

# **The ICC's Involvement in the Conflict in Darfur and the Peace Versus Justice Debate**

**Kassahun Molla\***

## **Abstract**

*The involvement of the ICC in Darfur, Sudan has elicited many mixed legal and political reactions. Critics of the ICC's involvement, among other things, claim that the involvement of the ICC could drive Sudan into dissolution, undermine the peace process and prolong the violence. Advocates of ICC's involvement, on the other hand, claim that the involvement of the ICC promotes the peace process, exposes the crimes perpetrated by the parties, stigmatizes leaders and eventually removes them from office. This article argues that tighter controls on humanitarian activities, a rally of support for those prosecuted and arrest warrants that were able to cause some travel inconveniences are the outcomes of the involvement of the ICC in Darfur.*

## **Introduction**

The involvement of the International Criminal Court (hereinafter, ICC) in the conflict in Darfur, Sudan was triggered due to the referral of the situation in Darfur to the ICC by the U.N Security Council. Both before and after the arrest warrants issued by the ICC, the involvement of the ICC has elicited many mixed legal and political reactions. Critics of the ICC's involvement, among other things, claimed that the involvement of the ICC could drive Sudan into dissolution, undermines the peace process

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and prolong the violence.<sup>1</sup> Advocates of ICC's involvement, on the other hand, claimed that the involvement of the ICC promotes the peace process, exposes the crimes perpetrated, stigmatizes leaders and eventually removes them from office.<sup>2</sup> The claims made by these opposing camps have not been tested in light of the reality on the ground in Sudan.

This article addresses the impacts of ICC's involvement in Darfur in light of the current reality in Sudan. The article is not an empirical assessment of the situation in Sudan. It is a modest contribution towards understanding the contrasting claims made by opposing camps regarding the involvement of the ICC. For this purpose, the paper uses the analytical framework developed by review of the literature regarding the impacts of intervention in conflicts by international tribunals. This will help to identify the vital theories relevant to the discussion, and then the framework will be used to measure the impacts of ICC's intervention in Darfur Sudan.

The first part of the article will briefly discuss the evolution of the conflict in Darfur and the referral by the UN Security Council. Following this, the second part discusses the theoretical debates regarding the impacts of tribunals intervention in a conflict. The third part of the article analyzes the ICC's involvement in Darfur in light of the theoretical framework developed in the second part of the article. Finally, the article ends with concluding remarks and suggestions.

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<sup>1</sup> See Wasil Ali, Justice a threat to peace in Darfur? ( 30 JUNE 2008), available at <http://www.sudantribune.com/spip.php?article27689>, [last accessed Sep. 18, 2016], Allo, Awol Kassim, Mayhem in Darfur: The Accountability, Peace and Immunity Debate (March 1, 2009). Mizan Law Review, Vol. 3, No. 1. Available at SSRN: <https://ssrn.com/abstract=1507302>,

<sup>2</sup> See Akhavan, Payam, Are International Criminal Tribunals a Disincentive to Peace? Judicial Romanticism with Political Realism, Human Rights Quarterly, Vol. 31, Aug. 2009, Clark, J. 'Natalya, Peace, Justice and the International Criminal Court Limitations and Possibilities', Journal of International Criminal Justice 9 (2011), 521-545

**1. Brief Background of The Conflict, Referral by The UNSC and the ICC's Involvement in Darfur**

Darfur is part of Sudan, home for diverse ethnic and linguistic groups that is located in the western part of the country. The Fur, Zaghawa, Tunjur, Maslit, and Birgid are tribes identified as “Africans” and they were the first to settle in Darfur before the Darfuri Arabs came to settle there.<sup>3</sup>With the influx of Arab tribes, combinations of economic, Arab supremacism, political marginalization and ethnic tensions in the region between 1986 - 2004 gave rise to three civil wars that claimed many lives of the people of Darfur.<sup>4</sup> Over the years, each of the problems in Darfur increased, and led to bloody civil wars between the Arab supremacist and the African inhabitants. While the Arabs were well equipped and trained, the African inhabitants were poorly organized and ill-equipped.<sup>5</sup> In fact, the Arab Gathering and the Islamic Legion, groups that were created for the expulsion of Africans from the area of the Sahel and to fight for Islamization of Sahel respectively, were the progenitors of the Janjaweed militias.<sup>6</sup> The term Janjaweed refers to Arab Militiamen on horseback, they were tolerated and backed by the government of Sudan and other states.<sup>7</sup>

