2019

States' non- Cooperation in the arrest and surrender of suspects of international crimes: an analysis of its precedents and impacts on the International Criminal Court

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States' Non- Cooperation in the Arrest and Surrender of Suspects of International Crimes: An Analysis of its Precedents and Impacts on the International Criminal Court

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Submitted in Partial Fulfilment of the Requirements of the Master of Laws at Strathmore

Strathmore Law School
Strathmore University
Nairobi, Kenya.

June 2019

DECLARATION

I declare that this work has not been previously submitted and approved for the award of a degree by this or any other university. To the best of my knowledge and belief this thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

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Approval

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ABSTRACT

States' cooperation is at the core of the International Criminal Court, it requires the cooperation of States to carry out some of the key functions which include arrest and surrender. Without cooperation in arrest and surrender, the court is handicapped as it has no provision to proceed in the absence of the accused. States' non-cooperation in the arrest and surrender of suspects has been a very big problem for the ICC. This is because of the lack of enforcement powers; it has to rely on States as well as the Assembly of States Parties and the United Nations Security Council to carry out enforcement on its behalf. This thesis evaluates this problem with an emphasis on the factors that mostly account for non-cooperation. It will also analyse the Rome Statute mechanism on non-cooperation to find the reasons for its ineffectiveness. Finally, it will then propose the use of diplomatic sanctions and trials in absentia in an effort to find practical solutions to this problem.

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LIST OF ABBREVIATIONS

ASP	Assembly of States Parties
AU	African Union
EU	European Union
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IMT	International Military Tribunal
LRA	Lord's Resistance Army
MICT	Mechanism for International Criminal Tribunals
SCSL	Special Court for Sierra Leone
SFOR	Multi National Stabilization Force
STL	Special Tribunal for Lebanon
UN	United Nations
UNSC	United Nations Security Council
USA	United States of America
WWI	World War I

ACKNOWLEDGEMENTS

The past one year and a half has been most intellectually inspiring and challenging in equal measure. I have had ups and downs that are so typical of academic life, I have been thoroughly exhausted but it was all worth it in the end. I take this opportunity to express my deepest gratitude to the people who held my hand, motivated me, pushed me, prayed for and with me. I would not have made it on my own.

To my family, you have been my rock and motivation. Kikanae, I am eternally grateful for the love, support, patience, push and encouragement. My parents especially Mama, your care and support moral and material are immeasurable.

To Dr Edwin Bikundo for the input and guidance on the initial parts of this thesis.

To Dr Anne-Marie De Brouwer for guiding me in this journey and for patiently walking this tedious journey with me. This work would not have been possible without all your input.

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DEDICATION

To Tayiani, my source of inspiration.

CHAPTER ONE
INTRODUCTION

1.1 Background to the Study

The International Criminal Court (ICC) is the only permanent international criminal court in the world. It was established in July of 2002 after the coming into force of the Rome Statute of the International Criminal Court (Rome Statute) that had been adopted in 1998.[1] It was established for the investigation, prosecution and punishment of perpetrators of what was termed by the international community as the most serious crimes namely crimes against humanity, war crimes, genocide[2] and aggression.[3] These were the crimes that states identified to be the most serious crimes that should not go unpunished.[4]

Central to the functioning of the ICC is the cooperation of states on various aspects including in arrest and surrender. This cooperation has not been easy to achieve for the ICC despite the express obligation in the Rome Statute. This thesis discusses the non-cooperation of states in arrest and surrender which has been a major challenge to the court. It will focus on its factors accounting for the high rate of non-cooperation, the effectiveness or lack of it in the enforcement mechanisms within the Rome Statute and possible solutions with an aim to enhance cooperation.

The establishment of the ICC was a culmination of attempts over the decades by states especially after the First and the Second World Wars to establish an international criminal court[5]. There had been attempts as far back as after WWI to bring all perpetrators to account for violations of the laws and customs of war.

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[1] Rome Statute of the International Criminal Court.
[2] Article 5, 6, 7 Rome Statute.
[3] International Criminal Court, 'Resolution RC/Res.6—Aggression amendment', 11 June 2010, at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf on 28 January 2018
[4] Preamble to the Rome Statute *"Affirming that the most serious crimes of concern to the International community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation*"
[5] Article 14 of the 1919 Treaty of Versailles.

The Rome Statute was thus negotiated and adopted against this backdrop. It was considered to be an institution to bring an end to impunity.

The Rome Statute established the ICC and expressly set out the legal status and powers that the court would have.[6] It provides that the ICC shall have "*international legal personality*" and that it has powers within the territory of any state party to the Rome Statute or by virtue of special agreement on the territory of a non-member state.[7] States that are not party to the Rome Statute are therefore excluded and not subject to the jurisdiction of the court and are effectively immune from the reach of the ICC unless the United Nations Security Council (UNSC) through the exercise of its powers under Chapter VII of the UN Charter imposes obligations on the non-member states in respect of a situation it referred to the court.[8]

States' cooperation within the framework of the Statute is fundamental to the functioning of the court. Cooperation in the arrest and surrender of suspects is key for the proceedings before the court because the Statute has no provision for trials in absentia. The accused persons must be present for the trials against them to proceed.[9] Cooperation in the ICC has been a thorny issue between States and the court for various reasons. The court has encountered considerable levels of non-cooperation from States some of which are parties to the Rome Statute and have express obligations to cooperate with the requests and orders of the court. Non-cooperation has been a problem that has stood out for the court which has been compounded by the inability of the court to enforce cooperation.

1.2 Problem Statement

The Rome Statute establishes an obligation on States to cooperate with the ICC in arrest and surrender of suspects. However, the ICC has been faced with significant instances of non-cooperation by States despite this obligation to cooperate. This non-cooperation has been identified as one of the major challenges facing the court. When States' non-cooperation is not effectively tackled the court faces a very uncertain future. So far there

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[6] Article 4 Rome Statute.
[7] Article 12 Rome statute.
[8] Charter of the United Nations and Article 13(b) of the Rome Statute
[9] Article 63 Rome Statute

have been proposals made to address this problem but none of them have concretely dealt with it. Therefore, there is need for more study and research to identify the most significant causes of States' non-cooperation and explore practical solutions. The aim of this study is to join the ongoing quest to determine the most significant factors influencing non-cooperation and exploring practical effective solutions to the problem. This will be done through qualitative review of the relevant literature.

1.3 Hypotheses

There are various factors that account for States' non-cooperation with the ICC's requests for arrest and surrender, these are; conflicting obligations and interests, immunities, politics, lack of enforcement powers and perceptions of bias.

The enforcement mechanisms currently provided to deal with non-cooperation have proved ineffective because there is no sanctioning power provided to the ASP while the UNSC has been reluctant to use its wide discretionary powers under Chapter VII.

Sanctions and trials in absentia within the Rome Statute will address and mitigate the effects of non-cooperation on the court by providing means of coercing States to cooperate and provide an alternative means of delivering justice.

1.4 Research objectives

The main objectives of this thesis are;

a) To identify the main factors that encourage States' non-cooperation and their impacts on the court.
b) To analyse the Rome Statute's sanctioning power with a view to establish its effectiveness in responding to non-cooperation.
c) To explore possible practical solutions that can be implemented within the Rome Statute to effectively address the non-cooperation by States.

1.5 Research Questions

This study will seek to answer four questions;

1. What factors account for the high rate of non-compliance with requests for arrest and surrender in the ICC?

2. What powers of sanction are currently available to deal with non-cooperation?

3. What amendments to the Rome Statute are necessary to strengthen States' cooperation or mitigate the negative effects of non-cooperation?

4. What other options exist, within and outside of public international law that might address the problem of States' non-cooperation?

1.6 Literature Review

The lack of cooperation has been one of the greatest challenges facing the court. The enforcement mechanism provided appears to have an inherent deficiency which has impacted the ability of the court to sanction States for non-cooperation. This review explores the various debates on the problem of non-cooperation.

1.6.1 The centrality of States cooperation in the ICC.

In "*Non-cooperation and the efficiency of the International Criminal Court*"[10] Annika Jones contends that one of the most significant challenges that the ICC has faced since its creation has been securing State cooperation, the writer argues that "…. the failure of the State to cooperate has frustrated the court's proceedings significantly." This argument is in line with the argument advanced in this thesis that the effect of non-cooperation on the ICC has been tremendous. The writer further examines the relationship between non-cooperation and the efficiency of the ICC. The article examines the impact of the failure of States to cooperate with the court on the efficiency of its proceedings. It draws from the court's investigations in Darfur, Sudan and Kenya to demonstrate the significant impact that lack of cooperation has had on the ability of the Court to seek justice for the crimes that fall within its jurisdiction.

Further, the writer considers the potential for the inefficiency of ICC to conversely affect the willingness of States to cooperate with the court. The writer argues that the inefficiency of the court encourages non-cooperation from States that then in turn produces further

[10] Jones A, Non-cooperation and the efficiency of the International Criminal Court in Bekou, O and Burke D (Eds) *"Cooperation and the International Criminal Court perspectives from theory and practice*" Brill Nijhoff, Leiden 2016.

inefficiency. The argument here is that the cycle must be addressed from within the ICC and its legislative and management body by taking measures to encourage efficiency in all aspects of the court's operation especially in response to non-cooperation. This is distinct from the arguments by Banteka who argues on the importance of politics in the cooperation of States and proposes that the ICC needs to use its political role to increase its rates in the apprehension of suspects and secure higher levels of judicial enforcement.[11] The author does not however, demonstrate how the court can use politics without compromising its judicial independence.

In *"The cooperation of States with the International Criminal Court"*[12] the authors argue that the success of the ICC is determined by the level of cooperation it receives from States. The ICC fully relies on States to arrest and surrender suspects having no police force of its own. Without such assistance it is faced with many challenges and difficulty in conducting proceedings. The writers argue that the key point in cooperation is the domestic legislation permitting the State party to co-operate when requested. The argument here fails to account for the non-cooperation by States that have enacted domestic legislation implementing the Statute. It is clear that enacting domestic legislation has not guaranteed cooperation. There are more fundamental factors underlying non-cooperation.

James Meernik in his article *"Conflicting Justice, Power and Peace Interests and the "Apprehension of ICC Suspects,"* argues that the apprehension of suspects was the one absolutely most important thing that must be realized in order for the ICC to fulfill its mission to provide judicial accountability for violations of international humanitarian law.[13] This argument is aligned with the main propositions and arguments of this thesis.

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[11] Banteka N, Mind the gap: a systematic approach to the International Criminal Court's arrest warrants enforcement problem, 521. *Cornell International Law Journal*, 2016, 49.
[12] Oosterveld V, Perry M and McManus, The cooperation of states with the International Criminal Court, 25. *Fordham International Law Journal* 3, 2001, 18.
[13] Meernik J, Justice, Power and Peace: Conflicting Interests and the Apprehension of ICC Suspects. *International Criminal Law Review* 13, 2013, 169.

Cassese observed in *Cassese's International criminal law*[14] that State cooperation is crucial to the effectiveness of the judicial process of international criminal courts and that without cooperation the courts cannot operate.

1.6.2 The enforcement problem

In the *International Criminal Court's ineffective enforcement mechanisms: The indictment of President Omar Al Bashir*[15] Gwen Barnes argues that the ICC is ineffective due to the lack of enforcement mechanisms in the Rome Statute. The author analyses the refusal by Chad and Kenya to arrest Al Bashir and notes that the ICC is helpless in the face of such non-cooperation. The author links this apparent helplessness to the lack of clear repercussions for States that breach their obligations to cooperate and also to the lack of clarity in the provisions of the Rome Statute specifically Article 98(1) and (2) relating to immunity and excusal of a State party from obligations to cooperate due to other obligations. This is the position that is advanced in this thesis, that there is need for clear, concise consequences under the Statute for failure to cooperate, which ensures that States are fully aware of the repercussions for failing to cooperate.

A similar argument is advanced by Ngolo in *Analysing the future of international criminal justice in Africa,* the author argues that the problem of the ICC is that it does not have the capacity to function without States cooperation and is powerless in the face of non-cooperation. That it cannot do much to deal with non-cooperation. Further that the Rome Statute does not provide any action to be taken when a State fails to cooperate.[16]

The author in *Mind the gap: A systematic approach to the International Criminal Court's arrest warrants enforcement problem*[17] contends that the ICC fails to procure substantial results due to its rejection to factor in politics. She argues on the importance of politics in the enforcement of arrest warrants and proposes that the ICC needs to use its political role

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[14] Cassese A, Gaeta P, Baig L, Fan M, Gosnell C and Whiting A, Cassese's international criminal law,3, Oxford University Press, 2013, 298.
[15] Barnes G, The International Criminal Court's ineffective enforcement mechanisms: the indictment of Omar Al Bashir, 34. *Fordham International Law Journal* 6, 2011, 47.
[16] Ngolo E.W, Analysing the future of international criminal justice in Africa: A focus on the ICC, Strathmore Law Review, 2016, 102-103.
[17] Banteka, Mind the gap, 49.

to increase its rates in the apprehension of suspects and secure higher levels of judicial enforcement. It is not clear how the factoring in of politics will ensure enforcement.

