed crime carries sufficient gravity requiring the involvement of the ICC.³⁴ Sudan is incapable to adopt the principle of complementarity in its current judicial system and prosecute perpetrators of international crimes for three reasons. First, the presence of contradictory provisions between the ICC Statute and the INCRS interdicts and debars the application of the complementarity. Article 1 of the Rome Statute stresses conditionally that the ICC shall be complementary to national jurisdictions, but the jurisdiction and functioning of court shall be governed by the provisions of the Rome Statute.³⁵ Sudan is not State Party to the Rome Statute, so that it adopts its provisions in legal accountability against the alleged individual Sudanese nationals for the international crimes, neither its current INCRS provides adequate provisions conforming to the ICC Statute. Particularly Article 3 of the INCRS in part one asserts its supremacy as a law of the land³⁶ and contrastively, Article 21 of the ICC Statute expressly attests its supremacy on the national laws.³⁷ Furthermore,, the INCRS derives its sources from the *Sharia* (Islamic law)³⁸ with capital punishment attributable to Article 27 of Penal Code, 1991, prescribing death penalty for the offences of murder³⁹ in contradiction with the ICC that derives its sources from the Statute, elements of crimes, rules of procedure and evidence, applicable treaties, rules of the international law, national laws in consistent with the ICC Statute and finally, the recognised norms and standards internationally. Moreover, Article 77 of the ICC Statute repudiates death penalty and imposes terms of imprisonment in accordance to the gravity of criminal offence.⁴⁰

³⁰Security Council Refers Situation in Darfur, Sudan, to the Prosecutor of the International Criminal Court Resolution 1593 (2005) Adapted by Vote of 11 in Favour to None Against, with 4 Abstentions (Algeria, Brazil, China, United States)

³¹ Omer Hassan Ahmad Al Bashir ICC-02/05-01/09-104 March 2009/ and the second on 12 July 2010 Pre-Trial Chamber I/Decision Case: The Prosecutor v. Omer Hassan Ahmed Al-Bashir. Situation: Situation in Darfur, Sudan

³² Pre-Trial Chamber I/Decision. Case: The prosecutor v. Abdel Raheem Muhammad Hussein <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/12-2>

³³ Arrest in Sudan (20 April, 2019 “*Sudanese Authorities Arrest Officials of Bashir's National Congress Party*” [www.trtworld.com](http://www.trtworld.com/Africa) › Africa

³⁴ I. Ova, Catherine, *The Complementarity Regime of the International Criminal Court*, New York: Springer International Publishing AG (2017)

³⁵ Ibid

³⁶ Interim National Constitution of the Republic of the Sudan <https://www.wipo.int/edocs/lexdocs/laws/en/sd/sd003en.pdf>

³⁷ Rome Statute Article 4 (2), the court shall have international legal personality; Article 21 (a) (b), the court applies statute, elements of crimes, applicable treaties, principles and rules of international law

³⁸ Article 5 (1), part one of the interim national constitution, 2005 states “Islamic *Sharia and popular consensus*” are sources of legislation in Sudan www.wipo.int/edocs/lexdocs/laws/en/sd/sd003en.pdf

³⁹ Death penalty in Sudan’s criminal code www.deathpenaltyworldwide.org/country-search-post.cfm?country=sudan

⁴⁰ Rome Statute of the ICC online <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

Second hypothesis is an extradition of AL Bashir with other suspects to the ICC, but at the moment, the generals in effective control of power in Sudan resist to unfold to the regime of the ICC the underlying legal obligations impeding them to surrender Al Bashir and other Sudanese nationals to the ICC. Indeed, why do the new generals in control of power in Sudan prefer domestic remedies as alternative mechanisms of legal accountability, instead of the ICC? Do they really understand comprehensively that the alleged crimes of genocide, crimes against humanity and war crimes, which AL Bashir with other Sudanese nationals have committed in Darfur region against the Fur, Zaghawa and Massalit ethnic groups require a legal instrument of international authoritative personality?⁴¹Theoretically, the presence of relative mistrust to a foreign judicial institution and protection of sovereignty compel responsible and authoritative agencies in a state to resist extradition of suspected nationals of international criminal commission and omission in favour of the principle of complementarity primarily. Occasionally, the implementation of nation-states to the extradition or surrender of their nationals to foreign jurisdictions creates legal trends of controversy. Jurisdictions of national civil laws of some states prohibit surrender or extradition of nationals to alien courts for three reasons. First, national constitutional obligation imposes protection of the nationals or citizens from extradition; second, honour and respect to the territorial sovereignty; and third, existence of apparent mistrust to foreign legal-judicial system in prosecuting non-nationals.⁴²

The intentional resistance of the Sudanese generals in power may be among these three reasons, but none refers to them in their resisting statements of surrender or extradition specifically. Alternatively, comprehensive knowledge of their resistance to surrender Al Bashir and others to the ICC can be inferred through their released and uttered statements to the public media. In criminal law, inference is a distinctive legal procedure, which helps legal officers, researchers, judges and juries to excavate and infer the implicit intention of (a) defendant(s).⁴³At this juncture, a legal researcher is an advocate of inferential facts from implicit individual utterances as statements, however,(s)he does not limit inference on the documented utterances as statements available in audio and visual aid formula, but attaches them with the ideological background of the author or the speaker of those statements. Eventually, the amalgamation of the analysed audio and visual statements and ideologies constitute dramatic effect(s) at the conclusion of a subject in legal investigation. Significantly, this phase, inferencing of facts from the authoritative statements of the Sudan's Army Generals in the MCC becomes imperative source, where we receive and analyse implicit statements. First, the Chairman of the MCC, Lieutenant General Abdel Fattah Al-Burhan Abdelrahman argues that Sudan has a fair judiciary system, which prosecutes criminals, unless it is incapable⁴⁴otherwise, the next civilian elected government democratically decides further legal mechanism for accountability of President Al Bashir and associates.⁴⁵Wittingly, the Sudanese nationals identify the Chairman of the MCC as a free soldier from ideological attachments to the Islamic law, *Sharia* in Sudan. He, instead, adheres to the Islamic religious sect of *Sufi* sectarianism⁴⁶contrary to the Sudanese fugitives from the ICC remained in power for thirty years and grafted legislation with sources derived from the *Sharia*. Conspicuously, General Al-Burhan has no ideological affiliation of resisting surrender of Al Bashir with others to the ICC. Perhaps, legal obligation impeding him originates from three elements. First, Sudan's Attorney General, Al-Walid Sayed Ahmed charges Al Bashir with money laundering and suspect of funding international terrorism. After his removal from power, national currency of 5,000,000,000 billion Sudanese Pounds equivalent to \$110. 9 million, and foreign currencies of sum \$350,000 million and £ 7,000,000,000 million were found in his abode within some numbers of his private bags.⁴⁷

