The Experience of International Criminal Court in Africa: Problems and Prospects

A dissertation submitted to the department of law, international Islamic University, Islamabad in partial fulfillment of the requirements for the degree of master of law (LLM Human Rights Law)

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FINAL APPROVAL

It is certified that we have read the dissertation submitted by Mr. Adama Magassouba, Registration No. 108-FSL/LLMHRL/F12 on "**The Experience of International Criminal Court in Africa: Problems & Prospects**" in Department of Law, Faculty of Shariah & Law. We have evaluated the dissertation, and found it upto the requirements in its scope, and quality by the International Islamic University, Islamabad, for award of LL.M. Human Rights Law Degree.

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Topic: **The Experience of International Criminal Court in Africa: Problems and Prospects**

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Accepted by the Faculty Shariah and Law, International Islamic University in the partial fulfillment of the requirement for the award of LLM (Human Rights Law) degree

DECLARATION

I, Adama Magassouba, hereby declares that this dissertation is original and has never been presented in any other university or learning institution. I, moreover declare that this thesis has never copied and any secondary information used in this dissertation has been duly acknowledged.

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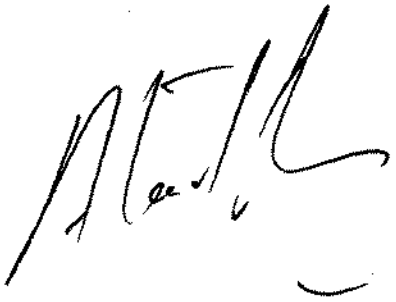

DEDICATION

Dedicated to my beloved late Mother who gives up everything for my success with the hope that one day she can see me among the scholars of my country but unfortunately the destiny has decided something else. (May Allah be please to her. Ameen.)

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I thank Allah, the Almighty, who gave me the strength to accomplish this work.

Then I pay tribute to my parents specially my Father who is real asset of my life, and I will remain indebted to him through my whole life.

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ABBREVIATIONS

- ACHPR: African Charter on Human and People Rights
- ACHPR: African Court of Human and People's Rights
- ACJ: African Court of Justice
- ACJHR: African Court of Justice and Human Rights
- ACPR: African Commission on Human and People's Rights
- AMIS: African Mission In Sudan
- AU: the African Union
- BBC: the British Broadcasting Corporation
- BIA: Bilateral Immunity Agreement
- CAR: Central African Republic
- CCJ: Caribbean Court of Justice
- CEN-SAD: Community of Sahel-Saharan States
- CIS: Commonwealth of Independent States
- DRC: Democratic Republic of Congo
- ECOWAS: Economic Community Of West African States
- EU: European Union
- GNC: General National Congress
- ICC: International Criminal Court
- ICJ: International Court of Justice
- ICTR: International Criminal Tribunal for Rwanda
- ICTY: International Criminal Tribunal for the former Yugoslavia
- KNCHR: Kenyan National Commission on Human Rights

- NAFTA: North American Free Trade Agreement
- NATO; North Atlantic Treaty Organization
- NCP: National Congress Party
- NGO: Non-Governmental Organization
- NTC: National Transitional Council
- OAU: Organization of African Unity
- OECS: Organization of Eastern Caribbean States
- OIC: Organization of the Islamic Conference
- OSCE: Organization for Security and Cooperation in Europe
- PTC I: Pre-Trial Chamber I
- RFI: Radio France International
- SC: the Security Council of United Nations
- SCSL: Special Court for Sierra Leon
- TJRC: Truth Justice and Reconciliation Commission
- UN: the United Nations
- UNGA: the United Nations General Assembly
- UNSC: United Nations Security Council
- US: the United States of America
- WEU: Western European Union

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ABSTRACT:

Violence, corruption and mal-governance are major causes of non-development of African states leading to lack of stability in the continent. A strong and independent forum of justice is essential in order to fight impunity in the continent promoting peace and security with protection of human rights as set in African charter on Human and Peoples rights.

This thesis analyzes different issues related to the violation of Human Rights in the continent, the current turbulence between AU and ICC and gives solution how to enhance their relations, eradicate the custom of impunity in the continent system.

The method of involvement of ICC to prosecute international crimes in Africa has been examined which we call the activities of ICC in Africa. This covered the ICC prosecution of Kenyan leaders related to the violence of post-election 2008, the ICC prosecution of Al-Bashir related to Darfur issue and its action against Libyan ex-president Muhammad Qaddafi and his officials and all issues raised by those prosecutions. Further it is analyzed the implementation of ICC's decision in Africa, the position of AU toward the court and its arrest warrant. Then followed by the analysis of the concept of immunity of Head of state and state's officials under international law and how Omar Al-Bashir is protected by these laws from prosecution.

Ultimately the jurisdiction of ICC over the national of states which are not party to the convention of Rome Statute and the validity of its prosecution of those officials and Head of states in Africa has been analyzed. At the end there are suggestions and recommendations of how to enhance the relation between the ICC and African countries, how to eradicate the custom of impunity in African society and how to improve ICC credibility in its criminal investigation all over the world.

After thorough literature review and consultation with my teachers, I found necessary to write on this topic" *The Experience of International Criminal Court in Africa: Problems and Prospect"*. As to my knowledge, I could not find a single consolidated work that highlights these issues with the aim of eradicating impunity in Africa.

However, there are some articles dedicated to some specific issues such like (Darfur issue in Sudan, South Africa apartheid, Sierra Leone civil war!!!) but all these articles need some kind of improvement in one way or the other.

CHAPTER ONE

THE ACTIVITIES OF INTERNATIONAL CRIMINAL COURT IN AFRICA

1.1 INTRODUCTION

The Rome Status which established the International Criminal Court (ICC) at Hague on July1th, 2002, is an independent permanent court setup to punish perpetrator of the most heinous crime of international community concern such (War Crimes, Crime Against Humanity, Crime of Genocide and Aggression Crimes). The court has jurisdiction to all these crimes from the date entered into force in all the territory of the states that ratified the Statute of Rome (ICC). Up to May 2013, there are 122 countries in the world ratified the Rome Statute, among which there is all South American countries, more than half of African countries, almost all European and Oceania countries.[1]There is another 31 countries that signed the treaty but not ratified it, and the Statute obliges these countries to refrain from doing any act that oppose to the spirit of treaty until they get totally in or out of the treaty. As to date only three countries have doing so (US, Israel and Sudan) declaring to UN General Secretary that they no longer intended to be part of the ICC as such they have no obligation whatsoever from their previous signatories. The remained 41 United Nations members did not take any step to ratify the Statute.[2]

As mentioned in the Statute, the case can be taking to the ICC in three different ways: whether by self-reference or by initiation of prosecutor in his/her own motive and lastly by referral of UN Security Council. As present four cases have been referred by state government to the prosecutor namely (Central African Republic, Uganda, Democratic republic of Congo and Mali) all are states parties to ICC. Two cases referred by UN Security Council (Sudan and Libya) the two not ratified the Statute. One case initiated by the prosecutor by his own motion

[1]United Nations treaty database entry regarding Rome Statute of international Criminal Court

[2]China's attitudes toward the ICC, Lu Jianping and Wang Zhixiang, *Journal of International Criminal Justice*, 2005-07-06.India and ICC, *UshaRamanathan, Journal of International Criminal Law, 2005*

after the office investigation (the violence in Kenya's election in 2007-8). The remained cases are under consideration to full investigation.[3]

The ICC is the court of last resort, it deal the cases of genocide, war crime, crime against humanity committed by the persons not by government or organization and it handle these crimes in the countries where it has jurisdiction and where that country is not willing or incapable to genuinely prosecute these crimes. This principle of been last resort is known as "complementarity".[4]

Contrary to domestically legal system where the sitting president is given immunity from prosecution in criminal nature, the ICC's statute did not recognized such exemption to head of state or state officials under its Statute.[5] This is one of the issues which shall be examined later on.

1.2 THE CASES INVESTIGATED BY ICC IN AFRICA:

Impunity in Africa is widespread,[6] as it has becomes part of custom for the people. Whenever people stand to claim their rights, whether through a political party or directly from government, the authoritative government start to oppress them by its cohesive power, which lead in many circumstance to violence and some time to civil war, as the sole way for the people

[3]Reportedly, the ICC has received 1,700 communications about alleged crimes in 139 countries, but 80 percent have been found to be outside the jurisdiction of the court. The Prosecutor has received self-referrals only from African countries. See Stephanie Hanson, Global Policy Forum, "Africa and the International Criminal Court," *Council on Foreign Relations*, July 24, 2008

[4] 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 thProsecutor'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).