1.6.3 Tackling States' non-cooperation.

The writers herein have made different arguments on how to deal with the question of non-cooperation with the ICC.

According to A. Jones, the way to address the issue of non-cooperation is through internal measures by the ICC within its legislative and management body to encourage efficiency in all aspects of the court's operation especially in response to non-cooperation.[18]

G. Barnes argues for the amendment of the Rome Statute to include defined repercussions for States that refuse to cooperate with the ICC's requests. This is the argument that is advanced by this thesis, that to effectively deal with non-cooperation, there must be clearly defined consequences. The author proposes three options as repercussions which are suspension, expulsion and UNSC sanctions. According to the author repercussions faced will be determined by the severity of the breach by the State. This resonates well with the general ideas of this thesis. Further, the article proposes amendment of Article 98 to indicate what immunity and excusal constitute to deal with confusion surrounding the subject.[19]

Banteka argues for the use of non-State actors and also the use of positive and negative incentives including inducements, reputational sanctions, travel bans and asset freezing as a way to increase compliance with arrest warrants.[20]

1.6.4 The place of the study

The above writers have all acknowledged that cooperation by States on the arrest and surrender of suspects is fundamental to the effective and successful functioning of the ICC. And further, that non-cooperation has been a contributing factor in the apparent ineffectiveness of the ICC. However, there is no consensus on the most effective approach

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[18] Jones, Non-cooperation and the efficiency of the International Criminal Court.
[19] Barnes, The International Criminal Court's ineffective enforcement mechanisms,47.
[20] Banteka, Mind the gap, 49.

to be taken to deal with the non-cooperation; this is what this thesis seeks to address. This study seeks to join the ongoing debate on the problem of non-cooperation. The fact that non-cooperation is still a major challenge despite decades long debates on the subject means that it is an issue that has not been fully tackled. It remains a very live issue especially noting the very clear consequences still impacting the court. Therefore, the debates have not been exhausted and the court needs a practical solution if it is to survive.

This thesis proposes the revision of the Rome Statute to provide for definite sanctions as a means of enforcing full compliance with requests for the arrest and surrender of suspects as well as to provide for trials in absentia as a measure of last resort when the presence of the accused cannot be obtained.

1.7 Conceptual framework

This thesis studies the factors that account for States' non-cooperation in the ICC and also considers the ineffectiveness of the enforcement mechanism within the Rome Statute. It demonstrates that States' cooperation is fundamental to the functioning of the ICC because States are the court's enforcement arms in the arrest and surrender of suspects. States are therefore the central actors within the Rome Statute regime without which the ICC is handicapped.

The Rome Statute establishes obligations for States parties to cooperate in the arrest and surrender of suspects. These obligations are binding on these States in international law by virtue of their ratification of the Statute. Under the Vienna Convention on the Law of Treaties, States are bound to perform their obligations under treaties that they are party to according to the doctrine of *pacta sunt servanda*.[21] This means that ICC States parties have a duty to comply with their obligations under the Statute. While these obligations are binding, they present a conflict with the doctrine of State sovereignty.[22] The independence of the court in the exercise of its judicial functions infringes on the sovereignty of States because traditionally, the exercise of criminal judicial jurisdiction is the monopoly of

[21] Article 26 provides "Every treaty in force is binding upon the parties to it and must be performed by them in good faith"

[22] Wind M, Challenging sovereignty? The USA and the establishment of the International Criminal Court, *2 Ethics and Global Politics Journal*, 2009, 94.

States. Thus, the yielding of this power to the ICC curtails the sovereignty enjoyed by States. The obligations on cooperation and judicial assistance under the Rome Statute infringe on the exercise of national sovereignty, they require States to surrender sovereign power to the ICC.[23] The court is therefore seen as assuming a superior position when States are bound to comply with its orders and requests.

These doctrines are at the centre of the pull and push between the ICC and States on the question of non-cooperation. Although States have binding obligations under the Statute, they are reluctant to surrender the exercise of their sovereignty. States view the two principles as incompatible therefore resulting in the problem of non-cooperation.

1.8 Approach and Methodology

This study will be conducted through review of literature, this will be a qualitative analysis of primary and secondary sources of literature on the subject. The primary sources of literature for review herein will be the documents that form the law relating to State cooperation, these are the Rome Statute and the UN charter while the secondary sources will include books, journals and articles of scholars on the subject.

1.9 Limitations and Assumptions

This study will be limited entirely to the review of literature on the subject. It will also be faced by time constraints as it will be conducted within a limited period of time because it forms part of course work for the requirements for the award of the master of laws.

There is an assumption that since State parties to the Rome Statute voluntarily joined and supported the establishment of the ICC, they would as a matter of cause be ready and willing to cooperate with it in all aspects.

1.9.1 Chapter Breakdown

This study will be organized into five chapters.

Chapter 1 will contain the introduction to the study that will be further divided to cover problem statement, research objectives and questions, literature review, conceptual

[23] Robert C, International criminal law vs sovereignty, *European Journal of International Law*, 2005, 985.

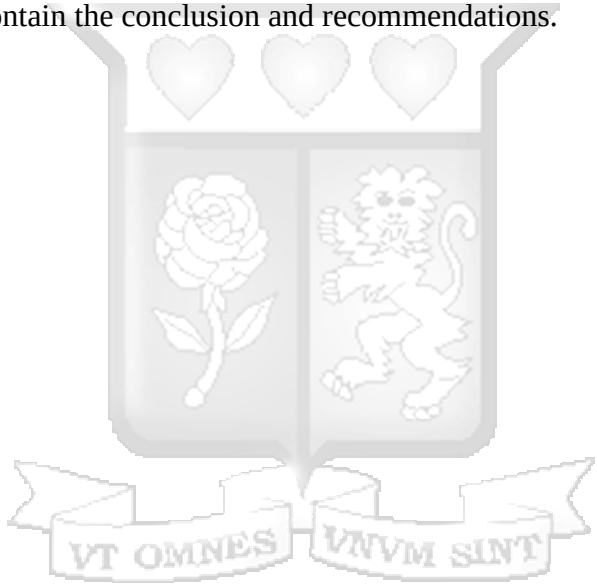
framework, approach and methodology, limitations and assumptions and chapter breakdown.

Chapter 2 will examine the factors that account for the high rate of non-cooperation by States with the ICC.

Chapter 3 will analyse the Rome Statute regime relating to non-cooperation and the reasons for its apparent ineffectiveness in dealing with States' non-cooperation.

Chapter 4 will examine the possible amendments to the Rome Statute to ensure cooperation and mitigate the effects of non-cooperation on the court.

Chapter 5 will contain the conclusion and recommendations.



CHAPTER TWO

An effective ICC: The Impact of States' non-co-operation on arrest and surrender

2.1 Introduction

The ICC heavily depends on States in the discharge of its core mandate. State co-operation is paramount for the proper functioning of the court. On the flip side, it can thus be argued that States' non-co-operation with the ICC hinders the proper functioning of the court. It therefore, has negative implications for the court. This chapter will deal with the factors accounting for non-co-operation and its impact on the effectiveness of the court. The first part will discuss what effectiveness of the ICC entails. The second part will deal with factors that influence the actions of States towards the ICC, basically factors encouraging non-co-operation. The last part will address the impact of non-co-operation on the effectiveness of the ICC.

2.2 The question of effectiveness

What constitutes an effective or successful ICC? This has been a subject of debate by scholars and commentators since the establishment of the court. There has, however, not been much consensus on the topic. This is mostly because there is no single standard of determining the ICC's success, thereby making such an attempt a difficult exercise. To find a somewhat easier approach to this question, it is important to start with an understanding of the core objectives for which the court was established. Effectiveness or success would then constitute an achievement of these objectives by the court. The ICC was established for a number of ambitious objectives. The objectives are; to ensure that the common bonds of all peoples are not shattered, to recognise and ensure justice for the millions of people that have been victims of unimaginable atrocities, to bring to account all perpetrators of the most serious and atrocious crimes regardless of any official position held and to end the impunity of these perpetrators with an aim to deter the commission of these crimes.[24] The ICC's success is therefore an achievement of these very ambitious objectives. To achieve these objectives, the ICC heavily relies on State parties to assist in

[24] Preamble to the Rome Statute.

carrying out some fundamental functions, which include arrest and surrender, taking of evidence, facilitating appearance of witnesses in the court, execution of searches and seizures, protection of victims and witnesses, enforcement of sentences among other forms of assistance.[25]

As it has already been argued herein, co-operation by States is at the core of the ICC's ability to effectively function. Without States the ICC has no capacity to carry out certain fundamental functions related to the discharge of its core mandate. Without the co-operation of States in arrest and surrender of suspects, the court is rendered ineffective and unable to function. There are various factors that inform the actions or inaction of States towards the court in relation to arrest and surrender. The most notable factors are conflicting obligations and interests in international law faced by States in respect of the requests for arrest and surrender, domestic and international politics to which the court being a creature of a treaty ultimately finds itself in, lack of enforcement powers and accusations of bias in its choice of cases. According to Cherif Bassiouni the tenets of realism have an impact on States cooperation and that the greatest obstacle to the effectiveness of the ICC "will always be *realpolitik* and States interests"[26]

2.3 Factors influencing States' non-co-operation in arrest and surrender

2.3.1 Conflicting obligations, interests and immunities

Under Article 98 of the Rome Statute, the court may not proceed with a request for surrender or assistance that would make the requested State to act inconsistently with its obligations with respect to either its international law obligations relating to State or diplomatic immunity or its obligations under international agreements which prohibit the surrender of a person. The court must first obtain the consent of the third State before the requested State can comply with the ICC requests. This provision recognizes that States have obligations accruing under international law which at times might conflict with their obligations to the ICC. This provision can be interpreted to give States an opportunity to decline to assist the court when it is clear that in fulfilling such requests the State would be

[25] Article 86, 87 and 93 of the Rome Statute.
[26] Bassouni M.C. The ICC-quo Vadis? 4 *Journal of International Criminal Justice*, (2006), 426.

acting inconsistently with its other obligations in international law. Although the Rome Statute expressly excludes official capacity as a basis for immunity from prosecution, it self contradicts by giving States an opportunity to decline to arrest or surrender a suspect to the court on the basis of other forms of immunity. This provision together with Article 86 of the Rome Statute that provides a general yet limited obligation to cooperate, means that although there is a general obligation to cooperate the same can be limited in accordance to the statute. This gives States latitude in relation to co-operation and presents a very serious challenge to the court. It gives States a choice to decline to co-operate for this reason. Therefore, in the instance where a State has another obligation which is incompatible with the obligation in the Rome Statute, the State can rely on Article 98 of the Rome Statute. In essence other international obligations relating to immunity take precedence to those under the Rome Statute. The AU relied on Article 98 in passing the resolution during its 13th Summit on 6th July 2009 persuading member States not to co-operate with the ICC on the arrest of Omar al Bashir.[27] Some African States[28] party to the Rome Statute have relied on this declaration of the AU in declining to co-operate with the ICC in the arrest and surrender of Al Bashir whilst he was within their territories. Under Article 27 of the Rome Statute there is no immunity for Heads of states. However, under customary international law, Al Bashir enjoys full immunity from arrest in foreign countries.

Under customary international law, States would be faced with incompatible obligations under which they can be excused from co-operating under Article 98. Therefore, the duty to arrest Al Bashir in this circumstance puts these States' interests at loggerhead with their obligations under the statute. The States' foreign policy and economic interests with Sudan and other members of the AU are at stake. Relying on principles of realism in international relations, these States chose to pursue their own interests not the interests of international criminal justice.[29]

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[27] Decisions and declarations of the assembly of the African Union thirteenth ordinary session.
[28] Chad, Kenya, Djibouti, Malawi and South Africa.
[29] Ali N, Bringing the guilty to justice: can the ICC be self-enforcing, 14 *Chicago journal of international law* 2, (2014), 417.

