IS THE NOTION OF IMMUNITY OF HEADS OF STATES BEING EXERCISED FREELY AND BEING GIVEN THE SAME AMOUNT OF RELEVANCE ACROSS THE BOARD?

BY

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200622463

A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF BACHELORS OF LAWS (LLB) DEGREE

SUPERVISOR:

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IN THE SUBJECT OF

PUBLIC INTERNATIONAL LAW

AT THE

UNIVERSITY OF NAMIBIA

Declaration

I, the undersigned, hereby declare that the work contained in this Dissertation for the purpose of obtaining my LLB Degree is my own original work and that I have not used any other sources than those listed in the Bibliography and quoted in the references.

…… ……

Gabriel C. Mlunga Date

Supervisor’s Certificate

I, Clever Mapaure, hereby certify that the research and writing of this Dissertation was carried out under my supervision

…… ……

Clever Mapaure Date

Dedication

I dedicate this dissertation to my father and mother for their support and love that they have shown to me, in furtherance of obtaining my LLB Degree

Acknowledgment

I would like to take this time to thank all persons who were involved in helping my in completion for this dissertation, in addition to that, I would like to thank them for all the hard work that they together with the writer of this script went through in ensuring that everything works out. I would also like to give a vote of thanks to my supervisor Clever Mapaure, for the direction he gave me in terms of ensuring that I do the correct work and also for his submission of his constructive criticism to the paper and helping ensure that I do it well. Also, I would like to give thanks to Aisha Isaak, for assisting me in the conducting of research as well as offering her views on the topic.

Abstract

Is the notion of immunity of Heads of States being exercised freely and being given the same amount of relevance across the board? This notion seeks to discern the underlying purpose of what immunity is and whether it is afforded to all Heads of States irrespective of whether it is a Western head of state, or Non-Western head of State. It is the belief of the writer of this dissertation that, the latter heads of states have become victims to non-compliance with respect to immunity from the International Criminal Court (ICC). Thus the effect of this paper would be to help the reader understand as why this position is being articulated and the effects that have been created as a result of this disregard.

The Dissertation, serves to uncover underlying reason for this cause and further made recommendations as to how one would be able to solve this imbalance created by the Rome Statute, taking into account, International Customary Laws.

Table of Contents **Page**

Chapter One:

Introductory Analysis to the Concept of Immunity

1.1 Introduction

This dissertation is an attempt to provide the readers with insight into the paradigm shift that is currently taking place in Africa, more specifically in Northern Africa as well as Non-Western states. Many of the States belonging to these geographical areas have been enveloped by war, political activism, religious tension, social inequalities and economic woes. Recent political developments have shown there to be rebellious action in the north, where the nationals of mostly Islamic nations, have decided to revolt against their leaders. Can this be construed to be acts vigilantism, heroism, treason, or reasonable acts of the citizens of a sovereign Country aimed at achieving regime change?

It is within this context that the concept of concept of “immunity” which is enjoyed by the State leaders in their capacity as rulers of the nations shall be assessed. This immunity possessed by such leaders shall be construed alongside the rights of individuals acting in cahoots with one another, so as to facilitate and implement regime change albeit through less passive means. The question shall thus be asked when such conduct constitutes an act of treason and finally where does one draw the line between the interests and basic human rights of the nationals, and the will of the leader acting in his representative capacity of the state. When does he lose his immunity and become answerable to the citizens of the world and is there a selective application of this right to immunity when considered in the framework of international governance structures such as the International Criminal Court and the United Nations?

Having noticed the increased activism of individuals in what one could call politically volatile states the need to determine the climate under which such interference from international governance structures ensues, in addition to the implications of this involvement and the repercussions it has on both the state in which the violation occurs as well as the global arena and the general sentiment

that follows. The research methodology of this paper thus seeks to ascertain the aforementioned questions in addition to determining what exactly is needed on the part of African nations as well as Non-Western to effectively address and combat issues arising internally as well as identifying the general weaknesses within these organisations that precludes them from dealing with matters pertaining to political instability.

This dissertation thus looks at African political history and its development in relation to dealing with internal disputes and its international relations, the impact of international law on both these African and Non-Western states as well as the existing enforcement bodies and their implementation of the law, whether international or international customary law and the general competency of these afflicted states to handle matters internally and sine Western interference. The nature of these bodies of law shall also be assessed in the context of what they ought to represent in juxtaposition to how it is enforced and applied at present.

A number of journal articles, academic texts, newspaper and news sources were consulted in pursuit of formulating arguments contained in this dissertation and expounding upon concepts so as to create clarity on the matter of immunity and the various international governance structures that are required to execute mandates as enshrined in their regulatory instruments. The ultimate conclusion arrived at in this dissertation is based primarily on the argument advanced by Malanczuk[1] in that these Western countries which act as the controllers and principals of international governance structures are often motivated by their self-interests and as such take on a stance wherein which there is a discretionary power to invoke sanctions and exert pressures on countries that fall outside their geo-political realm. The repercussion of this is that there has been a disassociation from any affiliation to these entities on the basis that these Non-Western states feel that they "are not bound by the rules which they did not help create."[2] Finally the paper asserts the contention that in order to forge political independence from these self-serving governance structures, African and Non-Western states need to rely on and create their own regulatory bodies to

[1] *1997, 28*
[2] *P. Malanczuk,"Akehursts Modern Introduction to International Law" 7th ed 28. 1997*

effectively handle and deal with problems arising within the countries internal governance structures.

Chapter 2
Historical Backgrounds of African Governance and its Overall Efficacy.

2.1 Case Study on African States affected by ICC Rulings

In order for us to understand the purpose of this dissertation, we would need to understand what gave rise to it. Below is a few case studies that I am of the view would help the reader understand the position of African leaders with regards to the ICC and the role that it has played and continues to play in terms of International Law. Further it also seeks to exhibit how the ICC has and continues to disregard International Customary Law that is afforded to all states. Further the author of this dissertation by illustrating the cases below, intends to bring the attention of the reader to the fact that the Rome Statue that created the ICC has provisions that contravene International Customary Law, which is basically the respect of sovereignty of States as well the Immunity extended to Heads of States. African States have been on the receiving end of ICC rulings as well as arrest warrants being issued against them. We will now take a closer look at these cases.

2.2 Case Study: Libya[3]

"On June 27, ICC judges issued arrest warrants for Libyan leader Muammar al Gadhafi, his son Sayf al Islam al Gadhafi, and intelligence chief Abdullah al Senussi, having found "reasonable grounds" to believe that they are responsible for crimes against humanity, including murder and "persecution." In his application for the warrants, filed on May 16, the Prosecutor alleged that Gadhafi "conceived and implemented, through persons of his inner circle" such as Sayf al Islam and Al Senussi, "a plan to suppress any challenge to his absolute authority through killings and other acts of persecution executed by Libyan Security Forces.[4]

They implemented a State policy of widespread and systematic attacks against a

[3] *CRS Report RL33142, Libya: Unrest and U.S. Policy, by Christopher M. Blanchard*
[4] *CRS Report RL33142, Libya: Unrest and U.S. Policy, by Christopher M. Blanchard*

civilian population, in particular demonstrators and alleged dissidents."[5] The ICC Prosecutor has subsequently suggested he may seek additional charges related to sexual assault. Some observers have argued that the warrants make it less likely that Gadhafi will agree to relinquish power, while others argue that they could deter further abuses.[6] The Gadhafi government has denied accusations of rights abuses.

On February 26, 2011, U.N. Security Council Resolution 1970 referred the situation in Libya since February 15, 2011, to the ICC. This action provides the ICC with jurisdiction over war crimes, crimes against humanity, and genocide occurring in Libya since that date, even though Libya is not a state party to the Court. The United States voted in favour of the resolution, the first time it has done so in referring an issue to the ICC. The Prosecutor indicated in opening a formal investigation in March that he would focus on the role of the government and security forces in on-going violence, but warned that members of armed opposition groups could also be held criminally liable for abuses.[7]

ICC President Sang-Hyun Song suggested in April that the Libya investigation had placed significant pressure on the Court's budget, which could potentially impede the Court's ability to advance its existing prosecutions or examinations of new situations.[8]

2.3 The Kenyan Situation[9]

The Prosecutor's request to open an investigation in Kenya was approved by ICC judges in March 2010. Kenya is a party to the ICC, but it was the first instance in which ICC judges authorized an investigation based on a recommendation from

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[5] *ICC Pre-Trial Chamber I, Office of the Prosecutor, Situation in the Libyan Arab Jamahiriya: Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif al-Islam Gaddafi and Abdullah al-Senussi, May 16, 2011.*

[6] *See CRS Report RL33142, Libya: Unrest and U.S. Policy, by Christopher M. Blanchard.*

[7] *CRS Report RL33142, Libya: Unrest and U.S. Policy, by Christopher M. Blanchard*

[8] *Aaron Gray-Block, "Interview-ICC Budget 'Under Pressure' to Fund Libya Probe," Reuters, April 14, 2011.*

[9] *The case study of Kenya is a reflection of the situation before the conviction, the purpose of which is to establish a link between the acts of the ICC and the undermining of African and developing countries' leaders. ICC Office of the Prosecutor, Factsheet: Situation in the Republic of Kenya, December 15, 2010. Herewith, the president of the ICC is suggesting that with the continued hardship of getting any enough evidence in Libya, which could prove the claims that the ICC has alleged against the then President of the country, M. Gaddafi. Further more, what he is further stating is that due to a lack of finance, it is becoming increasingly hard for them to continue with the case.*

the Prosecutor, as opposed to a state referral or U.N. Security Council directive. The investigation was related to post-election violence in Kenya in 2007-2008, in which over 1,000 individuals were killed, hundreds of thousands displaced, and a range of other abuses, including sexual violence, allegedly committed. A government of national unity was formed following the disputed elections, and the issue of accountability for abuses has remained a sensitive one in Kenyan politics. The Prosecutor contends that high-ranking officials planned and instigated large-scale abuses, a view supported by independent investigations into the violence.[10]

On December 15, 2010, the Prosecutor presented two cases, against a total of six individuals, for alleged crimes against humanity. The Prosecutor applied to ICC judges for summonses, rather than arrest warrants, stating that summonses would sufficient to ensure the suspects' appearance before the Court.[11] Judges issued the summonses in March 2011, and in April the six suspects appeared voluntarily before the court, where they each denied the accusations against them.

The suspects named in the first case are William Ruto, Member of Parliament and former Minister of Education; Henry Kosgey, Minister of Industrialization; and Joshua Arap Sang, a radio journalist. They are each accused of three counts of crimes against humanity, related to murder, forcible population transfers, and "persecution." Those named in the second case are Francis Muthaura, head of the public service, secretary to the Cabinet, and chairman of the National Security Advisory Committee; Uhuru Kenyatta, deputy prime minister and minister of finance (and the son of Kenya's founding leader Jomo Kenyatta); and Mohamed Hussein Ali, former commissioner of the Kenyan police. They are each accused of five counts of crimes against humanity, related to murder, forcible population transfers, rape, "persecution," and "other inhumane acts."[12]

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[10] For example, the state-funded Kenya National Commission on Human Rights has alleged that senior government ministers were perpetrators of violence, including Higher Education Minister William Ruto and Finance Minister Uhuru Kenyatta. Both have denied the allegations, and Ruto accused the Commission of bribing witnesses. See Reuters, "Kenyan Ex-Minister Says Meeting with ICC a Success," November 8, 2010.

[11] ICC Office of the Prosecutor, Factsheet: Situation in the Republic of Kenya, December 15, 2010.

[12] ICC, "Situation in the Republic of Kenya," accessed on July 20, 2011.

The suspects in the first case are associated with Prime Minister Raila Odinga, while those in the second case are associated with President Mwai Kibaki. The prosecutions, which have targeted the upper echelons of political power, are an extremely sensitive issue in Kenya with potential implications for the country's stability, inter-ethnic relations, and elections scheduled for 2012. The ICC Prosecutor appeared to acknowledge this sensitivity by naming suspects of different ethnic groups and political loyalties.