[5] Article 27 of the Rome Statute.

to resort or show their grievances and seek remedy for it. That is because, in Africa, majority of governing powers are authoritative or dictators but covered itself with shelter of democracy due to fear of western critics or loss of confidence and external help.[7]

Every government in Africa declares itself democratic government and manages to bring some prima-facie democratic system (election, fixation of term of tenure in office...) to be credible in the eyes of the west and pursue its own way of governance.[8]

Because of this mal-governance with corruption and fraud of election system to remain in power forever, people become frustrated and sometime seek to take their affairs in their hands by all means hence violence start.

It can be asserted that no African state remains today which has not gone through some kind of oppression, violence with large scale of killing without any fear to be held accountable. These conflicts can be happened in different background, some because of ethnic background such as the case of Rwanda, South Africa, Mali, Republic Democratic of Congo; some because of political background, as it is the case of Ivory Coast, Kenya, Liberia; others because of mal-governance with corrupt system, which force people to rebellion as it was the case of Libya, Tunisia, Guinea, and Egypt.[9]

The ICC's Prosecutor has investigated against 26 persons of five African countries. The total of Twenty-five are still open; one is dismissed the case of Bahar Idriss Abu Gardathe the leader of rebels in Sudan, the prosecutor is planning to bring new evidences to re-open the case

[7] The African Commission on Human and Peoples' Rights meeting at its 38th Ordinary Session held in Banjul, The Gambia from 21 November to 5 December 2005.

[8] Because to them, to please western countries is the guaranty of their powers.

[9] An example is the civil war in Liberia first and second (1989-1996; 1999-2003) respectively, Sierra Leone (1991-2003), Rwanda (1994), Democratic Republic of Congo (1996) apartheid South Africa (1948-1994), Kenya (2007) and most recently in Guinea (2009), Ivory Coast (2010), Tunisia (2011), Egypt (2011), Libya (2011), and Mali (2012).

again against him. Those investigation cases are from: Democratic Republic of Congo (DRC), Central African Republic, Libya, Kenya's post-election in 2007, and Darfur of Sudan.

The examination is going on in 2011 post-election violence in Ivory Coast where ex-president Laurent Gbagbo and Charle Ble Goude are transferred to ICC, the military oppression of opposition's militant in Guinea 2009 manifestation, and inter-community clash in Nigeria.

CAR, DRC, Guinea, Kenya, and Nigeria all are states parties ratified the ICC Statute but Sudan, Libya are not. Ivory Coast did not ratify the Statute but has accepted the court jurisdiction in ongoing conflict. ICC got its jurisdiction over Sudan and Libya through U.N. Security Council referral.

Here is table of the people prosecuted by ICC in Africa

1.3 TABLE OF SUMMARY OF PEOPLE PROSECUTED BY ICC IN AFRICA:

Situation	Case	Status
Libya	Muhammar Qaddafi, his son Saiful Islam Qaddafi, and his intelligence chief Abdullah Senussi	Arrest warrant was issued to Muhammar Qaddafi on 27 June 2011. After resolution was passed by U.N Security Council in February 2011 to refer Libya's case to ICC. The court open Investigation on 3 March 20011.[10] MuhammarGaddafi proceedings finished by his killing on 20

[10] For further information for the Article, International Criminal Court Cases in Africa,10

		October 2011. Saiful Islam Gaddafi was arrested on November 19, 2011, now he is in custody of Libyan rebels. Abdullah Senussi was arrested on March 16, 2012. Also in custody of Libyan rebels.[11]
Kenya	There is two set of political group the case is lodge against in ICC. First group: Henry Kosgeythe Minister of Industrialization, Joshua Arab Sang journalist, William Ruto the politician	Joshua Sang appeared voluntarily before the court and charges are confirmed, trial is going on before chamber 7(a). Henry Kosgey proceedings dismissed with charges dismissed. William Ruto current status of his case: fugitive.[12]
	Second group:	Uhuru Kenyatta appeared

[11]ICC case information sheet on the Gaddafi-Senussicase.Gaddafi's son 'captured in Libya'.BBCOnline. (Last accessed 05-12-2013).

[12]ICC case information sheet on the Ruto-Sang case.Ruto and Sang trial opens at the International Criminal Court.

	Uhuru Kenyatta the current Deputy Prime Minister of Kenya, Francis Muthaurathe Cabinet Secretary, and Maj. General. (Retd.) Hussein Ali	voluntarily before the Court and Charges are confirmed, trial before chamber7 (b) is going on but the case is about to fail by lack of standard evidences against the accused. Hussein Ali proceedings dismissed with charges dismissed. Francis Muthaura proceeding is finished, he appeared voluntarily before the court after confirmation of charges, the case was withdrawn by prosecutor before trial.[13]
Darfur, Sudan	Ahmad Muhammad Harun the former minister of interior, Ali Kushayb the ex- Militia leader and Baharldriss Abu Garda the rebel leader of Darfur.	Ahmad Muhammad Harun was governor of Southern Sudan the State of Kordofan. The Arrest warrant was issued against him on May 2007 on Suspicion of his role in the violence. His case

[13]ICC case information sheet on the Kenyatta case.

		was dismissed by ICC judges February 2010.[14] Ahmad Harun Ali Kushayb current status of his case: fugitive. BaharIdriss Abu Garda proceedings finished with charges dismissed.[15]
	Two other rebels leaders of Darfur; Abdullah Banda Abakaer Nourain, and Saleh Muhammed Jerbo Jamus	The case is in Pre-trial Phase; After confirmation of charges March 2011, the two appeared voluntary before the court to respond the summonses in June 2010.[16] Jerbo proceeding is finished by his dead on April 19, 2013.[17]
	Omar al Bashir	The ICC issued him Arrest warrant on March 2009 for War

[14] The International Criminal Court Cases in Africa: Status and Policy Issues; writing by Alexis Arieff, Rhoda Margesson, Marjorie Ann Browne, and Mathew C. Weed

[15] ICC case information sheet on the Haroun-Kushayb case.

[16] *Ibid.*

[17] ICC case information sheet on the Banda-Jerbo case.

	The sitting President	Crime and Crimes against humanity then another warrant was issued in July 2010 for crime of genocide After his re-election in April 2010 for another 5 years.[18]Current status of his case: fugitive.[19]
Situation of the lord's resistance Army (LRA), Uganda	LRA commanders Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya	Unsealed Arrest warrant was issued in October 2005 but Vincent and Raska are reported dead.[20] Joseph Kony, OkotOdhiambo, Dominic Ongwen, current status of their cases: fugitive[21].
Democratic Republic of Congo (DRC).	Thomas Lubanga Dyilothe leader of alleged militia	In March 2006 Thomas was transferred to ICC custody and his trial started in January 2009.[22]

[18] The International Criminal Court Cases in Africa: Status and Policy Issues; writing by Alexis Arieff, Rhoda Margesson, Marjorie Ann Browne, and Mathew C. Weed

[19]ICC case information sheet on the al-Bashir case.

[20] The International Criminal Court Cases in Africa: Status and Policy Issues; writing by Alexis Arieff, Rhoda Margesson, Marjorie Ann Browne, and Mathew C. Weed

[21] ICC case information sheet on the Mudacumura case.ICC case information sheet on the Kony*et al*.case.Vincent Otti is confirmed dead.

[22] The International Criminal Court Cases in Africa: Status and Policy Issues; writing by Alexis Arieff, Rhoda Margesson, Marjorie Ann Browne, and Mathew C. Weed

		The accused was found guilty and sentenced for 14 years of imprisonment. The appeal is lodged if conviction stand after appeal he will be release between July 2015 in case of two third of sentence or March 2020 the full sentence.[23]
	Germain Katanga and Mathieu Ngudjolo Chui militia the leaders of militia.	The trial of the two alleged started in November 2009. Germain Katanga and Mathieu Ngudjolo Chui were transferred to ICC in October 2007 and February 2008, respectively.[24] The trial of Germain Katanda is concluded before chamber II and the decree has to be delivered.

[23]ICC case information sheet on the Lubanga case. Article 110 (3) of the Rome Statute of the International Court states that "when the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time." Article 78 (3) of the Rome Statute specifies that "in imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime." The Court's Trial Chamber I determined in its sentencing decision that the time since 16 March 2006 is to be deducted from the sentence. Thus, if conviction and sentence stand, Thomas Lubanga is to be released on or before 16 March 2020. Starting from 16 March 2006, two-thirds of 14 years (nine years and four months) will have elapsed by 16 July 2015.