Article 98 of the Rome Statute also envisions agreements between States under which States may be prohibited from surrender of suspects to the court. The United States of America (USA) has used this provision to enter into bilateral agreements with various States that are parties to the Rome Statute with an aim to shield its citizens from the ICC's jurisdiction. These agreements ensure that these States do not surrender American citizens to the ICC.[30] These agreements create conflicting obligations for States that have obligations under the Rome Statute, as such States can decline to co-operate with the ICC requests on the basis of such agreements.

2.3.2 Domestic and international politics

The ICC has constantly presented itself as an institution that is outside the political realm. The former Chief Prosecutor had in relation to this stated that he applies the law without political considerations.[31] The current Chief Prosecutor has similarly echoed her predecessor in this assertion that the court is not guided by politics. She argues that ICC justice is guided solely by the law and evidence.[32]While the court itself purports to be apolitical and not involved in any politics, it is, naturally-owing to its nature-tangled with politics. It is a political creature and therefore it cannot run away from the consequent politics. It fundamentally relies on States co-operation to function; States are inherently political entities thus all actions in relation to the ICC are politically motivated in one way or the other. Therefore, the ICC finds itself caught up in this politics. There are instances that demonstrate the politics that comes into play in the relationship between the court and states.

In 2003 the president of Uganda referred the Lord's Resistance Army (LRA) to the ICC. This was after a decade and a half of war between the Ugandan army and the LRA. By many this move was viewed as the government's attempt to defeat its long-standing

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[30] Ndungu G and Retief JM, *Africa and US article 98 agreements: A threat to international criminal justice, International criminal justice in Africa 2017*, Strathmore University Press, Nairobi, 2018, 160.
[31] 'Keynote address Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Council on Foreign Relations', Washington DC, 4 February 2010.
[32] Bensouda F, International justice and diplomacy, New York Times, 2013, www.nytimes.com/2013/03/20/opinion/global/the-role-of-the-icc-in-international-justice-and-diplomacy.html?_r=0.

military enemy through non-military means. This referral was therefore a political move that had nothing to do with the quest for justice for victims. The prosecutor in pursuing the Ugandan referral conducted investigations into the situation and subsequently indicted the top commanders of the LRA, this was in spite of the wide spread atrocities that were also committed by the Ugandan armed forces. In choosing which cases to pursue in Uganda the Prosecutor had taken political considerations,[33] by choosing not to investigate and prosecute the crimes of the Ugandan forces, the prosecutor was interested in ensuring full co-operation of the Ugandan government.[34] In doing so the prosecutor recognised the implication of indicting the Ugandan army and the consequences it would have on his ability to conduct investigations within the region, there would have been outright resistance by the Ugandan government and any form of co-operation would be impossible. The prosecutor therefore played right into the political machinations surrounding that referral. The Ugandan government's co-operation with the court was solely influenced by political consideration. The Ugandan president has since taken up an active role in the AU campaign against the ICC. Nadia Banteka has argued that the ICC as an actor within the international landscape makes many decisions that are inevitably political.[35] This demonstrates how politics influences States in their actions towards the ICC as well as the ICC's approach to situations.

The actions of African States in refusing to arrest Al Bashir demonstrate the impact that the politics within the AU has had on the response of States to the ICC. The actions are informed by regional political considerations. As discussed earlier on in this chapter, the AU has engaged in a campaign against the ICC as solely focusing on Africa ignoring other international crimes occurring in conflicts outside the continent. It passed a resolution directing members not to co-operate with the requests for the arrest of Al Bashir.[36] The AU's argument is a political denunciation of the ICC as a political tool of the

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[33] Clark J.N Peace, justice and the International Criminal Court; limitations and possibilities, 9 *Journal of International Criminal Justice*, (2011), 527.
[34] Nouwen S.M.H and Werner W.G Doing justice to the political: The International Criminal Court in Uganda and Sudan, 21 *The European Journal of International Law*, (2010), 950.
[35] Banteka, Mind the gap, 531.
[36] Decisions and declarations of the assembly of the African Union thirteenth ordinary session.

west.[37]African States have been guided by the directives of the AU in so far as their reaction to the Al Bashir warrants are concerned.[38] This demonstrates that the ICC is inevitably in one way or another affected by political considerations of States.

The UNSC referrals of the Sudan and Libya[39] situations are a reflection of politics; referrals are political tools used by the Security Council as and when it suits its own interests. The fact that it is now thirteen years since the Security Council made the referral of the Darfur situation[40] and there has been no progress made by the ICC with regard to the case shows the lack of political interest and will by the Security Council to pursue justice for the victims. This is also the position in relation to the Libyan situation. In 2011 the UNSC referred the situation in Libya to the ICC. Warrants of arrest were issued thereafter in march by the pre-trial chamber against three accused persons namely Muammar Gaddafi, Abdullah Al Senussi and Saif Al Islam. The warrants against Gaddafi were withdrawn following his death in November 2011. The proceedings against Al Senussi came to an end on 24th July 2014 when the Appeals chamber confirmed the decision of the pre-trial chamber declaring the case inadmissible before the ICC.[41] Al Islam was subsequently captured in December 2011 by Libyan forces. The ICC prosecutor made a request to the Libyan government to surrender him to the ICC. The government argued that he should be tried in Libya therefore challenged the admissibility of the case before the ICC, the case was held to be admissible by the court. Two subsequent warrants of arrest were issued against Mohamed Khaled and Mahmoud Al Werfali.[42] To date none of the accused persons have been handed over by the Libyan government to the ICC and their cases remain at the pre-trial stage. The ICC referred the non-co-operation by the Libyan government to the UNSC but there was no effort by the council to enforce co-operation.[43] The Chief

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[37] Cole R J V, Africa's relationship with the International Criminal Court: more political than legal, 14 *Melbourne Journal of International Law,* 2013, 12.
[38] Chad, Kenya, Djibouti, Malawi and South Africa
[39] UNSC Resolution 1593 (31 March 2005) and UNSC resolution 1970, 26 February 2011.
[40] Situation referred to the ICC by the UNSC in March 2005.
[41] ICC situations and cases, https://www.icc-cpi.int/libya 22 December 2018.
[42]ICC situations and cases, https://www.icc-cpi.int/libya 22 December 2018.
[43] Saif Al-Islam Gaddafi Case: ICC Pre-Trial Chamber I issues non-compliance finding for Libyan Government and refers matter to UN Security Council https://www.icc-cpi.int/pages/item.aspx?name=PR1074 22 December 2018.

Prosecutor has since this referral acknowledged the co-operation she has received from the Libyan government in her investigations in Libya.[44] With regard to the Darfur case, Fatou Bensouda has blamed the Security Council for not taking any concrete action to help the ICC in Darfur.[45] The attitude of the Security Council has had an impact on the actions of States. The lack of commitment and action by the council in spite of the authority it has under chapter VII of the UN Charter to compel co-operation has greatly undermined the ICC's efforts for co-operation by Sudan and other States.

2.3.3 Lack of enforcement powers

The lack of enforcement agencies and powers by the ICC is one of the challenges that affect the ability of the court to achieve its institutional goal and to the furtherance of international criminal justice.[46] The ICC does not have enforcement powers in relation to its requests and orders, it also lacks powers to enforce or compel co-operation by States. This framework makes the court entirely powerless in the face of non-co-operation, it can only be strengthened by the support of States. Under Article 87 (5) and (7) of the Rome Statute, the court can make a finding of non-cooperation by a State upon which the court informs the ASP or the UNSC of the said non-co-operation. There is no provision indicating what action these bodies should take upon being informed of the non-co-operation. Article 112(8) provides that the ASP shall *consider pursuant to Article 87 paragraph 5 and 7 any question relating to non-co-operation.* There is no express provision as to what happens after such consideration. The pre-trial chamber has made

[44] Thirteenth report of the prosecutor of the ICC to the UNSC pursuant to resolution 1970, 8th May 2017.
[45] UNSC 69th year, 7337th meeting, Friday 12 December 2014, New York, S/PV.7337.
[46] Ali, Bringing the guilty to justice, 417.

several findings of non-co-operation by Chad,[47] Kenya,[48] Djibouti,[49] Malawi,[50] the DRC[51] and South Africa[52] in relation to non-co-operation on the arrest of Al Bashir. All the States above are parties to the Rome Statute and have an obligation to co-operate under the Statute.[53] The Rome Statute has no mechanism or power to compel these States to co-operate other than to rely on the UNSC and ASP. The ICC has made referral in relation to the stated non-co-operation to the ASP and UNSC.[54] Despite these referrals by the court to both the UNSC and the ASP, there has been no concrete action taken to compel or sanction these States for their failure to co-operate. There is no clear mechanism either in the Rome Statute or established by the UNSC and ASP to compel States to comply with their obligations and further there is no clear consequence to be suffered by the non-complying State.[55] This has greatly frustrated the efforts of the court and has basically

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[47] ICC, *prosecutor v Omar Hassan Ahmad Al Bashir* decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about the Omar al Bashir recent visit to the Republic of Chad, ICC-02/05-01/09-109, 27 August 2010.
[48] ICC, *prosecutor v Omar Hassan Ahmad Al Bashir* decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al Bashir presence in the territory of the Republic of Kenya, ICC-02/05-01/09-107, 27 August 2010.
[49] ICC, *prosecutor v Omar Hassan Ahmad Al Bashir* decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al Bashir recent visit to Djibouti, ICC-02/05-01/09-129, 12 May 2011.
[50] ICC, *prosecutor v Omar Hassan Ahmad Al Bashir* corrigendum to the decision pursuant to Article 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the co-operation requests issued by the court with respect to the arrest and surrender of Omar Hassan Al Bashir, ICC-02/05-01/09-139-corr, 13 December 2011.
[51] ICC, *prosecutor v Omar Hassan Ahmad Al Bashir* decision on the co-operation of the Democratic Republic of Congo regarding Omar Al Bashir arrest and surrender to the court, ICC-02/05-01/09-195, 9 April 2014.
[52] ICC, *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 arrest, ICC-02/05-01/09, 6 July 2017.
[53]ASP, member states https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx.
[54] ASP Report of the Bureau on non-co-operation of Malawi and Chad, November 2012 https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-29-ENG.pdf, ASP Report of the Bureau on non-co-operation of Chad and Nigeria, November 2013 https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-34-ENG.pdf, ASP Report of the Bureau on non-co-operation of Chad, Central African Republic and Democratic Republic of Congo, December 2014 https://asp.icc-cpi.int/iccdocs/asp_docs/ASP13/ICC-ASP-13-40-ENG.pdf, ASP Report of the Bureau on non-co-operation of South Africa, Libya and Sudan, November 2015 https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/ICC-ASP-14-38-ENG.pdf, ASP Report of the Bureau on non-co-operation of Djibouti, Uganda and Kenya, November 2016 https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-31-ENG.pdf on 22 December 2018.
[55] Article 112(8) of the Rome Statute.

hindered any progress on the case. Therefore, the success of the ICC in this case will depend on the enforcement by the UNSC and ASP in relation to the requests for co-operation in investigations, arrest and surrender of the accused.

2.3.4 Choice of cases: perceptions of bias

African States were at the forefront in supporting the establishment of the ICC, in 1998 African countries adopted the *Dakar Declaration*[56] in support of the establishment of the International Criminal Court and subsequently a high number of African States ratified the Rome Statute and currently Africa has the largest block of membership of the ASP at 33 after the recent withdrawal of Burundi.[57] However, over the years this support has turned to great antagonism towards the court. All the twenty-seven active cases[58] currently before the ICC and situations referred to it by the UNSC are from Africa.[59] There are several situations under preliminary examinations that are outside of Africa.[60] This fact notwithstanding, there is still perception that the court has not actively pursued cases from outside of the continent. This has greatly influenced the perception within African States that the court is biased.[61] This has led to serious hostility of the AU towards the ICC, this deteriorated further with the court's issuance of an arrest warrant for president Omar Al Bashir.[62] Following this warrant of arrest, the AU requested the UNSC to suspend the warrant to enable negotiation of a peace agreement in Darfur, the UNSC did not respond to this request.[63] This further fueled the assertion that the ICC is a tool of neo-colonialism by powerful western States that are permanent members of the UNSC. African States have

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[56] Dakar declaration for the establishment of the International Criminal Court in 1998. http://www.iccnow.org/documents/DakarDeclarationFeb98Eng.pdf on 22 December 2018.
[57] ASP,https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx on 22 December 2018.
[58] https://www.icc-cpi.int/Pages/cases.aspx#Default=%7B%22k%22%3A%22%22%7D#2ae8b286-eb20-4b32-8076-17d2a9d9a00e=%7B%22k%22%3A%22%22%7D on 22 December 2018.
[59] https://www.icc-cpi.int/libya, https://www.icc-cpi.int/darfur on 3 January 2019.
[60] ICC preliminary examinations https://www.icc-cpi.int/pages/pe.aspx on 3 January 2019.
[61] Ljuboja L, Justice in an uncooperative world: ICTY and ICTR foreshadow the ICC in effectiveness, 32 *Houston Journal of International Law,* 2010, 785.
[62] ICC warrant of arrest for Omar Hassan Ahmad al Bashir, 4 March 2009, https://www.icc-cpi.int/pages/record.aspx?uri=639078 3 January 2019.
[63] Paragraph 9 Decisions and Declarations, Assembly of the African Union, Assembly/AU/Dec.245(XIII) Rev.1.

questioned the integrity of the ICC in so far as it does not demand the same accountability from western leaders as it does of African leaders. This perception has further been compounded by the UNSC non-referral of other conflict situations outside of Africa like Israel, Iraq and Syria. This perception has fueled criticism that by only focusing on Africa, the ICC has not lived up to the universal aspirations for which it was established.