In response to the Arab tribes' movement in Darfur, the African tribes started to organize armed resistance that culminated in the establishment two rebel groups.<sup>8</sup> These were the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM). The former, which announced its establishment in February 2003 as Sudanese Liberation Movement/Sudan Liberation Army (SLM/SLA), attacked

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<sup>3</sup> See Natsios, S. and Scott, Z, Darfur, Sudan, Oxford University Press, 2012

<sup>4</sup>See Ibid

<sup>5</sup> See Liu, Zihng, The Prosecutor v. Omar Hassan Ahmad Al Bashir, Independent, August 27, 2016, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2830778](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2830778), Last accessed 10 Oct., 2016

<sup>6</sup> See Ibid

<sup>7</sup> Kastner, Philipp, *The ICC in Darfur-Savior or Spoiler?* 14 ILSA J. Int'l & Comp. L. 145 2007-2008, p. 146

<sup>8</sup> Natsios, S. and Scott, Z., Supra note 3, P.240

different places from the beginning of June 2002.<sup>9</sup> In response to this the government mobilized and trained the Janjaweed Units and engaged in massive recruitment of the Janjaweed from different Arab tribes. This was a pivotal point where the government transformed its tactics. At this point, the targets of the attacks by the regime and the Janjaweed became civilians and their village.<sup>10</sup> The conflict in Darfur has resulted in the internal displacement of 2.7 million people, has claimed 300, 000 lives and forced 250,000 people to flee their country.<sup>11</sup>

With these high casualties, the conflict elicited different international responses. Included among the responses was the establishment of a Commission of Inquiry by the Secretary-General of the United Nations. The initiative to establish the commission came from the U.N Security Council.<sup>12</sup> In January 2005, the Commission reported its finding and the report stated that the government of Sudan and the Janjaweed militia were responsible for serious violations of international humanitarian and human rights law amounting to war crimes and crimes against humanity.

<sup>13</sup> Based on the findings of the Commission, the U.N Security Council decided to refer the situation in Sudan to the ICC, thereby triggering the referral power of the Security Council in the Rome Statute.<sup>14</sup> Sudan is not a party to the Rome Statute and the ICC got jurisdiction over Sudan because of the referral made by the U.N Security Council.

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<sup>9</sup> Ibid

<sup>10</sup> Ibid

<sup>11</sup> See International Coalition for the Responsibility to Protect (ICRtoP) , The Crisis in Darfur, available at <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-darfur>, , [last accessed Sep. 18, 2016]

<sup>12</sup> UN Security Council, *Security Council Resolution 1564 (2004) on Darfur, Sudan*, 18 September 2004, S/RES/1564 (2004), available at:

<http://www.refworld.org/docid/41516da44.html> [accessed 17 October 2016]

<sup>13</sup> See, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, available at :

[http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf) [accessed 17 October 2016]

<sup>14</sup> UN Security Council, *Security Council Resolution 1593 (2005) on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan*, 31 March 2005, S/RES/1593 (2005), available at:

<http://www.refworld.org/docid/42bc16434.html> [accessed 17 October 2016]

## **Analysis of the Impacts of ICC's Involvement...Kassahun Molla**

The investigation by the ICC has produced a range of cases against government officials, leaders of the Janjaweed militia and opposition leaders. The charges include war crimes, crimes against humanity and genocide. President Al Bashir is the first sitting President to be wanted by the ICC, and the first person to be charged by the ICC for the crime of genocide. The ICC issued the first arrest warrants in April 2007 for two suspects and in March 2009 for President Al-Bashir. The arrest warrants issued by the court, particularly for President Al-Bashir, have been severely criticized and praised as well.<sup>15</sup> Ever since it has been a subject of political, legal and academic controversies.<sup>16</sup> The debates concerning the warrants include, among other things, issues regarding jurisdictional competence of the ICC on non-state party to the Rome Statute, issues of heads of state immunity, political allegations that portray the ICC as instrument of powerful states, and the insensitivity of the ICC for the peace process in Darfur.<sup>17</sup>

The above is a brief development of events that led to the involvement of the ICC in Sudan. Unlike the Nuremberg model and the *ad hoc* tribunals, the ICC has a forward looking jurisdictional power. As a result, interventions by the court and their impacts can easily be a point of controversy. The following part of the article presents the two opposing positions regarding the impacts of interventions in the form of a criminal prosecution.