Polls indicate that a majority of Kenyans support ICC prosecutions over domestic trials.[13] Still, the case has sparked a backlash within Kenya's political class despite earlier support for ICC involvement. Although Odinga has repeatedly encouraged the ICC to pursue its cases (which are widely viewed as more detrimental to his potential political rivals than to him), President Kibaki has criticized the ICC cases and called for trials to be held within Kenya instead. To date, none of the suspects targeted by the ICC have been charged in Kenya, though public prosecutors reportedly questioned them in July 2011.

In December 2010, parliamentarians passed legislation urging Kenya to withdraw from the Court. (According to some legal analysts, a withdrawal would not necessarily preclude ICC jurisdiction over crimes committed during the period when Kenya was a state party.) Efforts by Kenya's government and the African Union (AU) to push for a deferral of ICC prosecutions by the U.N. Security Council in the interest of peace and security have been unsuccessful to date. Kenyan government legal filings to ICC judges that challenge the cases' admissibility have been similarly unsuccessful.

The Kenyan government initially pledged to cooperate with ICC actions, although senior officials have been accused by some observers and the ICC Prosecutor as attempting to stonewall investigations. Some Kenyans are reportedly concerned that prosecutions could stir up the same ethnic tensions that led to the post-election turmoil, while others fear that a lack of prosecutions could lead to

[13] *Reuters, "Majority of Kenyans Back Trials at Hague ICC—Poll," September 22, 2010; Reuters, "Kenyans Want ICC Suspects Out of Public Office—Poll," December 18, 2010; Reuters, "Kenyan Support for Local Violence Trials Slips- Poll," April 5, 2011.*

future electoral violence.[14] Other concerns center around the protection and relocation of witnesses and victims, who have already reportedly been subjected to intimidation and threats.[15] In August 2010, Kenya was criticized by ICC advocates when it welcomed Sudanese President Bashir (see "The Case Against Bashir," below) to a celebration of the country's adoption of a new constitution.

2.4 The Sudan Situation [16]

"ICC jurisdiction in Sudan was conferred by the U.N. Security Council, as Sudan is not a party to the Court. U.N. Security Council Resolution 1593, in 2005, referred the situation in Darfur, dating back to July 1, 2002, to the ICC Prosecutor.[17] The Resolution was adopted by a vote of 11 in favour, none against, and with four abstentions—the United States, China, Algeria, and Brazil. While Sudan is not a party to the ICC and has not consented to its jurisdiction, the Court argues that the Resolution is binding on all U.N. member states, including Sudan".[18]

As per above dicta, one may draw the following conclusion as to the situation in Sudan. The Sudanese Government has not ratified the convention of Rome, thus are not bound to it or by its regulations. However the United Nations Security Council decided that notwithstanding the fact that Sudan is not a member of the Rome State, it would still be held to be bound by the provisions of the said document, by virtue of Sudan's membership to the United Nations.

In addition to the above-mentioned, one may clearly determine the undermining of Western States and their instruments that they create over the leaders and

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[14] Reuters, "Most Kenyans Want Violence Suspects Tried by ICC," July 18, 2009; Reuters, "Kenya Keeps Options Open on Violence Court," July 30, 2009.

[15] Andrew Teyie, "Kenya: Ocampo Witnesses Fear Leak," Nairobi Star, April 21, 2010; AP, "International Court Prosecutor Says 'Bribed' Witnesses Will Not Testify in Kenya Violence Case," November 17, 2010; Nairobi Star, "Government Explains Kimeli Death to Ocampo," May 23, 2011.

[16] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, S/2005/60, January 25, 2005.

[17] See U.N. Press Release, "Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court," SC/8351; and U.N. Press Release, "Secretary-General Welcomes Adoption of Security Council Resolution Referring Situation in Darfur, Sudan to International Criminal Court Prosecutor," March 31, 2005, SG/SM/9797- AFR/1132.

[18] Frederic L. Kirgis, "U.N. Commission's Report on Violations of International Humanitarian Law in Darfur: Security Council Referral to the International Criminal Court," American Society of International Law Insight Addendum, April 5 2005.

countries of the developing world. One may determine this, by looking at the facts that have said thus far.

USA is not a member of the ICC and only plays an advisory role for the ICC; in addition to that, they have an Article 98 agreement, which they established as a means to further their agenda.[19] However with the events that have passed including the war in Afghanistan 2001, and the subsequent one war in Iraq, both wars having been carried out unlawfully and admittedly after a commission into the war, having found the promoter of such war[20] guilty of failing to adhere to the required protocol on engaging war.

The fact that the ICC raised no objections as to this conduct shows a double standard that it shows to the African leaders. Where African leaders protected from prosecution either criminal or civil by virtue of immunity from prosecution, as such, any conduct carried out by these African leaders is not seen by the ICC to be valid enough to validate their immunity.

"The Security Council had previously, in September 2004, established an International Commission of Inquiry on Darfur under Resolution 1564, maintaining that the Sudanese government had not met its obligations under previous Resolutions.[21] In January 2005, the Commission reported that it had compiled a confidential list of potential war crimes suspects and "strongly recommend[ed]" that the Security Council refer the situation to the ICC."[22]

"Following the Council's referral, the ICC Prosecutor received the document archive of the Commission of Inquiry and the Commission's sealed list of individuals suspected of committing serious abuses in Darfur, though this list is not binding on the selection of suspects. The Office of the Prosecutor initiated its own investigation in June 2005. The Sudanese government also created its own

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[19] By agenda, the author of this paper, attempts to argue that, the agenda of the West, is that which they have set out to manipulate mostly, African leaders into thinking that their style of governance is the best, secondly, to lay claim to the resources that are in surplus and lastly to enhance their control over African leaders, by placing their puppets to run the African Governments and allow USA free pass. (Please take note, these are the ideas of the author and may not necessarily represent the true reflection, but that which can be analyzed by looking at the facts.)

[20] President Bush on both occasions.

[21] S/RES/1564 (2004), September 18, 2004.

[22] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, S/2005/60, January 25, 2005.

special courts for Darfur in an apparent effort to stave off the ICC's jurisdiction; however, the courts' efforts were widely criticized as insufficient."[23]

2.5 The U.S. Position on U.N. Security Council Resolution 1593

In statements made in July and September 2004, respectively, Congress and the Bush Administration declared that genocide was taking place in Darfur.[24] The Administration supported the formation of the International Commission of Inquiry for Darfur.[25] However, the Bush Administration preferred a special tribunal in Africa to be the mechanism of accountability for those who committed crimes in Darfur. It objected to the U.N. Security Council referral to the ICC because of its stated objections to the ICC's jurisdiction over nationals of states not party to the Rome Statute.[26] Still, the United States had at one time supported a version of the Rome Statute that would have allowed the U.N. Security Council to refer cases involving non-states parties to the ICC, but would not have allowed other states or the Prosecutor to refer cases.

The United States abstained on Resolution 1593 (which is not equivalent to a veto in the Security Council) because the Resolution included language that dealt with the sovereignty questions of concern and essentially protected U.S. nationals and other persons of non-party States other than Sudan from prosecution.[27] The abstention did not change the fundamental objections of the Bush Administration to the ICC. At the same time, the Bush Administration supported international cooperation to stop atrocities occurring in Darfur.[28]

2.6 Darfur Rebel Commanders

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[23] Human Rights Watch, Lack of Conviction: The Special Criminal Court on the Events in Darfur, June 2006; U.N. News, "Sudan's Special Court On Darfur Crimes Not Satisfactory, UN Genocide Expert Says," December 16, 2005; Sudan Tribune, "Govt Fires Darfur War Crimes Prosecutor Amid Talk of 'Transitional Justice,'" October 18, 2010. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, S/2005/60, January 25, 2005.

[24] Concurrent Resolution Declaring Genocide in Darfur, Sudan (H.Con.Res. 467 [108th], July 22, 2004; Congressional Testimony by then-Secretary of State Colin Powell, September 9, 2004.

[25] U.N. Press Release, "Security Council Declares Intention to Consider Sanctions to Obtain Sudan's Full Compliance with Security, Disarmament Obligations on Darfur," SC/8191, September 18, 2004.

[26] U.S. Mission to the United Nations (USUN) Press Release #055, "Explanation of Vote on the Sudan Accountability Resolution," Ambassador Ann W. Patterson, March 31, 2005.

[27] See Paragraph 6 of Security Council Resolution 1593; also see Kirgis, Op. Cit

[28] USUN Press Release #055, Op. Cit.; USUN Press Release #229, "Statement on the Report of the International Criminal Court," Carolyn Willson, Minister Counselor for International Legal Affairs, November 23, 2005.

In December 2007, the ICC Prosecutor announced the opening of a new investigation into the targeting of peacekeepers and aid workers in Darfur. In November 2008, the Prosecutor submitted a sealed case against three alleged rebel commanders in Darfur whom he accused of committing war crimes during an attack on the town of Haskanita on September 29, 2007. Twelve African Union peacekeepers were allegedly killed and eight injured in the attack.[29]

"In May 2009, ICC pre-trial judges issued a summons to one of the three suspects, Bahar Idriss Abu Garda, to appear before the Court.[30] Abu Garda reported to The Hague voluntarily, where he denied the accusations of involvement in the Haskanita incident. In February 2010, ICC judges declined to confirm the Prosecutor's case against Abu Garda, contending that there was insufficient evidence to establish that he could be held criminally responsible for the attack on peacekeepers."[31]

In June 2010, two other rebel commanders sought by the Prosecutor, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, voluntarily surrendered to the Court. Their names had not previously been made public. Banda, a former military commander in the rebel Justice and Equality Movement (JEM), and Jerbo, a former leader in the Sudan Liberation Movement (SLM)-Unity faction, each face three counts of war crimes related to "violence to life," intentionally directing attacks against a peacekeeping mission, and pillaging.[32] On March 7, 2010, ICC judges confirmed the charges against Banda and Jerbo, paving the way for a trial.

2.7 The Case Against Bashir

On March 4, 2009, ICC judges issued an arrest warrant for Sudanese President Omar Hassan al Bashir. The warrant holds that there are "reasonable grounds" to believe Bashir is criminally responsible for five counts of crimes against humanity

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[29] ICC Office of the Prosecutor, "Attacks on Peacekeepers Will Not Be Tolerated; ICC Prosecutor presents evidence in third case in Darfur," November 20, 2008. The peacekeepers were serving under the African Union Mission in Sudan (AMIS), which was later folded into the U.N.-African Union Mission in Darfur (UNAMID).

[30] The ICC judges decided that an arrest warrant was not necessary to ensure Abu Garda's appearance before the Court.

[31] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, S/2005/60, January 25, 2005.

[32] ICC, "Case The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus."

and two counts of war crimes, referring to alleged attacks by Sudanese security forces and pro-government militia in the Darfur region of Sudan during the government's six-year counter-insurgency campaign.[33]

The ICC warrant states that there are reasonable grounds to believe attacks against civilians in Darfur were a "core component" of the Sudanese government's military strategy, that such attacks were widespread and systematic, and that Bashir acted "as an indirect perpetrator, or as an indirect co-perpetrator."[34] In his application for an arrest warrant, filed in July 2008, the ICC Prosecutor affirmed that while Bashir did not "physically or directly" carry out abuses, "he committed these crimes through members of the state apparatus, the army, and the Militia/Janjaweed" as president and commander-in-chief of the Sudanese armed forces.

The arrest warrant is not an indictment; under ICC procedures, charges must be confirmed at a pre-trial hearing. The decision to issue a warrant is expected to take into account whether there are reasonable grounds to believe that a suspect committed crimes as alleged by the Prosecutor and whether a warrant is necessary to ensure the suspect's appearance in court. Although many domestic legal systems grant sitting heads of state immunity from criminal prosecution, the Rome Statute grants the ICC jurisdiction regardless of official capacity.[35]

Human rights organizations hailed the warrant, the first issued by the ICC against a sitting head of state, as an important step against impunity. Many governments, including France, Germany, Canada, the United Kingdom, and Denmark, and the European Union, called on Sudan to cooperate. Reactions by African and Middle Eastern governments were more critical, with many condemning the ICC or calling for the prosecution to be deferred. The governments of Russia and China also expressed opposition.

The ICC urged "all States, whether party or not to the Rome Statute, as well as

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[33] See CRS Report RL33574, Sudan: The Crisis in Darfur and Status of the North-South Peace Agreement, by Ted Dagne.