[24] Alexis, Arieff*et al*, International Criminal Court Cases in Africa: Status and Policy Issues;writing by Alexis Arieff, Rhoda Margesson, Marjorie Ann Browne, and Mathew C. Weed

		Mathieu Ngudjolo Chuiis Acquitted by the Chamber and released from the court custody but the prosecutor has appealed the acquittal.[25]
	Bosco Ntangadathe Former militia and leader of rebels then turned to be the army officer of DRC	In August 2006 the Arrest warrant was issued to him.[26] Now the accused is in the custody of ICC and charges have to be confirmed before Pre-Trial Chamber II.[27]
	Alleged militia political leader Calixte Mbarushimana	The accused was arrested in France October 2010, transferred to ICC in January 2011. [28] Proceedings finished with charges dismissed and released.[29]
	Jean-pierre Bemba Gombothe former Congolese leader of	His trial started in November 2010. He was arrested in

[25]ICC case information sheet on the Chui case.

[26] The International Criminal Court Cases in Africa: Status and Policy Issues; writing by Alexis Arieff, Rhoda Margesson, Marjorie Ann Browne, and Mathew C. Weed

[27]ICC case information sheet on the Ntaganda case.

[28] The International Criminal Court Cases in Africa: Status and Policy Issues; writing by Alexis Arieff, Rhoda Margesson, Marjorie Ann Browne, and Mathew C. Weed

[29]ICC case information sheet on the Mbarushimana case. . Mbarushimana case: ICC Appeals Chamber rejects the Prosecution's appeal. ICC.

	rebel's leader then became Congolese transitional vice-president and senator.	Belgium in July 2008 and transferred to ICC custody.[30]
Ivory Coast	Former president Laurent Gbagbo	The accused is in custody of ICC and the confirmation of the charges were postpone for the presentation of new evidences. The decision on confirmation of charges will be on 12 Jun 2014.[31]
	Charles Ble Goude Minister of youth of Laurent Gbagbo	The accused was Arrested by Ivorian Authority on 17 January 2013 and transferred to ICC custody in March 2014.[32]
	Simone Gbagbo wife of Laurent Gbagbo	The accused is arrested by Ivorian authority in April 2011.[33]
Guinea	----------	Preliminary investigations.[34]

[30] The International Criminal Court Cases in Africa: Status and Policy Issues; writing by Alexis Arieff, Rhoda Margesson, Marjorie Ann Browne, and Mathew C. Weed

[31] ICC case information sheet on the Laurent Gbagbocase.Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute. ICC Pre-Trial Chamber I.

[32] http://www.bbc.com/news/world-africa-26765453

[33] ICC case information sheet on the Simone Gbagbo case.

[34] The International Criminal Court Cases in Africa: Status and Policy Issues; writing by Alexis Arieff, Rhoda Margesson, Marjorie Ann Browne, and Mathew C. Weed

Nigeria	-------	Preliminary investigations.[35]

1.4 Criticisms OF ICC INVESTIGATION IN AFRICAN CONTINENT:

Many observers have supported the investigation of ICC in Africa as one of the vital march to fight impunity in Africa, but at the same time it has raised many debates of why the court is prioritizing African's cases over other continent of the same nature, its selection and the effect of that selection on peace processes in the continent. The court has been accused of totally disturbing political settlements that aim of lasting peace in different conflict in the Continent. The supporters of the ICC have rejected these remarks by saying that the court investigations will result to the long-term peace after justice is rendered to the people.

The AU which formed African political body has strongly objected the ICC indictment of Omar Al-Bashir the sitting president of Sudan, while that opposition did not cool down, the ICC move to indict Libyan president Muhammar Qaddafi. This move irritated African Union of not considering its position to these conflicts. Since then the AU decided not cooperate with ICC in its arrest warrant against none of these two leaders (Bashir and Qadhafi).[36]This decision has been implemented by African leaders, indeed, Al- Bashir has visited since his warrant was issued in 2009, the Chad, Kenya, and Djibouti, all are ICC states member without attempt to arrest.

[35] *Ibid.*

[36] In July 2009, the AU resolved not to cooperate with the ICC's arrest warrant for Sudan's President Bashir. AU heads of state adopted a similar resolution in July 2010, after a second warrant for Bashir was issued for the crime of genocide, and simultaneously rejected the ICC's request to open a liaison office at the AU headquarters in Ethiopia. AU Commission Chairman Jean Ping stated that the genocide warrant "does not solve the problem in Darfur. In fact it is the contrary… We have no problem with the ICC and we are against impunity. But the way prosecutor Ocampo is rendering justice is the issue." The AU has also objected to NATO military actions in Libya. *AFP*, "Beshir Charges Won't Help Darfur: African Union," July 14, 2010; *Pretoria News*, "Botswana Backs International Criminal Court Warrant for Gaddafi," July 7, 2011; RukminiCallimachi, "L'UnionAfricaineDemande à SesMembresd'Ignorer le MandatContreKadhafi," July 2, 2011

Only Botswana a sole country has decided to arrest Bashir if he travels to Botswana in defiance of AU decision.[37]

The court investigations in the continent have raised the issue of African countries sovereignty. The continent was subject of long foreigner's intervention which marks its whole history and which is never forget by the people of Africa. For example the Rwandese President Paul Kagame reported to say: "the ICC is a form of "imperialism" that seeks to undermine people from poor African countries and other powerless countries in terms of economic development and politics".[38]This speech clearly indicates that Africa is afraid of some new system of imperialist is taken place through an institution like ICC. Some other observers have remark that the limitation of Prosecutor investigation to Africa is due to geopolitical pressures, and out of the court desire but to avoid confrontation with world major powers. Hence the court has been considered as a tool of Western foreign policy to control other part of the globe.[39]

The court effort to prosecute Al-Bashir has raised the conscience of many African leaders including common people to observe the ICC activities; Jean Ping the ex-president of AU Commission, has attacked the court of playing hypocrisy in its ruling decision by saying that "we are not against the ICC, but there are two systems running in this court, one for Africa and its leaders the other for the remain of the world".[40]But the supporters of ICC responded that most

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[37] *AFP*, "Botswana Says Al-Bashir Must Stand Trial at ICC," July 6, 2009; Radio France Internationale (RFI),"Chadian Leader Vows to Cooperate With ICC Over Bashir Warrant," via BBC Monitoring, July 14, 2009; *Reuters*, "Uganda Says Sudan's Bashir to Send Deputy Over ICC," July 16, 2009; *AFP*, "SAfrica Will Arrest Beshir If He Visits: Foreign Ministry," July 30, 2009

[38]"Rwanda's Kagame says ICC Targeting Poor, African Countries," July 31, 2008; Rwanda Radio via BBC Monitoring, "Rwandan President Dismisses ICC as Court Meant to 'Undermine' Africa," August 1, 2008.

[39] Oraib Al Rantawi, "A Step Forward or Backward?" *Bitter Lemons*, 32, 6, August 14, 2008 ; Charles Kazooba, "African Legislators See Bias in ICC's Workings," June 7, 2010.

[40]Christophe Ayad, "Nous Sommes Faibles, Alors On Nous Juge et On Nous Punit," *Libération*(Paris), CRS transl., July 30, 2009.

investigations in Africa up to-date were started by the way of self-referral and that the Prosecutor is investigating and analyzing other cases apart from Africa.

The Office of the Prosecutor asserted that its choice of African's cases is because of their gravity in nature.[41]A South African Constitutional Chief Justice Sandile Ngcobo, has expressed the same sentiment saying 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".[42]ICC officials including the present prosecutor Fatou Bensouda an African woman, challenge that in fact the Court is actually protecting African people instead of "targeting" them. ICC supporters argue that the African legal systems are not functioning properly and too weak, ICC needs to intervene through the principle of "complementarity" to fortify those legal systems.[43]

These sentiments were repeated by Kofi Annan the former U.N. General Secretary "In all these cases, it is the culture of impunity which is target, not African countries. And it is exactly the role of the ICC; to be last resort court".[44]In states party to ICC meeting in Kampala the capital of Uganda in 2010, there was an initiative to coordinate donors and expert to strength national judicial systems of weaker countries. The initiative was well come by the U. S, which participated as observer in the meeting, and expressed its coordination for such initiative.[45]

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[41]CRS interview with Office of the Prosecutor official, September 3, 2008.

[42]FrannyRabkin, "'No Anti-African Bias' at International Criminal Court," *Business Day*, July 20, 2010

[43]Tim Cocks, "Interview-ICC Says Protecting Africans, Not Targeting Them," *Reuters*, June 29, 2011.