⁴¹Mandate and Crimes under the ICTY Jurisdiction are limited with the authority to prosecute and try individuals on four categories of offences: Grave breaches of 12 August 1949, Geneva Conventions, violations of laws or customs of war, genocide and crimes against humanity, online www.icty.org/en/about/tribunal/mandate-and-crimes-under-icty-jurisdiction

⁴²P. Michael, (Non) Extradition of Nationals: A Never Ending Story? (13) Emory International Law Review, (1999) 77

⁴³ T. Peter and Green, E. (eds.) Probability and Inference in the Law of Evidence, Dordrecht: Kluwer Academic Publishers(1988)

⁴⁴Chairman's Sudan Transitional Military Council Lt. General Abdel Fattah al-Burhan, BBC World Service Hard Talk,(April 2019) online <https://52/chairman-sudan-transitional-military-council-lt-general-abdel-fattah-al-burhan>

⁴⁵Ibid

⁴⁶Abdel Fattah al-Burhan Exclusive: Abdel Fattah al-Burhan Dedicated General Facing online <https://aawsat.com/.../exclusive-abdel-fattah-al-burhan-dedicated-general-facing-politi>.

⁴⁷Sudanese Attorney General Orders Bashir's Interrogation on Charges on Money Laundering, Middle East Monitor online www.arabnews.com/node/1491586/middle-east

Under Al Bashir until today, Sudan remains a state that harbours and sponsors international terrorism in US State Department.⁴⁸ Probably, these domestic charges prevent Al-Burhan and declines on surrender in preference of national judiciary.

Second, fear and responsibility on the consequences of surrender making him to swing between favour of domestic accountability and pushing the decisive legal mechanism with consequences of responsibility to the next elected civilian government. Doubtlessly, fear prevents states' actors from certain conduct(s) to evade unknown situation, which may make them become victim(s) of future domestic and legal consequences or social and political blames.⁴⁹ States act within their civil national constitutional obligations and some constitutional laws impose obligation on states to extradite or surrender their nationals to other territorial sovereign states for legal accountability in authoritative and competent national court.⁵⁰

Third, Sudan in particular has no registration in neither regional nor international depositories about extradition of its nationals to the systems of foreign judiciaries for legal accountability, nonetheless, it is not void of the law for extradition. Perhaps, it is hard for General Al-Burhan to vigilantly fathom the presence of the national source of law permitting the extradition of the Sudanese fugitives from the ICC. Proof beyond reasonable doubt, Sudan has a vital law of extradition expressly appears at Article 9 (2) in conjunction with Article 10 (1) of 1957 Criminal Law. It permits extradition of nationals, but under condition that a Magistrate Judge must provide a burden of proof that a Sudanese citizen is proved guilty beyond reasonable doubt of a crime or multiple crimes, which genuinely warrant(s) extradition to an alien judicial-legal body.⁵¹ Majority of the Sudanese have no trust to the ICC, but *bona fide*, General Al-Burhan has two procedures to settle the case of the Sudanese fugitives from justice of the ICC. First, the Government of Sudan has an international legal obligation to surrender perpetrators of the international crimes to the ICC. The UN resolution 1593, Article 2 binds and dictates the Government of Sudan and ... other parties to the conflict in Darfur to cooperate fully ... and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution.⁵² Second, international obligation is incumbent upon the present Government of Sudan, under the leadership of General Al-Burhan to invoke the law of extradition of 1957 as a necessary assistance for legal vindication of surrender the alleged Sudanese fugitives from the ICC to The Hague.⁵³ This hypothesis counters resistance from other Sudanese Army Generals. General Omer Zain Abedeen, the former Spokesman of the MCC dismisses extradition of Al Bashir and describes the hypothesis that it 'stains an ugly mark on Sudan'.⁵⁴

This description is controversial and extenuating statement, hence, the adoption of the principle of inference for the analysis of this statement unfolds two reasons for his resistance to surrender the fugitives to the ICC. First, the Sudanese allege that he has indispensable attachment to the ultra-Islamic ideological orthodoxy of Al Bashir.⁵⁵ Second, the General might have access public legal education, which enlightens the relevant officers or other staff that the acts of the governments' agents are accountable to individuals in command of responsibility in a state.

⁴⁸ State Department and Sudan online <https://www.state.gov/foreign-terrorist-organizations/>

⁴⁹ W. Arthur V. N. and D. Thomas, Criminal Victimization and Its Effect on Fear of Crime and Justice Attitudes, *Sage Journal of Interpersonal Violence* (1997) online <https://journals.sagepub.com/doi/10.1177/088626097012005009>

⁵⁰ Extradition Treaty between the Government of Kenya and Federal Republic of Germany 14th May 1872 between the German Reich and Great Britain continues to apply. Article I permits extradition of nationals between the two states; P. Michael, (Non) Extradition of Nationals: A Never Ending Story?, (13) *Emory International Law Review* (1999) 77

⁵¹ Sudan, Law of extradition, 1957, Article 9 (2) and Article 10 (1)

⁵² S/RES/1593 (2005) Adopted by the Security Council at its 5158th meeting on 30 March 2005; M. Ch. Bassiouni and E.M. Wise, *Aut dedere aut judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht/Boston/London: Martinus Nijhoff, (1995), p. 52; G. S. Goodwin-Gill, Crime in International Law: Obligations *Erga Omnes* and the Duty to Prosecute, in Guy S. Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law, Essays in Honour of Ian Brownlie* 199 (Oxford: Clarendon Press, (1999) 213, 220.