2.4 Impact of States' non-co-operation

As discussed above the ICC has faced a considerable level of non-co-operation from States that have an obligation to co-operate by virtue of their ratification of the Rome Statute. The non-co-operation has had an impact on the court's ability to discharge its mandate. The non-co-operation herein has resulted in the ICC's inability to proceed with the trial against Al Bashir and the other accused persons in the Darfur case. The case was referred in 2005, it is now thirteen years later and there has been no progress made in relation to the cases and the violence in Darfur has not stopped. The Prosecutor has not been able to carry out investigations in Darfur and it looks like there is no chance of that position changing any time soon. This has led to delay in prosecution of the accused persons and in effect in bringing the perpetrators to justice and giving justice to the victims. It has been argued that this inability to arrest suspects undermines the international justice system and frustrates cases while denying justice to the victims of these crimes.[64] The Prosecutor has consequently had to suspend the investigations in Darfur, Stuart Ford notes that the decision of the Prosecutor to suspend investigations is an admission that the success of the ICC in Darfur is almost entirely out of its hands.[65]

Lack of co-operation has generated delay in the proceedings of the court, this has resulted in higher operational costs. The court has so far dedicated time and resources towards the investigations and cases while the accused still remain at large. This means that the cases are dormant while the court remains in a state of inactivity as it awaits the arrest and surrender of the accused persons. Anika Jones argues that the non-co-operation in the

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[64] Roper S.D and Barria L.A, State cooperation and international criminal court bargaining influence in the arrest and surrender of suspects, 21 *Leiden Journal of International Law,* 2008, 458.
[65] Ford S, The ICC and the Security Council: How much support is there for ending impunity, 26 *Indiana International & Comparative Law Review*, 2016, 38.

Darfur cases has had an obvious impact on the efficiency of the court, time and resources have been invested in the investigations which cannot proceed to trial without the arrest and surrender of the accused. This has contributed to an increased sense of frustration with the slow pace of justice at the ICC and the low number of cases the court has completed.[66] This non-co-operation as demonstrated has had an effect on the efficiency and effectiveness of the court by increasing the period of time the investigations and the cases have taken and resulting in some inactivity at the court.

The lack of enforcement mechanisms and powers to compel or sanction States for non-co-operation has further encouraged and emboldened States not to co-operate. The number of States that have been able to get away with non-co-operation without any consequence contributes to more instances of non-co-operation by States. The lack of clear and concrete consequences and sanctions for non-co-operation encourages States to act in their interests. Anika Jones in this regard notes that inefficiency of the court could have a negative impact on the willingness of States to co-operate.[67] The lack of enforcement capacity is one of the threats to the ability of the court to achieve its fundamental mandate, it thus renders the ICC highly ineffective and generally at the mercy of States that are driven by their own interests and rarely act inconsistently with their interests.[68]

As demonstrated herein the ICC's effectiveness depends on States co-operation in arrest and surrender. Without the accused persons before the court, the court cannot proceed with trials. It is therefore clear that when States fail to arrest and surrender accused persons, the court cannot function. The failure to arrest and surrender accused persons is therefore heavily impacting on the court's effectiveness.

[66] Jones, Non-cooperation and the efficiency of the International Criminal Court,6.
[67] Jones, Non-cooperation and the efficiency of the International Criminal Court,15.
[68] Ali, Bringing the guilty to justice, 417.

CHAPTER THREE

THE ROME STATUTE ENFORCEMENT FRAMEWORK ON NON-COOPERATION: IS IT SUFFICIENT?

3.1 Introduction

States' cooperation in arrest and surrender as demonstrated in the preceding chapter is fundamental to the functioning of the ICC. This is particularly important because the court cannot proceed in the absence of the accused person. The presence of the accused is mandatory for the trial, Article 63(1) of the Rome Statute provides "The accused shall be present during the trial." Accordingly, the court can only proceed when an accused person has been presented before it. Thus, the failure to arrest persons wanted before the court has a crippling effect on the court's proceedings.

This chapter seeks to analyse the enforcement framework towards non-cooperation in arrest and surrender within the Rome Statute. The Statute contains provisions that deal with how the court responds to the issue of non-cooperation with its requests and orders, which will be outlined first in paragraph nine to eleven of the chapter. The chapter then seeks to establish whether these provisions are adequate to sufficiently deal with the issue of non-cooperation.

3.2 Mechanism for States' cooperation in arrest and surrender within the Rome Statute

Part 9 of the Rome Statute contains provisions relating to international cooperation and judicial assistance. It contains elaborate provisions on how State parties are to cooperate and assist the court in its requests and orders. The provisions essentially establish an elaborate mechanism that is aimed at ensuring that States have all the necessary tools to achieve cooperation with the court. The Statute also establishes a general obligation for State parties to cooperate with the court in accordance with the provisions of the Statute.[69]

[69] Article 86 Rome Statute.

On the subject of arrest and surrender, article 58(1) of the Rome Statute provides for the issuance of a warrant of arrest by the Pre-Trial Chamber on the application of the Prosecutor and upon satisfying itself that there are sufficient grounds to issue the said warrant. Upon the issuance of the warrant, the court is authorized to transmit a request accompanied by all the supporting materials for the arrest and surrender of the person to the State in whose territory the person may be found.[70] The requests are transmitted through diplomatic or any other channel designated by the State in question.

A State party that has received a request for arrest and surrender must immediately take steps to arrest and surrender the person.[71] It should take such steps in accordance with its national laws and the provisions of part 9 of the Statute. Arrest is essentially undertaken through national laws; States must therefore have national procedures to be able to give effect to the requests for arrest. Cooperation in arrest and surrender within the Statute also entails the enactment of national laws and procedures to enable the implementation of the requests and orders of the court.[72] Upon arrest, the person must be promptly brought before a competent court to determine that the person arrested is the one sought, that the arrest was in accordance with the law and that the rights of the person have been respected. The court will also determine questions of interim release and any application on the principle of *ne bis in idem.* Such determinations will be made in consultation with the ICC. The State will then surrender the person to the ICC as soon as possible. The use of national procedures for this process underscores the centrality of State cooperation for the functioning of the court. It further shows that in the absence of cooperation from the State, the ICC has no other way of arresting an accused person. There is no provision that gives authority or a mechanism for the court to directly execute the warrants of arrest.

In a case where the State receives competing requests from the ICC and another State relating to the same person over the same conduct, the State receiving the requests must give priority to the ICC request.[73] The exception to this priority is where the requested

[70] Article 89(1) Rome Statute.
[71] Article 59(1) Rome Statute.
[72] Article 88 Rome Statute.
[73] Article 90(2) Rome Statute

State has an existing international obligation to extradite to the other State not a State party to the Rome Statute. This makes the obligation to the ICC secondary. However, the State must take into account all relevant factors in determining whether to surrender the person to the ICC or extradite to the other State.[74] The Statute also provides for consultation between the court and the State where there are problems encountered by the State which may prevent the execution of the request.[75]

The State is obligated under the Statute to take steps to fully cooperate to give effect to the request by the court. The obligation to comply with these requests is set out by article 86 and extended by 89. The State therefore must fully cooperate with the request but at the same time has a leeway not to cooperate as discussed above.

The procedure for arrest and surrender is clear, elaborate and would in practice be easy to implement. However, States have not been forthcoming with cooperation which has had a negative effect on the work of the court. The Statute provides recourse for the court in instances where a State fails to comply with a request from the court.

3.3 Rome Statute procedure on States' non-cooperation

The Rome Statute establishes an obligation for States to cooperate with the court on its requests and orders. Where a State party fails to cooperate with a request by the court, the court may make a judicial finding of non-cooperation and refer the matter to the Assembly of States Parties or the Security Council in cases where it had referred the matter to the court.[76] This is the only recourse available to the court under the Statute. The court makes a finding to that effect pursuant to an application for a finding of non-cooperation under article 87(7) by the prosecution within which the State in question may be called upon to respond to the application. When the court is satisfied that the State in question has failed to cooperate with the request of the court, it may make a finding of non-cooperation and

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[74] Article 90 Rome Statute.
[75] Article 97 Rome Statute.
[76] Article 87(7) provides "Where a state party fails to comply with a request to cooperate by the Court contrary to the provisions of this statute, thereby preventing the Court from exercising its functions and power under this statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or where the Security Council referred the matter to the Court, to the Security Council."

may refer the matter to the ASP or UNSC as envisaged under 87(7). The Statute has no provision for the court to directly compel or sanction the State for the non-cooperation, it only allows for a finding of non-cooperation. The finding of non-cooperation is a requirement that must be met before a referral is made. When the court makes a referral, it has no authority over how the ASP and Security Council respond.

The Statute does not set out any consequence that is to be suffered by the State for its non-cooperation. As currently constituted, there are no defined repercussions for non-cooperation other than a finding of non-cooperation. Further, the Statute does not have provision on the action that is to be taken by the ASP and Security Council when a referral is made.

The lack of clear and defined consequences for non-cooperation within the Rome Statute makes the entire enforcement regime weak and unenforceable. The lack of clear consequences makes the enforcement by the ASP and Security Council uncertain. This uncertainty gives them the liberty to choose whether to take action and what action to take. This creates a schism between the court and its enforcement arms in the sense that a judicial pronouncement of non-cooperation will not always attract the same consequence or any consequence at all. Further, the court has no control over the enforcement of its findings. This is because it has no powers to direct the two bodies in any way on how to respond to its findings of non-cooperation.

This gap illustrates the inherent weakness in the enforcement regime that has exposed the court to instances of willful and direct non-cooperation by States. The lack of clearly defined consequences has encouraged non-cooperation by States.

3.4 ASP procedure on non-cooperation

Article 112 of the Statute establishes the ASP[77] with a mandate to, among others, consider any question relating to non-cooperation.[78] Further Article 112(9) mandates the Assembly to adopt its own rules of procedure. The Assembly and the Bureau have been actively

[77] Article 112(1) provides "An Assembly of States Parties to this Statute is hereby established…"
[78] Article 112(2)(f) provides "Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation."

engaged in activities relating to non-cooperation with an aim to enhancing the ability of the Assembly to deal with issues relating to non-cooperation.[79] The Assembly in this regard during its tenth session in 2010 under resolution 5 adopted the Assembly procedures relating to non-cooperation. The procedures were formulated by the Assembly's Bureau following a request by the Assembly during its ninth session.[80] The basis for the procedures was the recognition of the negative impact that non-cooperation on the court's requests can have on the ability of the court to execute its mandate. The procedures are aimed at strengthening the Assembly's mandate on issues relating to non-cooperation.