[44]Kofi A. Annan, "Justice Vs. Impunity," *International Herald Tribune*, May 30, 2010

[45]State Department, "U.S. Engagement With The International Criminal Court and The Outcome Of The Recently Concluded Review Conference," June 15, 2010.

1.5 NEED TO STRENGTH AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS:

It is worth to mention here that the main propose of establishment of African Court of Justice and Human Rights (ACJHR) was to serve as AU principal judicial organ, but unfortunately the court is still now not functioning.[46]

In order to fully understand how the ACJHR was developed, it is important to know the aim of AU creation in brief.

The AU today is the offspring of the Organization of African Unity (OAU) which charter was adopted by 32 African Nations in Addis Ababa, Ethiopia on 25 May 1963.[47] The main purpose of the creation of the OAU was to bring together African countries and to serve as bridge of one nation. "In 1981 the OAU adopted the African Charter on Human and Peoples' Rights (African Charter) to serve as regional treaty of Human Rights for Africa. The Charter entered into force in 1986, ratified by all African states. In 1987 the African Commission on Human and Peoples' Rights (ACHPR) was created to be presented as the main pan-African human rights institution to supervise the African Charter of Human Rights. The Commission is made quasi-judicial to hear complain from victims whether collectively or individually but its decision is not binding. The OAU adopted in June 1998 a protocol to the African Court of Human and People's Rights (ACHPR Protocol) for protection of the commission mandate. The protocol became operative in December 2003 after the ratification of required number of 15th countries, but the court became actually functional in 2006".[48]

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[46]Frans Viljoen & EvaristBaimu 'Courts for Africa: Considering the Co-Existence of the African Court on Human and People's Rights and the African Court of Justice' (2004)

[47] John Dugard *International Law: A South African Perspective* 3rded (2005).

[48]As of June 2011, the ACHPR had received eleven cases mostly filed by individuals against governments. Of these cases, one was a request for an advisory opinion. See Coalition for an Effective African Court on Human and

The OAU was replaced on 9 July 2002 by the African Union (AU) and in July 2003, the AU Heads of State Assembly adopted a Protocol to establish Court of Justice of the African Union (ACJ). The AU Assembly decided on 8 July 2004 to merge the two courts (ACHPR and ACJ) for better management of the court structure and make it costless operational.[49]In 2008 the court was created and voted by African leaders to be known as African Court of Justice and Human Rights (ACJHR) to serve as main judicial organ of AU.[50]

Now the legal document that established the court is open for ratification to all African States. As we can see from the above mentioned process how the creation of the court has been complex. In case this court to become fully operational it needs many years' experience, but once operational, it expected to be a full Human Rights Court for African Nations as a whole. Bonita Meyersfeld reported to say, 'The ACJHR has the potential to enforce human rights through a proper judicial process relatively independent of political leaders. However, its success as a defender of such rights will depend largely on its accessibility".[51]

As it is clear that the perpetrators of Human Rights in worldwide are mostly the tyrannical leaders specially in Africa, as such, in case for ACJHR to stop Human rights violation atrocities in Africa, it is necessary for the court to incorporate in its mandate criminal jurisdiction and allow individuals to bring cases before it and hold every perpetrator personal responsible for

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Peoples Rights 'African Court Cases and Judgements', <http://www.africancourtcoalition.org/index.php?option=com_content&view=c> (last accessed 05.12.2013).

[49] Olufemi Elias 'Introductory Note to the Protocol on the Statute of the African Court of Justice and Human Rights' (2009) 48 2 *International Legal Materials* 334: 'The decision was based on consensus regarding the increasing number of African Union institutions and the cost of maintaining them. The main idea was to consolidate the limited resources available for a single court'.

[50]Richard FrimpongOppong 'The African Union, The African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web' (2010) 18 1 *African Journal of International and Comparative Law* 92

[51]Bonita Meyersfeld 'Why Africa?' please see this website. <http://www.chathamhouse.org/sites/default/files/public/The%20World%20Tod...]>(Last accessed 05.12.2013).

his act. Today the proposed inclusion of criminal jurisdiction is under the consideration. The inclusion and implementation of this provision will help to diminish the degree of human rights violation in Africa. In order to reach to this goal, the African leaders have to look the state as an institution to serve and guaranty people security and not as an institution to self-interest. If so, they can easily move forward.[52]

Another question arise here by some observers is the possibility of the enforcement of the ACJHR's judgments. It has been suggested that some mechanism should be there to ensure the implementation of the court's decisions. The best way for the court to be effective, is to make the AU back to the court decisions. Any decision of the court against any state or individual, the AU has to make sure that the decision is implemented and if not, the AU shall take sanctioning actions including cutting off diplomatic and economic relations with other AU member states.

1.6 NECESSITY OF FORMING REGIONAL BLOCK SYSTEM:

It is necessary to form regional block system in order to reach to the goal. The UN charter contemplated that the United Nations in its effort to restore international peace, the regional block should be used to facilitate its mandate, on condition that those activities of regional block are compatible to UN general goals.[53]

In fact the Security Council encourages all states to approach first its regional organization to settle all disputes rose within the region before taking the issue to UN Security Council. The formation of regional mechanism to handle disputes is very important, as these

[52]Sarah Ancas 'The Effectiveness of Regional Peace-Making in Southern Africa – Problematising the United Nations – African Union – Southern African Development Community Relationship' (2011),*African Journal on Conflict Resolution: Southern African – 50 Years after Hammarskjöld: Special Issue* 129 at 147.

[53] Chapter 8 art 52 of United Nations Charter (UN) on regional arrangement.

regional organizations are in best position to understand the nature of dispute and as such they can give the best solution than UN Security Council.

The regional institutions and international organizations have contributed to development and protection of human rights a lot as there is no global institution or court set up to supervise the violations human rights. The different regional courts of the world have assumed great prominence effort to protect human rights violation in their respective regions due to the non-existence of international court that protects human rights globally.[54] And ACJHR is expected to do greater than other regional court that because the violation of Human Rights in African are common and serious in its nature. For this reason it is very important for African countries to make this regional system function well to serve the victims of these rights as the international court in many circumstances is out of reach by these aggrieved people special (woman and children).[55]

Creating a regional system, governing by single law can help a lot for the integration of the continent which the original goal of the AU creation; bringing African states together as one single Nation. So the court (ACJHR) creates opportunities for African States to unify and develop together with one strong voice in world political system. And of course this will be the

[54]The International Criminal Court has criminal jurisdiction over genocide, crimes against humanity and war crimes, but it is not, strictly speaking, a human rights court. There are UN committees tasked with monitoring compliance with international human rights treaties, and some of these can hear complaints from individuals, but these committees are not courts and their decisions are not binding.

[55]Bonita Meyersfeld*Domestic Violence and International Law* (2010) at 91.

starting point for the African Nations to have a set of international law respecting their own values.[56]

To reach to this goal, it very important for African States to work together to strength all institutions that watch the implementation of African Charter on Human and People Rights (ACHPR) in the region. Establishing a network that help countries of weak judicial system, influenced by politics or else as defined by human rights expert.[57]

[56] Kithure Kindiki 'The Proposed Integration of the African Court of Justice and the African Court of Human and Peoples' Rights: Legal Difficulties and Merits' (2007) 15 1 *African Journal of International and Comparative Law* 138 at 140

[57] Linda C. Reif 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 *Harvard Human Rights Journal* at 1.

CHAPTER TWO

THE INTERNATIONAL CRIMINAL COURT (ICC) AND AFRICA

2. INTRODUCTION:

The International Criminal Court (ICC) or Rome Statute established in Hague and entered into force on July 1, 2002[58] as permanent independent institution to prosecute those persons who committed the most heinous of international concern crimes. The court is giving jurisdiction to try the following crimes namely: war crimes, crimes against humanity, genocide and crime of aggression. The Rome Statute, giving the individual jurisdiction, to prosecute those persons committed the said crimes, as such the court has important role to play in world system to eradicate these crimes.

As the ultimate goal, the African states were activated and motivated for the creation of the court as these crimes have serious concern in African countries. To date, the African countries represent the largest group number in ICC's Assembly states parties to Rome Statute.

While African states were initially supporting the ICC, the relationship between the court and African countries turndown when the court indicted the Sudanese president Omar Al-Bashir in 2008 for the crime that took place in Darfur. This move of the court was not welcome in Africa especially in political level where it was thought the move is an attack of dignity of African leaders and violation of diplomatic and head of state immunity. The AU which represents all African countries called for its member states to implement a policy of non-cooperation with the court, as it see the court influenced by politics instead of spirit of justice.