⁵³ Prosecutor Statement to the United Nations Security Council on Situation in Darfur, Pursuant to UNSCR 1593 (2005)

⁵⁴ Sudan's Army rejects extradition of Al-Bashir to The Hague <https://www.chronicle.co.zw/sudan-army-removes-leader-rejects-al-bashir-extradition/> The fugitives include President Al-Bashir to the Minister of Defence, Hussein, Deputy Minister of Interior, Harun and the Head of the Arab militia, Janjaweed, Kushyab

⁵⁵ Three Members of Sudan's Transitional Military Council Resign a Head". They include the Islamist Lieutenant General of Omer Zain Al-Abedeen, Lieutenant, Jalaluddin Al-Shiekh and Lieutenant General Al-Tayieb Babikir online <https://www.reuters.com/...sudan...resignations/three-in-sudan-military-council-resign>

In international criminal law, conduct(s) of the government agents are attributable to individuals in state.⁵⁶ Law dictates the officers or employees of states to provide individual citizens an adequate knowledge of public legal education relevant to their national laws and cross-border law, which is in practise a public international law discipline.⁵⁷

In light of this, conducts towards nationals, which disdain conformity to the recognised norms universally transfigure an ugly mark of a long term imprisonment to the individual agents of state⁵⁸ and occasionally, fragments a territorial state into multiple territorial countries with recognised sovereignties.⁵⁹ Moreover, another General, Jalaluddin Sheikh, a Member of the MCC utters the same legal mechanism that Sudan national legal system is fair and recommends that the trial of Al Bashir remains within the domestic parameters, but possibility of his 'extradition to the ICC rests on the next elected civilian government'.⁶⁰

Practically, the overall suggestions of the present Army Generals in Sudan comply with the legal provision of international criminal law. Principle of complementarity considers and authorises the ICC primarily as a 'complementary to national jurisdictions'.⁶¹ At this juncture, it is imperative for the international community in the body of the ICC, African Union and the UNSC to embrace the new Sudanese willingness with capability to try Al Bashir and other Sudanese nationals in their domestic judiciary, but under adoption of one from two international legal mechanisms, monistic or dualistic system in their national laws of Sudan.

1.1. Monistic Legal System

Sudan, under the new regime of MCC needs to demonstrate professional state demeanour complying with international obligations vis-à-vis to the crimes committed in Darfur against the ethnic Fur, Zaghawa and the Massaliet as the ICC unseals them for public. On 4 March 2009, the ICC Pre-Trial Chamber I issued the first warrant of arrest for Al Bashir for five counts on the crimes against humanity and two counts of war crimes and on 2 July 2010, second warrant of arrest was issued with three counts on the crimes of genocide and all three international crimes were committed against the Fur, Zaghawa and the Massaliet ethnic groups in Darfur at remote villages in the western Sudan, known as Darfur.⁶²

In addition, on 27 April 2007, other arrest warrants on similar charges were issued with 20 counts of crimes against humanity, 22 counts of war crimes against Muhammad Ahmad Harun, Deputy Minister of Interior, 22 counts of crimes against humanity and 28 counts of war crimes against Ali Muhammad Ali Abdel Al-Rahaman, 'Kushyab', leader of the Arabs' militia, *Janjaweed*.⁶³ The latter was arrested last month in Central African Republic and surrendered to the ICC in the Hague⁶⁴, however, the rest including the Minister of Defence, Abdel Raheem Muhammad Hussein on 1 March 2012 charged with seven counts of the crimes against humanity and six counts of war crimes remain at large, but under the fashion of being out from power that shielded them.⁶⁵

⁵⁶Crawford, James (2013) *State Responsibility*, Cambridge: Cambridge University Press, 1

⁵⁷Bhardwaj, A.P., *Legal Awareness and Reasoning*, London: Pearson (2016) 1-2

⁵⁸Case law, ICTR the Prosecutor v. Jean Paul Akayesu, ICTR-96-4-T. Trial chamber 1, 2 September 1998

⁵⁹ S. Bert F. *Constitutional Crisis in Yugoslavia and the International Law: Slovenia's' and Croatia's' to Secede*, Boston College International and Comparative Law Review, Vol. 15, Issue 1, 10 (1992) onlinelawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1537&context=iclr

⁶⁰Al Bashir ICC Extradition up to Civilian Government, Sudan's Junta Says online <https://www.thecitizen.co.tz> › News

⁶¹Article 1 of Rome Statute of the International Criminal Court done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, treaty Series, vol. 2187, No. 3844, Depositary: Secretary-General of the United Nations <http://treaties.un.org>.

⁶² First warrant of Arrest for Omer Hassan Ahmad Al-Bashir ICC-02/05-01/09-104March 2009/ and the second on 12 July 2010 Pretrial Chamber I/Decision Case: The Prosecutor v. Omer Hassan Ahmed Al-Bashir. Situation: Situation in Darfur, Sudan

⁶³ Harun and Kushyab case- ICC <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/07-2>

⁶⁴Initial Appearance of Ali Muhammad Scheduled on 15 June 2020 www.icc-cpi.int › Pages › item

⁶⁵ Pre-Trial Chamber I/Decision. Case: The prosecutor v. Abdel Raheem Muhammad Hussein <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/12-2>

After their thirty years in power, with allegations of violating international human rights law and international humanitarian law, which involved forced disappearances, summary executions, mass displacements, extra-judicial killings, systematic and wide spread attacks against the Sudanese civilian population and destruction of their objects⁶⁶, the ‘Sudanese Professional Association for Freedom and Change’⁶⁷ supported by the MCC deposed Al Bashir regime from the throne of power on 11 April 2019.⁶⁸ Cognizance to the significance of the international criminal case on Al Bashir with other nationals from Sudan, it is incumbent upon the international community to seek audience from the successor(s) of Al Bashir in search for legal mechanism(s) of justice to review and redress the serious alleged international criminal offences Al Bashir with others have committed within the scope of their regime and the reaction of the UNSC, which revoked immunity of Al Bashir as President of Sudan.⁶⁹

Visibly, one of the legal international mechanisms to redress such offensive situations of international nature is the adoption of monistic legal tradition. This body of law admits sovereign states to apply international law to their domestic legal systems without ratification of international treaties, instead, states incorporate them into their national constitutions, under the basis of ‘self-executing treaties’.⁷⁰ Vasquez defines the theory of self-executing treaty as a body of treaty law that enforces its provision(s) in national court(s) without seeking prior legislative amendments from legislature.⁷¹ At the same token, the new Government of Sudan post Al Bashir needs to immediately incorporate the ICC Statute into its present constitution or the envisaged new constitutional system in order to adjudicate in the Sudanese domestic national courts. The incorporation reconciles Sudan’s domestic laws stipulated in the INCRS, 2005 with the ICC principle of ‘complementarity’.⁷² Under this principle, the Sudanese national judiciaries will commence to prosecute the accused persons of international crimes in nature. McClean and Veronica observe that whenever a conflict of laws arises in a case vis-à-vis public international nature, the application of the foreign legal system becomes inevitable.⁷³