## **2. Opponents of Intervention**

Critics of international criminal justice have developed a set of arguments against intervention in a form of prosecution by tribunals. First, it is

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<sup>15</sup> See Supra note 1

<sup>16</sup> See Global Policy Form, International Criminal Court Investigations Sudan, available at: <https://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/darfur-sudan.html>, Last accessed on 4 Nov. 2016

<sup>17</sup> Blommestijn, Von Michiel and Ryngaert, Cedric, Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity, available at :[www.zis-online.com/dat/artikel/2010\\_6\\_461.pdf](http://www.zis-online.com/dat/artikel/2010_6_461.pdf) , Last accessed on 4 Nov. 2016

claimed that intervention in a form of prosecution can instigate and prolong the violence.<sup>18</sup> The assumption is a threat of accountability in a form of prosecution makes responsible leaders of atrocities cling to power and refuse to lay down weapons.<sup>19</sup> In support of this, exemplary models like the amnesties granted to military officers in Chile, Argentina, and South Africa's Truth and Reconciliation Commission are often cited as evidence of the possibility and viability of dealing atrocities with a non-prosecutorial model.<sup>20</sup> Clark argues that "in both South Africa and in Latin America, justice - in the sense of criminal trials - was traded for peace."<sup>21</sup>

Moreover, critics of prosecution model argue that an indictment complicates or undermines peace negotiations. The argument here is, if key leaders of atrocities would face prosecution, it would then be difficult to persuade leaders with the power to end violence to stop or reduce it.<sup>22</sup> For example, in the case of Uganda, it was argued that the ICC's involvement was an obstacle to the peace talks between the government and The Lord's Resistance Army (**LRA**), as the latter made it clear that it would not sign a peace agreement while facing an arrest warrant.<sup>23</sup> In this case ICC was accused of exacerbating the conflict, complicating the peace negotiation, portraying bias towards one party and neglecting the traditional conflict resolution mechanisms.<sup>24</sup>

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<sup>18</sup> See Kastner, Philipp, *supra* note 5

<sup>19</sup> See Kersten, Mark, *Seeing the Forest for the Trees: The International criminal court and the Peace – Justice Debate*, available at: <https://justiceinconflict.org/2016/07/21/s/>, Last accessed on 4 Nov. 2016

<sup>20</sup> Clark, J. Natalya, *Peace, Justice and the International Criminal Court: Limitations and Possibilities*, *Journal of International Criminal Justice* 9 (2011), at p. 539

<sup>21</sup> *Supra* note 10, P. 539

<sup>22</sup> Rodman, Kenneth A., *Why the ICC Should Operate Within Peace Processes*, *Ethics & International Affairs*, 26, No. 1 (2012), p. 64

<sup>23</sup> See *Ambiguous impacts: The Effects of International Criminal Court Investigation in Northern Uganda*, Refugee Law Project Working Paper no. 22, oct. 2012

<sup>24</sup> See Malu, N. Linus, *The International Criminal Court and conflict transformation in Uganda*

*Views from the field, ACCORD*, available at: <http://www.accord.org.za/ajcr-issues/the-international-criminal-court-and-conflict-transformation-in-uganda/>

### **Analysis of the Impacts of ICC’s Involvement...Kassahun Molla**

Furthermore, it is claimed that at national and international level intervention by tribunals might draw support for leaders sought by tribunals. The thrust of this claim is that international trials are sensitive to politicization and “leaders who defy international criminal justice may gain greater support from domestic constituents and similarly positioned foreign leaders.”<sup>25</sup> It is also claimed that exposing and shaming states for non-cooperation might risk “more resistant because it can fuel nationalists’ claim that the tribunal is moving away from its purported focus on individual guilt to a more expansive focus on shaming and blaming the state and nation”.<sup>26</sup>

### **3. Proponents of Intervention**

Advocates of prosecution model, in contrast, raise many advantages of intervention by tribunals. Among many imperatives, deterring offenders and preventing recurrence of crimes are considered as the main goals of justice through prosecution. In setting an important precedent and deterring further atrocities many transitional justice scholars find that the trial model is indispensable. In an ongoing conflict, it is claimed that the prospect of accountability in a form of prosecution would induce perpetrators to reduce violence against victims.<sup>27</sup>