[34] ICC Pre-Trial Chamber I, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, March 4, 2009.

[35] Rome Statute, Art. 27. International legal experts are, however, divided as to whether the Rome Statute waives "procedural" immunity for sitting heads of state—i.e., protection from arrest while traveling in official capacity—under customary international law.

international and regional organizations," to "cooperate fully" with the warrant.[36] However, most observers agree that there is little chance of Bashir being arrested in Sudan. One analysis noted that while Bashir may risk arrest if he travels overseas, "no one expects Sudan to hand over Bashir, who has been executive ruler of the country for more than 15 years, absent major political changes in the country."[37]

Sudanese government officials have rejected the ICC's jurisdiction, though some legal experts argue that Sudan is obligated as a U.N. member state to cooperate because the warrant stems from a U.N. Security Council resolution under Chapter VII.[38] In June 2011, the ICC Prosecutor argued in an appearance before the Security Council that "crimes against humanity and genocide continue unabated in Darfur" at Bashir's behest.[39]

Colonialism, oppression and the suffering of countless millions have long plagued the history of African politics. Upon the dawning of democracy in many African States, a realisation emerged that in order for economic, political and social interests to be further advanced, there was an intrinsic need for these newly independent States to conform to and submit themselves with the dictates of International Law as well as International Customary Law. Not only would this expose the Countries themselves to increased protection and development, but also it made them partners in the global communities.

This notion however, of being part and parcel of the global community became increasingly tainted in many States, as there was the argument that the rules of International Law operated in such a manner that it sought to only serve the interests of the 'Western Nations', to the expense of the African and Non-Western fellows. It must be had that when reference is made to these "western states" it implies not only reference to the geographic area in which these states

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[36] ICC press release, "ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan," March 4, 2009.
[37] P. Worship, "No Quick Way to Enforce ICC Warrant for Bashir," Reuters, March 5, 2009.
[38] The Sudanese government signed the Rome Statute on September 8, 2000, but did not ratify it. On August 26, 2008, Sudan notified the Secretary-General of the United Nations, as depositary of Rome Statute of the International Criminal Court, that Sudan "does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000." (Reference: C.N.612.2008.TREATIES-6
[39] AFP, "Bashir Committing New Crimes in Darfur: Prosecutor," June 8, 2011.

are located but also the political stance they adopt, namely the liberal democratic tendencies which they seek to propagate on other nation states. Owing to this exertion of power on weaker states, the common belief is that the demands of International Law are to a large extent often outmoded and unduly restrictive on States that are unable to exercise much influence in the global arena.[40]

It must be noted that to a large extent economic interests also influence the position towards International Law. Many States have strong feelings of past oppression and exploitations, and to a certain extent when the demands of International Law, and the exercise of the mandates contained therein often impinge upon the rights of the African States, there is an increased resistance towards its acceptance and application. There is therefore the general view that in light of this, International Law, and particularly the conventions subscribed to, such as the Rome Convention seeks to diminish the role of Non-Western States in relation to its western counterparts. This is so owing to the fact that when the amount of cases dealt with by institutions such as the International Criminal Court are dealt with, and assessed, the striking conclusion is that hitherto the court has opened cases arising solely from African States, involving precisely 25 African leaders from six different African States, including: Libya, Kenya, Sudan (Darfur), Uganda (the Lord's Resistance Army, LRA), the Democratic Republic of Congo, and the Central African Republic.[41]

2.8 Primary problem with the rejection of International Law

As a general rule, compliance with International Conventional Law creates an obligation on signatories to comply with the tenants of the international legal instrument. The effect of this is that such law essentially amounts to a form of social and economic regulation, and any State that violates such an International obligation is responsible for the commission of a wrongful act.[42] The problem lies herein, a State cannot change the demands of International Law without breaking it, and even where this is done, it is done with a great sense of reluctance owing

[40] *Malanczuk "Modern Introduction" 1997 29.*
[41] *Arieff A, Browne M. et al International Criminal Court Cases in Africa: Status and Policy Issues 1 July 22 2011.*
[42] *Malanczuk "Modern Introduction" 1997 3.*

to the fact that many States have this relationship of reliance on Countries and further to that just a general lack of political will. However there are certain instances wherein, which we find African States take a collective stance against the dictates of International Law, in pursuit of their own collective ambitions. [43]

One such example of this was recently in August 2011, when multiple African leaders denounced the war on Libya collectively arguing on the basis that there was a misuse of the United Nations Security Council and further to this that they were guarding against the "re-colonisation of Africa".[44] Additionally South Africa and several other African Countries took a stand against the decision taken by the United Nations Security, for the implementation of the 'no-fly-zone' over Libya, to which I am of the opinion that it was done to the prejudice of the African State. The Founding President Dr. Sam Nujoma condemned the Western Imperialist Countries' War of Aggression against the people of Libya and their Sovereign State, describing the continued bombings as a crime against humanity. The Founding President further reiterated: "…that Africans must be on full alert as the imperialist Countries were waging wars of aggression in Asia and Africa for reasons only known to themselves"[45]

The example set out is indicative of the fact that there is an increased unwillingness to submit to the decrees of International Law where there is the sentiment that Africans as a whole are being exploited by their Western counterparts or where it has emerged that there is such a tendency to continually only prosecute African or other non western leaders. Owing to this sentiment, one can therefore safely assume that there is increased disgruntlement with the agents of International Law, or rather the Countries that exercise the most influence whether be it in the economic or political sphere and their treatment of other nations that perhaps do not occupy this same status.

There has been disgruntlement from some Western Nations as well, who

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[43] *Malanczuk "Modern Introduction" 1997 3.*
[44] *The Namibian 2011 August 24 Eminent Africans denounce war on Libya. Retrieved 5 September. Available on http://allafrica.com/stories/201108241083.html*
[45] *Swapo Party. (2011) Retrieved 5 September. Available on http://www.swapoparty.org/chavez_backs_ghadafi.html*

expressed what they felt on the War on Libya and what it would mean should they have been involved in such a campaign. The following is a Statement made by the German foreign Minister, Mr. Guido Westerwelle whom is noted to be a fierce opponent to the strikes on Gaddafi's forces as well as military intervention in Libya. Guido Westerwelle held that: "Germany has a strong friendship with our European partners. But we won't take part in any military operation and I will not send German troops to Libya." "The military solution seems so simple but is not so simple. It's risky and dangerous." The German foreign minister argued that although there is a general concern for the freedom movements taking place in North Africa and the Arab world, it ought to be conducted in such a manner that "freedom movements are to be strengthen and, not weakened".[46]

It is quite apparent from the above view that there are states, such as Germany, which do indeed understand the need for countries enveloped by political turmoil to find means to address these problems. The need for political redress of tensions in states is indeed one that is understood and in fact advocated for. It must be however be fostered and advanced under the right conditions. The question however is ultimately who dictates that which is acceptable and when the "right conditions" are being fostered. This question is particularly vexing as we have seen such as in the case of Libya, nationals took to the streets to protest and demand for regime change, the Western world however resorted to military intervention and justified this as a means of securing peace and stability. The question must be asked however, why other alternatives to military intervention could not be resorted, mechanisms which were less invasive yet equally effective. The underlying reason for the institution of these severe mechanisms can perhaps only be attributed to the desire to acquire some interest within the invaded country.

Owing to this abrasive invasion and selective involvement in the affairs on non-western states there has been a natural disposition for many of these states to deviate from compliance with international obligations. Naturally, there are many

[46] *Harding, Luke. 2011 March 17 Germany won't send forces to Libya, foreign Minister declares. Retrieved on September 7 2011. Available on* http://www.guardian.co.uk/world/2011/mar/17/germany-rules-out-libya-military?intcmp=239 .

advantages that stem from the compliance with these International obligations, they for example confer upon nations a degree of stability in the economic sense, perhaps also providing some political security from more aggressive neighboring Countries, and more so they are often aimed at the protection of fundamental rights. As a result of these benefits it is indeed understandable why there is a tendency to accept and become signatories to these obligations, however the problem arises in the reasons for rejection of such laws. As indicated above, the disillusionment with International Law comes from the opinion that this supposed beneficial and protective tenant of the Law is being used primarily against the interests of Non-Western States. It is therefore clearly apparent that the recent denunciation of the Acts of Western States serves as an attempt address and reject the inconsistent application of International Law, and its continued abuse against its Non-Western subjects.

2.2.1 The Rule of Law and International Criminal Law

The leading academic in constitutional democracy AV Dicey has often formulated the concept pertaining to "rule of Law" in the most simplified terms namely that the Law is the supreme regulatory body, and no individual is above it. Further to this, there is an expectation that the concept of justice is given due regard, in the application of procedures and the administration of the Law. Dicey further holds that it is pivotal that there be limitations on discretionary powers, so as to prevent the abuse of authority and lastly that there be an underlying thread of morality which ought to flow through all legal systems.[47] These notions are an intrinsic and inherent feature of many of the prescriptions of International Law that States are committed to on a national basis. Ideally, the formation provided by Dicey serves as the ideal representation of what any legal system ought to be like, and the nature of the values it should strive to advocate. It is with this in mind that International Criminal Law shall be assessed as it stands, in determination of whether these ideals and notions are indeed propagated in its application.

The Judge President of the International Criminal Court (ICC) Sang-Hyun Song

[47] *AV Dicey "An Introduction to the Study of the Law of the Constitution" 8th ed (1915).*

recently remarked: "for justice to prevail, we need to develop the National and International elements in parallel".[48] The clear indication this provides is that even on the International plain there is a need to take cognizance of the rule of Law and furthermore sees to its implementation. Thus when dealing with International Law in the context of specific crimes, there is the demand that every offence prescribed in treaties or custom be implemented in a State's national legislation or Constitutional Instrument. The general rule is that a State that does not properly incorporate the treaties principles or omits to give effect thereto will generally be held liable for a Contravention thereof.[49] The above statement is analogous to the sentiments of Bantekas & Walsh who held that the objective of International Criminal Law can be said to pursue three main aims, namely to "prevent, prosecute and punish offenders and that these objectives must be pursued in such a light that they are beneficial" to all persons.[50]

2.2.2 Enforcement of International Criminal Law

The problem however arises where we have a supposed infringement to a fundamental right of persons that perhaps conflicts with the demands of the UN Charter, which for example assert that every individual has certain inalienable rights and legally enforceable rights protecting him/her against State interference and abuses by the government. [51] The question however arises at what point do you determine when these International forces are to intervene where such abuses ensue and secondly, to what extent is this intervention supposed to take place? These questions are of particular importance because as mentioned above, there is a need to encourage freedom movements and ensure that they occur in conditions with minimal abuses. The autonomy and sovereignty of the state must at all times be respected, however there is a fine line between allowing such freedom movements to freely propagate their agendas and between allowing foreign intervention to take place for the purpose of advancing ideals of freedom or serving self-interests and using the guise of "assistance" to

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[48] *San Hyung Song. (2011) Retrieved 6 September 2011. Available on http://www.icc-cpi.int/NR/exeres/FF221F70-92A9-495A-8185-CEE061B3EA48.html*
[49] *I. Bantekas, S. Walsh "International Criminal Law" 2ed 2003 7.*
[50] *I. Bantekas, S. Walsh "International Criminal Law" 2ed 2003 10.*
[51] *Article 1 Charter of the United Nations and Statute of the International Court of Justice.*

further socio-political self interests. In the Namibian context for example the South African government clearly violated the rights of Namibians during the Apartheid era, the ICJ went as far as saying:

"… to establish and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent, or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter."[52] Thus the primary objective of this chapter is as such to determine when there are contraventions of international legal prescriptions, and the determination of at which point intervention is needed. It is somewhat apparent owing to the above dicta [53]that the investigation, discussion and condemnation of human rights in a State is intrinsically linked to the Sovereignty of that State." "And although the Western States have been accused of "double standards" in their application of the Law, one clear observation can be made, this is that these international crimes warranting intervention arise where there has been a serious breach of an International obligation which bears the essential importance of safeguarding the most basic and pivotal rights of human beings.[54]"

In the proceedings chapters regard shall be placed on whether this intervention is aimed at the preservation and safeguarding of fundamental rights, or whether they have been affected with the purpose of pursuing their own political, military and economic objectives. Interestingly, in the case of Nicaragua v USA the International Court of Justice held that the "use of force could not be the appropriate method to ensure respect" for human rights.[55] The authorization of the UN is always demanded, however the interesting issue arises when one considers the controlling agents behind the UN and the interests those States perhaps have in a particular Country.