Adoption of an alien legal system becomes investable at present Sudan with aim to create conformity to the ICC complementarity with present INCRS or further constitutional document arising from the anticipated new elected government democratically. First, Article 1 of Rome Statute stresses conditionally that the ICC shall be complementary to national jurisdictions, but, the jurisdiction and functioning of such court shall be governed by the provisions of the Rome Statute.⁷⁴ Sudan is not State Party to the Rome Statute, so that it does not apply its provisions in legal accountability against the alleged individual Sudanese nationals for the international crimes, nor its current INCRS of 2005 provides adequate provisions conforming to the general ICC Statute provision. Importantly, part one, Article 3 of the Constitution of Sudan asserts its supremacy on other laws as a law of the land.⁷⁵ On the other hand, Article 21 of the ICC Statute expressly affirms its supremacy on the national and domestic laws.⁷⁶

⁶⁶Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2005 <https://www.un.org/.../report-of-the-international-commission-of-inquiry-on-darfur-to...>

⁶⁷ Sudan Sit-in Protestors Sudan Sit-in: How Protestors Picked a Spot and Made It Theirs –Africa <https://africanarguments.org/.../sudan-sit-in-how-protesters-picked-a-spot-and-made-it...>

⁶⁸The Mass Movement That Toppled Omar Al-Bashir, Dissent Magazine online <https://www.dissentmagazine.org/.../the-mass-movement-that-toppled-omar-al-bashir>

⁶⁹T. Dan and M. Duane L.L.P., Personal Immunity and President Omar Al-Bashir: An Analysis under Customary International Law and Security Council Resolution 1593, 16 UCLA Journal of International Law Foreign Affairs, (2013rev) 279

⁷⁰N. Marko (ed), Basic Concepts of Public International Law: Monism and Dualism, Belgrade: Belgrade University Press (2013),

⁷¹S. Carlos Manuel, The Four Doctrines of Self-Executing, Georgetown Law of Scholarly Commons (1995) online <https://scholarship.law.georgetown.edu/facpub/1016/>

⁷²Rome Statute of the ICC Article 1

⁷³M. David and R. Abou-Ngh, Veronica, *Conflict of Laws* (9th ed), Sweet & Maxwell: Wales, (2016) 19

⁷⁴Ibid

⁷⁵Interim National Constitution of the Republic of the Sudan <https://www.wipo.int/edocs/lexdocs/laws/en/sd/sd003en.pdf>

⁷⁶ Rome Statute Article 4 (2), the court shall have international legal personality; Article 21 (a) (b), the court applies statute, elements of crimes, applicable treaties, principles and rules of international law

Second, the INCRS of 2005 derives its sources from the *Sharia* (Islamic law)⁷⁷ with capital punishment foreshadows at Article 27 of Penal Code, 1991. Conspicuously, this Act' is entirely relying on the *Sharia* principles and it prescribes death penalty for the offences of murder⁷⁸ in contradiction with Article 77 of the ICC Statute that repudiates death penalty and imposes terms of imprisonment in accordance to the present level of gravity related to an offence committed by perpetrator(s) in a certain limited scope of time.⁷⁹

Apparently, the appearance of incompatibility of the ICC with the provisions of the Constitution' of Sudan vindicates directly 'incapability' of the national judiciary system of Sudan to adopt the principle of complementarity of the ICC to prosecute international crimes of the ICC in its jurisdiction. This condition coerces the research to urge for the application of monistic legal system as an alternative reconciling the visible conflicts between the Constitution of Sudan with its Penal Act of 1991 and the Statute of the ICC. The adoption of the monistic legal system in national legal order by States' Party to the ICC curtails admissibility of cases expressly demonstrates at Article 17 (a) (b) that deals with admissibility and inadmissibility of the referrals from the State Party to the ICC. Imodemhe urges the African States 'Party to the ICC to set a mechanism of framework that increases the adoption of the ICC principle of complementarity in their domestic judicial structures, rather than, relying on referrals. Under direction of the complementarity, the referral to the ICC would be avoided in favour of the domestic remedy.⁸⁰For this researcher, complementarity principle is better antidote than the referrals to the ICC and its needs States 'Party to the ICC to modernise and empower domestic judicial institutions to conform to the international fashion. In the view of Jackson, a genuine prosecution can succeed on 'a lawfully constituted regional tribunal'⁸¹ within the legal system of States Party to the ICC as a complementary national body to the international legal jurisdictions.⁸²One anticipates that adoption of the principle of complementarity mitigates most cases of international crimes to be inadmissible, before the ICC, under Article 17.⁸³On the other category, adoption of the dualistic legal mechanism for the accountability of international alleged criminals for the crimes of genocide, crimes against humanity and war crimes in Darfur of Sudan is another necessary legal mechanism among states which apply it.

1.2. Dualistic Legal System

The divisive suggestions from the new body in power and potentials to it in Sudan to try Al Bashir in domestic judicial system implies the adoption of the ICC principle of complementarity, but the Sudanese in power refrain to unseal the procedure of reconciling the prevailing legal binaries of the INCRS, 2005 and the Rome Statute of the ICC of July 1998 and entered into force on 1 July 2002. Sadiq Al-Mahdi, Former Prime Minister of Sudan and currently, Chairman of the National *Umma* Party and a possible potential candidate for the position of President or Premier depending on the new constitutional system in the next democratic elections in Sudan presses for the ratification of the Rome Statute of the ICC. He argues, Sudan was a member in *travaux* and a signatory on 17 July 1998 in Rome Statute, but disdains and refuses to ratify the treaty into force in July 2002. At present time, after popular and forceful departure of Al Bashir regime, it is incumbent upon the new transitional Government of Sudan to ratify the Statute of the ICC.⁸⁴Ratification of the ICC at this moment requires the adoption of dualistic traditional legal order prevailing in international law. It refers to the ratification of a state to a treaty and subsequently national legislature enacts its provisions into national judicial systems in the territorial sovereign state.⁸⁵Legally, ratification of the Government of Sudan to the ICC Statute does not qualify it directly to apply its provisions into its national judiciaries.