The fight against impunity is another important justification invoked by advocates of the prosecution model. Proponents of impunity stress the importance of accountability in ensuring stability and peace. Orentlicher argues that the consequences of “a complete failure of enforcement vitiates the authority of law itself, sapping its power to deter proscribed conduct”.<sup>28</sup> Cautioning against relapsing to atrocities because of inactions,

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<sup>25</sup> Broache, Michael P., *The International Criminal Court and Atrocities in DRC: A Case Study of the RCD-Goma (Nkunda faction)/CNDP/M23 Rebel Group*, available at: <http://ssrn.com/abstract=2434703>, Last accessed on 4 Nov. 2016

<sup>26</sup> Peskin, Victor, *Caution and Confrontation in the International Criminal Court Pursuit of Accountability in Uganda and Sudan*, HRQ, Vol. 31, No 3, Aug. 2009, p. 661

<sup>27</sup> Hillebrecht, Courtney, *The Deterrent Effects of the International Criminal Court: Evidence from Libya*, available at <http://dx.doi.org/10.1080/03050629.2016.1185713>, Last accessed on 4 Nov. 2016

<sup>28</sup> Quoted by Majzub, Diba, *Peace or Justice? Amnesties and The International Criminal Court*, Melbourne Journal of International Law, Vol. 3

Aguilar argues “when the past is pushed aside before it has been clarified, discussed and dealt with, sooner or later it will invade a nation's political life, forcing governments to face it, though not always under the most favorable conditions”.<sup>29</sup>

Stigmatization or marginalization of key leaders of atrocities is also often invoked to justify intervention by tribunals. Stigma is not always a result of actual punishment, rather “stigma attaches to its target regardless of that target’s reaction to it”.<sup>30</sup> And it is argued that tribunals like the ICC are powerful in stigmatizing perpetrators of atrocities.<sup>31</sup> Intervention is also presented as important tool to increase the awareness of the international community, thereby attracting necessary support and attention.<sup>32</sup> Gorno and Brien, for example, stress the roles the ICC intervention played in pushing leaders of the LRA in northern Uganda to end the conflict. They contended that the arrest warrant stigmatized, cut support from neighboring states like Sudan, increased awareness of the conflict in northern Uganda and ultimately pushed the LRA leaders to a negotiating table.<sup>33</sup>

#### **4. Analysis of the impacts of the ICC’s Involvement in Darfur**

In the following part, the theoretical framework in the above part of the article will be used to analyze the impacts of the involvement of the ICC in Darfur. At this juncture, one has to understand in the absence empirical evidence; it is really hard to establish the concrete effects of the ICC’s involvement. Thus, the following discussion is not an undertaking to establish a chain of causation between the ICC’s involvement and the events that unfolded thereafter.

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<sup>29</sup> Quoted by Kersten, Mark, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Conflicts*, Oxford University Press, 2016. P.21

<sup>30</sup> See Mégret, Frédéric, *Practices of Stigmatization, Law and Contemporary Problems*, Vol. 76:287-318

<sup>31</sup> See Akhavan, Payam, *supra* note 26

<sup>32</sup> See Grono, Nick and Brien, Adam O’, *Justice in Conflict? The ICC and Peace Processes*, available at: [mercury.ethz.ch/serviceengine/Files/ISN/.../3\\_from+2008-03\\_ICC+in+Africa.pdf](http://mercury.ethz.ch/serviceengine/Files/ISN/.../3_from+2008-03_ICC+in+Africa.pdf), Last accessed 23 Sep. 2016

<sup>33</sup> *Ibid*



#### **4.1 Removal from office, The Expulsion of NGOs and Fragmentations**

At the individual level, the two contrasting claims that are usually made are accountability in a form of prosecution would remove leaders, and would make leaders cling to power.