2.2.3 Enforcement Bodies

[52]*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 – Advisory Opinion of 21 June 1971 – General List No. 53 1970–1971 para 57.*
[53] *Namibia ICJ case 1971*
[54] *Malanczuk "Modern Introduction" 1999 220.*
[55] *ICJ 1986 para 135.*

In order for the prescriptions imposed by International Law to be of effect and force, naturally there is a need for bodies aimed at enforcing its policies and laws. The enforcement of the rules of International Law can take place in essentially two manners: direct and indirect. In the former we are often confronted with the usual prosecutorial and judicial action against persons whom are suspected of alleged International Criminal Acts. The problem with this enforcement mechanism however is that the Courts, for example the ICC can only exercise its jurisdiction over a Country which consents thereto, unequivocally. This problem manifests itself when one considers who the signatories are to the Courts Jurisdiction. There are 117 Countries that are States Parties to the Rome Statute of the International Criminal Court. Out of them 32 are African States, 16 are Asian States, 18 are from Eastern Europe, 26 are from Latin American and Caribbean States, and 25 are from Western European and other States.[56] Interestingly the most influential Countries in the contexts of political and economic strength are not party thereto, these include China and the USA most notably. Yet these two Countries exert the most influence in terms of power in the ranks of the Security Council.

The political year of 2011 brought forth many uprisings and protests towards existing governing structures. These incidents took place in countries such as Libya and Egypt and were directed at the institution of reform within governance structures. It is interesting to note that these countries wherein which such uprisings ensued were subject to interference of Western States in the form of military and political involvement. It is worth mentioning that these Countries under the greatest scrutiny of the Western World were not even signatories to the jurisdiction of the ICC. One must vigorously question the reason for this activism and enforcement of force against nations that are not part and parcel of the jurisdiction of the ICC and notwithstanding the 'guise of the protection of human rights' is indeed legitimate and honest as a means to go to war with these nations. Another element of direct enforcement that can be exercised is through the Municipal Courts of the Country however this channel is often used only once

[56] *International Criminal Court. Retrieved 6 September 2011. Available on* http://www.icccpi.int/Menus/ASP/States+partie/

tensions have ceased and secondly as a last resort.

It is worth construing the argument as to why these channels are not resorted to more easily as opposed to exerting external pressures on States by other nations. Naturally, and normatively speaking, this should be the channel that is explored first, and given the most precedent, thereafter, and only if the dictates of the Law really so demand external pressures and force can perhaps be implemented, but only as the last resort. Where immediate reliance is placed on the jurisdiction of outside courts, and International courts, one immediately allows for the discharge of the States obligation in the pursuit of the protection of rights, where it is indeed felt that there is a deviation from that which is deemed acceptable and permissible in any State.

In the absence of International tribunals States have found themselves to reach a minimum requirement of cooperation in International criminal matters, this arises when dealing with the issue of extradition. This mechanism supplements the indirect enforcement mechanisms by enabling a more willing and better-equipped jurisdiction to handle the issue. However as we have seen over the last few months, there is a general unwillingness to extradite “these alleged offenders”, and perhaps there is good reason for this, as will be shown there is the inconsistent application of force on States, especially those which do not easily submit themselves to the policies and tendencies of the West. [57]

[57] *I. Bantekas, S. Walsh “International Criminal Law” 2ed (2003) 9, 10.*

Chapter 3

3.1 Immunity from Prosecution and the issue of Jurisdiction

Under this chapter, the concept of immunity as encapsulated in terms of the Rome Statute shall be discussed. This chapter will also look at the Statutes provisions that protect foreign leaders and the extent of this immunity, in addition to focusing on the limitations that are imposed and determining whether these limitations contravene the Domestic Immunity Act of the respective Country. In addition to the above, the extent of Western domination on Non-Western Countries shall be ascertained, with the ultimate conclusion indicating that the ICC is an institution serving only as a neo-colonialist institution, seeking to only further its on ambitions at the expense of Non-Western States.

3.2 Understanding the concept of jurisdiction

The concept of jurisdiction must be understood in light of the Lotus case.[58] In terms of this case, a French ship, the Lotus collided with a Turkish ship. The Turkish ship subsequently sank and a number of crewmembers lost their lives. The Lotus picked up a few survivors and put them onto a port in Turkey. The officer on watch on the Lotus was tried and convicted of culpable homicide. France objected to the exercise of Turkeys jurisdiction and the dispute was subsequently referred to the Permanent Court of International Justice. In its judgment the court held that: "…a State may not exercise its power in any form in the territory of another State, unless there is a permissive rule to the contrary".[59]The court also reiterated the idea that International Law does not prohibit a State from exercising jurisdiction in its own territory.[60] Thus if we seek to understand the meaning of jurisdiction it relates to "the power of each State under International Law to prescribe and enforce its Municipal Laws with regard to persons and property."[61] States, on account of the concept of sovereignty have enjoyed the right to exercise criminal jurisdiction over offences perpetrated upon their territory. Since States are independent and legally equal, no State is

[58] *1927 PCIJ Reports, Series A no 10.*
[59] *para 18-19.*
[60] *para-19.*
[61] *I. Bantekas, S. Walsh "International Criminal Law" 2ed 2003 143.*

conferred the right to exercise jurisdiction over another State without its consent. In other words States may only exercise their power in their own States, and when an act takes place outside their sovereign territory, there needs to be consent in place before one State can exercise its authority over another.

Similarly, the event of Osama Bin Laden death that took place on Pakistani territory would be one example where a State (United States of America) violated an International caveat that all States shall respect the territorial boundaries of Nations and that any state which is in breach of this, would be punishable under International law and that it would be regarded as an act of War against that nation in that there is an outright disregard for firstly, the Constitutional Laws of the aggrieved nations and secondly, Public International law and lastly, International Customary law. Perhaps the argument could also be made that no state is to harbour criminals who pose threats to international peace and security however if this is the justification to invading a state and using military force in such a country then what purpose do the demands of international law and customary law serve. If acts of aggression can be justified based purely on the latter argument there is indeed no need for the compliance with and becoming party to bi-lateral and multilateral agreements affecting nation states. Notwithstanding the urgency and prompt reactions required in certain situations, there is nonetheless the need to also proceed with caution and respect the inherent right of a state to its sovereignty.

The issue causing much vexation in the case of the American invasion of Pakistan so as to attack Bin Laden is of concern because is America did not make any of its plans for such invasion known to the Government of Pakistan, or at least the President of the Country. Instead of making use of a diplomatic channel for which this matter could have been dealt with, they opted to do things in a matter excluding political negotiation and on their own accord. Herein lies the problem, which I have mentioned above, in that the ICC or any other international institution advocating for the respect of human rights and the internal laws of a country, does not frown upon such acts of Western Nations, which show an overt disregard for International law, and the violation of sovereignty of developing

Nations.[62]

The notion of the Sovereignty of States is sometimes undermined when one looks at the principle of "The Act of State Doctrine". In terms of this, the acts of a State, which have been carried out within its own territorial borders, cannot be challenged in the courts of other States. This is so even where there are violations of the International Law. Interestingly, American courts such as in the case of Underhill v Hernandez[63] have actively propounded this notion. One must look at this 'double standard' approach in light of all other case Law wherein which there have indeed been violations of the International Law in Countries, and the agents of those violations have been prosecuted, however the same such acts are exempt from prosecution in the American context, and as mentioned afore they are usually the leading forces behind the institution of forceful actions against "aggressor States." In light of this, the current events in Egypt that took place as well as in Tunisia, the US Government was the front running Country to come out and speak out against the violence in these nations equally they sporadically caused the violence in the one nation to spread to other nations. Thus the above arguments seek to establish the contention that there seems to be selective denunciation of the acts of states, which infringe and undermine the sovereignty of other states. Clearly, very little regard is given to the importance of sovereignty and the need to protect and not violate any countries autonomy.

3.3 Diplomatic Immunity and the International Criminal Court

It is trite that the acts of International crime committed within Africa are high on the ICC agenda. The Court is only permitted to take up the most serious crimes that are of grave concern to the International community. These include but are not limited to crimes of genocide, crimes against humanity and war crimes.[64]

Taking cognisance of the national enforcement mechanisms of States such as

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[62] *I. Bantekas, S. Walsh "International Criminal Law" 2ed 2003 143*
[63] *168 US 250 1987.*
[64] *J. Dugard "International Law a South African Perspective" 3rd ed 2005 179.*

their own courts the ICC is under an obligation to not supersede the prosecutions of persons guilty of International crimes" when the national justice system is capable of effecting its own control over the supposed aggressor.[65] This is known as the Principle of Complementariness.

It is must however be mentioned that often we find that the national justice system is not considered in the effecting of these enforcement measures and is merely side lined. It is even argued by Dugard that amnesty conferred upon an 'aggressor' by the national courts does not have extraterritorial effect; the implication this bears is that the ICC is not precluded from exercising criminal jurisdiction over such a person and instituting action against such an individual.[66] The argument generally promoted in justification of this is that it is in the interests of justice that such a route be followed, even if at the expense of diplomatic immunity.

Diplomatic immunity is made provision for in term of the Vienna Convention on Diplomatic Relations.[67] Diplomatic immunity from jurisdiction means that a court cannot entertain a suit against a person, it does however not mean that the individual is precluded from criminal liability. The immunity falls away as soon as the procedural bar allowing for that immunity has fallen away. The ICC must be given credit for its keen observation of this notion, and its protection of the right, which serves the fundamental purpose of, namely to allowing such foreign official to perform his functions of office while representing his Country without any impediments thereto.[68] Thus the effect of this is that once the person is removed from office, he or she may thereafter become subject to criminal prosecution for offences committed at any time in the past.

This credit which has however been given to the ICC must however not be stretched too far, if we look at the case of the dealings of the manner in which Saddam Hussein and his trial was dealt with. In the Hussein case, the leader was charged with the ethnic cleansing of the Kurds, the invasion of Kuwait, the killing

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[65] *S v Basson CCT 30/03 9 September 2005 para 127.*
[66] *J. Dugard "International Law a South African Perpsective" 3rd ed 2005 194.*
[67] *Vienna Convention on Diplomatic Relations 1961.*
[68] *I. Bantekas, S. Walsh "International Criminal Law" 2ed 2003 168.*

of political activists for a period of over 30 years, as well as the killing of religious leaders in 1974.[69] In terms of the UN Charter and the Rome Statute this would make for the textbook example of a matter, which could be dealt with by the ICC.

The basis for this position is that the ICC prefers to focus its efforts on the most serious crimes and on those who bear greatest responsibility for these crimes. Factors relevant in assessing gravity include: the scale of the crimes, its nature, the manner of its commission and its impact. The interesting fact however is that the Hussein's trial was not undertaken by the ICC but rather American courts, which cited the need for their interference in the matter on the basis that they feared prosecution would take too long if conducted under the auspices of the ICC. This is especially interesting in the sense that when one considers the impact of Hussein's crimes they affected multiple nations, including Kuwait and also the people of Iraq. The more natural deduction that can be drawn from the United States' unwillingness to have an ICC led prosecution is rooted on the basis that they were manipulating the ICC so as to once again serve their own interests and safeguard their own national secrets.

This argument is based on the contention that the United States was once pleasant with Saddam and having had shared intelligence with him against Ayatollah Khomeini's Iran, the aforementioned intelligence is one that the United States, would take to kind to it being known to all and also want aired in an International Court for prosecution of the culprits responsible for colluding with him.[70] The position adopted in this case is once again an indication that the notion of complementariness has been side stepped, however in this case, to promote and protect the interests of the US government. In order to provide clarity and depth on the above mentioned argument it must be said that we are dealing with an organization, the ICC which clearly had the competency and capabilities of dealing with the prosecution of an individual accused of human rights violations. The court thus clearly had the jurisdiction to handle the matter, however the prosecution was stripped from its hands so as to allow for the United States, a country not signatory to the Rome Convention to exact punishment on

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[69] *http://news.bbc.co.uk/2/hi/middle_east/3320293.stm (1 July 2007) Retrieved 06 September 2011*
[70] *http://articles.timesofindia.indiatimes.com/2007-01-01/india/27883575_1_icc-fair-trial-saddam-hussein Retrieved 06 September 2011*

the offender. The question should be why is the jurisdiction of the court being undermined to such an extent and why is the US being permitted to undertake matters that are clearly intended to be handled under the auspices of a court authorized to handle matters by its signatories? This question cannot be answered without bearing in mind considerations pertaining to the control the US and other Western States have over such entities and the extent to which they manipulate international law and practices so as to further their own powers and ambitions.