Under the procedures, non-cooperation is to be understood as the failure by a State party or a State which has entered into an ad hoc agreement with the court to comply with a specific request for cooperation from the court. The State party herein must have implemented the Rome Statute domestically in a manner as to be able to comply with the request.[81]

The procedures set out two scenarios where the Assembly may take action. Firstly, where the court has referred a non-cooperation matter to the Assembly and secondly where there is no referral but the Assembly has reasons to believe that a specific and serious incident of non-cooperation in respect of a request for arrest and surrender of a person is about to occur or ongoing and urgent action by the Assembly may help bring cooperation.[82] The two scenarios require different procedures to be adopted. There are formal and informal procedures used to respond to the scenarios.[83]

The referral by the court which constitutes the first scenario requires a formal procedure by the Assembly. The formal procedures involve successive steps to be taken by the Bureau and the Assembly. The formal procedures are outlined in paragraphs 13 and 14 of the procedures. The steps to be taken include emergency Bureau meeting where an oral report

[79] The efforts include diplomatic engagement with states and the creation of focal points for non-cooperation.
[80] Resolution ICC-ASP/9/Res.3, strengthening the International Criminal Court and the Assembly of States Parties, 10 December 2010.
[81] Assembly procedures relating to non-cooperation, para 4 and 5.
[82] Assembly procedures relating to non-cooperation, para 7 (a) and (b).
[83] Assembly procedures relating to non-cooperation, para 9.

from the president on the action taken and to further decide on what further action would be required. The next step entails an open letter from the president to the State concerned reminding it of its obligation to cooperate and requesting its views on the matter within a period not more than two weeks. The president may send a copy of the letter to all State parties encouraging them to raise the matter in bilateral contacts with the state in question. The Bureau can then hold a meeting at the expiry of the time limit or at the receipt of a response from the State. A representative of the State presents its views on how to cooperate with the court in future. A public meeting could then be held to allow for open dialogue with the State and other interested States and organizations. The Bureau may then submit its report to the Assembly including recommendation as to whether the matter requires action by the Assembly. The report could then be discussed at the plenary session of the Assembly and where necessary, the Bureau will appoint a facilitator to consult on a draft resolution containing concrete recommendations.[84]

The second scenario outlined in paragraph 15,16,17,18 and 19 of the procedures would get an informal response at the diplomatic and political levels. The informal procedures include the appointment by the Bureau of four or five regional focal points to assist the president in this regard. Informal contact by the president with State officials of the State in question and other stakeholders would take place for the purpose of raising awareness of the issue and to promote full cooperation. The president would then make an oral report to the Bureau immediately after such interactions and as maybe decided the president may continue undertaking the informal interactions.[85]

In relation to the informal procedures, the Bureau through the focal points developed a toolkit for the implementation of the informal procedures.[86] It is a resource for States parties to improve the implementation of the informal procedures on non-cooperation. It

[84] Assembly procedures relating to non-cooperation, para 14 (a), (b), (c), (d), (e) and (f).
[85] Assembly procedures relating to non-cooperation, para 19 and 20.
[86] Assembly of States Parties, report of the Bureau on non-cooperation, toolkit for the implementation of the informal dimension of the Assembly procedures relating to non-cooperation, ICC-ASP/15/31/Add.1, 9 November 2016.

contains resources in which States parties may draw upon to encourage States to cooperate in relation to arrest and surrender of persons subject to a warrant of arrest.[87]

The toolkit is meant to encourage States to cooperate with the court and to be able to reach out in time for sensitive situations to ensure the arrest and surrender of suspects. It intends to have a standardized response to potential instances of non-cooperation. The toolkit contains various actions that can be undertaken by States to encourage cooperation. They include monitoring the travel of persons subject to warrants of arrest through diplomatic networks, google alerts, sharing information with the court, States parties and civil society. It also contains templates for States to use to encourage cooperation and prevent instances of non-cooperation.

3.5 The Security Council response to non-cooperation

The United Nations and the ICC entered into a relationship agreement which sets out the relationship between the two institutions.[88] Article 3 of the agreement establishes an obligation of cooperation and coordination between the two institutions on matters of mutual interest.[89]Article 17 specifically refers to the cooperation between the Security Council and the Court. Under this article the Security Council has powers to refer situations where crimes within the jurisdiction of the court have been committed. Article 17(3) empowers the court to make a referral for non-cooperation in a situation referred by the Security Council.

The agreement does not establish a response mechanism for the Security Council when a referral for non-cooperation is made. The Security Council has not established its own procedure for responding to the referrals by the court. Therefore, there is no structured and

[87] Toolkit for the implementation of the informal dimension of the Assembly procedures relating to non-cooperation, ICC-ASP/15/31/Add.1, 9 November 2016, para 1.
[88] Negotiated relationship agreement between the International Criminal Court and the United Nations.
[89] Article 3 states "the United Nations and Court agree that with a view to facilitating the effective discharge of their respective responsibilities, they shall cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest pursuant to the provisions of the present agreement and in conformity with the respective provisions of the Charter and the Statute."

defined way for the Security Council to respond and enforce findings of non-cooperation referred to it by the court.

3.6 A critique of the non-cooperation framework

The ICC has no enforcement mechanism for arrest and surrender. It is fully reliant on States to perform this important function. In the event that States fail to cooperate in this regard the Rome Statute provides a mechanism that the court can use in response.

The Statute provides that when a State fails to cooperate with a request from the court, the court may make a finding of non-cooperation and refer the matter to the ASP or the Security Council as the case maybe. This is the only response available to the court in the face of non-cooperation. This response is inadequate for various reasons that will be discussed herein.

The fact that the only avenue available for the court is to make a finding of non-cooperation leaves the court powerless, without a means of directly sanctioning a State for non-cooperation. The lack of power to enforce its judicial decision makes the court very weak and reliant on a long and indirect way through the ASP and Security Council with unlikely tangible results.[90] The lack of a mechanism in which the court enforces its finding on non-cooperation displays a weak court incapable of exercising basic judicial powers. The court has to rely on the two bodies over which it has no power to direct on the course of action to take in reference to its referral. The enforcement system creates an incomplete mechanism for the court as it has no way of ensuring action by either the ASP or the Security Council. It has no authority to follow up with the ASP and Security Council to ensure that there has been decisive action taken to deal with the non-cooperation.

The ASP procedure is aimed at strengthening the assembly's ability to respond to the non-cooperation referred to it. The procedures are non-judicial in nature. The formal procedures are not compelling on States in any way; the wording of the procedures demonstrates that States are not obliged to cooperate with the assembly in the process. The president of the bureau sends an open letter to the State in question reminding it of its obligation under the

[90] Banteka, Mind the gap, 528.

Statute to cooperate and request its views on the matter. The language used in the procedures suggests that States are not obliged to respond to the letter by the president of the bureau. There is no sense of obligation despite the fact that the court made a finding that the State in question is in breach of its obligation under the Statute. The letter itself is not coercive, it only reminds the State of its obligation and requests the views of the State on the matter. A State may fail or decline to respond to the letter without any consequence. The procedures need to have an element and sense of authority and compulsion with some kind of force of law to make them more authoritative.

During the envisaged meeting of the Bureau with a representative of the State, the representative is only required to present views on how the State would cooperate in the future. There is no provision of having the State sanctioned or even required to explain why it failed to cooperate leading to the finding and referral. It creates a sense that States can get away with non-cooperation without any consequences. It is important to have consequences that follow non-cooperation because the lack of consequences makes it easier for States not to cooperate.

The procedures also envisage a report being made to the assembly with a possibility of the report being discussed at the plenary of the Assembly. Subsequent to this plenary discussion there is no indication of the next concrete step that can be taken by the assembly when the attempts at addressing the non-cooperation are futile. The procedures are vague as to what happens when all the steps have been concluded and the State still fails to comply.

The ASP procedures appear to be insufficient and incapable of decisively addressing non-cooperation. They are aimed at persuading States but have no force of compelling cooperation. They are also not clear as to what will happen when all the steps have been exhausted and the State fails to comply with the request of the court. The procedures entail mostly diplomatic activities which are insufficient to enforce the court's finding.

In practice these procedures have proved to be ineffective, the court to date still faces non-cooperation and the ASP has not been able to cure or obtain cooperation in the cases referred to it. A review of the cases referred to the ASP for non-cooperation indicates that

the ASP has largely been ineffective in enforcing States cooperation with the court. On 27th August 2010, the ICC Pre-Trial Chamber I referred Chad and Kenya to the Security Council and ASP for non-cooperation in arresting Omar Al Bashir when he visited the two countries.[91] On 12th May 2011, the Pre-Trial Chamber I referred Djibouti to the Security Council and ASP for non-cooperation in the arrest of Al Bashir when he visited the country.[92] On 11th July 2016 the Pre-Trial Chamber II referred Uganda to the Security Council and the ASP for non-cooperation in the arrest and surrender of Al Bashir when he visited the country.[93]

The ASP has responded to the referrals made to it through the Bureau. In its reports, the Bureau details some of the actions undertaken in response to the non-cooperation. The Bureau's reports from 2012 to 2016 detail the engagements between the Bureau and States parties in relation to the non-cooperation referrals by the court.[94] Despite the engagements by the ASP, non-cooperation by States has persisted over the years involving States parties and non-State parties.

The Security Council has not been as engaged as the ASP in response to the referrals made to it. The ICC Prosecutor in one of her briefings to the Security Council indicated that her briefings on the situation in Darfur have been followed by inaction and paralysis within the Council.[95] While explaining the decision to put the Darfur investigations on hold, the Prosecutor explained that in almost ten years of reporting, there has been no action or

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[91] *Prosecutor v Omar Al Bashir,* Decision informing the United Nations Security Council and the Assembly of States Parties of the Rome Statute about Omar Al Bashir recent visit to the Republic of Chad, ICC-02/05-01/09, 27 August 2010, Decision informing the United Nations Security Council and the Assembly of States Parties of the Rome Statute about Omar Al Bashir presence in the territory of the Republic of Kenya, ICC-02/05-01/09, 27 August 2010.

[92] *Prosecutor v Omar Al Bashir*, Decision informing the United Nations Security Council and the Assembly of States Parties of the Rome Statute about Omar Al Bashir's recent visit to Djibouti, ICC-02/05-01/09, 12 May 2011.

[93] *Prosecutor v Omar Al Bashir*, Decision on the non-compliance by the Republic of Uganda with the arrest and surrender of Omar Al Bashir to the court and referring the matter to the United Nations Security Council and the Assembly of States Parties of the Rome Statute, ICC-02/05-01/09, 11 July 2016.

[94] Report of the Bureau on non-cooperation, ICC-ASP/11/29, 1 November 2012, ICC-ASP/12/34, 7 November 2013, ICC-ASP/13/40, 5 December 2014, ICC-ASP/14/38, 18 November 2015, ICC-ASP/15/31, 8 November 2016.

[95] UN Security Council, 6974th meeting, 5 June 2013, S/PV.6974.

engagement by the Council to solve the non-cooperation problem in the Darfur situation.[96] The ICC has referred several states to the Security Council for non-cooperation in the Darfur and Libya situations that it referred to the court. These are Sudan, Chad, Kenya, Djibouti, Malawi, Democratic Republic of Congo and Libya.[97] During the twenty third briefing on the Darfur situation, the Prosecutor lamented at the conspicuous silence and inaction by the Council which has had negative impacts on the progress of the cases.[98] The Security Council has not made much effort to respond to the referrals in spite of regular briefing by the Prosecutor on the status of the cases and in total disregard of the agreement between the ICC and the United Nations of which the Security Council is an organ. Article 3 of that agreement provides an obligation for the two bodies to cooperate on matters of mutual interest to facilitate the effective discharge of their respective responsibilities.[99]

3.7 Conclusion

It is very clear that the framework of the Rome Statute in response to non-cooperation is highly insufficient. Non-cooperation in arrest and surrender remains one of the biggest challenges facing the court.[100] The mechanism for enforcing cooperation through the ASP and the Security Council has not been effective in addressing the problem, it has not cured previous non-cooperation neither was it able to prevent it.

The lack of consequences has had an impact on the court's ability to function fully and fulfil its mandate. It has also impacted the willingness of states to cooperate, it encourages

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[96] UN Security Council, 7337th meeting, 12 December 2014, S/PV.7337.

[97] *Prosecutor v Omar Al Bashir,* Decision informing the United Nations Security Council and the Assembly of States Parties of the Rome Statute about Omar Al Bashir recent visit to the Republic of Chad, ICC-02/05-01/09, 27 August 2010, Decision informing the United Nations Security Council and the Assembly of States Parties of the Rome Statute about Omar Al Bashir presence in the territory of the Republic of Kenya, ICC-02/05-01/09, 27 August 2010. Decision informing the United Nations Security Council and the Assembly of States Parties of the Rome Statute about Omar Al Bashir's recent visit to Djibouti, ICC-02/05-01/09, 12 May 2011. *Prosecutor v Saif Al-Islam Gaddafi*, Decision on the non-compliance by Libya with request for cooperation by the court and referring the matter to the UNSC, ICC-01/11-01/11, 10 December 2014.

[98] Statement of the Prosecutor of the ICC to the UNSC on the situation in Darfur, Sudan pursuant to UNSCR 1593 (2005).

[99] Negotiated relationship agreement between the International Criminal Court and the United Nations.