In the context of Darfur, with a reasonable certainty it can be asserted that the prosecution did not bring the removal of the key leaders sought by the ICC. When the arrest warrants were issued, Ahmed Harun had been serving as a Minister of State for Humanitarian Affairs and Al-Bashir was the President of Sudan. Since the issuance of the arrest warrant in April 2007, Ahmed Harun has been serving in different high ranking positions. First, he had been appointed to head an inquiry into allegations of human rights abuses in Darfur. Following this, from May 2009 – 12 July 2013 he had been appointed as the Governor of South Kordofan, and since 14<sup>th</sup> of July 2013, he has been serving as the Governor of North Kordofan. The arrest warrant did not bring the removal of President Al-Bashir either. Al-Bashir won two elections, in 2010 and in 2015 after the arrest warrants. In the latest one, he was re-elected with 94.5% of a vote. As it was claimed by some the indictment did not set into motion a chain of events that would bring the ultimate removal of the responsible leaders. No one with certainty can also claim that they cling to power because of the arrest warrant by the ICC since there is no tangible evidence to that effect.

Expulsion of NGOs was one of the impacts that can directly be linked to the arrest warrant issued for President Al-Bashir. Panicked by the arrest warrant, the administration of Al-Bashir reacted by expelling a number of humanitarian agencies working in Darfur.<sup>34</sup> The ejection of NGOs came immediately after the ICC issued the arrest warrant. It was widely

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<sup>34</sup> UN News Center, Expulsion of Aid Groups from Darfur Will Have Wide Impact, UN Agencies Warn, available at <http://www.un.org/apps/news/story.asp?NewsID=30105#.WAtIpf97IU>, last accessed, Oct. 21, 2016

accepted that the expulsion of humanitarian NGOs had dire consequences for the internally displaced people in Darfur.<sup>35</sup> Some estimated that the expulsions reduced 50 percent of the overall humanitarian assistance in Darfur. In fact, the expulsion of NGOs was the direct consequence of the arrest warrant issued by the ICC, as NGOs were suspected of working with the office of the prosecution.

As already alluded, fragmentation and unity of groups or individuals are the other two opposing claims that are usually made in relation to the impacts of the involvement of the ICC in a conflict. The impact of President Al-Bashir's arrest warrant was initially felt by the leading National Congress Party (NCP).<sup>36</sup> The party perceived the move by the ICC as the gravest threat ever to the survival of the party and took it as a move that was made to change the regime in Sudan.<sup>37</sup> In addition, initially signs of fragmentations within the party between Al-Bashir and his group on the one hand, and groups that felt Al-Bashir's leadership was driving Sudan into a pariah state, on the other hand, were unfolding. However, this did not go further to have any appreciable consequences.

Further, first by using the Janjaweed militia as a scapegoat, the government denied the existence of a relationship between the government and the Janjaweed militia.<sup>38</sup> At the moment the denial was considered as a move of the government distanced itself from the militia. It was also believed that the indictment would pressure the Sudanese government to cut support for the Janjaweed militia, as the methods of arming and supporting this militia were criticized severely.<sup>39</sup> In contrast to this, recent developments regarding this indicate the other way around. On June 24, 2014, the New York Times, for instance, reported that "the Sudanese government has reconstituted the Janjaweed, notorious militias

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<sup>35</sup> Ibid

<sup>36</sup> Bubna, Mayank, The ICC's Role in Sudan: Peace versus Justice, IDSA Issue Brief, p.

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<sup>37</sup> Ibid

<sup>38</sup> See Human Rights Watch, Failing Darfur, available at :

<https://www.hrw.org/sites/default/files/features/darfur/fiveyearson/report4.html>, Last accessed oct, 2016

<sup>39</sup> See Akhavan, Payam , supra note 26

### **Analysis of the Impacts of ICC's Involvement...Kassahun Molla**

that terrorized the restive Darfur region for years, making them an official, uniformed force that has recently burned down huts and attacked civilians".<sup>40</sup> Thus, the arrest warrant hanging over Al-Bashir could not deter him from officially integrating the Janjaweed. I maintain that the failure to enforce the arrest warrant because of the strategic interests of powerful states and the political support that Al-Bashir enjoys emboldened him to contempt the arrest warrant issued by the ICC. According to New York Times, "government's role in fomenting the violence is hardly secret anymore."<sup>41</sup> This exemplifies the situation where the international politics playing above international justice, rendering the latter toothless.