3.4. Cooperation with the International Criminal Court

As indicated above, there has been an increasing attitude of disillusionment within the policies and demands of International law. The effect of this attitude change is that the influence of the ICC will be greatly diminished if it continues to be a puppet of the dominating Western States. In that the ICC is seen by most African states to be an instrument that has been set up by the Western Nation, as a way of extending their dominance over these nations, namely African and other non-western states.[71] Furthermore this is so because the ICC relies heavily on the 'Intercession of National Jurisdictions' to gain custody over suspects.[72] The Court does not have a mandate to execute arrests. Thus it relies on the help of States and other actors to implement warrants of arrest to enable the Court to fulfill its mandate. These arrests however require a complex process involving cooperation with the territorial State, States Parties and International organizations.[73]

The International Criminal Court Act, [74]therefore makes provision for two kinds of arrest, one in terms of a warrant issued by the ICC itself and secondly one issued by the member Countries National Director of Public Prosecutions. In terms of the former suggestion, if we look at the South African position for example, where the ICC issues a warrant, the receiving nation of such a warrant must in terms of

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[71] Thus held by then Libyan President M. Gaddafi at the United Nation General Assembly, 2010.
[72] Section 5 of the International Criminal Court Act 27 of 2002.
[73]http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Prosecutions/ Retrieved 06 September 2011
[74] Rome Statute of the International Criminal Court Act 1998

section 8 of the Rome Statute of the ICC Act[75], refer the request to the Director General of Justice and Constitutional Development with the necessary documentation to satisfy a local court that there are indeed sufficient grounds for the surrender of the individual to the Hague.[76]

The Director General must then forward the request to a magistrate who must endorse the warrant in any part of the Republic. In terms of Article 27 of the Rome Statute of the ICC Act which reads that:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or International Law, shall not bar the Court from exercising its jurisdiction over such a person.[77]

The overall effect of this provision is essentially that the ICC is never without the option of prosecuting a national occupying an official capacity. Furthermore in terms of section 98(1) of the Rome Statute of the ICC Act there is an obligation on State parties to commit themselves to cooperate with the court, which essentially requires them to arrest and surrender to the court persons charged with an ICC crime.[78]

In light of this obligation one must ask to what extent we can really expect nations to conform to the demands of the ICC when there is an apparent trend that the majority of prosecutions seem to only be of African nationals. Namibia has outright refused to arrest or detain Libyan President as well as

[75] *S 8 of the Rome Statute of the International Criminal Court Act.*
[76] *J. Dugard "International Law a South African Perspective" 3rd ed 2005 201.*
[77] *Rome Statute of the International Criminal Court*
[78] *J. Dugard "International Law a South African Perspective" 3rd ed 2005 209.*

President Al Bashir should they come to Namibia for the same reason that many other African countries have refused to comply with that warrant as well. It is inconsistent with the policy and guidelines of the African Union and Municipal laws of those sovereign States.

An example of this can perhaps be attested to in terms of Article 17 of the African Union Protocol on Peace & Security in terms of which it is held that "member States shall commit themselves to make available to the Union all forms of assistance and support required for the promotion and maintenance of peace, security and stability on the Continent, including rights of passage through their territories."[79]

To date cases heard before the ICC are limited to the following Countries those involving Uganda, the Democratic Republic of Congo, Sudan and the Central African Republic. One must then beg the question, why are other matters pertaining to and arising from human rights violations from other Countries not being heard by the ICC? What is the basis for this one dimensional prosecution, and secondly, can these African Countries really be faulted for taking up issue with this and giving effect to the demands of the African Charter on Human and Peoples rights which in terms of Article 20 guarantees the right to self determination, and in terms of Article 20(3) holds that; "All people shall have the right to the assistance of State Parties to the Present Charter in their struggle against foreign domination, be it political, economic or cultural."[80]

Thus a clear interpretation of this clause reads that when these African States, reject this assistance of the court, or denounce the selective and unfair action against their African counterparts by the UNSC or the ICC, it is not for the purpose of breaching International obligations, but rather for the purpose of committing to advancement of African ambitions and needs, which is more often than not ignored

[79] *Protocol Relating to the Peace and Security Council of the African Union Article 17.*
[80] *Article 20(3) African Charter on Human and Peoples 1986.*

Chapter 4.

4.1 Competency of Non-Western Nations in Handling Disputes within their Continents

The, the incident involving Saddam Hussein and the consequential act of exercising jurisdiction over his trial proceedings by the USA is a clear indication of the manner in which the ICC controlling functions can be shaped and molded according the will of selected western powers. This is naturally an unacceptable position to be followed especially when the rights of so many interests are violated or ignored. It is for this purpose that perhaps African States should seek to distance themselves from the selective prosecution exercised by the ICC and move towards the utilization of its own court structures, which are indeed made provision for in terms of the Protocol of the Court of Justice of the African Union. In terms of the Jurisdiction of the Court it is able to exercise control over all signatories and parties to the AU as well as in terms of the listed grounds, which are contemplated in accordance with Article 19 of the said Protocol that reads:

1. The Court shall have jurisdiction over all disputes and applications referred to it in accordance with the Act and this Protocol which relate to:

(a) the interpretation and application of the Act;

(b) the interpretation, application or validity of Union treaties and all subsidiary legal instruments adopted within the framework of the Union;

(c) any question of international law;

(d) all acts, decisions, regulations and directives of the organs of the Union;

(e) all matters specifically provided for in any other agreements that States Parties may conclude among themselves or with the Union and which confer jurisdiction on the Court;

(f) the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union;

(g) the nature or extent of the reparation to be made for the breach of an

obligation.

Thus if a close reading of the provision is followed it would enable one to see that in terms of Article 19 (c),[81] the dictates of international law indeed provide the courts with a scope within which it can operate under. The effect of this is that the court would essentially be able to adjudicate on essentially the same matters as those, which fall within the scope and mandate of the ICC, namely war crimes, crimes against humanity and so forth. It is also well within the scope of the court's mandate to direct that a reparation be made in the event that there is a breach of such an obligation, stemming from either a breach of international law or even a breach of the requirements of the African Charter.[82]

The Protocol makes further provision for the binding effect of the judgment issued in terms of the Article 37, which reads: "The judgments of the Court shall be binding on the parties and in respect of that particular case".[83] In addition to the possible imposition of a reparation order for non-compliance with an obligation, the court is further empowered, in terms of Article 52:

1. Where a party has failed to comply with a judgment, the Court may, upon application by either party, refer the matter to the Assembly, which may decide upon measures to be taken to give effect to the judgment.

2. The Assembly may impose sanctions under paragraph 2 of Article 23 of the Act.[84]

There is an undeniable character of community in the manner in which the court operates, this is so because of the referral system, which demands that where there is indeed non-compliance with the matter that is referred back to the Assembly, this denotes that as a communal whole, African Nations will then actively engage with the aggressor State so as to reach an alternative wherein which an outcome that can and will be followed can be reached.

[81] *Protocol of the Court of Justice of the African Union Article 19.*
[82] *Article 19(g)*
[83] *Article 37.*
[84] *Article 52.*

The natural conclusion that one draws from these provisions is that Africans do indeed have an appropriate forum through which they can address our inherent African problems as well as bringing about a solution to a dispute that one may find to have with other African Nations internally and without having to resort external mechanisms which perhaps do not have the best interests of our individual States at heart. Thus ensuring that African States driven by a common purpose to encompass like minded ideas, development of the African continent, furtherance of peace and stability in and around the continent, the respect of the rights and freedoms of the people of Africa and most importantly, an unabated immunity which exists over African heads of State, would formulate an organisation that encompasses the above mentioned traits. It is by this formation that African Heads of States, would enjoy an unbridled immunity from criminal or civil prosecution as held in their domestic Constitution.

The structure of such organisation, shall ensure that it hears matters that take place in the continent of Africa, and the chairperson of that organisation, shall be tasked with ensuring that they take all factors into account and engage in open dialogue with the members of the organisation, which would include all heads of state and their Foreign Minister as well as Justice Minister. Should a particular member of the organisation be brought forth for an issue that was referred to this organisation, and then all three officials[85] should attend the proceedings.

4.2 Additional Control Mechanisms that Exist within the AU

In light of the African Charter on Democracy Elections and Governance, active participation of all member States is required in the sense that there is an obligation on them to ensure that:

"All appropriate measures to ensure constitutional rule, particularly constitutional transfer of power".[86]

The proceeding Articles further demand that all State Parties are to ensure that

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[85] *The President of the country, Minister of Justice and Minister of Foreign Affairs, this ensures that high level Government officials represent its country in every respect, should the court hold that the countries humanitarian law are not in line with current international standard then you would have the Minister of Justice defend this. The president because he is the highest serving public member of that particular state.*

[86] *African Charter on Democracy Elections and Governance Article 5*

citizens enjoy fundamental freedoms and human rights whilst taking into account their universality, interdependence and indivisibility.[87] These are peremptory provisions which indicate that there is an absolute requirement that there is compliance therewith, and where this is not done, one can resort the enforcement mechanisms as made provision for in terms of the Court Protocol as listed above, and further to this, in terms of Article 7; "take all necessary measures to strengthen the Organs of the Union that are mandated to promote and protect human rights and to fight impunity and endow them with the necessary resources".[88] Further protection is made provision for in term of Articles 24 and Article 46 that respectively read:

Article 24

When a situation arises in a State Party that may affect its democratic political institutional arrangements or the legitimate exercise of power, the Peace and Security Council shall exercise its responsibilities in order to maintain the constitutional order in accordance with relevant provisions of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, hereinafter referred to as the Protocol.

Article 46

In conformity with applicable provisions of the Constitutive Act and the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, the Assembly and the Peace and Security Council shall determine the appropriate measures to be imposed on any State Party that violates this Charter.

The African Union ensures that not only are these rights protected but in terms of the provisions listed below make provision for the active involvement of the Peace and Security Council so as to ensure the tenants of the provisions are given the necessary effect for which they were intended. Thus once again as made mention of before, in the preceding sub heading of this chapter, the

[87] *Article 6*.
[88] *Article 7*.

provisions of both the African Charter on Democracy Elections and Governance as well as the Protocol of the Court of Justice of the African Union are set up in such a way that they require the participation of all members in the effecting of prosecuting decisions. It is therefore, uniquely African Model designed by Africans for Africans, as it is only we whom are able and truly appreciative of the needs of our nations and its people.

4.3 Gaddafi's condemnation of the UN Charter

During a 2009 speech at the General Assembly of the United Nations, Col Muammar Gaddafi blatantly lambasted the character of the United Nations and its structure in the sense that it creates an illusion of equality between states, however none such truly exists.[89] It is within this framework, and the perspective of an African leader and the expressions of the frustrations of the African community can be expressed with regard to the selective prosecuting as has been observed, wherein which it has been held that hitherto, the ICC has only prosecuted African states.[90] The late Libyan President in an amended version, which shall be quoted herein remarked as follows:

This is terrorism. We cannot have the Security Council and the countries, which have the superpowers. This is terrorism in itself. It should not be called the Security Council. It should be called the " Terror Council… You see, my brothers, that in our life, in our political life, that if the Security Council is used against us, then they go to the Security Council, they resort to the Security Council. If they have no need to use it against us, then they ignore the Security Council…If the charter, they have interests, an ax to grind to use against us, they respect the charter. They look for the seven chapters of the Security charter (inaudible). But if they want to violate the charter, they would ignore the charter as if it doesn't exist at all."