[100] ICC, statement to the United Nations Security Council on the situation in Libya pursuant to UNSCR 1970 (2011), 9 November 2017, the Prosecutor states in paragraph 47 *"Failure to execute arrest warrants issued by the court also remains a major challenge."*

non-cooperation. It is therefore important for the Rome Statute to be revised with a view to enhancing the role of the ASP and the Security Council and give them capacity to sanction or punish States that refuse to cooperate with the requests of the court for arrest and surrender.

CHAPTER FOUR

REALISING FULL COOPERATION IN ARREST AND SURRENDER: A CASE FOR REVIEW OF THE ROME STATUTE

4.1 Introduction

This study has in the preceding chapters demonstrated the importance of State cooperation in the arrest and surrender of suspects before the ICC and the negative effects of States' non-cooperation on the court. The ICC has no ability to arrest suspects; therefore, it is fully dependent on States to arrest suspects on its behalf. When States decline cooperation, the court has no power to enforce cooperation as the court has not been equipped under the Rome Statute to directly enforce cooperation. A more indirect way is through the ASP and UNSC by referring cases of non-cooperation to the two institutions. The Rome Statute does not expressly provide the action to be taken by these institutions against a state referred for non-cooperation. It is therefore important that there is clearly defined action to be taken when a State is referred for non-cooperation.

This chapter will therefore discuss and propose the use of sanctions by the ASP and UNSC as a way to enforce State cooperation with the ICC. It will also argue for review to provide for trials in absentia in cases where the court has been completely unable to procure the presence of the accused person. The first part discusses the precedents of cooperation in international criminal courts with a case analysis of the International Criminal Tribunal for the former Yugoslavia (ICTY). This is because the ICTY was the first international Tribunal established by the Security Council and it had a cooperation regime that relied on State cooperation. The second part studies the use of diplomatic sanctions. The third part studies the prospects of trials in absentia as alternative to the court having no trial.

4.2 The precedents: cooperation in arrest and surrender in the ICTY

The ICTY is an ad hoc Tribunal that preceded the ICC. It was created by the Security Council under its Chapter VII powers. The Tribunal therefore derived its authority from the UN Charter through a Security Council Resolution.[101] The resolution in paragraph four

[101] UN Security Council resolution 827 of 1993

established an obligation for all states to fully cooperate with the Tribunal.[102] This meant that all States had obligations to cooperate with the Tribunal by virtue of Chapter VII of the UN Charter and the express provision of the resolution.

The enforcement regime of the Tribunal was centred on States; the tribunal did not have any enforcement mechanism. Just like the ICC it fully dependent on States to arrest and surrender suspects. The Statute of the ICTY expressly established obligations for all States to cooperate and comply without undue delay with any requests for assistance or orders of the Tribunal.[103]

Cooperation by States in arrest and surrender with the ad hoc tribunal mirror the cooperation regime within the ICC. States play a very central role in the enforcement regimes of both institutions. The Tribunal having been created by a resolution of the Security Council essentially established binding obligations on all states unlike the Rome Statute of the ICC which primarily creates obligations for States parties. Despite the binding nature of Security Council resolutions, the ICTY faced similar challenges in cooperation like the ICC. The binding nature of the resolution did not deter States from failing to cooperate with the requests of the court.

The ICTY does not have any enforcement powers to compel States to cooperate. When faced with lack of cooperation it relied on the Security Council to enforce States cooperation. The president of the Tribunal had authority to report to the Security Council States that failed to cooperate with its requests.[104] The successive presidents made several reports to the Security Council on the non-cooperation of States with the requests and orders of the Tribunal.[105] In 2017, in the annual report to the Security Council, the president

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[102] "*All states shall fully cooperate with the International Criminal Tribunal and its organs in accordance with the present resolution and the statute of the International Tribunal and that consequently all states shall take any measure necessary under their domestic law to implement the provisions of the present resolution and the Statute Including the obligation of states to comply with requests for assistance or orders issued by a Trial Chamber under Article 29…"*

[103] Article 29 of the Statute of the ICTY provides "*States shall cooperate with the international tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law"*

[104] Rule 7 *bis* and 13 of the Rules of Procedure and Evidence

[105] Letter from the president of the ICTY to the Security Council of 2 November 1999 available at http://www.icty.org/en/press/president-mcdonald-reports-continued-non-cooperation-federal-

of the Mechanism for International Criminal Tribunals (MICT) which is the residual body of the ICTY and the ICTR, lamented the non-cooperation of Serbia and the inaction of the Security Council despite previous reports of the said non-cooperation.[106] States' non-cooperation was still a big problem twenty -four years after the establishment of the Tribunal. The Security Council has not taken any substantial steps to ensure or enforce cooperation of the States that have been reported. In these circumstances only the Security Council had power to enforce the duty to cooperate. The continued failure by the body to enforce the much-needed cooperation rendered the ICTY cooperation regime ineffective.[107]

The lack of any substantial response by the Security Council had a negative effect on the court. The Tribunal was unable to start working immediately as it took some considerable time before it secured the presence of accused persons before it. The first indictment by the ICTY was for Dragan Nikolic on 4th November 1994. It took six years for him to be brought before the court, he was arrested and transferred to the Tribunal in April 2000 by the Multi National Stabilization Force (SFOR). It is worth noting that he was arrested by the stabilization force.[108] This demonstrates the fact that it took the efforts of the force to ensure his arrest. Without the SFOR it might have taken much longer to hold him to account at the tribunal. However, Dusko Tadic was the first accused to be arrested and transferred to the Tribunal in April 1995 by German authorities, he had been indicted in February of the same year.[109]

Some of the former Yugoslav States in whose territory some of the accused persons were in, did not have much enthusiasm to cooperate given that some of the accused persons were

republic-yugoslavia-security, letter dated 22 October 2002 from ICTY president to the Security Council available at http://www.icty.org/en/press/judge-claude-jorda-president-icty-reports-continued-non-cooperation-federal-republic on 2 February 2019.

[106] UN Security Council 7960th meeting of 7 June 2017, S/PV.7960, 4.

[107] Mc Donald G K, Problems, obstacles and achievements of the ICTY, Journal of International Criminal Justice, 2, 2004, 560 and 562.

[108] Case information sheet available at http://www.icty.org/x/cases/dragan_nikolic/cis/en/cis_nikolic_dragan.pdf on 6 February 2019.

[109] Case information sheet available at http://www.icty.org/x/cases/tadic/cis/en/cis_tadic_en.pdf on 6 February 2019.

high ranking military and civilian officials.[110] This meant that a considerable number of accused persons remained at large, which frustrated the proceedings before the tribunal. Ratko Mladic was one such long standing fugitive having been indicted on 25th July 1995. He was arrested and transferred to the Tribunal in May 2011, sixteen years later.[111] The president stated in this regard "the Tribunal remains a partial failure-through no fault of its own-because a vast majority of indictees continue to remain free, seemingly enjoying absolute immunity."[112] In the subsequent report, the president reported that thirty-one indictees remained at large.[113] It is worth noting that this report was made five years after the establishment of the ICTY. This demonstrates the effect that the failure to arrest accused persons has had on the effectiveness of the Tribunal and its ability to expeditiously dispense justice.

4.3 The justification

As it has been discussed in the preceding chapters and in the discussion on the cooperation in the ICTY, States do not voluntarily cooperate with the requests for arrest and surrender. States are influenced by various factors which ultimately determine whether they cooperate or not. This means that States cooperate on their own will, as and when it suits their interests. It then becomes clear that there is need for an alternative mechanism which the court can use to realize cooperation or mitigate the effects of the non-appearance of the accused. The enforcement mechanism as currently constituted is insufficient to enforce cooperation. The lack of cooperation by States and the lack of enforcement mechanisms has had a negative impact on the court and its ability to function effectively. It could have fatal consequences for international criminal justice.[114] This therefore justifies the need to have coercive mechanisms that can be resorted to when there is willful non-cooperation by

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[110] They included Ratko Mladic, Slobodan Milosevic and Radovan Karadzic.
[111] Case information sheet available at http://www.icty.org/x/cases/mladic/cis/en/cis_mladic_en.pdf on 6 February 2019.
[112] Fourth annual report of the International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia, 7 August 1997, para 175.
[113] Fifth annual report of the International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia, 27 July 1998, 69 and 70.
[114] Demirdjian A, Armless giants, 10 International Criminal Law Review, 2010, 183.

States on the court's requests as well as holding trials in the absence of the accused when all efforts fail to yield the presence of an accused.

These recommendations are justified by the fact that the ICC has a very fundamental role to fulfil in the fight against impunity, bringing to account perpetrators of the most atrocious crimes in the world and delivering justice to the victims of these crimes. The ability of the court to fulfil these noble objects should not be left to the will and whims of States. This justifies the need to compel States to comply with their obligations to arrest and surrender suspects of international crimes. It further justifies the need to provide for trials in absentia. Taking into account that States cooperate according to their interests, the object and purpose of international criminal justice would be lost if there was no alternative to the will of States.

The ASP and the Security Council are the enforcement arms of the ICC. They have so far been unable to decisively deal with non-cooperation referred by the court. Because the court is fully dependent on the two institutions, they must as a matter of necessity grow some 'teeth' to carry out their enforcement mandate. It has been argued in this study and elsewhere that the ICC will only be effective when it will be able to enforce cooperation.[115]

There is consensus that there is major weakness in the ICC enforcement regime, therefore it needs to be reviewed if the court is ever going to be effective.

4.4 A case for diplomatic sanctions

Sanctions are a means of coercion which can be economic, military or diplomatic. They are aimed at coercing a State to change its conduct on a specific question. Most literature on sanctions has been focused on economic sanctions and more recently on targeted sanctions. Sanctions have traditionally been used by the Security Council but over time have come to be used by States and other organizations.[116]

[115] Maogoto N J, A giant without limbs, 23 *University of Queensland Law Journal*, 2004, 109.
[116] UN Charter, article 41

The efficacy of these sanctions is a highly contested subject in international law.[117] There have been many arguments advanced on the effectiveness and ineffectiveness of sanctions. Critics have demonstrated why sanctions do not work while proponents have argued that sanctions work when clearly implemented. The traditional view has been that sanctions are only effective in exceptional scenarios.[118] There has been debate on the effectiveness of the most studied sanctions in history. Drezner has argued that the sanctions in Iraq, Haiti and the former Republic of Yugoslavia were able to generate modest concessions.[119] Another argument advanced is that there is debate on whether sanctions work because of the difficulty of selection effect which is the bias of sample selection that brings to question the validity of the finding and the lack of consensus in the definition of success.[120]

The use of sanctions includes the threat of sanctions and the actual imposition.[121] There are instances when the threat as well as the imposition of sanctions have worked. In the ICTY the European Union (EU) and the United States of America employed the threat of sanctions and aid conditionalities in inducing States in the former Yugoslavia to cooperate with the Tribunal. These threats worked in inducing the States to cooperate with the court as is demonstrated by the arrest and surrender of Slobodan Milosevic. It has also been argued that the USA was successful in getting States some of which are States parties to the Rome Statute to sign forces immunity agreements by threatening to withhold military aid.[122]

Diplomatic sanctions have been used as part of broader sanctions regimes. They are rarely used on their own. The use of diplomatic sanctioning on its own is not common in international law. They are mostly used as part of broader sanctions regimes involving economic sanctions and blockades. Their use and effectiveness independent of economic sanctions has not been studied extensively. This dissertation has therefore mostly relied on

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[117] Hovi J, Huseby R and Sprinz F.D, when do economic sanctions work, *57 World politics*, 2005, 479.
[118] Hovi, when do economic sanctions work, 480.
[119] Drezner D.W, Sanctions sometimes smart: targeted sanctions in theory and practice, *International Studies Review*, 2011, 97.
[120] Nooruddin I and Payton A.L, Dynamics of influence in international politics: the ICC, BIAs and economic sanctions*, 47 Journal of Peace Research*, 2010,712.
[121] Hovi, when do economic sanctions work, 499.
[122] Nooruddin, Dynamics of influence in international politics, 712.

arguments made in relation to the broad set of economic sanctions that incorporate diplomatic sanctions. Noting that the arguments broadly apply to sanctions, the same would be applicable to diplomatic sanctions independently. This dissertation posits that diplomatic sanctions are modelled in similar regimes and the factors influencing the success of sanctions generally would apply.