⁷⁷ Article 5 (1), part one of the interim national constitution, 2005 states "Islamic *Sharia* and *popular consensus*" are sources of legislation in Sudan www.wipo.int/edocs/lexdocs/laws/en/sd/sd003en.pdf

⁷⁸Death penalty in Sudan's criminal code www.deathpenaltyworldwide.org/country-search-post.cfm?country=sudan

⁷⁹Rome Statute of the ICC online <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

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⁸¹J. Miles, Regional Complementarity: The Rome Statute and Public International Law, Oxford university Journal of International Criminal justice, Vol. 14, Issue, 5, (2016) 1061-1072

⁸²Ibid

⁸³Ibid

⁸⁴Opposition Chief Demands Sudan Joins ICC as Talks Held on Civilian Rule,online <https://www.journalducameroun.com/.../opposition-chief-demands-sudan-join-icc-as-t...>

⁸⁵S. Torben, Kelsen on Monism and dualism, (2013) in C. Dubay A., General Principles of International Law: Monism and Dualism", International Judicial Academy Journal of International Judicial Monitor (2014) online www.diva-portal.org/smash/record.jsf?pid=diva2:1248967

It needs enactment primarily from the Sudan's national legislation body in order to constitute its legality as a 'complementary to criminal national jurisdiction'.⁸⁶ Ratification stands as a tacit approval of the ICC principle of complementarity in Sudan. It qualifies for the prosecution of AL Bashir and other Sudanese citizens accused of having perpetrated the proscribed international crimes in national courts of Sudan, instead of surrender to the ICC. According to Nollkaemper, dualistic legal body functions as significant sword of justice, which the national courts apply, after its incorporation by the legislature to pierce the boundary of national legal order protecting individual legal rights.⁸⁷

Despite the divergence of legal mechanisms for the accountability of the alleged commissioners of the international crimes falling within the jurisdiction of the ICC in Sudan, it is important to underline two visible facts. First, Al Bashir culpability was a criminal offence for the last thirty years in national institutions of Sudan⁸⁸ and today, that legal situation has changed and the culpability is finally deleted from the vocabularies of penal code of Sudan. Second, one from two legal proposed mechanisms; prosecution in national judiciaries in Sudan or ratification of the Rome Statute of the ICC to create compatibility of the ICC principle of complementarity and the national laws of Sudan and prosecute Al Bashir subsequently will prevail for the interest of justice against the paradoxes of Al Bashir regime that divides the ICC into white man court in Europe and the black man institutional court in Sudan within Africa continent.

2. The White and the Black Courts

Post the issuance of the arrest warrant by the ICC Pre-Trial Chamber⁸⁹ against President Al Bashir, the Government of Sudan promulgates and institutionalises mistrust and racial categories between the ICC at one side and the territorial sovereign Sudan with its supporting Sudanese nationals at the other category. The Government of Sudan resorts to racial characterisation in explaining its resistance to the contingent danger of extradition or surrender of the President and the other alleged Sudanese nationals to the foreign judicial system, the ICC. The Minister of Information, Kamal Obaid issues a press statement stating 'There will be no recognition of the ICC or dealing with...white man court which has no mandate in Sudan against any of its people. Sudan's territorial sovereignty and independence is a red line'⁹⁰ for the foreign interference into it.⁹¹

Is it true that the ICC is a court of a white man versus the court of the black man? The answer to this question is both analogous and paradoxical. First, it is analogous taking into consideration two evidence; first, geographical location or the seat of the ICC is in a white man sovereign territory⁹² and second, most of the international criminal cases which fall within the jurisdiction of the ICC, since the time of its establishment and commencement as an authoritative court have been always concentrating on the racial black African leaders.⁹³ Some among the African black leaders have ended in The Hague with consequences of life term sentences.⁹⁴ Second, it is paradoxical, the victims of the alleged crimes against humanity and war crimes, which these black leaders committed have been always against their own nationals and not white men nationalities.⁹⁵

⁸⁶ICC Statute Article 1

⁸⁷ N. Andre, *The Duality of Direct Effect of International Law*, Oxford University Journal of International Law, Vol., 25, Issue 1 (2014) online <https://orcid.org/0000-0002-4586-4940>

⁸⁸ Sudan Criminal Act 1991 Article 3 injury means any hurt illegally inflicted upon a person in....., honour,.... or reputation. Culpable to the president is offence, under Article 8 (3) and punishable in Sudan Criminal Act 1991

⁸⁹ First warrant of Arrest for Omer Hassan Ahmad Al-Bashir ICC-02/05-01/09-104 March 2009/ and the second on 12 July 2010 Pretrial Chamber I/Decision Case: The Prosecutor v. Omer Hassan Ahmed Al-Bashir. Situation: Situation in Darfur, Sudan

⁹⁰ Uproar in Sudan over Al-Bashir war crimes warrant, Minister, Kamal Obaid Press
Releaseonline <https://www.theguardian.com/world/2009/mar/04/sudan-demonstrators-support-bashir>

⁹¹ Ibid

⁹² Article 3 (1) of the ICC statute shows that the "seat" is located in The Hague, a city in the Netherlands

⁹³ The Prosecutor V. Uhuru Muigai Kenyatta ICC-01/09-2/11 charges: Five counts of crimes against humanity allegedly committed during the 2007-2008 post-election violence in Kenya; The Prosecutor V. Laurent Gbagbo and Charles Ble Goude ICC-02/11-01/15; Gbagbo charges: four counts of crimes against humanity allegedly committed during the 2010-2011 post elections violence in Cote de' Ivoire;

⁹⁴ The Prosecutor v. Charles Ghankay Taylor (Case No. SCSL-03-01-A)

⁹⁵ The Prosecutor v. Laurent Gbagbo and Charles Ble Goude ICC-02/11-01/15; Gbagbo charges: Four counts of crimes against humanity: murder, rape, other inhumane acts or –in the alternative attempted murder, and prosecution, allegedly committed during the 2010-2011 post-election violence in Cote d'Ivoire; The Prosecutor v. Jean-Pierre Bemba Gomb, involving charges of war crimes: murder, rape and pillaging; and crimes against humanity: murder and rape

Third, the former Government of Sudan is completely conscious that the ICC is not a white men institution, however, it is obvious that whenever, a treaty, convention, pact or a UNSC resolution, which endeavours to bind individuals, organisations or associations and governments to avoid violation of the proscribed conducts in international law, such treaty may experience derogatory description and prescription, specially, when a government, an association or individuals subscribe consciously that the law threatens their domestic conducts or acts. Fourth, the description is an aim to launch an international opposite allegation of race to escape balancing justice and accountability in an impartial and authoritative court and alternatively, initiate a complementary court in Sudan, however, will this court not be a sham one.