[58] http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx (last accessed 11-03-1014)

In this chapter among the question addressed are: whether the reference of Sudanese's issue by UN Security Council in its resolution 1593 to ICC to investigate the crime committed in Dafur helped to solve the conflict or not? And what was the US position thereto; how the perpetrators were charged of different account of crimes, the reactions thereto; then it will be analyzed the Libyan issues, the involvement of ICC and its role thereto; the current challenge to ICC of admissibility of Saif Al-Islam's case by Libyan's authority in the ground of complementarity; lastly it be analyzed Kenyan verses ICC and the challenge faced by the court in its investigation to alleged crime committed in Kenya post-election 2007-08.

2.1 THE INTERNATIONAL CRIMINAL COURT AND SUDAN:

2.1.1 THE SECURITY COUNCIL RESOLUTION 1593 AND THE POSITION OF US:

As Sudan is non-party state to Rome Statute and never consent to the court's jurisdiction, make the court could not investigate any crime taking place in south Sudan (Darfur). The sole institution can take action in international level was UN Security Council under United Nations Charter.[59]

In order to exercise its power offered under this chapter, the Security Council passed a resolution 1593(2005) on March 31, 2005, to refer the situation in Darfur, Sudan to ICC by the vote of 11 in favor, four abstentions and none was opposed: the United State, China, Algeria, and Brazil abs tented from the vote.[60]

In Consideration of Article 13(b) of Rome Statute, the Security Council decided to refer the case of Darfur to ICC for investigation as it has power to do so even though Sudan did not

[59] UN charter chapter 7 Art 24(1,2)
[60] U.N. Security Council Resolution 1593 (2005), March 31, 2005.

rectified the treaty.[61] Prior this referral, the ICC could not take any action even though it is aware there was war crime, crimes against humanity, genocide are taking place in Darfur because of its lack of jurisdiction.

The ICC as institution setup to fight international crimes has fulfilled its entire procedural requirement to investigate the crime committed in Darfur after the referral of UN Security Council.

2.1.2 THE U.S. POSITION ON U.N. SECURITY COUNCIL RESOLUTION 1593:

The United States signed the Statute of ICC on December 31, 2000, at the end of Bill Clinton tenure of office. Unfortunately the Clinton administration never submits the treaty to senate for rectification as there was an objection of US regarding to certain Articles. When Bush come to office soon later the Afghanistan war started, in order to avoid US military prosecution in any foreigners court or international tribunals, the Bush administration decided to unsigned the treaty. The Bush Administration in May 2002 notified to United Nations General Secretary that US is not more intended to be party to ICC, as such US does not has any obligation from its previous signature.[62] As this was its position toward ICC, in September 2004, the Bush administration in its declaration acknowledged of genocide in Darfur,[63] and called the international community to take suitable action. The Bush administration suggested that there should be a special tribunal created under UN to prosecute those perpetrators in Darfur conflict

[61] Different kind jurisdiction of ICC under art 13 of Rome Statute.
[62] Alexis Arieff, Rhoda Margesson, Marjorie Ann Browne, Matthew C. Weed, "International Criminal Court Cases in Africa: Status and Policy Issues", *Congressional Research Service* 35:1(2011) 6
[63] 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.

and object a decision that suggest to take the case of Sudan to ICC,[64] because she believed that ICC does not have any jurisdiction over nationals of states not party to the treaty. Later on, the US endorses a version that allowed the referral of non-state party's case to ICC by U.N. Security Council only and not otherwise.[65]

This position of United States show that US do not want justice but it struggles to protect its nationals and sovereignty. Because knowing that it has permanent membership of Security Council and having veto power, no resolution can be passed without its consent, as such, the US gives its support to Security Council referral's cases to ICC's prosecutor but not otherwise. The United States knows that it has many criminal cases pending against her and its nationals from different war it went through (in Afghanistan, Iraq, Yemen, and Somalia etc...). So accepting other ways of ICC's jurisdiction, the result will be very catastrophe for her.

The United States abstention on 1593 resolution was because of preservation of its own sovereignty. US believed any prosecution of its national by the court without its consent directly challenges the sovereignty of US and other nations not party to the treaty. For this raison, the Bush Administration invoked international cooperation through UN mechanism to stop atrocities in Darfur and not otherwise.[66]

When the Administration seen that there is a big change of possibility to prosecute US subject in Hague base court without its consent, she manage to enter into bilateral convention called "(bilateral immunity agreements (BIAs)" or known as "Article 98 agreements") with most states

[64]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.
[65] Alexis Arieff, Rhoda Margesson, Marjorie Ann Browne, Matthew C. Weed, "International Criminal Court Cases in Africa: Status and Policy Issues", *Congressional Research Service* 35:1(2011)15
[66] 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.

party to Rome Statute not to surrender US citizen to ICC. These agreements are explained in Article 98(2) in the Statute of the agreement.[67]

The law prohibited US government to assist ICC in its investigation, arrest, detention or extraction in US territory.[68] This prohibition covered many other thing such like funding, cooperating or assisting any investigation of ICC in US or abroad including UN peacekeeping operations except those investigations aims of specific person of US concern such like terrorist groups.[69]

It clear by this position of US when the resolution 1593 was passed that she wanted to hold liable those committed these crimes in South Sudan (Darfur) but at the same time it has reservation by fear that its nationals will be prosecuted for war crimes in other part of the world without its consent. For this reason United State enters in to bilateral treaty with those countries who are party to Rome Statute not to submit US citizen to ICC

2.1.3 THE ICC INVESTIGATION OF ALLEGED CRIME AGAINST REBEL COMMANDERS IN DARFUR:

2.1.4 BACKGROUND:

The investigation of Darfur issue officially opened on 6 June 2005 by ICC after the reference of UNSC to the court in its resolution 1593 on 31 March 2005 as mentioned above. After the referral, the prosecutor has requested the court after its investigation to issue an arrest

[67] 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.

[68] The American Service members' Protection Act of 2002, or ASPA (P.L. 107-206, Title II)

[69] These prohibitions do not apply to cooperation with an *ad hoc* international criminal tribunal established by the U.N. Security Council such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR). 22 U.S.C. 7423(a)(1). In the case of Darfur, the *Darfur Accountabilityand Divestment Act of 2007* (H.R. 180), passed by the House on August 3, 2007, would offer U.S. support to the ICC's efforts to prosecute those responsible for acts of genocide in Darfur. Also do apply to those person known by their terrorist act.

warrant against *Ahmad Muhammad Harun, Ali Kushayb* and *Omar Hassan Ahmad Al-Bashir* the Sudanese president as the two are not likely to appear before the court voluntarily, as well applied to the court to summons to appear before the court all the three suspected commanders involved in Haskanita incident: *Abdallah Banda Abakaer Nourain*(Banda), *Saleh Mohammed Jerbo Jamus* (Jerbo) and Darfur rebel commander *BaharIdriss Abu Garda.*[70]

. Till the date, none of this arrest warrant has been implemented by Sudanese government and they publically announce that Sudan will never cooperate and the same was made to the intention of UN Security Council by ICC but no action was taken.[71]

2.1.5 THE CURRENT POSITION OF THE CHARGES AGAINST REBEL COMMANDERS UP TO DATE JUNE 2014:

As mentioned above, in May 2009 the pre-trial judges issued summons to Bahar Idriss Abu Garda.[72] Abu Garda appeared voluntarily before the court and denied all accusations levied against him in Haskanita incident. In February 2010, the judges acquitted him, declaring that there was insufficient ground to make him liable for the attack on African peacekeepers.[73]

The two remain rebel commander, *Banda* and *Jerbo,* on March 7, 2011, Judges of PTC I affirmed their charges, sending their cases for the trial. The two commanders are alleged to commit the crime of attacking on African Union Mission in Sudan (AMIS) peacekeepers.[74]

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[70] Oriane Mallet," ICC judges move Darfur rebels case to trial for crimes against peacekeepers, Pre-Trial Judges Confirm War Crimes Charge for Commanders Banda and Jerbo", *Coalision for the International Criminal Court* 1(2011), 2

[71] Ibid

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

[73] Alexis Arieff, Rhoda Margesson, Marjorie Ann Browne, Matthew C. Weed, "International Criminal Court Cases in Africa: Status and Policy Issues", *Congressional Research Service* 35:1(2011)15

[74] Oriane Mallet," ICC judges move Darfur rebels case to trial for crimes against peacekeepers, Pre-Trial Judges Confirm War Crimes Charge for Commanders Banda and Jerbo", *Coalision for the International Criminal Court* 1(2011), 2

The Judges found sufficient evidence to try Banda and Jerbo as co-perpetrators for three accounts namely: murder; attacking objects of peacekeeping mission; and pillaging. The said attack killed twelve AMIS security personnel and wounded eight others; all originated from different African countries (Mali, Senegal, Botswana and Nigeria) all states party to Rome Statute.[75]

"The decision confirming charges against Banda and Jerbo shows that the rule of law does exist in the Darfur situation," said William R. Pace, Convener of the Coalition for the ICC. But the actual problem here is not the fairness of ICC and its willingness to rend justice to the victims in Sudan and the main problem is the problem of jurisdiction, whether ICC is competent court to try these crimes in Sudan since Sudan is not party to Rome statute and never gives its consent to ICC jurisdictions. Here is laying the main issues. These issues will be analyzed later on whether the Security Council decision to refer Sudan's case to ICC was fair decision or not and whether the principle of complementarity which is the basic of ICC involvement in domestics matters was followed and exhausted or not?.