The Security Council has imposed thirty sanctions regimes in various parts of the world, these sanctions have taken various forms that include economic sanctions, arms embargos and travel bans among others. Currently there are fourteen ongoing sanctions regimes.[123]

The US has also used sanctions extensively as part of its policy. It has used diplomatic sanctions against certain States mostly in conjunction with its economic sanctions. It has also used them as measures associated with war. In some instances, it has used diplomatic sanctions on their own in attempts to induce regime change and in terrorism cases.[124]

The effectiveness of sanctions as employed by the UN and the US and other States is still unresolved.[125] The effectiveness has been argued depends on the number of States imposing, the number of issues under dispute and whether international organizations are involved. The argument here is that multilateral sanctions are more effective.[126]

4.4.1 Proposed sanctions regime

This thesis proposes the use of diplomatic sanctions as a means of coercing cooperation. It proposes for sanctions to be imposed by the ASP and UNSC. It is aimed at having clear consequences for non-cooperation spelt out in the Rome Statute. This will ensure that the UNSC which already has sanctioning power within its mandate has its work cut out for it. This argument is based on the acknowledgment that a referral for non-cooperation in practice means that the State in question willfully failed to cooperate.

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[123] https://www.un.org/securitycouncil/sanctions/information on 8 March 2019.
[124] Miller T, Diplomacy derailed: the consequences of diplomatic sanctions, *The Washington Quarterly*, 2010, 63.
[125] Taylor B, Chapter one: the sanctions debate, *The Adelphi Papers*, 2009, 23.
[126] Morgan C, Bapat N, Krustev V, The threat and imposition of sanctions, *Conflict management and peace science*, 2009, 93-103

This imposition therefore comes after the ASP procedure following a referral on non-cooperation has been exhausted. This means that the ASP will engage in negotiations with the State in question with an aim to obtaining that State's cooperation. When the State concerned has been engaged in accordance with the laid down procedure and the non-cooperation still persists, then the ASP sets in motion its sanctions mechanism. It is proposed that the ASP needs to come up with a structured mechanism through which the sanctions are triggered and applied by members.

4.4.2 Challenges to the effective use of sanctions.

As already pointed out the use of sanctions is contested and there are some challenges that arise on the use of sanctions. There are arguments advanced against sanctions. The assertion that multilateral sanctions work because of the coordination of the States involved is contested. It has been argued that there is no evidence that multilateral sanctions have had more success that unilateral sanctions. Some scholars on the subject have identified cooperation and coordination as a key factor in the success of multilateral sanctions. Drezner posits that there is an assumed link between coordination and success of multilateral sanctions, but in reality, there is no empirical evidence that supports this argument. To the contrary, he argues that there is no link between the coordination and success of such sanctions. He further contends that, in fact there is a negative correlation between the two and has worse outcomes than unilateral sanctions.[127]

Another practical challenge to the effective use of sanctions is the enforcement problem, this is a challenge of ensuring that all the States impose the sanctions when they are required to. Writers on sanctions have argued that multilateral sanctions fail because of enforcement difficulties. That States have been seen to backtrack on their initial promises to impose sanctions.[128] This presents a problem and is a major weakness for the applicability of the proposals within this thesis that focus on the multilateral aspect and

[127] Drezner DW, Bargaining, enforcement and multilateral sanctions: when is cooperation counterproductive? 54 *International Organization*, 2000, 73.
[128] Drezner, Bargaining, 75.

expectation that all the States concerned in the interests of justice will stick to the agreements and promises to impose sanctions when called upon to do so.

There is also the question of whether such drastic action such as imposition of sanctions will negatively impact the legitimacy of the ICC. The imposition of sanctions may be considered as an affront to sovereignty by some States. The ICC has been faced with the problem of non-cooperation which is a result of conflict between treaty obligations and sovereignty. States use the sovereignty argument when it suits them. It is clear from the provisions of the Rome Statute that States were aware that joining the Statute entailed surrendering some level of their sovereignty to the court. However, this fact notwithstanding, the proposal in this thesis is that the sanctions will be imposed by the ASP. The ASP is made up of States that are party to the Rome Statute, therefore in essence the sanctions are imposed by States and not the court. The argument here is that the sanctions are imposed by the international community noting the diverse membership of the Statute. It has been argued that when sanctions are imposed by the international community, they have a moral persuasion and arguments on sovereignty are unsustainable in that case. The sovereignty arguments are credible in the case of unilateral sanctions.[129]

This study proposes the use of diplomatic sanctions by the ASP and Security Council. Diplomatic sanctions are used in the political and diplomatic relations. They include actions such as severance or interruption of diplomatic relations, coordinated recall of diplomatic representatives, closing of embassies and missions among other diplomatic measures.[130]

This argument is based on the relationship among members of the ICC within the ASP which is political in nature. The ASP uses diplomacy in its engagement with States as shown by the ASP procedures in response to non-cooperation. The procedures consist of soft diplomatic approaches that have largely been unsuccessful in enforcing cooperation from states.

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[129] Drezner, Bargaining, 77.
[130] Drezner DW, Sanctions sometimes smart, 99.

The argument for diplomatic sanctions is guided by how States operate and engage with each other. States engage and influence each other through diplomatic channels.[131] The engagements at the ASP and Security Council are political and diplomatic, this is because States are inherently political creatures. They therefore need to be dealt with politically through diplomacy.

The Rome Statute should therefore be reviewed to provide for the use of diplomatic sanctions by the ASP and Security Council. Sanctions are as a matter of practice imposed after there have been negotiations that have failed.[132] Therefore, the ASP will undertake negotiations with the State in question with a view to ensure cooperation. The diplomatic sanctions will then only be imposed when the State fails to co-operate even after the negotiations have been exhausted. These will be actions taken by the ASP States collectively. The ASP needs to establish a comprehensive diplomatic sanctions regime which will be undertaken in a coordinated and collective manner by all the States parties. The ASP must be willing to put in the pressure on the non-cooperating State. They must be implemented collectively if these measures are to be effective. These institutions as the sole entities mandated to deal with non-cooperation must be given some element of coercive power to address non-cooperation. The Security Council already has this power under the UN Charter but has not been willing to go the extra mile to fulfil its mandate under the Rome Statute.

4.5 A case for Trials in absentia

Trials in absentia are trials that take place in the absence of an accused person. Such trials are generally an exception to the internationally recognized human right of an accused to be present at the trial.[133] Trials in absentia are not common within common law domestic jurisdictions but some civil law jurisdictions permit them but they are not common in the

[131] Nooruddin, Dynamics of influence in international politics, 721.
[132] Hovi, when do economic sanctions work, 482.

[133] ICCPR

international jurisdiction.[134] The general rule in criminal trials is that the accused person must be present during the trial. It is a basic guarantee of the right to a fair trial.

In this thesis an argument is made for trials in absentia within the ICC. This is because as it has already been demonstrated that the absence of an accused person resulting from the non-cooperation of States has negative implications for the court and the interests of justice. Trials in absentia provide potential practical solution to the negative consequences of States' non-cooperation in arrest and surrender of suspects.

4.5.1 Trials in absentia in the ICC

As it has already been pointed out, the presence of the accused person for trial is required before the ICC under Article 63(1) of the Rome Statute. Article 63(2) provides for the physical absence of the accused where he has been removed for disrupting the proceedings. This measure will be of last resort when all other alternatives have failed. However, the accused will be facilitated to observe the trial and instruct his counsel through communication technology. This is as far as the Statute allows for the absence of the accused.

The Rules of Procedure and Evidence were amended by the ASP in 2013 to provide for situations where an accused person may apply to be excused from attending the trial.[135] Rule 134*bis* provides the possibility of an accused attending parts of the trial through video technology. Rule 134*ter* provides that an accused may apply to be excused and to be represented by counsel during parts of the trial. Such an application will only be granted if it is shown that exceptional circumstances justify the absence, other measures have proved inadequate, the accused has explicitly waived his right to be present at the trial, the rights of the accused will be fully guaranteed in his absence. Rule 134*quater* provides for an accused to apply to be excused from the trial and to be represented by counsel only due to extraordinary duties. These applications are to be determined on a case by case basis taking into account the specific hearings in question. Rule 134*ter* (3) provides that any absence

[134] Schwarz A, The legacy of the Kenyatta case: trials in absentia at the International Criminal Court and their compatibility with human rights, 16, *African Human Rights Journal*, 2016, 102.
[135] ASP Resolution, 27 November 2013, ICC-ASP/12/Res.7.

must be limited to what is strictly necessary and must not become the rule. In practice the court has been cautious in allowing the absence of the accused. The Trial Chamber granted conditional excusal to William Ruto on the basis of Rule 134 *quater*.[136] The pre-trial confirmation of charges can be held in the absence of the accused.[137]

4.5.2 Human Rights questions and the legitimacy of trials in absentia

The right of the accused to be present at the trial is an internationally accepted basic human right. The International Covenant on Civil and Political Rights (ICCPR) in Article 14 gives the right for an accused person to be tried in his presence.[138] Therefore, it can be interpreted to mean that trials in absentia are generally prohibited within that provision. Trying an accused person in their absence infringes on their fair trial rights that include the right to defend oneself or be defended by counsel of their own choice and the right to examine the evidence of witnesses. The provision in the ICCPR is explained by the UN Human Rights Committee in General Comment No.13 which gives the accused the rights to pursue all available defenses and to challenge the conduct of the case. It then also provides for the strict observance of the rights of the defense during exceptional circumstances when trials in absentia are justified.[139] The most logical interpretation of Article 14 and General Comment No.13 is that trials in absentia are not entirely prohibited, they are the exception to the general rule. They can be permitted in rare exceptional circumstances. The Human Rights Committee does not provide what are the justified reasons for permitting trials in absentia. This leaves the courts to interpret and come up with justified reasons that would allow trials in absentia. This is perhaps in consideration that every case has its own peculiarities that courts have to consider. The HRC has determined that trials in absentia are permissible in some circumstances in the interests of justice.[140]

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[136] *Prosecutor v Ruto and Sang*, ICC-01/09-01/11, decision on excusal from presence at trial under rule 134 *quater* of 18 February 2014.
[137] Rule 124, 125, 126, Rules of Procedure and Evidence, ICC
[138] "to be tried in his presence and to defend in person or through legal assistance of his own choosing."
[139] "the accused and his lawyer must have the right to act diligently and fearlessly in pursuing all available defenses and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defense is all the more necessary."
[140] *Daniel Monguya Mbenge v Zaire*, CCPR Comm. No. 16/1997 (1983).

The European Court of Human Rights determined this issue in *Krombach* v *France*[141] the court held that if a trial in absentia is to be permitted, elaborate safeguards must be provided for the accused. The accused must have notice of the intended trial, the accused has to unequivocally waive his right to be present, the accused must have the right to be represented and the accused must be able to obtain fresh determination of the merits of the charges. The court further held that trials in absentia are not necessarily incompatible with the rights of the accused person provided the safeguards have been guaranteed. This demonstrates that there are circumstances that trials in absentia must be conducted in the interests of justice.

Within the International ad hoc Tribunals, the overall trend that can be observed is that trials in absentia are generally not allowed. The International Military Tribunal in Nuremberg had provision that allowed trials in absentia. Article 12 of its Charter expressly allowed for trials to take place in the absence of the accused person in the event that the accused has not been found or when the Tribunal finds it necessary to conduct the hearing in his absence.[142] The rules of procedure required that the accused be notified of the charges against him.[143] In practice, the IMT applied this provision in the case of Martin Bormann who was tried and sentenced to death in absentia. Prior to his trial in absentia, notice was given to him though radio and newspaper announcements. A counsel was then appointed for him to conduct his defense in his absence.[144]

The ICTY and ICTR did not have provision for trials in absentia. The accused's right to be present during the trial was explicit in the Statutes for both Tribunals.[145] The rules of procedure had a provision which allowed for a reconfirmation of the charges of an accused in his absence. In this reconfirmation, the indictment and all the evidence are submitted to

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[141] *Dieter Krombach v France*, ECtHR Judgment of 13 February 2001.
[142] Article 12, London Charter of the Nuremberg International Military Tribunal, "the Tribunal shall have the right to take proceedings against a person charged with crimes set out in article 6 of this Charter in his absence if he has not been found or if the Tribunal for any reason finds it necessary, in the interests of justice to conduct the hearing in his absence."
[143] Rule 2(b) Rules of Procedure for the IMT, "any individual defendant not in custody shall be informed of the indictment against him."
[144] Schwarz, The legacy of the Kenyatta case, 103.
[145] Article 21(4)(d) of the ICTY and ICTR Statutes.

the Trial Chamber in an open and public session. The Trial Chamber would then issue an international warrant of arrest but no determination on the merits of the charges or guilt of the accused is made. This reconfirmation was only permitted when a warrant of arrest has not been executed or served on the accused person. The Prosecutor has the burden of satisfying the court that all reasonable steps have been taken but the accused still remains at large.[146]

In the Special Court for Sierra Leone (SCSL), the accused has the right to be tried in his presence under Article 17(4)(d) of the Statute. The Rules of Procedure provide exceptions to this general rule of trial in the presence of the accused. Rule 60 provides two exceptions where a trial can proceed in the absence of the accused. Firstly, where an accused person has made an appearance before the court but then declines to make further appearance and secondly, when the accused is at large and has declined to appear. The court must be satisfied that the accused has expressly or by implication waived his right to be present.[147] The rule here essentially provides for trial in absentia despite the right of the accused to be present. In the case of Augustine Gbao charged with two others, the court proceeded with the trial in his absence finding that he had waived his right to be present when he declined to make subsequent appearance before the court. The court held that trial in absentia is permissible and lawful in limited circumstances.[148] The court took into consideration the delay and injustice that would be occasioned if the trial was to be stopped due to his refusal to appear. It is a decision made in the interests of justice.