2.1. Sham Tribunal Criminal Courts in Darfur

In Rome's Statute of the ICC, the principle of complementarity expressly reiterates at Article 1 to be a 'complementary to national criminal jurisdiction'.⁹⁶ The Government of Sudan suggests immediately, after the announcement of the indictment of the President Al Bashir with other alleged Ministers and the Head of the Arab militia, *Janjaneed* Ali Kushyab to the ICC, the establishment of complementary court within Sudan legal system. The Minister of Justice Ali Mohamed Osman Yassin challenges the ICC's jurisdiction and admissibility of the application of the trial to the President Al Bashir with other alleged Sudanese nationals for crimes of genocide, crimes against humanity and war crimes in the ICC, instead of domestic judiciaries. He explicitly refers to Article 17 (1) (a) of the ICC Statute and argues 'if the State which has jurisdiction is investigating or prosecuting the case unless the State is unwilling or unable genuinely to carry out the investigation or prosecution'.⁹⁷

It was insurmountable, the former Sudanese authority has been repeatedly and vehemently stating that it would not cooperate with the ICC, simply the judiciary of Sudan is not incapable of trying the cases related to the violence in Darfur in its Sudanese national courts. On 7 June 2005, the Minister of Justice established the tribunal known as the "Special Criminal Courts on the Events in Darfur"⁹⁸ (SCCED). The SCCED in principle and not in practical term conforms to the principle of complementarity of the ICC. Article 1 of the ICC Statute affirms that it has the power to exercise its jurisdiction over persons for the most serious crimes of international concern and shall be complementary to national criminal jurisdictions.⁹⁹ Notably, the Ministry of Justice introduces efforts of conformity to the ICC Statute over media and not the changing of its constitutional provisions to match with the ICC provisions. It reiterates that SCCED is formed in Sudan to demonstrate the ability and willingness of Sudan to deal with prosecutions of the alleged perpetrators of criminal liabilities in domestic jurisdiction and work as a substitute to the ICC.¹⁰⁰

In fact, on 18 June 2012, the SCCED started hearing the first cases of 160 suspects accused of committing undefined crimes in three states of North, West and South Darfur.¹⁰¹ First, the establishment of the SCCED does not conform to the ICC as a complementary tribunal to identify the international criminal court purpose and objective of its establishment. Article 27 (1) of the ICC Statute states 'This Statute shall apply equally to all persons without distinction based on official capacity. In particular, official as a Head of State or Government, a member of a Government or parliament, an elected representative or exempt a person from criminal responsibility'.¹⁰²

In contrast, Article 60 (1) of the Interim National Constitution of the Republic of the Sudan provides distinctive treatment on the officials of the state, Sudan with immunity to the head of state protecting him or her from any legal proceedings and shall not be charged with any lawsuit or sued in any criminal and civil courts of law.¹⁰³

Second, Article 1 of the ICC Statute expressly states 'The... functioning of the Court shall be governed by the provisions of the ICC Statute'¹⁰⁴ inconsistent to the functioning of the SCCED in Darfur, which shall be mainly governed by the provisions of the *sharia* (Islamic law). At the moment, Article 5 (1) limits sources of

⁹⁶ Rome Statute of the ICC enter into force 1 July 2002

⁹⁷ Ali Mohamed Osman Yassin [Sudan: Judiciary Challenges ICC over Darfur](https://www.globalpolicy.org/intjustice/icc/2005/0624collaborate.htm)
<https://www.globalpolicy.org/intjustice/icc/2005/0624collaborate.htm>

⁹⁸ Decree No. 21/2001 and extended to 2003 for the establishment of the 'Special Criminal Courts on Events of Darfur'

⁹⁹ ICC Statute

¹⁰⁰ Sudan rejects ICC extradition www.irinnews.org/report/55068/sudan-judiciary-challenges-icc-over-darfur-cases

¹⁰¹ B. Paul and H. Ralph, *The criminal law of Genocide: International, Comparative and contextual Aspects*, Ashgate Publishing: Hampshire, (2007) 55

¹⁰² ICC Statute

¹⁰³ The Interim national constitution of the republic of Sudan, 2005 and amended 2015

¹⁰⁴ International Criminal Court Statute <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

legislation in Sudan to the *Sharia*, Islamic law.¹⁰⁵ Third, in Sudan, particularly, during Al Bashir, there was an apparent intricacy of law, *Sharia* and politics and such practise neutralises impartiality of the SCCED as a complementary national jurisdiction to the ICC. Political power in the territorial sovereignty of Sudan by then did not allow a deviation or degeneration from the Islamic dogmas in its civil and criminal codes.¹⁰⁶ Moreover, the reference of the former Sudanese Minister of Information that ‘There will be no dealing with white man court’¹⁰⁷ renders or causes the establishment of a racial black man court in Sudan and it degenerates it from the principle of legality as a ‘complementary’ domestic court in Sudan and it creates automatically unprecedented six legal problems in international law. First, the international legal defenders of the victims of the crimes subject to the ICC jurisdiction such as crimes against humanity, war crimes and crimes of genocide at Article 5 will describe such court as a racial black man court per se in Africa, Sudan, an antithesis to the white man court in Europe, Netherlands.¹⁰⁸ Second, a racial court implies a fragmentation and division of one international criminal law with one truth of one fact vis-a-vis the alleged international crimes on the basis of colours and race, and indeed, disqualifies it to be a law. Law must be in conformity to the principle of legality, *nullum crimen sine lege*, refers to the pre-existence of law¹⁰⁹ for the prosecution of suspects. The contemporary legal systems are void of laws, which constitute colour, race and ethnic backgrounds. In another expression, there is no law in international law, which constitutes exclusively racial courts to try perpetrators of international crimes in accordance to their colours, races nor on ethnic groups’ basis.¹¹⁰