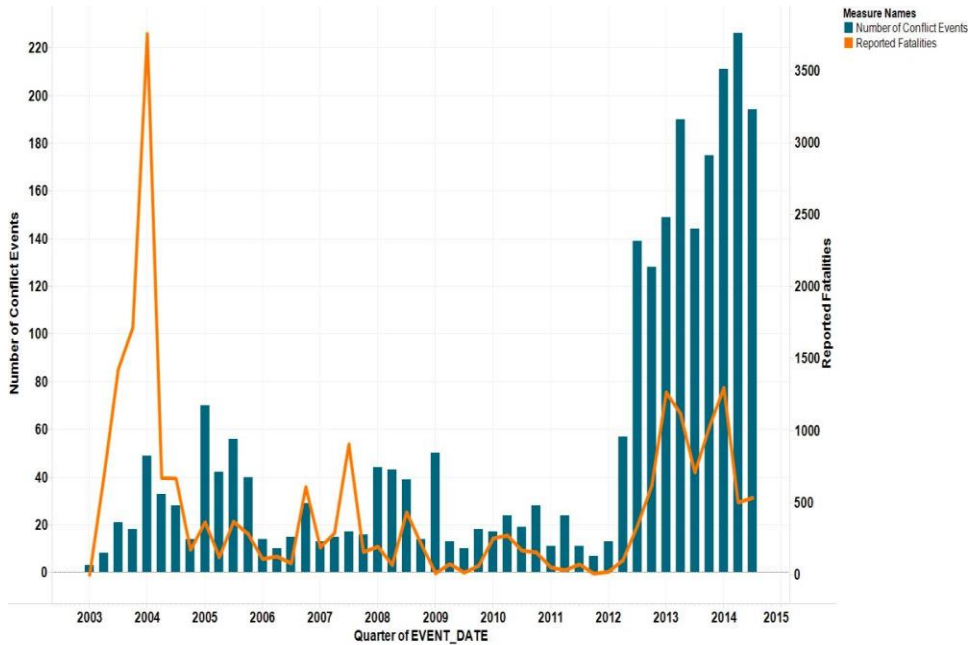
#### **4.2 The National Level of Violence and The Peace Negotiations**

De-escalation and escalation of violence are another two opposing claims that are often made as the impacts of an involvement of ICC in a conflict. In the case of Darfur, it is extremely difficult to assess and attribute violence that happened or stalled after the involvement of the ICC. This is so because, ICC is one among the many actors involved in Darfur and the complex political dynamic limits us from making attribution to a particular entity. The following figure, provided by the Armed Conflict Location and Event Dataset, shows trends in violent incidents. The figure shows the numbers of conflict incidents and reported the fatalities after the involvement of the ICC.

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<sup>40</sup>Jeffrey Gettleman, Sudan Said to Revive Notorious Militias, the New York Times, June 24, 2014, available at <http://www.nytimes.com/2014/06/25/world/africa/sudan-darfur-janjaweed-militia-khartoum.html>, Last accessed oct, 2016

<sup>41</sup> Ibid



Source: ACLED

A cursory examination of the figure indicates that the conflict trends change over time in relatively smaller scale up until 2012, and thereafter there is a sharp rise in the number of conflict events with the corresponding rise in reported casualties. If one considers the referral of the situation in Darfur to the ICC by the UN Security Council as the initial point of ICC’s involvement in Darfur, one can see small scale rising and falling of violence in between 2005- 2012. The question is can it be claimed that the ICC’s involvement has de-escalated the violence initially and then the failure to enforce the arrest warrants caused the escalation of violence again? At this moment, in the absence of empirical evidence that correlates the ICC’s involvement to this fact in the ground both claims cannot be confirmed beyond mere speculation.

Portraying intervention as an impediment to peace and as an incentive to peace negotiations are the other two competing claims made by opponents and proponents of the ICC. In relation to the Darfur conflict, important attempts of peace negotiations between the insurgents and the government

### **Analysis of the Impacts of ICC's Involvement...Kassahun Molla**

of Sudan have been made at different times. The article, however, discusses only two of them since they were closer to the arrest warrants. The first is the Darfur Peace Agreement (DPA) that was signed on 5 May 2006 between the government and one of the SLM/A's factions in Abuja.<sup>42</sup> The JEM refused to sign this peace negotiation and rejected the agreement considering that the methods of power and wealth sharing proposed by the agreement did not adequately address the initial causes of the conflict.<sup>43</sup> Subsequently, this attempt failed. At this point, the ICC had not issued an arrest warrant for any of the accused and the failure of the peace negotiations cannot be linked to ICC's intervention.