2.1.6 THE ICC INVESTIGATION OF CRIME CHARGED AGAINST OMAR AL-HASSAN BASHIR:

2.1.7 ARREST WARRANT APPLICATION:

The Prosecutor of the ICC Moreno-Ocampo on July 14, 2008, applied to the court to arrest al-Bashir.[76] Moreno-Ocampo presented a charge sheet implicating president Omar in three account of crime of genocide, five accounts crimes against humanity, and two accounts of war

[75] Ibid

[76] In a briefing to the Security Council on June 5, 2008, the ICC Prosecutor had indicated that he would present a second case on Darfur to ICC judges in July. ICC Office of the Prosecutor, *Seventh Report of the Prosecutor*.

crimes.[77] The sheet refers to the attacks by Sudanese troops and pro-government militia's counter-insurgency operation in Darfur. Moreno-Ocampo said that "Bashir didn't "physically or directly" carry out these crimes but he did it through the state formal and informal institutions (the army group and the militia of janjaweed), as president of Sudan and the chief in army forces, he is directly liable of these crimes".[78]

Contrary to the domestic legal system, the ICC Statute did not recognized any exception or immunity to head of state or officials capacity when the person committed the crime of the court concern during proceeding the case of such person.[79]

2.1.8 THE ICC CHARGES OF GENOCIDE AGAINST BASHIR THE SITTING PRESIDENT OF SUDAN:

On March 4, 2009, the arrest warrant was issued to President Omar Al- Bashir by ICC's judges.[80] The warrant upholds that there is sufficient evidence to believe that Al-Bashir has committed those crimes framed against him during the government counter insurgency

[77] The counts are: (1) Genocide by killing of members of each target group; (2) Genocide by causing serious bodily or mental harm to members of each target group; (3) Genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction; (4) Murder of civilians in Darfur, constituting a crime against humanity; (5) Extermination by inflicting conditions of life calculated to bring about the destruction of a part of the civilian population in Darfur, constituting a crime against humanity; (6) Forcible transfer of population in Darfur, constituting a crime against humanity; (7) Torture of civilians in Darfur, constituting a crime against humanity; (8) Rape of civilians in Darfur, constituting a crime against humanity; (9) Attacks against the civilian population in Darfur, constituting a war crime; and (10) Pillaging of towns and villages in Darfur, constituting a war crime (ICC Office of the Prosecutor, *Summary of Prosecutor's Application under Article 58*, July 14, 2008).

[78] ICC Office of the Prosecutor, *Summary of the Case: Prosecutor's Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad Al Bashir.*

[79] Article 27 of Rome Statute. 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 to a foreign country in official capacity) under customary International Law. This point will be discussed in detail in chapter 2 under the immunity of Head of State under international law. For further discussion, see Marko Milanovic, "ICC Prosecutor Charges the President of Sudan with Genocide, Crimes Against Humanity and War Crimes in Darfur," *American Society of International Law Insight*, July 28, 2008; DapoAkande, "The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?," *Oxford Transitional Justice Research Working Paper Series*, July 30, 2008; and PondaiBamu,"Head of State Immunity and the ICC: Can Bashir be Prosecuted?" *Oxford Transitional Justice Research Working Paper Series*, August 1, 2008.

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

campaign.[81]. As pointed out by the prosecutor in his application, the Court issued an arrest warrant on those accounts but reject for genocide.[82]The court ruled out that the prosecutor did not supply sufficient evidence to show that act was done by Sudanese government with intend to destroy the whole community of part of it. Therefore the charge of genocide was left out.

However the door was open to the prosecutor to add or modify the charge sheet in light of subsequent evidence in according to article 58(6) of the Statute. This decision made the prosecutor at will to add genocide crime whenever he gets evidence for it.

2.1.9 THE SUDANESE REACTION AND POSITION AGAINST THE COURT:

After the issuance of warrant, the Sudanese government publically rejected the decision of ICC arguing that ICC did not has any jurisdiction on Darfur and it will never recognize The Security Council resolution which refer Darfur issue to ICC as the Government of Sudan believed that UNSC does not has any power to do so under international rule and principle. In fact the government of Sudan argued that the ICC is nothing more than western instrument to control the free act of Africa sovereign countries and Muslim world.[83]

The government spokesman of Sudan has several time accused the prosecutor as the part of "terrorist" in Sudan since his investigation is based on information from the report of rebel group, the act of prosecutor is nothing more than aggravating the Darfur issue.[84]

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

[82] AT Cayley 'The prosecutor's strategy in seeking the arrest of Sudanese President Al Bashir on charges of genocide' (2008) 6 *Journal of International Criminal Justice* 829-840 and De Waal 'Darfur, the Court and Khartoum: The politics of state non-cooperation' in N Waddell and P Clark (eds) *Courting conflict? Justice, peace and the ICC in Africa* (2008) 125.

[83]E.g., BBC Monitoring, "Sudanese Leader Calls International Court 'Tool of Imperialist Forces,'" [State-owned] Suna News Agency, August 20, 2008.

[84]*The Associated Press* (hereafter, *AP*), "Sudan Dismisses ICC Proceedings on Darfur, Reiterates Refusal to Hand Over Any Suspects," July 11, 2008.

All these reactions of Sudan are due to the irresponsible decision of UN Security Council by referring Sudan's case to ICC. The Council knows that any action by ICC which is not in interest of Sudan integrity could not be welcome by Sudanese authority. Furthermore Sudan as sovereign independent state, it was not wise to issue arrest warrant against a sitting president Bashir. This action can be interpreted as attempt to the sovereignty and dignity of Sudan notwithstanding the genuine of warrant, or good faith of judges. The referral of UN Security council to ICC and the issuance of arrest warrant by ICC against Bashir worse the situation in Dafur and intercept the ongoing peace dialogue process. Any state can challenge these decisions with the feeling that its sovereignty and dignity has been undermined.

Also it was a mistake to hope that this warrant will weaken the power and popularity of Bashir as some observers quoted out.[85] In contrast these actions fortified Bashir position in Sudan. Sudanese resentment of court's action reverses all things in Sudan and rally the country to Bashir side. Shortly after this warrant was issued, Bashir visited Darfur and he was able to rally in his side thousands of people to combat the conspiracy organized against Sudan and its people. Even the political party could not dare to take the opposite side. The ruling National Congress Party (NCP) reported to join the rally for support of Sudan and has said that "the ICC action in Sudan is aimed to attack the core national values and state interests".[86]

Since then the government has took several step against ICC investigation people and those sympathizing with them.[87] Among the action taken by government, expelling the humanitarian workers who are suspect to collaborate with ICC and prevent all government

[85] *New York Times* analysis noted that while many advocates hope the arrest warrant will weaken Bashir's hold in power.

[86] SulimanBaldo, "The Politics of an Arrest Warrant," *Making Sense of Darfur* [online forum published by the Social Science Research Council], July 23, 2008.