Third, an optional racial court in Sudan is inconsistent with horizontal obligation of international criminal law at all times and at all places in treating and prosecuting the alleged perpetrators of genocide, crimes against humanity and war crimes as proscribed conducts internationally irrespective of race, national or colour. According to Hart, the most prominent general feature of law at all times and places is that its existence means that certain kinds of human conduct or commission are no longer optional, but, obligatory.¹¹¹ It is obligatory for the current regime personality in Sudan to render the suspects of international crimes and suspend options of domestic accountability. Fourth, the timing of the establishment of the SCCED and the press statement of the Minister of Information, white man court creates suspiciousness about the neutrality and impartiality of such court in terms of the initiation of legal procedure, collection of relevant data and facts, identification of suspects, investigation, *proprio motu*, credibility of the accountability and justice to the victims of genocide, ‘crimes against humanity and war crimes. Fifth, the establishment of the SCCED demonstrates a rejection of the ICC jurisdiction and insertion of the suspicious complementary court without willingness and ability to try the suspects of international crimes. In his consistent dissent to the International Military Criminal Tribunal (IM CT) on Japan, Judge Pal describes such trials as manifestation of a sham court employed intentionally to satisfy the thirsty allies for revenge against the Japanese nationals.¹¹²

In the same token, the CCED stands as a distinctive sham court designed to shield and protect the alleged criminals from accountability on violation to the proscribed crimes internationally, under international law of the nations.

¹⁰⁵ Ibid

¹⁰⁶ Sudani (2008, July). “Nafi Ali Nafi *Idaat Ocampo len Tathel Intikabat*, Nafi Ali Nafi the Warrant Arrest of Ocampo Does not Obstruct Elections”, Arabic Newspaper, Sudani, Issue No. 958, 1, Nafi Ali Nafi, former Presidential Assistant of Sudan argues in a political speech that the building of Sudan as an Islamic state, where its constitutional laws are derived from the *Sharia* is an imperative objective of any Muslim in the country. It is a Will of God and must be dictated with all available means, including stripping power by force as long as that power imposes *Sharia* (Islamic law) with Arabic in orienting the national institutions in Sudan.

¹⁰⁷ The Minister of Information issues the press statement that “There will be no recognition of the ICC or dealing with the white man court which has no mandate in Sudan against any of its people. Sudan’s sovereignty and independence is a red line”<https://www.theguardian.com/world/2009/mar/04/sudan-demonstrators-support-bashir>

¹⁰⁸ Article 1 specifies the territory of the ICC seat of the court at The Hague, Netherlands

¹⁰⁹ Von Feuerbach, Pal J. A. Ritter, *The Foundations of Criminal Law and the Nullum Crimen Sine Lege Principle*, Oxford University Journal of International Criminal Justice, Vol., 5, Issue, 4,(2007) 827-828 online <https://academic.oup.com/jicj/article-pdf/5/4/1005/2374498/mqm053.pdf>

¹¹⁰ Erasmus, D. and Ndengu, N. C., A note on the introduction of *nullum crimen, nulla poena sine lege* or principle of legality in the South African asset of Forfeiture Jurisprudence, *Juta and company Journal of Criminal Justice*, Vol., 29, Issue 3, (2006) 247-272, 247

¹¹¹ Hart, H L A, *The Concept of law*, Clarendon Press: Oxford, (1961) 6

¹¹² B. Gideon and Ch. Pascale, *International Criminal Justice*, Edward Elgar Publishing Inc: Massachusetts,(2017)

Other two human rights agencies such as the Human Rights Watch (HRW) and Amnesty International (AI) object the formation of the SCCED for substantial reasons. First, Human Rights Watch dismisses it for two reasons: First, it defines the envisaged laws to be applied by the SCCED as far from independent clarity, since they embody “the hybrid of Sudanese statutes of *Sharia law*”.¹¹³ For the Human Rights Watch, *Sharia* is substantive law that emanated from decree in its entirety and without reference to international law that disqualifies the work of such court to be opaque and arbitrary.¹¹⁴ Second, there is no explicit definitions in Sudanese national laws a reference to the crimes against humanity and violations of other proscriptions of the international humanitarian law and such absences make these courts less creditable to prosecute the perpetrators of heinous crimes with aim to generate justice and credible accountability.¹¹⁵ Second, Kolawole Olaniyan, director of Amnesty International in Africa programme issues a statement of rejection to the SCCED in Darfur. The statement asks ‘What we have here is a court system that is willing to silence newspapers and aid workers ... attempting to speak the truth about human rights violations in Sudan. How can we trust that same system to bring to trial the accused nationals?’¹¹⁶

Moreover, some publicists react and criticise seriously the formation of the domestic courts to represent complementary national ones in Darfur. First, the Sudanese publicist, Babiker argues that Sudan’s judiciary structures have no ability to prosecute international crimes; war crimes, crimes against humanity and genocide to conform to the standards of the international criminal law and principles.¹¹⁷ Furthermore, the United Nations, UN Special Representative of the Secretary-General for Sudan, Jan Pronk, describes the establishment of the SCCED as positive, but rejects its substitution to the ICC and recommends its juxtaposition functioning with the ICC for the trial of the suspects of the international criminal offences in Darfur.¹¹⁸

The support of the UN Special Representative to the establishment of the SCCED to operate domestically as complementary courts juxtaposes to the ICC on the other hand as an international body is legal, under international law¹¹⁹, however, one perceives that such courts will not hold actual perpetrators accountable for serious international atrocities or bring them to just accountability within the context of its diverse sources of laws, including customary laws of the *Sharia* (the Islamic Law).¹²⁰ In criminal law, a person cannot face criminal punishment except for an act that was criminalised by law, before a perpetrator performed or committed the act. There must be always a law or principle of legality, *Nullum crimen sine lege*.¹²¹ Fighting ethnic insurgents composed of Fur, Massaliet and Zaghawa rebels with their civilian supporters and sympathisers in Darfur is not construed by the former Government of Sudan as a criminal offence, and hence, there is no law to punish the perpetrators of the crimes of genocide, crimes against humanity and war crimes in Darfur, instead, the conducts of the government militia, *Janjaweed* are regarded constitutionally as both ‘defence’ to the country and ‘honour duty’ of the Sudanese citizens. Article 18 of the Interim National Constitution of the Republic of the Sudan, 2005, states ‘Defence of the Country is an honour and a duty of every citizens.....’¹²² In addition, the same Constitution of the Republic of the Sudan chapter III (23) (2) states ‘In particular every citizen shall: (a) defend the country and respond to the call for national service.....’¹²³ and such constitutional terms build impunity to the perpetrators of both national and international crimes in the Sudan.