In the negotiation of February 2010, the Sudanese government and the JEM signed another peace agreement in Doha.<sup>44</sup> It would seem that the change of venue from Abuja, Nigeria to Doha (Qatar) was caused by the involvement of the ICC, as Qatar is not a party to the Rome Statute. The ICC had only issued arrest warrant for Ahmed Haroun and Ali Kushayb at the beginning of the negotiation. Later, when the ICC issues an arrest warrant for president Al-Bashir on March 2009 the first rounds of the talks, some argued, was dominated by talks regarding the arrest warrant.<sup>45</sup> According to some, JEM considered that the arrest warrant would weaken the government of Sudan and withdrew from the peace agreement "saying it would not negotiate with an indicted war criminal"<sup>46</sup> Here it can be argued that to some extent indictment has played a role for withdrawal of JEM at this specific moment.

It is possible to concede that the arrest warrant had an impact on this specific negotiation, but it can also equally be argued that the ICC's involvement was not the cause for the failure of the Doha negotiation.

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<sup>42</sup> Nadil Nabil Jurdi, *The International Criminal Court and National Courts: A Contentious Relationship*, Ashgate Publishing, Ltd., 28 Feb 2013, p. 223

<sup>43</sup> *Ibid*

<sup>44</sup> *Ibid*

<sup>45</sup> Patrick S. Wegner, *The International Criminal Court in Ongoing Intrastate Conflicts: Navigating the Peace–Justice Divide*, Eberhard-Karls-Universität Tübingen, Germany, 2015

<sup>46</sup> *Ibid*

This is so because, JEM as a party to the negotiation had resumed its efforts even after the arrest warrant. For example, the ceasefire agreement between the government and JEM on 24 February 2010 was agreed after the first arrest warrant. The reason for the failure to reach a negotiated agreement was the absence of a genuine interest of the parties to resolve the conflict. It was claimed that “while the government engaged in the talks because they needed to show that the indicted Al-Bashir was not blocking peace efforts; the JEM was interested in being recognized as the only negotiation partner on the rebel side “. <sup>47</sup> The discussions at the later stages indicate that the main cause for the failure of the negotiations was not the ICC’s involvement. It was more a question of representation, administrative status of Darfur, and more importantly, it was a question of marginalization of the people in Darfur. <sup>48</sup>

### **4.3 Stigmatization at The International Level**

Stigmatization versus rallying are the other competing claims that are made in relation to the ICC’s involvement in a conflict. Reduction of acceptance by other states that might be caused as a result of discrediting attributes of an arrest warrant can be used to assess whether the tainted status being identified as a leader of atrocious crimes has stigmatized the accused or rallied individuals and states in support of the accused.

In the context of Sudan, particularly in the case of Al-Bashir, after the arrest warrant many states rallied in support of Al-Bashir. The arrest warrant did not stop many states from inviting Al-Bashir in order to show their solidarity. In fact, since his indictment, until March 2016, he was able to visit 21 different countries and made 74 trips. <sup>49</sup> Out of which, seven were signatories to the Rome Statute and have an obligation to

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<sup>47</sup> See Patrick S. Wegner, *supra* note 59

<sup>48</sup> *Ibid*

<sup>49</sup> See Nuba Reports, Sudan’s president has made 74 trips across the world in the seven years he’s been wanted for war crimes, Quartz Africa, 4 March 2016, available at <http://qz.com/630571/sudans-president-has-made-74-trips-across-the-world-in-the-seven-years-hes-been-wanted-for-war-crimes/>, last accessed 20 oct. 2016

### **Analysis of the Impacts of ICC's Involvement...Kassahun Molla**

cooperate with the court in arresting Al-Bashir.<sup>50</sup> Due to this, the failure of Uganda and Djibouti, as it was the case with Chad and Kenya previously, to arrest Al-Bashir is referred by the ICC to the Assembly of States Parties to the Rome Statute.<sup>51</sup>

One of the impacts of the arrest warrants was the fact that it led to a unified opposition to the move made by the ICC. For example, the African Union criticized the move by the ICC, requested the deferral of the case and adopted a resolution calling for the African states not to cooperate with the ICC.<sup>52</sup> The Arab League also rejected the arrest warrant and showed strong support for Al-Bashir.<sup>53</sup>