In the Special Tribunal for Lebanon (STL), the accused has a right to be tried in his presence but that right is conditional and subject to the provisions of Article 22.[149] Article 22 provides for trials in absentia. A trial can proceed in the absence of the accused under three express conditions: when the accused has to expressly waive his right to be present; when he has not been surrendered by the State concerned; and when he cannot be found

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[146] Rule 61, Rules of Procedure and Evidence, ICTY, ICTR.
[147] Zakerhossein MH and De Brouwer AM, Diverse approaches to total and partial in absentia trials by international criminal tribunals, *Criminal Law Forum*, 2015, 189.
[148] *Prosecutor v Issa Hassan, Morris Kallon and Augustine Gbao*, SCSL-04-15-T, ruling of 12 July 2004.
[149] Statute, STL.

despite all reasonable efforts having been made to avail and notify him of the charges.[150] The accused person must be notified of the charges against him and if after thirty days the accused fails to appear, the Trial Chamber will commence the proceedings in absentia where the court will provide counsel for the accused.[151] The accused has a right for retrial.[152]There has been debate on whether the STL is actually an international tribunal or an extension of the Lebanese domestic system noting the nature of the crimes within its jurisdiction. Thus, whether its use of trials in absentia falls within the international sphere.[153] Chris Jenks has argued that the STL's provisions permitting trials in absentia make the Tribunal illegitimate as they violate the ICCPR guarantees.[154] It has also been argued that the overriding objectives of criminal justice to punish an accused are not served by trials in absentia therefore they have no practical results while the right of retrial presents an expensive justice given the cost implications of international trials.[155] While the cost aspect is a real issue especially for the ICC where availing witnesses and evidence bears serious costs, the real question would be whether cost implications should be a bar to the ends of justice especially for the victims. The answer is a resounding no, justice is far much more important than money. The court is similarly incurring costs during the long periods of inactivity in the absence of the accused.

It is clear that although the legitimacy of trials in absentia is contested and international tribunals have not used them much, they are not entirely inconsistent with the rights of the accused person provided that certain minimum guarantees are afforded to the absent accused. A trial in absentia can only be deemed valid if the accused person enjoys the same rights as though he was present and that a right of retrial is afforded when the accused eventually if ever avails himself before the court. The right to a counsel of their choice or appointed by the court as well as the right to a retrial essentially provide legitimacy to the

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[150] Article 22(1)(a)(b)(c).
[151] Article 22(2)(a)(c).
[152] Article 22(3).
[153] Bouhabib MA, Power and perception: The Special Tribunal for Lebanon, 3, *Berkeley Journal of Middle Eastern and Islamic Law*, 2010, 190-193.
[154] Jenks C, Notice otherwise given: will the trials in absentia at the STL violate human rights, 33, *Fordham International Law Journal*, 2009, 97.
[155] Zakerhossein, De Brouwer, Diverse approaches to total and partial in absentia trials, 198.

process as well as a remedy as the accused will be fully represented by counsel and enjoy all other consequent rights as if he was there, it will only be his physical presence that is lacking. Having argued on the lawfulness of trials in absentia in specific circumstances, this study further argues that trials in absentia can be useful and practical in international criminal justice. Punishment is not the only objective of criminal trials especially internationally. International criminal justice gives a voice to the victims as well as sending a message that impunity is not tolerated.

The Rome Statute therefore needs to be reviewed to provide for trials in absentia in situations where all reasonable steps have been made to present the accused before the court. Notice must be given through all forms of communication internationally and within the State where the accused person is of the charges and the intention to hold the trial. Further guarantees should be provided that the accused person must be represented by counsel who must be facilitated to effectively defend the accused. Finally, a right for a retrial or redetermination of the charges depending on the circumstances of the case must be given. This is to ensure that such trials are in compliance with international human rights standards

4.6 Conclusion

The propositions made in this chapter are made against the backdrop of the serious challenge that has faced the ICC and the consequent inability to proceed with the trials before it because of the absence of the accused.

The use and effectiveness of sanctions has been a hot debate over the years. While sanctions have not been effective a hundred percent, they have been proven to have worked in some cases. Effective sanctions require sufficient coordination by all States. Sanctions have the potential to achieve some results. It is on this basis that the argument in this chapter has been advanced. The objects of international criminal justice demand that States must take action to ensure that the ICC fulfils the ideals and purposes for which it was established. In simple terms, international criminal justice must work and States must put in the efforts to make it work.

Conducting trials in absentia though not the most ideal case is a necessity, it is the option of last resort for the court. Having noted its inability to enforce cooperation of States in arrest and surrender and the inordinate periods of inactivity owing to the absence of the accused. The absence of the accused means that they are holding the court at ransom. The trials in absentia are then aimed at giving a voice to the victims as well as showcasing to the world the horrific actions of the accused. This will help to administer some kind of justice to the victims notwithstanding that the accused has not been punished and send a message to the world that impunity is unacceptable.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This thesis set out to examine the non-cooperation of States in arrest and surrender within the ICC. The main objectives of the study are to identify the major factors that account for the non-cooperation, to analyse the Rome Statute sanctioning power to determine its effectiveness in addressing non-cooperation and to explore possible practical solutions to be implemented to deal with non-cooperation. The preceding chapters have examined in detail all the questions advanced. This chapter will provide a conclusion of the thesis and give recommendations.

5.2 Summary of the findings

Conclusions from a review of all the relevant literature on the research questions have confirmed that States' cooperation is fundamental to the effective functioning of the ICC. Without cooperation from States in arrest and surrender the ICC is unable to work. States non-cooperation is one of the major challenges facing the ICC. This research has further confirmed that the ICC has no power under the Rome Statute to enforce cooperation. It is fully dependent on the ASP and Security Council to enforce cooperation.

Lack of co-operation has generated delay in the proceedings of the court, which has resulted in higher operational costs. The court has so far dedicated time and resources towards the investigations and cases while the accused still remain at large. This means that the cases are dormant while the court remains in a state of inactivity as it awaits the arrest and surrender of the accused persons.

The lack of enforcement mechanisms and powers to compel or sanction States for non-co-operation has further encouraged and emboldened States not to co-operate. The number of States that have been able to get away with non-cooperation without any consequence contributes to more instances of non-cooperation by States. Therefore, the lack of clear and concrete consequences and sanctions for non-co-operation encourages States to act in their

interests and disregard the orders and requests of the court. The lack of enforcement capacity is one of the threats to the ability of the court to achieve its fundamental mandate, it thus renders the ICC highly ineffective and generally at the mercy of States that are driven by their own interests and rarely act inconsistently with their interests.

States fail to cooperate with the court for various reasons. Some of the key factors identified include conflict of interests and obligations, immunity questions, ICC's lack of enforcement powers and perceptions of bias in the choice of cases. These factors have contributed in various degrees to the non-cooperation facing the court. It is also clear that the court has not been able to obtain cooperation even after making referrals to the ASP and the UNSC. There is a clear schism between the court's judicial functions and its enforcement arms which is the two institutions.

As demonstrated the ICC's effectiveness depends on States co-operation in arrest and surrender. Without the accused persons before the court, the court cannot proceed with trials. It is therefore clear that when States fail to arrest and surrender accused persons, the court cannot function. The failure to arrest and surrender accused persons is therefore heavily impacting on the court's effectiveness.

The mechanism for enforcing cooperation through the ASP and the Security Council has not been effective in addressing the problem, it has not cured previous non-cooperation neither was it able to prevent it.

The lack of consequences within the Rome Statute has had an impact on the court's ability to function fully and fulfill its mandate. This has also impacted the willingness of States to cooperate, it encourages non-cooperation. It is therefore, important for the Rome Statute to be revised with a view to enhancing the role of the ASP and the Security Council and give them capacity to sanction or punish States that refuse to cooperate with the requests of the court for arrest and surrender

Conclusions from review of literature on sanctions confirm that the threat or the imposition of sanctions might potentially contribute to cooperation of states. These sanctions must be imposed in a collective and coordinated manner if they are to have any significant impact on States cooperation. To have an effective sanctions regime, the ASP and Security

Council must put in the necessary work to establish an elaborate diplomatic sanctions regime. They must also be ready to put pressure on all States to collectively apply the sanctions in a coordinated form.

Sanctions will have more impact if they are applied by all members at the same time. The importance of diplomatic relations among nations is based on the arguments that if a large number of States, collectively threaten or impose coordinated diplomatic sanctions, the State in question might be induced to cooperate. The threat of sanctions in terms of withholding military financing was successful for the US in obtaining immunity agreements with States. Similarly, the EU and World Bank threats of financial sanctions to Serbia successfully induced Serbia to surrender Slobodan Milosevic to the ICTY.

The study also confirmed that the history of the effectiveness of sanctions has been controversial. Sanctions may work or they may not work. Therefore, there is need for more research and thought by scholars on alternative ways through which States cooperation can be improved.

The conclusions on trials in absentia confirm that the legitimacy of trials in absentia is contested. However, they are not entirely inconsistent with the rights of the accused person provided that certain minimum guarantees are afforded to the accused. A trial in absentia can only be deemed valid if the accused person enjoys the same rights as though he was present and that a right of retrial is afforded when the accused eventually if ever avails himself before the court. The right to a counsel of their choice or appointed by the court as well as the right to a retrial essentially provide legitimacy to the process as well as a remedy as the accused will be fully represented by counsel and enjoy all other consequent rights as if he was there, it will only be his physical presence that is lacking.

Having argued on the lawfulness of trials in absentia in specific circumstances, this thesis further argues that trials in absentia can be useful and practical in international criminal justice. International criminal justice gives a voice to the victims as well as sending a message to the perpetrators that impunity is not tolerated.

5.3 Recommendations

This thesis recommends a review of the Rome Statute to provide in certainty the actions to be taken by the ASP and Security Council when a referral for non-cooperation is made. The Rome Statute's uncertainty on the actions that follow a referral for non-cooperation has been made, has contributed to the weakness of the enforcement regime. This recommendation is for review of the Rome Statute to provide for use of diplomatic sanctions on States that fail to cooperate with the ICC.

Given the nature of the effects that non-cooperation has on the ability of the court to be effective, the imposition of sanctions provides a coercive mechanism that can be used to compel States to cooperate with the court's requests for arrest and surrender. The proposed sanctions are to be imposed by the ASP as a last resort when the diplomatic avenues within its response procedures have been exhausted with no success. Therefore, the proposed sanctions will be imposed by the ASP through its members as part of its final response to non-cooperation.

This thesis also recommends a review of the Rome Statute to provide for trials in absentia in situations where all reasonable steps have been made to present the accused before the court.

The recommended provisions should include; notice to be given through all forms of communication internationally and within the State where the accused person is of the charges and the intention to hold the trial. Further, guarantees should be provided that the accused person must be represented by counsel who must be facilitated to effectively defend the accused. Finally, a right for a retrial or redetermination of the charges depending on the circumstances of the case must be given. This will ensure that such trials are in compliance with international human rights standards.

The recommendation is grounded on the main objectives of international criminal justice. The ideals of international criminal justice aim to among others punish the most responsible perpetrators of international crimes, give victims a voice while delivering justice to them and fighting impunity. It is this basis that the justification for trials in

absentia is made. Accused persons wanted before the ICC remaining at large mostly with the complicity of States is the highest level of impunity. To reject this impunity, trials in absentia showcase to the world that impunity will never be tolerated.

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