[8787] CRS interview with ICC Office of the Prosecutor official, September 3, 2008. ICC prosecutorial staffs have conducted extensive interviews with witnesses outside of Sudan, including in neighboring countries. In November 2008, Sudanese police detained a human rights activist they accused of being in contact with the ICC, and in January 2009, a Sudanese man was convicted of "spying" for the ICC and sentenced to prison.

officials to contact, speak directly or indirectly to ICC investigation team.[88] In July 2010, the second warrant was issued to Al-Bashir, in retaliation, the Sudanese government expelled most senior humanitarian officials in Darfur accusing them of conspiring against Sudan, in November of the same year the security force shutdown an independent ratio accusing its staff of cooperating with ICC team and rebel group in Darfur.[89]

In a further effort to prevent ICC to involve in Darfur issue, Bashir said that Sudan has all possibility to try domestically. In fact in August 2008, before the arrest warrant was issued, the government has took some step for this as it appointed *Nimer Ibrahim Mohamed*, a special senior lawyer to investigate all the crimes in Darfur. This step was taken by the government after the arrest warrant was issued to Harun and Kushayb by ICC. Despite Ibrahim Mohamed is reported to be good lawyer, but it was observed that his effort will be limited because of political pressure that he will face by Sudanese government. And it was further argued that Sudan does not have a law that punishes the crime of genocide, war crime and crime against humanity.[90]

All these reactions of Sudan are retaliation aimed to exhaust the ICC effort in Sudan with strong believe that ICC is acting illegally in Sudan.

2.1.10 THE REGIONAL REACTION TO THE DECISION:

After this internal reactions, the government of Sudan lunched a diplomatic campaign, there were many rallies supporting Sudan from African and Arab leaders. Among regional organizations that supported Sudan effort for the deferral of the case; African Union (AU), the

[88] Bashir reportedly warned that "all the diplomatic missions in Sudan, the NGOs, and the peacekeepers" could face the same punishment,Abdelmoniem Abu Edries Ali, "Defiant Beshir in Darfur, Warns Foreigners," *AFP*, March 8, 2009; *AFP*, "ICC Action Against Sudan's Beshir Could Hurt UN: Ban," February 4, 2009.
[89] *Reuters*, "Sudan Accuses Darfur Radio Staff of Working for ICC," November 7, 2010.
[90] Abdelmoniem Abu Edries Ali, "Sudan Appoints Darfur Prosecutor," *Agence France-Presse*(hereafter, *AFP*), August 6, 2008.

Community of Sahel-Saharan States (CEN-SAD), the Arab League, and the Organization of the Islamic Conference (OIC).[91]

By the statement written of AU peace and Security Council on July 11, 2008 expressed its concern over the Darfur issue by declaring "the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting a lasting peace, and restated that the AU is very worried of mishandling justice to indict African leaders".[92]The same position of the council was supported in the meeting with OIC in New York on 21, 22 July that the SC should suspend the ICC investigation in Darfur for the sake peace and stability.[93]For controlling the situation the AU called Sudan to investigate all violation of human rights in Darfur and promise to help Sudan to bring the perpetrator to justice. In October 2009, the penal of AU led by ex-president of South African *Thabo Mbeki* suggested that there should be a "hybrid" court composing judges from Sudan and outside to try the Darfur crimes. The suggestion was good in its kind but failed to clarify whether the court will deal the present case before ICC or not. (Unfortunately till date the proposal never implemented due to many obstacle posed by international forums).

By analyzing conflict resolution perspective in one side and by looking to various ongoing political processes in Sudan, it can be conclude that this arrest warrant to Al Bashir is nothing but a provocative act which is aimed to further complicate the issue of Darfur, thereby explained the sentiment of AU.

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[91]Alexis Arieff, Rhoda Margesson, Marjorie Ann Browne, Matthew C. Weed, "International Criminal Court Cases in Africa: Status and Policy Issues", *Congressional Research Service* 35:1(2008)19

[92] African Union, *Letter Dated 14 July 2008 from the Permanent Observer of the African Union to the United Nations Addressed to the President of the Security Council*, S/2008/465.

[93] Security Council Report, "Update Report: Sudan," July 28, 2008. While some see these statements as evidence of regional support for Bashir, others point out that the option of a deferral could serve as leverage over Khartoum.

But by the analyses of the prosecutor, this point seems to have a little value, as it appeared from his intervention by saying that "as prosecutor of the court, justice is only his motive of guidance". For him, his office has nothing to do with peace and security. The office of prosecutor has published in September 2007 a paper declaring that his office following the criteria as lay down in Article 53 of the statute. Moreno Ocampo said "the office will naturally be guided by the objects and purposes of the Statute, namely the prevention of serious crimes of international community concern through ending impunity". Furthermore he said "there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions such as the UN Security Council other than the Office of the Prosecutor".[94] He has added that his office will "pursue its own judicial mandate independently and will not submit to the political pressure of those trying to mislead the ICC in the face of other conflicting questions".[95]

This position of prosecutor is fair position for the sake of justice and equity; the court should be impartial while acquitting its duty under the statute. It has a duty to apply the law regardless the political factor surrounded it, but this should be in cases where it is taken legal decisions or adjudicating as independent court of justice settled with the aim to eradicate impunity in world system. At the same time, to be wised and to have its decisions executed, it might be suggested that ICC should play some kind of politics. Since it does not has police to bring its indicted to the court except to rely on the government of concern, the ICC has to refrain issuance of arrest warrant to the sitting president, and postpone his case until the concern president is not more in office. This politics and policy can help the court to hide its weaknesses in the sight of world.

[94] F Megret 'The politics of international criminal justice' (2002) 13 *European Journal of International Law* 1262.
[95] Ibid

As pointed out earlier, Bashir is part of problem and solution in Darfur; as such any step taking ignoring his position can only complicate the situation in Sudan. Therefore any intervention in international level aimed to easy the situation in Darfur has to consider the government position in the conflict for better resolution.

2.2 THE INTERNATIONAL CRIMINAL COURT (ICC) AND LIBYA

2.2.1 THE SECURITY COUNCIL RESOLUTION 1970, 1973 (2011) AND ITS REFERRALS TO ICC:

As Arab nations became to revolt against their authorities because of corruption and mal-governance and step forward to overthrow their dictator government and replace by genuine democracy system (commonly call Arab spring or Arab uprising).

After the successful revolution of Tunisia and Egypt, which became the role model of other Arab nations, the Libyan civilians took street against 41 years ruling of Muammar Al-Gadhafi the uncontroversial president of Libya.

Unfortunately the civilians were met army forces resistance by attacking and killing hundreds of protesters, the situation turnout quickly to be internal army conflict.

Realizing the gravity of what is going on in Libya, the UN Security Council adopted two important resolutions.

In late February, ten days after the government's violent crackdown began; the Security Council passed a resolution imposing arms embargo, travel ban and freezing Gaddafi's assets and other officials. Some weeks later, the Council passed another resolution that authorized "all

necessary measures" for protection of Libya's civilians.[96] After these two resolutions, the NATO air started its campaign operation in Libya.

The Security Council in using its power under chapter 7 of UN charter which gave it power to act on the behalf of international community and by considering Article 13(b) of Rome Statute, voted unanimously to refer Libya's case to ICC. Hence the prosecutor initiated his investigations in Libya.

2.2.2 THE ICC ACTION AGAINST EX-PRESIDENT MUHAMMAD QADDAFI AND HIS REGIME OFFICIALS:

Once the case was referred, the next surprise was how quickly the ICC prosecutor moved from investigation to arrest warrants. What took several years in other contexts, such as Sudan, was accomplished in three months in the case of Libya.

On June 27, the arrest warrant was issued to Mohammed Al Qaddafi, his son Saif Al-Islam Al Qaddafi, and his intelligence chief Abdullah Al Senussi. The court found sufficient evidence to believe that these crimes were committed by these personals mentioned. The prosecutor in his application filed on May 16, 2011 for arrest warrant to Qaddafi conceived that the crime was done and implemented through Qaddafi internal trustee such like Saif Al Islam and Al Senussi.[97]

In Libya there was a possibility of successful negotiations to end the war and the numbers of attempts were made to do so; the African Union may have led the most serious effort.[98] One member of the National Transitional Council (NTC), the political leader of the opposition at that

[96] UN Security Council Resolution 1970, 26 February 2011. UN Security Council Resolution 1973, 17 March 2011.
[97] 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.
[98] Alex de Waal, "African Roles in the Libyan Conflict of 2011," *International Affairs* 89:2 (2013), pp. 365-379.

time, described the changed of dynamics as soon as the ICC warrants were on the table. "It seemed that there was no longer a serious effort by the international community to try to end the war by means other than through military means", he noted. [99]

This position of international community shows that the case in Libya was more political than legal. The revolution was big opportunity for international community to end Gadhafi's four decades ruling in Libya which was considered to be more excessive; that why the table of negotiation was narrow down and there was no effort for it in the side of international community. The ICC was definitely seen as an impediment for getting Gaddafi to leave power, at least in the views of some who were central to NTC decision making.