President Al Bashir has also faced challenges because of the arrest warrants. For instance, he was not able to travel freely in different countries. For instance, in South Africa, a civil society group brought a suit to the South Africa's High Court to enforce Al-Bashir's arrest warrant.<sup>54</sup> Even though the government of South Africa allowed him to leave the country, the court actually ordered that he should remain in South Africa pending a ruling on the application.<sup>55</sup> Moreover, in some cases due to the arrest warrant he had to cancel trips. This is the case, for example, when he decided to call off his trip to the USA to attend the 68<sup>th</sup> UN General Assembly after the ICC invited the officials of USA to apprehend and Surrender him.<sup>56</sup> Similarly, on 21 April 2015 he called off

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<sup>50</sup> Ibid

<sup>51</sup> See DABANGA, ICC reports Uganda, Djibouti for not arresting Al Bashir, available at : <https://www.dabangasudan.org/en/all-news/article/icc-reports-uganda-djibouti-for-not-arresting-al-bashir> , last accessed, oct..2016

<sup>52</sup> See Coalition For The International Criminal Court, News on the African Union, Sudan and the ICC, available at <http://www.iccnw.org/?mod=newsdetail&news=3414>, Last accessed, 5 oct. 2016

<sup>53</sup> Ibid

<sup>54</sup> Ibid

<sup>55</sup> See Amnesty International, South Africa: Decision to leave International Criminal Court a 'deep betrayal of millions of victims worldwide' available at : <https://www.amnesty.org/en/latest/news/2016/10/> , Last accessed on 4 oct. 2016

<sup>56</sup> See Security Council Report, Sudan (Darfur) Chronology of Events, available at: <http://www.securitycouncilreport.org/chronology/sudan-darfur.php?page=2>, Last accessed on 4 oct. 2016

his conference visit to Indonesia to attend the Asia-African leaders' conference in the capital Jakarta.<sup>57</sup>

### **Conclusion**

The article attempted to modestly appraise the impacts of the ICC's involvement in Darfur Sudan at individual, domestic and international levels. As outlined, in the above parts of the article, the theoretical debates concerning an involvement of a tribunal in a conflict is often presented in a sharp contrast without offering the necessary evidence for substantiating claims. The first position presents dire consequences of intervention by a tribunal in a conflict, while the opposite position claims many fruits that would be collected as a result of an intervention.

In the context of Sudan, the intervention did not bring the removal of President Al-Bashir or other leaders that were prosecuted by the ICC. There is no any empirical evidence that would confirm that the prosecuted leaders are still in power because of the ICC's arrest warrant either. Rather, the intervention has created tighter controls on humanitarian activities as evidenced by the expulsion of NGOs working in Darfur as a result of the arrest warrants issued for Al-Bashir. The little sign of fragmentation created at the beginning as a result of the intervention within the party and the persistent denial of a link with the Janjaweed militia could not endure the test of time. The failure of the ICC to enforce the arrest warrants and the absence of the necessary political support for the ICC have rendered the court toothless.

As the discussion showed the claims that the ICC could escalate and impede peace negotiations in Darfur is more of speculation. There is no available evidence to substantiate these claims made by opponents of the intervention. It is also completely difficult to attribute the decrease of violence, at the initial sage of the intervention, to the ICC's involvement.

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<sup>57</sup> See Report by Aljazeera, Sudan president cancels conference visit to Indonesia, available at : <http://www.aljazeera.com/news/2015/04/sudan-president-cancels-conference-visit-indonesia-150421171322043.html>, Last accessed on 4 oct. 2016



### **Analysis of the Impacts of ICC's Involvement...Kassahun Molla**

The failures to conclude peace agreement cannot also be attributed to the ICC's involvement. As the analysis indicated the failures of the parties to negotiate was caused by the inadequacy of the terms of the agreements to satisfy the expectations and demands of the parties to the conflict rather than the involvement of the ICC.

Finally, the impact on the acceptance of, particularly president Al-Bashir, is more of restriction to travel to some countries. The evidence rather suggests that the ICC's involvement drew many African countries and regional organizations to rally in support of President Al Bashir.

Finally, the author concedes that the absence of empirical evidence is the main limitation of this article. The writer suggests further empirical researches to confirm claims made by opposing groups.