¹¹³ Human Rights Watch online <https://www.hrw.org/legacy/grounder/ij/Sudan/0606/>

¹¹⁴ Ibid

¹¹⁵

¹¹⁶ Sudan: National court for Darfur <https://www.amnesty.org.uk/.../sudan-national-court-darfur-crimes-lacks-credibility-and->

¹¹⁷ B. Mohamed Abdel Salam, The international criminal court and the Darfur crimes: The dilemma of peace and supra-national criminal justice, Tylor & Francis International Journal of African Renaissance studies, Vol, 5, Issue 1, (2010) 82-100 online <https://doi.org/10.1080/18186874.2010.500033>

¹¹⁸

¹¹⁹ Central African Republic Organic Law No. 15-003 <https://ihl-databases.icrc.org/applic/.../implementingLaws.aspx?action>. ICC-01/05 CAR Government refers the situation to the ICC <https://www.icc-cpi.int/car>

¹²⁰ Special Courts for the trial of war crimes in Darfur www.amnesty.org/download/documents/92000/afr540262004en.pdf

¹²¹ B. Venus G and Mruthi, T R, *Nullum crimen sine lege in international criminal court*, Journal of Acta Universitatis Danubius Juridica, Vol, 6, No, 3(2017) online.journals.univ-danubius.ro/index.php/juridica/article/view/668

¹²² Interim National Constitution of the Republic of Sudan, 2005 and amended 2015

¹²³ Constitution of the Republic of Sudan 2005 and revised 2015

2.2. Impunity of Perpetrators of International Crimes

At this phase, it is difficult for a scientific legal researcher to conclude that the SCCED conforms to the international law obligations. International criminal law denies immunities to perpetrators of international crimes irrespective of their official positions in the government of such state.¹²⁴ For Akande and Shah, international law imposes obligations on states to prosecute the perpetrators of international crimes within their territorial sovereignties. International Human Rights Law includes a right to a remedy provided by the state that has violated the substantive human rights, but in practise these methods of enforcement of human rights and international criminal law often end in fiascos. Domestic law may not incorporate the relevant international human rights norm. International crimes are often committed by state agents as part of state policy, and so governments avoid prosecution of their own officials engaged in criminal acts and that avoidance generates the culture of impunity.¹²⁵

In light of these two authors, the international crimes were committed in Darfur as a state systematic and widespread policy¹²⁶ and as such, the former state authority could not prosecute it superior and subordinate nationals in command of responsibilities and the President of state, but today, Sudan is under the MCC and impunity seems to have been eradicated at least AL Bashir is imprisoned in the public prison, Kober and later to the reformatory prison. Since, there is no consensus among the ruling authority in Sudan, instead, individuals within the institution of the MCC offer legal hypotheses for accountability of the alleged criminals of the heinous international crimes in Darfur, then the ICC is inevitable option to ensure that the perpetrators of international prohibited commission and omission in Darfur must be accountable as an obligation in international criminal law. At its 'Preamble', the ICC Statute asserts in "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished", instead the perpetrators must be sought, arrested, investigated and prosecuted in an authoritative court of justice¹²⁷ satisfying the victims and the defendants.

3. Conclusion

The divergent legal suggestions emanating from the Sudanese in contemporary effective control of power and other potentials for power in Sudan represents an epitome paradigm of the triumphant trajectory of justice, after the removal of the President Al Bashir with other alleged criminals for having commissioned international crimes against the ethnic Fur, Zaghawa and Massaliet in the region of Darfur at the peripheries of the Western Sudan from power.

Resistance of the Military Command Council to surrender Al Bashir and other Sudanese accused of international criminal nature and their unanimous recommendation for their trial within the national judiciaries systems tacitly conforms to the principle of complementarity in the ICC regulations for admissibility and inadmissibility of the referrals to it. Prosecuting Al Bashir and others in domestic courts is legal, since it is in compliance with the principle of complementarity, however, the existence of the conflict of laws in the Interim National Constitution of the Republic of Sudan (INCRS), 2005, where the Penal Code of Sudan, 1991 mainly relies on the *Sharia* at one side and the Rome Statute of the ICC at the other set is insurmountable. Provisions in the INCRS and Criminal Act of Sudan contain irreconcilable provisions, under the complementarity. Article 27 (1) of the ICC Rome Statute applies equally to all persons without distinction based on official capacity or position, but Article 60 (1) of the INCRS provides immunity to the head of state from any legal proceedings and shall not be charged in any competent civil and criminal courts of law. In contrast, the Rome Statute of the ICC, Article 1 presses that the court is governed by its provisions contrary to Sudan judiciary systems. Article 5 (1) limits the governing provisions derive from the *Sharia* law. Alternatively, the research suggests the adoption of monistic legal system that helps to merge and reconcile the conflicting laws of the Interim Constitution of the Republic of Sudan with its Penal Code of the *Sharia*, 1991 with the Statute of the ICC.

¹²⁴ M. Konstantino D) "The interplay between the transfer of Slobodan Milosevic to the ICTY and Yugoslav constitution, Oxford University of European Journal of International Law, Vol, 13, Issue, 3, (2002) 661-677. Statute of the ICTR article 6 (2) "The official position of any accused person, whether as head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment see also article 6 (3) and (4) of the same statute

¹²⁵ A. Dapo and S. Sangeeta, Immunities of state officials, international crimes, and foreign domestic courts, Oxford University of the European Journal of International Law, Vol, 21, No, 4, (2010) 815-852

¹²⁶ K. Claus, The Darfur Report and Genocide Intent, Oxford University Journal of International Criminal Justice, Vol, 3, Issue 3, 5,(2010) 562-578, the Government of Sudan authorities, individual state officials, members of militia, *Janjaweed* entertain crimes against humanity and war crimes as reported by the UN Commission of Inquiry on Darfur.

In international law, monism is a legal theory that incorporates treaty law into its national legal system without prior ratification of the legislative authority. Thus, its adoption eases the prosecution of the Sudanese fugitives from justice of the ICC in national judicial systems, under the principle of complementarity.

Other Sudanese nationals, on the other hand, press for the ratification of the Statute of the ICC to pave the procedure of accountability for the accused criminals on the crimes of genocide, crimes against humanity and war crimes in remote Darfur. Ratification of the Government of Sudan to the ICC and its incorporation by legislature creates a dualistic legal system that applies the ICC principle of complementarity in national judiciaries of Sudan. Both monistic and dualistic constitute accountability of the alleged criminals of the international crimes in national judiciaries in Sudan.

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