The rhetoric adopted by the Late President is mindful of the arguments forwarded by various critics of the actions of the ICC, which explore issues pertaining to the impact on deterrence, the objectives of the AU, accusations of bias, and the

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[89] *Gaddafi, Muammar. Speech at the General Assembly. United Nations General Assembly. New York, U.S.A 23 September 2009.*

[90] *Arieff, A., Browne M. et al "International Criminal Court Cases in Africa: Status and Policy Issues. July 2011.*

tension between the concepts of justice and peace.[91] Furthermore, one can draw relevance to the speech held by the then President of Libya, where in which he condemns the UN charter with specific reference to the Security Council, in that there are similarities with the general feel towards the Rome Statue as it underlying purpose is to bring to book, leaders who have been held to have contravened the Rome Statue, which has been adopted to ensure peace and justice for all, even Heads of States.

One may be of the opinion that the late President[92] is expounding in his condemnation of the UN charter is that, equally the Rome Statue notwithstanding the advocating of peace, justice, accountability and due process for all. The record shows that they have sent out more arrest warrants for incumbent Presidents, as well as former Presidents all from the non-western and more specifically, African continent, for prosecution. Thus showing a propensity of focusing its resources available to it, to try and prosecute these leaders.

With regard to the argument pertaining to the accusations of bias, it has been submitted that the intervention of the ICC is to a degree questionable owing to the perpetual involvement of the Court in African countries. One of the main reasoning of the ICC's involvement is rooted in the contention that "the Prosecutor has limited investigations to Africa because of geopolitical pressures, either out of a desire to avoid confrontation with major powers or as a tool of Western foreign policy.[93] The counter submission made by proponents for the court however divorces itself from the above argument and remarks that many of the cases that do indeed come before the court, are referred to it.

Further to this the office of the Prosecutor maintains that the cases brought and heard before the court, are reflective of the most serious manifestations of crimes, there are however other investigations, which are being construed which occur outside the borders of Africa.[94] Recently, the former Chief Justice of the

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[91] *Arieff, A., Browne M. et al "International Criminal Court Cases in Africa: Status and Policy Issues. July 2011 28-33.*
[92] *Muhummar Gaddafi*
[93] *Oraib Al Rantawi, "A Step Forward or Backward?" Bitter Lemons, 32, 6, August 14, 2008; Charles Kazooba,*
[94] *CRS interview with Office of the Prosecutor official, September 3, 2008.*

South African Constitutional vocalized a similar such statement, to the effect that "abuses committed in Sub-Saharan Africa have been among the most serious, and this is certainly a legitimate criterion for the selection of cases."[95] Although needing to be mindful of the fact that often many African states are unable to deal with such matters owing to perhaps deficient legal systems, it is nonetheless still arguable that where we do have the competencies and the means to undertake such tasks, the opportunity ought to indeed be afforded.

However such opportunities that ought to be offered as mentioned above on a ad hoc basis, where the country seeking the assistance, receives such assistance but that it should be limited to the sovereign law of that nation requesting for the assistance. In addition to this, the respect of the municipal law as well as International law, that dictates Immunity, should be protected and upheld, whenever the ICC is granting such assistance. I am of the view that the comments made by those who are in support of the ICC and it exercising mandate over nations is justifiable, however only in as much as the ICC does so within reasonable legal boundaries. Also I am in support of the views of those who are not in support of the ICC, in that it is selective of only African states as well as non-western States, and that they exercise a certain bias towards them.

As mentioned in the precededing chapter, there are indeed institutional structures, which allow for the exercise of such a mandate,[96] and where indeed possible, these alternatives ought to be actively pursued. The African Union is one great institution that has been put in place to ensure that governments in Africa are kept under checks and balance, and also to ensure that should a Head of State, act outside his mandate a leader of a Nation, that such organization shall be responsible to ensure that, such a leader held accountable. This right or exercising jurisdiction should rest exclusively with the African Union and as well as any African ad hoc tribunal formulated for a specific country or leader, and from there deliberate on the sanctions to be placed on the offending party.

Another interesting dynamic in the argument pertaining to the exercise of the courts power is related to whether this is in pursuit of objects relating to the

[95] *Franny Rabkin, "'No Anti-African Bias' at International Criminal Court," Business Day, July 20, 2010.*
[96] *Protocol of the Court of Justice of the African Union Article 19.*

achievement of justice, and whether indeed this really brings forth peace.[97] A particularly vexing statement was put forth which held that:

"In the past, Africa's deposed heads of state could count on a comfortable exile in a friendly country... But since the International Criminal Court was established in 2002, rulers who have committed war crimes or human rights violations against their own people have found their exile options diminished."[98]

Thus the most pervasive argument forwarded in conjunction with the above statement is that in the exercise of its prosecutorial functions in States where matters have already been solved, the court vitiates peace processes which have perhaps efforts have been directed towards. [99]There is thus a step away from progress in the political sphere and continued movement towards political instability and the perpetuation of socio-political instability. U.N. Secretary-General Ban Ki-moon, has maintained a neutral position on the ICC's actions and has nonetheless argued that the international community must seek to balance "peace" and "justice" in dealing with the conflict and expressed concern that the expulsion of aid organizations was detrimental to relief and peacekeeping operations.[100] In light of this statement it is clear that a balance indeed must be struck, what the Secretary General however refrains from stating, is the mechanisms which will be used to achieve this balance, because it appears from the case studies that are herein to be assessed, this "balancing" act has not been conducted adequately.

Thus from the above dicta, it seems as though the Secretary General, has no definitive stance with regards to the position of the ICC and its exercise of mandate over African as well as non-western leaders, all he does say is that there is a need to achieve both peace and justice. However what he does not say is how one can achieve this. It is such that there is a need for both players in the

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[97] Arieff, A., Browne M. et al "International Criminal Court Cases in Africa: Status and Policy Issues. July 2011 28.

[98] Christine Cheng, "Justice and Gadhafi's Fight to the Death," The Wall Street Journal, April 6, 2011.

[99] Nick Grono and Adam O'Brien, "Justice in Conflict? The ICC and Peace Processes," in Courting Conflict?

[100] U.N. Security Council, Report of the Secretary-General on the deployment of the African Union-United Nations Hybrid Operation in Darfur, S/2008/558, August 18, 2008; UN News Service, "Ban-Aid Workers' Expulsion Impeding Peacekeeping, Relief Efforts," April 22, 2009

international community i.e. Western Powers and Non-Western Powers, to come together and engage upon dialogue. The purpose of this dialogue is to ensure that peace and justice is achieved when the stake players have a say towards the creation and implementation of the Rome Statute.

This creates a sense of involvement, where you would have a non-western nation, who would put its considerations forth as well as any reservations that it would have with regards to laws proposed by the Western Nation. What this in effect creates is a uniform organisation, created as a means of bi-lateral and multi-lateral agreement on the position of law, its administration, implementation and enforcement. It is by achieving this unison cooperation over the exercise of law, that you will achieve a balance between peace and justice in the world.

Chapter 5

5.1 Referral system

This chapter shall focus on the referral system which is introduced by the Rome Statue, that the national Country itself, or any other Country with an interest in the matter, can refer a matter to the ICC; if they do not have the capacity to hold the alleged criminal leader to count, or do not have the facilities to try him. Then by a simple referral system, one can then have the said leader held and tried at The Hague, where the ICC is situated.

In as much as much as one would like to concede that the intention of the creators of the ICC statute is one that is in pursuant of human right for all, while ensuring that the rule of law is exercised to such extent that promoter of violent acts of human rights are brought to justice. It is the general feeling that the de facto reason for the establishment of the ICC would be that of exercising 'control'. Control over persons who violate International human rights law and moreover, have a disregard for the application of law in their own countries. Furthermore, one may further say that the establishment of the ICC is also partly, to have a disregard to the immunity enjoyed by leaders who are brought forth to the courts for adjudication.[101]

An additional motivation as to the idea of control would be that one may be of the opinion that the United States Government and various other Western Governments have found it harder to have a hold over certain African leaders and as such, have put in place various structures to ensure that they exert their power under the auspices of the ICC. However the Western side may argue it differently as untrue, and unfounded, however the mere fact that more African Heads of States are formulating new partnership agreements with the East[102], there has been a new dynamic change in terms of which there has been less reliance on the Western countries in terms of trade measures that existed

[101] *This is evident by the current arrest warrant that has been served on the incumbent President of Sudan additionally the international pressure to remove L. Bagbo, M. Gaddafi. These are a few examples of Presidents who have been faced with International pressure to vacate their positions.*
[102] *China, Russia and India*

before[103] as well as economic pact agreements entered into by these non-western States. With the advent of the World economy in shambles, the East as well as merging Markets[104] has shown substantial growth and as a result, non-westerns states, especially the African and Middle East, have developed a new consciousness to those merging markets and have begun formulating partnership agreements with these States.

Thus the purpose of the above dicta, goes to the root cause of why the writer of the dissertation if of the view that because of these new partnership agreements, the Western States are losing their control or hold over these African and Middle Eastern nations.

The non-ratification of the U.S.A to the Statute is a clear indication that they would not like to be dictated to in as far as their policy toward the violation of human rights is concerned. Libya equally is not a country that has ratified the ICC statue, due to the reason that it chose not to be bound by the laws of the ICC. However one would find that due to a protest of a few in Libya and the fact that this group found it within them, the necessary will; to overcome the hardship that scathed the dignity, the given rights of the people and their hopes and ambitions, a opportunity, which gave the United States a chance to ensure that they rally as much support from the general assembly especially NATO countries in an effort to “rescue” the people of Libya from the tyrant, Muammar Gaddafi.

It is an idea that, the U.S. government sought this opportunity to its advantage by ensuring that because of the violations of human rights that were inflicted by the then leader of Libya should be addressed by the international community and that such dictators should not be given a platform to rule people undemocratically.[105] Thus, one is able to discern from the above dicta, that the U.S. governments and its NATO counter part’s intention for Libya was one of exerting their democratic policies on a government that is ruled in a different style

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[103] One such measures is the EEPA, European Economic Partnership Agreement, USAID, an agency set up by the American Government to give support to the Namibian people.
[104] BRICS: Brazil, Russia, India, China and South Africa
[105] This was part of the speech made by the President of USA, Barack Obama, on the 20th October 2011. On CNN.

of government then the U.S. or NATO countries, thus violating the principle of self-determination and the respect thereof.

In terms of the referral system, states that are members of the ICC statute can take it upon themselves to bring the attention of the ICC to a State that is under the provisions of the ICC statue for violating International human rights. There has been several instances where countries have brought the attention of the ICC to a country that has violated the ICC or Human Rights provisions. Articles 13 and 14 (1) of the Rome Statute provide for both States Parties and U.N. Security Council referral of "situations" to the Court. During the negotiations, the question arose regarding whether individual "cases" or "situations" should be referred to the ICC Prosecutor. Accordingly under the jurisdiction of the ICC, "it was suggested that States Parties should not be able to make complaints about individual crimes or cases: it would be more appropriate, and less political, if 'situations' were instead referred to the Court."[106]

Another author[107], writing on the role of the Prosecutor, noted that the "powers of the Prosecutor could also be broadened in the context of a State's complaint to the Court, if the complaint referred to 'situations' rather than to individual 'cases'. A proposal to this effect, introduced by the U.S. delegation in 1996, was "very soon supported by a large majority of States," many of whom had been 'uneasy' with allowing a party to "select individual cases of violations and lodge complaints with respect to such cases. This could encourage politicization of the complaint procedure".[108] The Prosecutor, after referral of the situation, could "initiate a case against the individual or individuals concerned."[109]

Thus from the above we are able to comprehend the workings of the ICC in terms of the referral system. The flaw in terms of the referral system is that, most

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[106] *E. Wilmshurst, "Jurisdiction of the Court," Chapter 3, in Roy S. Lee, editor, The International Criminal Court. The Making of the Rome Statute: Issues, Negotiations, Results [Boston: Kluwer Law International, 1999, p. 131.*

[107] *S. A. Fernandez de Gurmendi "The Role of the International Prosecutor," Chapter 6, in Lee, The International Criminal Court, p. 180.*

[108] *E. Wilmshurst, "Jurisdiction of the Court," Chapter 3, in Roy S. Lee, editor, The International Criminal Court. The Making of the Rome Statute: Issues, Negotiations, Results [Boston: Kluwer Law International, 1999, p. 132*

[109] *S.A. Fernandez de Gurmendi, "The Role of the International Prosecutor," Chapter 6, in Lee, The International Criminal Court, p. 180.*

of the countries that have made the referrals are from the developed nations, you would seldom find that countries from the developing nations making referrals to the ICC about countries violating ICC statute. One African state namely the DRC is one such state mentioned above that forms part of developing nations that made a referral to the ICC. In addition to this, as mentioned above, the purpose of the ICC is 'to exercise control' in as much as it is an instrument that has been introduced by the Western Nations to ensure that they still hold the same strong hold over Non-Western Countries among others. This[110] ensures that the African and other developing nations have a grasp of their standing in the world as compared to them.

There is an incident that took place in Pakistan[111] concerning Bin laden's death, this represented a clear violation of the sovereignty that Pakistan enjoys, however you would find that not one Western Country, raised the issue of the illegal invasion or violation of United Nations Sovereignty Laws[112]. Instead, they stand idle and refuse to comment or bring the issue before the ICC. However when Iraq occupied Kuwait, you would find that there was an overwhelming call for Saddam Hussein to be brought to book for those atrocities from the Western Nations over the illegal occupation. The biase suffered is what I refer to as 'exercise of control'.

An additional problem with regards to the referral system; the writer is of the opinion that it goes without saying that most of the countries that cry foul and call for referrals are usually influenced by Western States so as to increase their influence around the world[113] and over those leaders who are newly elected in Governments.[114] International Public Law dictates that the Sovereignty of a country should be respected and upheld by all states. The reason being that all nations are considered to be equal from one another, they are not part of a

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[110] *The Control exercised by the Western Nations over developing nations.*
[111] *When a contingent of the United States SEAL team carried out a mission against Osama Bin Laden, in Pakistan during May 2011. In this, the SEAL team was deployed on foreign grounds without the consent of the Pakistani authority, thus clearing demonstrating a disregard for international sovereignty.*
[112] *To respect the International boundaries of States and ensure that all member states respect the sovereignty of each state.*
[113] *One would find this in respect of leaders that have been accused by of selling off their natural resources to Western State, and also in so doing, are influenced to make referrals on behalf on the West. This was also part of the speech of M. Gaddafi at the UN General Assembly.*
[114] *Such Countries include, South Sudan and many newly formed Nations*

hierarchy that dictates which nations are more important than the other, thus under the doctrine of sovereignty, the boundaries of a state as drawn shall be respected and not violated. Any state that chooses to cross such boundary wall without the consent of the state, such act shall be regarded as ‘an act of war’.

Thus the overarching principles of International Public Law vis a vis Sovereignty of State, should be upheld by all states and respected. There is a need to bring about a dramatic dynamic shift from the Western dominated ideals to those befitting the World, especially the developing countries. It is my view that by achieving this goal, you would be able to have an institution/instrument that represents the interests of all parties involved in the establishment of the statute.

There has been a case to which the ICC has been referred to and has set itself to ensure indictment. Former President of an African State, namely, Liberia former President Charles Taylor. He was official charged with various violations of human rights by the ICC. In terms of International Law, it is common practice that, the acts of an President conducted while serving as President of a legitimate Country, shall preclude him from prosecution due to the immunity that all State President enjoy while President. However, the Rome Statute had varying provision that held that, such immunity shall not apply to any persons or serving head of state. Thus under this restrictive provision, Head of States, that acted in a manner that is not commensurate with the provisions of the United Nations and or the provisions of the International humanitarian rights and freedoms of the people of Liberia, which ensures the protection of individual human rights, shall be tried by the ICC and if found guilty shall be incarcerated.

Sudanese President, Al-Bashir, is the first incumbent head of state that has a warrant of arrest issued by the ICC for crimes against humanity and varying violations of human right laws. In terms of this, the ICC has mandated any contracting party to arrest and detain the President should he visit those Countries. However, the directive by the ICC goes against the policy of:

- The Domestic Laws of Sudan

- The African Union

- International Customary Law in terms of Immunity

The abovementioned principles go in as far as stating that; under the domestic laws of the nations, as in Namibia, a serving Head of State, shall enjoy immunity from prosecution for any criminal and civil matters. However the exercise of this principle shall only apply in as far as that the domestic law does not violate International Human Rights laws that exist inalienable for all persons. Thus the underlying purpose for the above dicta is that in as much as International law is important and the need to respect goes without saying, the domestic law of the country should equally be respected and given the same amount of importance as that given to International law. The importance of domestic law is that it governs the sovereignty of the State and that it is the aspiration, purpose and spirit of the national people, thus the importance of domestic law and the implementation thereof. A balance should be reached between international law and domestic law, with rights to immunity of heads of states.

What this would entail is the following; should the head of state be thought to have committed an act against International human rights in his country, then by virtue of the immunity that he enjoys, cannot be subjected to any criminal proceeding, including and especially an organisation that such head of state has not ratified. This brings about the respect of State sovereignty as well as their territorial boundary.

With regards to the domestic laws of Namibia, they protect the actions of the President and grant him immunity from prosecution from any act or directive given while holding the post of President. Further to this, the President is precluded from being indicted or tried in local courts, as they do not have the mandate or jurisdiction to hold him accountable as per Constitution of Namibia[115]. This rights exist over such President even after he vacates the office, Moreover, there is no authority that can compel the President to be tried at an ICC, unless he brings himself before the jurisdiction of the ICC. Thus without the head of state, submitting himself to the jurisdiction of the ICC proceeding, no other entity can compel a sovereign head of state, to any jurisdiction of court.

[115] *Article 31 of the Namibian Constitution*

5.2 Referral System and the Selective Prosecution of the cases by ICC

The International Criminal Court (ICC) has, to date, opened cases exclusively in Africa. Cases concerning 25 individuals are open before the Court, pertaining to crimes allegedly committed in six African states: Libya, Kenya, Sudan (Darfur), Uganda (the Lord's Resistance Army, LRA), the Democratic Republic of Congo, and the Central African Republic.[116] A 26th case, against a Darfur rebel commander, was dismissed. The ICC Prosecutor has yet to secure any convictions. In addition, the Prosecutor has initiated preliminary examinations, a potential precursor to a full investigation in Côte d'Ivoire, Guinea, and Nigeria, along with several countries outside of Africa, such as Afghanistan, Colombia, Georgia, Honduras, and the Republic of Korea.

The Statute of the ICC, also known as the Rome Statute, entered into force on July 1, 2002, and established a permanent, independent Court to investigate and bring to justice individuals who commit war crimes, crimes against humanity, and genocide. As of July 2011, 116 countries including 32 African countries, the largest regional block were parties to the Statute. Tunisia was the latest country to have become a party, in June 2011.[117] The United States is not a party. Thus from the above one can see that the African States form the largest group of Countries to have joined the Statue, yet the United States failed to do so, demonstrating a lack of commitment on their part, to ensure a world without violent acts from aggressors who exert their power over the feeble and commit acts of atrocity against them. Moreover, it is more disappointing that a country that is regarded as the most powerful nation in the world, has omitted to ratify the statue.

There are several reason that could be attributed to this omission, and chief among them is the fact that the United States Government, are hedging themselves against any liability for committing the very same atrocities that are barred by the Statute. Secondly, because of the 'ego like' structure of the

[116] *M. C. Weed, International Criminal Court and the Rome Statute. 2010. Page 25*
[117] *M. C. Weed, International Criminal Court and the Rome Statute. 2010. Page 25*

government,[118] that holds that no other state should dictate as to policies that are put in place by the government viz a vis foreign occupation policy.

Thus the, ICC prosecutions have been praised by human rights advocates.[119] At the same time, the ICC Prosecutor's choice of cases and the perception that the Court has disproportionately focused on Africa have been controversial. The Prosecutor's attempts to prosecute two sitting African heads of state, Sudan's Omar Hassan al Bashir and Libya's Muammar al Gaddafi, have been particularly contested, and the African Union has decided not to enforce ICC arrest warrants for either leader.

The reason the African Union has decided to enforce the decision to arrest both heads of States, falls within the ambit of the immunity that is enjoyed by both President as per, domestic law, common law and African Union provisions, moreover, Sudan nor Libya is a party to the ICC; in both cases, jurisdiction was granted through a United Nations Security Council resolution.[120] (The United States abstained from the former Security Council vote, in 2005, and voted in favour of the latter, in February 2011). Controversy within Africa has also surfaced over ICC attempts to prosecute Kenyan officials in connection with post-election violence in 2007-2008.[121] Although Kenya is a party to the Court, the government has recently objected to ICC involvement, which some contend could be destabilizing.

Owing to the omission of the US government from ratifying the Rome Statue, under the Obama administration, they have found a way of being part of the Statue, without ratifying it; by serve its purpose at an advisory role by means of imparting information on relevant countries and individuals of interest. It does so under the auspices of UNSC (United Nation Security Council) as a means to

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[118] With "ego like structure" what the writer of this paper is suggesting is that, because of the status of the United States, which is that it holds the position of being the most powerful nation in the world, and because of that, it does not want any organisation or agency dictating to it, on policies making or being reprimanded for ascertaining democracy around the world, notwithstanding the method employed by them in ensuring this. Thus ego like structure, is basically how the USA hold themselves of a higher importance then other nations.

[119] Western Human Right Advocates.

[120] M. du Plessi. Complementarity and Africa: The promises and problems of International criminal justice 2005. Page 8.

[121] M. du Plessi. Complementarity and Africa: The promises and problems of International criminal justice. 2005. Page 8.

prosecute African leaders referred to the ICC. The following excerpt would demonstrate this view:

"Congressional interest in the work of the ICC in Africa has arisen in connection with concerns over gross human rights violations on the African continent and beyond, along with broader concerns over ICC jurisdiction and U.S. policy toward the Court. Obama Administration officials have expressed support for several ICC prosecutions. At the ICC's 2010 review conference in Kampala, Uganda, Obama Administration officials reiterated the United States' intention to provide diplomatic and informational support to ICC prosecutions on a case-by-case basis.

The U.S. government is prohibited by law from providing material assistance to the ICC under the American Service members' Protection Act of 2002, or ASPA. Legislation introduced during the 111th Congress referenced the ICC in connection with several African conflicts and, more broadly, U.S. policy toward, and cooperation with, the Court. Menendez welcomes the U.N. Security Council referral of Libya to the ICC."[122]

Thus from the above dicta, one is able to comprehend as to how the U.S. has its influence over the ICC and referral system, in that they under the auspices of the United Nation Security Council, intend on providing diplomatic and informational support to the ICC prosecutors on a case by case basis, to ensure that certain individuals are prosecuted. Thus the role they play is one in which they refer the ICC to certain members that they cannot prosecute themselves due to a lack of jurisdiction, thus making use of the ICC as a tool to achieve this goal.[123]

The ICC's Assembly of States Parties provides administrative oversight and other support for the Court, including adoption of the budget and election of 18 judges, a Prosecutor (currently Luis Moreno-Ocampo from Argentina), and a Registrar (currently Bruno Cathala from France).[124] The ICC is considered a court of last resort, in that it will only investigate or prosecute cases of the most serious

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[122] *Emily C. Barbour. The International Criminal Court (ICC): Jurisdiction, Extradition, and U.S. Policy, 2010. Page 45.*

[123] *The situation of Sudanese President, Al Bashir, is one example, where the US government sought to have him removed from office, by ensuring that they refer the matter to the ICC for review.*

[124] *J. K. Elsea CRS Report RL31437, International Criminal Court: Overview and Selected Legal Issues.*

crimes perpetrated by individuals (not organizations or governments), and then, only when national judicial systems are unwilling or unable to handle them. This principle of admissibility before the Court is known as "complementarity."[125] Although many domestic legal systems grant sitting heads of state immunity from criminal prosecution, the Statute grants the ICC jurisdiction over any individual, regardless of official capacity.[126] With the advent of the referral system, an anomaly was never addressed and such anomaly is: 'The extend of the immunity of Head's of State'

Given that member states have the right of referring any case to the ICC, one should bear in mind that there are certain persons who enjoy immunity from prosecution in their country, and because of that right, referring a head of state, or person who enjoys immunity would serve no purpose for the ICC. However, because the ICC, has gone further and stated that notwithstanding any immunity enjoyed by such person, the ICC shall have the jurisdiction to hold such person under the jurisdiction of the court and adjudicate the matter. This is a contravention of the International Customary Law definition of sovereignty[127] as well as the foundation for which the United Nations was established.[128]

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[125] *In the ICC case against Congolese suspect Thomas Lubanga Dyilo, the Pre-Trial Chamber ruled that in order for a case to be inadmissible, national proceedings must encompass "both the person and the conduct which is the subject of the case before the Court" ICC Pre-Trial Chamber I, The Prosecutor Vs. Thomas Lubanga Dyilo, Decision on the Prosecutor' s Application for a Warrant of Arrest, Article 38, February 10, 2006. Even in such a case, the ICC may retain jurisdiction if domestic proceedings are not conducted impartially or independently (Rome Statute, Article 17).*

[126] *Article 27 of the Rome Statute.*

[127] *Which is the supreme power or authority that is enjoyed by a head of state for which he exercises such power as bestowed on him, by the people of the country to govern them. Thus the consequences of this would be for other states, groups, entities and other forms of organisation to respect this legitimacy.*

[128] *That each nation is equal, and that there is not one country, which is above the other.*

Chapter 6

The Reaction of Nations with rights to the Rome Statute and the ICC.

6.1 The United States Position

The United States is not a party to the Rome Statute. The United States signed the Statute on December 31, 2000, but at the time, the Clinton Administration had objections to it and said it would not submit it to the Senate for its advice and consent to ratification. Thus the Statute was never submitted to the Senate. In May 2002, the Bush Administration notified the United Nations that it did not intend to become a party to the ICC, and that there were therefore no legal obligations arising from the signature. The Bush Administration opposed the Court and renounced any U.S. obligations under the treaty. Objections to the Court were based on a number of factors, including[129]

- the Court's assertion of jurisdiction (in certain circumstances) over citizens, including military personnel, of countries that are not parties to the treaty;10

- the perceived lack of adequate checks and balances on the powers of the ICC prosecutors and judges;

- the perceived dilution of the role of the U.N. Security Council in maintaining peace and security; and

"The Bush Administration concluded bilateral immunity agreements (BIAs), known as "Article 98 agreements," with most states parties to exempt U.S. citizens from possible surrender to the ICC.[130] These agreements are named for Article 98(2) of the Statute, which bars the ICC from asking for surrender of persons from a state party that would require it to act contrary to its international

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[129] *E. C. Barbour. The International Criminal Court (ICC): Jurisdiction, Extradition, and U.S. Policy, 2010. Page 68.*

[130] *Each state party to an Article 98 agreement promises that it will not surrender citizens of the other state party to international tribunals or the ICC, unless both parties agree in advance. An Article 98 agreement would prevent the surrender of certain persons to the ICC by parties to the agreement, but would not bind the ICC if it were to obtain custody of the accused through other means*

obligations."[131]

"The U.S. government is prohibited by law from providing material assistance to the ICC in its investigations, arrests, detentions, extraditions, or prosecutions of war crimes, under the American Service members' Protection Act of 2002, or ASPA. Section 2015 of ASPA,[132] however, provides: "Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity." "Owing to that section, the US has the authority that it has bestowed upon itself, to effectively bring to justice individuals mentioned herein notwithstanding the fact that such mandate is usually carried out by the ICC."[133]

In the above mentioned dicta by the author[134], what comes across is that the authors is making averments that under Article 98 agreement concluded by the Bush administration, where in which they decided to sign Bilateral Immunity Treaties with various nations. The effect of this agreement is that when any person, whether sovereign or otherwise, commits an act which is recognised under the Rome Statute as a violation of the International Human Rights, such person(s) cannot be held liable under the ICC nor any other piece of legislation that would under normal circumstances hold such person(s) liable.

The effect of this is that, the President of America, can commit several acts of violence in countries that it has signed this bilateral agreement with, and the ICC can do nothing about it. This violation is a clear undermining of the International Customary law and legislative authority for Heads of State to be granted immunity from prosecution. In that the Rome Statute, holds that it shall not recognise the legislation and that any head of state that contravenes a humanitarian right, shall be arrested and tried. While at the same time, an American national or sovereign who contravenes the similar act is absolved from prosecution. This kind of undermining carried out by the government of USA,

[131] *International Criminal Court Cases in Africa: Status and Policy Issues*
[132] *22 U.S.C. 7433, known as the "Dodd Amendment"*
[133] *International Criminal Court Cases in Africa: Status and Policy Issues*
[134] *International Criminal Court Cases in Africa: Status and Policy Issues*

clearly indicates how the U.S. exhibits dominance over all nations especially non-western nations and that the idea expounded as to the equality of nations is but a facade portrayed by the Americans.

In addition to the above, the US, has sought a way to be part of the ICC, which is to be the advisory party as well as provide funding to the ICC to assist it in the course of its business. Moreover the role that the US plays in terms of its advisory role is such that any individual, who commits acts of atrocity against other persons, shall not be subjected to the ICC nor shall the UNSC refer the matter to the ICC, because the US is a permanent member of the Security Council. Further to this, from the above dicta, one is able to make the following observations thereof:

Firstly, the U.S. government is prohibited under the ASPA to provide 'material assistance to the ICC in its investigations, arrests, detentions, extraditions, or prosecutions of war crimes' and in addition to that, it also is 'prohibited from, obligation of appropriated funds, assistance in investigations on U.S. territory, participation in U.N. peacekeeping operations.' The problem in this lies in the following statement: " Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity."[135]

The problem that one would be faced with here is that, not only does the USA, exclude themselves from joining the Rome Statute, which in turn would prosecute a sovereign accused of violation of the abovementioned crimes, but that they created a Article 98 agreement, where they absolve themselves from prosecution, should they commit such act, further the effect of the document grants them immunity from prosecution. Now they have gone a step further and have declared even after the prohibition under ASPA, that they would assist the United Nations, ICC and related organisation, in their attempts to prosecute leaders of the Al Queda and persons accused of crimes mentioned above herewith.

[135] *International Criminal Court Cases in Africa: Status and Policy Issues*

This is a clear violation of the principle of equality of nations and would also show how the immunity of African leaders is prejudiced as opposed to that of the USA and its counter parts.

"In her confirmation hearing as Secretary of State before the Senate Foreign Relations Committee in January 2009, Hillary Clinton said, "Whether we work toward joining or not, we will end hostility toward the ICC and look for opportunities to encourage effective ICC action in ways that promote U.S. interests by bringing war criminals to justice." Speaking in Nairobi, Kenya, in August 2009, Secretary of State Clinton said that it was a "great regret" that the United States was not a party to the ICC, but that the United States has supported the Court and "continue[s] to do so."

"Obama Administration officials have recently indicated, amid a wider review of U.S. policy toward the Court, that the Administration is "considering ways in which we may be able to assist the ICC, consistent with our law, in investigations involving atrocities." A January 2010 review by the Department of Justice concluded that diplomatic or "informational" support for "particular investigations or prosecutions" by the ICC would not violate existing laws."[136]

"Members of Congress have taken a range of positions on the ICC with regard to Africa. Many in Congress are concerned about massive human rights violations on the continent, and some see the ICC as a possible means of redress for these crimes. Several pieces of draft legislation introduced during the 111th Congress, such as H.R. 5351 (Ros-Lehtinen), S.Con.Res. 59 (Vitter) and H.Con.Res 265 (Lamborn), expressed broad objections to the ICC and to U.S. cooperation with it. S.Con.Res. 71 (Feingold) stated that it is in "the United States national interest" to help "prevent and mitigate acts of genocide and other mass atrocities against civilians," but did not explicitly reference the ICC."[137]

From the above dicta, one is able to see the intent of most nations and the reservations that they had over the role of the US in the ICC. In that their reservation against the United States was primarily because of the role that it

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[136] *Mary Beth Sheridan, "Clinton Says U.S. Supports International Criminal Court," August 6, 2009.*
[137] *Jennifer K. Elsea. CRS Report RL31437, International Criminal Court: Overview and Selected Legal Issues.*

played with rights to the ICC. The fact that they have not ratified the Rome Statute and have created as a consequence Bilateral Immunity Agreements with other nations so as to protect its own sovereign while at the same time, prosecute and help prosecute non-western state leaders for infringing the same laws as it does, it a clear violation of International Customary Law, that advocates for equality of all nations as well as the protection and respect of the sovereign boundaries of each nation.

Congress made a statement to which I am of the view that it is not in its entirety truthful: “Many in Congress are concerned about massive human rights violations on the continent, and some see the ICC as a possible means of redress for these crimes”. This is a departure from the truth, due to the fact that Congress has been fuelling these crimes in Africa, by supporting a militia group so as to gain control over certain mineral resources and as such causing division among the people of these nations[138]. Moreover, the war in Libya that was carried out by the Western powers, left a lot of casualties that were mostly women and children, this is a grave violation of human rights, however you find that the USA, justify their actions by stating that they had to remove a dictate. I am of the view that “two wrongs do not make something right” and due to that, the President of America, Obama, should be held accountable for the lose of lives he has caused.

[138] *There has been documented events where the US Congress has been held to have supported militia groups to gain control over certain commodity. Recent events include the war in Libya, when the congress supported a small faction to topple Gaddafi. These are but a few incidents that have been recorded. Equally there has been a faction of militia men supported by the US congress to topple Fidel Castro, however that plot did not work.*

Chapter 7

Conclusion and Recommendation

In conclusion, one may see the contrasting difference that the ICC and Rome Statue has brought about, which is the sanctimonious contrast between the Developed nations with specific reference being made to the American government, and the poorly treated Non-Western states. In addition to that, in order for one to answer the question of immunity being sovereign for Non-Western Heads of State, one would need to look at domestic law of the country, the reason for this would then give the reader the chance to see whether the domestic law gives effect to the immunity of such Heads of States. The writer is of the view that from the domestic laws as they apply in those countries, are regarded as the sovereign laws of the country thus should be respected by all persons under that jurisdiction, and foreign nationals including foreign countries as well.

It can also be argued that the resolve of the ICC as a legal institution aimed at adjudicating on serious crimes is greatly undermined owing to its selective prosecutions especially in the context of the African framework. The result of this selective prosecution is that it has resulted in the diminution of regard the court has in its jurisdiction, this naturally is a very unfortunate matter. It cannot however be ignored that owing to this phenomenon Africans and Middle Eastern have become more determined to deal with matters independently of the courts mandate. This is manifestly seen in the blatant disregard for compliance with warrants for arrest, as well the resolve to seek mechanisms that can deal with the inherent African problems through enforcement and regulatory institutions designed for and run by Africans. This perhaps can be seen as the solution to the woes faced by many African states, and their targeted officials.

Another recommendation is that Western States as well as Non-Western States should join a forum where they come together and engage with one another and enter into a dialogue, where both sides can forward arguments and reservations that they might have with the Rome Statute in terms of its application and enforcement. Once you have a statue that is a result of consultations and dialogue, then you would find that all nations would agree to the new terms and

carry out the Rome Statute as it was intended to have been achieved. Further to this, you would find that, with the creation of these amendments, that there would be a greater respect for the Statute, and that both Western and Non-Western Nations would ratify it and adhere to the provisions underlying it, because it would then as a consequence create accountability amongst Western leaders as well as Non-Western leaders.

Thus the intention of this dissertation is to demonstrate to the reader, the idea of how immunity that should be relished by those endowed with it, honored and respected by international community. By and large, as per the doctrine of sovereignty, it is imperative that all leaders, irrespective of where they come from either developed or developing nation. Respect for sovereignty should be across the board and should not serve to protect the rights of one state and prejudice the other, similarly, the purpose for which the ICC was created; is to adjudicate on all matter that concern themselves with the gross violations of human rights, the failure of a state party to comply with ICC regulation concerning the protection and promotion of human rights. Once they focus on that, they need to appreciate the extent of sovereignty and how and when it applies. In so doing, you would find that the ICC would have an appreciation for the African and developing leaders' sovereignty is respected.

Thus I do not believe that immunity is being exercised freely as it should be.

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