At one point, when the NTC leadership thought there was movement on possible negotiations, they asked ICC prosecutor Moreno---Ocampo to delay his announcement of the request for warrants, to allow them to push for a negotiated solution. The prosecutor complied with this request.[100] While the NTC negotiating position was that, Gaddafi must leave power, and if he left the country they would not pursue him. They were also prepared if necessary to ask for an Article 16 deferral from the Security Council, which would have halted the ICC prosecutions for at least one year. All these possibilities were in the table of negotiation but the international community never interested to it.[101] Once the warrants were released, the opposition felt that Gaddafi is in his heels and will fight to the end.

While the AU's negotiation efforts were stymied by NATO military actions, the AU saw the arrest warrants as hindering peace options. Shortly after the warrants were confirmed, the AU

[99]Priscilla Hayner, " International Justice and the Prevention of Atrocities Case Study:Libya: The ICC Enters during war", *European Council on Foreign Relations ecfr.eu.*:1(2013)2.
[100] Ibid
[101]According to an NTC Executive Committee member.

declared that it would not implement the warrants, and that Gaddafi could freely travel in Africa.[102]

The question was rise how AU political decision can overrule the legal obligation of the then thirty-one African states who are members of ICC, and who were required to cooperate? The answer is simple, since international law has become the law of game and interest in the hand of powerful nations, nothing left to legitimate any action were states are fighting to gain their interest and sovereignty. The counter-question can be posed, how United States entered into Bilateral Immunity Agreement (BIA) with almost all African countries whether state party to ICC or non-state party not to submit US citizen to ICC?, and this agreement was considered to be valid because of lack of objection rise to it.

2.2.3 THE PRESENT POSITION OF LIBYAN AUTHORITY TOWARD ICC REGARDING TO THE CASE OF SAIF-ISLAM SON OF MUHAMMAD QADDAFI:

Saif-Al-Islam Gaddafi the son of Muhammad Qaddafi was apprehended on 19 November 2011. The Libyan authority submitted a report to ICC concerning Saif Al-Islam transfer to ICC after the court request to submit him into its custody on 23 January 2012. PTC I insisted in its order that Libya authority without delay should deliver Saif Al-Islam Gaddafi to the ICC custody on 4 April 2012. Libyan authorities appeal this order but dismissed by Appeals Chamber on April 25.[103]

Before analyzing the challenge of Libyan authority against admissibility of Sail-Islam and

[102] African Union, "Decision on the Implementation of the Assembly Decisions on the International Criminal Court: Doc. EX.CL/670(XIX)", Assembly/AU/Doc.366(XVII), 1 July 2011, para. 6.
[103] http://www.iccnow.org/?mod=newsdetail&news=4985 (last accessed 5-2-2014)

Abdullah Al-Sanussi's case before ICC, it is important to analyze the current security situation in Libya.

2.2.4 THE CURRENT SECURITY POSITION IN LIBYA UP TO DATE:

After overthrow Qaddafi's Government, the serious issues rise was the security problem. Where in every part of Libya there were multiple attack lunch by loyalist of ex-president Muhammad Qaddafi regime and other independent groups. The General National Congress (GNC), the current new authority has failed to maintain law and order.

Libya remains till today turmoil of insecurity almost after 3 years of Gadhafi's ouster, the rivals and armed militias still now posing threat to the country security. The insecurity rate in Libya is too high and there is mess everywhere. That can be explained by murdering of United States Ambassador to Libya, John Christopher Stevens, in an attack on the US consulate in Benghazi on September 5, 2012.[104] Melinda Taylor, a member of the ICC's Office of Public Defense Counsel and other ICC representatives were imprisoned in Zintan for 26 days after met Saif Al-Islam Gaddafi. They were accused by the Libyan government of spying to help Saif Al-Islam Gaddafi.[105]

She said "the court (ICC) should not trust Libya and its so-called fair justice system to try the son of Qaddafi". She said "she was jailed by Libyan authority when she trusted them that her visit was privileged and she will not be arrested by Libyan authority but was imprisoned by the same authority more than two weeks accusing her of passing a confidential document to her client".

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[104] Vivenne Walt, *Why Libya-and not the Hague-will try Gaddafi's son*, October 10, 2012, http://world.time.com/2012/10/10/why-libya-and-not-the-hague-will-try-gaddafis-son/ .

[105] Kirkland Green,"The Libya Cases at the ICC and the Libyan Government's Admissibility Challenge", *American Non-governmental Organizations Coalition for the International criminal Court* 1.:(2012)2

Taylor warned the court of not trusting the Tripoli authority otherwise Saif-Al Islam will lose his life in the arbitrary manner which has nothing to do with the justice.[106]The evidence is that the government does not has control over anti-Qaddafi militia groups who held Saif-Al-Islam, it has been requested several time to handover Saif-Al Islam to government but the demand was rejected by militia group. However, the militia and the government reached a compromise agreement that Saif Al-Islam Gaddafi's trial should be in Zintan.[107] The authority of Libya now decides to challenge ICC for admissibility of the case in Hague.

2.2.5 CHALLENGE OF ADMISSIBILITY OF SAIF-AL-ISLAM'S CASE BY LIBYAN AUTHORITY:

The ICC operates under a requirement of "complementarity." According to this, the Court must defer cases to a state that claims jurisdiction unless it determines that the state is unwilling or unable to hold fair trials of the accused. Once a state challenges the admissibility of a case on the grounds of complementarity, the Pre-Trial Chamber of the ICC must determine whether or not the trial will take place at The Hague, or in a domestic court.

In May 2012, Libya made such a challenge submitted by lawyers on behalf of the government. They claimed that the case was "inadmissible in ICC on the grounds that Libya's national judicial system has already took all necessary step to investigate Sail-Al Gaddafi and Mr. Al-Senussi cases genially" The challenge also states that, "To deny Libyan people this

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[106] http://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/libya/51974-international-criminal-court-debating-where-moammar-gadhafis-son-should-be-put-on-trial.html?itemid=id#50289. (last accessed 5-2-2014)

[107] Nick Meo, *Libya: Saif Gaddafi to go on trial next month,* August 18, 2012, http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9484459/Libya-Saif-Gaddafi-to-go-on-trial-next-month.html .

historic opportunity would be inconsistent with the purpose of ICC principles which is to accords the national judicial system the primary jurisdiction and to stand as the last resort."[108]

Determining where Saif Al-Islam Gaddafi and Abdullah Al-Senussi will face judgment is a challenge for the ICC's mandate and also a test for the newly-formed Libyan government. Since the Court is considered as the forum of last resort, some believe that the trial should be deferred to Libyan domestic courts. For example, they say that if the Court is serious about supporting complementarity, the Court should defer to Libya in order to give the newly forming democracy the ability to assert itself and correct its own wrongs. Moreover, others argue that ICC involvement in the case is enabling the Libyan government to act, creating a "culture of justice" that could set a good precedent.[109] The US government welcomes a domestic trial of the accused, assistance states in creating credible legal institutions to fight impunity, known as positive complementarity, is something the US believes the ICC should engage in.[110] Whatever the US officials have stated that any domestic initiatives against the accused should "fully comply with Libya's international obligations."[111]

However, due to unchecked militias and attacks on forces loyal to Muammar Gaddafi, some argue that The Hague is the best place to ensure justice for the accused. An expert on Libya from Human Rights Watch stated that "the challenge today in Libya is the transformation from the rule of guns to the rule of law."[112]They declared that "the current government has failed to examine the deaths of Muammar Gaddafi and his supporters, stating that the killing of captured

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[108]ICC Pre-Trial Chamber I, *Application on behalf of the government of Libya pursuant to Article 19 of the ICC Statute*, May 1, 2012, http://www.icc-cpi.int/iccdocs/doc/doc1405819.pdf .
[109] Eric Leonard, *Testing the ICC: the politics of complementarity*, June 1, 2012, http://jurist.org/hotline/2012/06/eric-leonard-libya-ICC.php .
[110]US Department of State Legal Advisor Harold HongjuKoh, *International Criminal Justice 5.0*, November 8, 2012, http://www.state.gov/s/l/releases/remarks/200957.htm .
[111] Eric Leonard, *Testing the ICC: the politics of complementarity*, June 1, 2012, http://jurist.org/hotline/2012/06/eric-leonard-libya-ICC.php .
[112] Haifa Zaiter, *Libya faces uphill battle in disbanding militias*, October 16, 2012, http://www.al-monitor.com/pulse/politics/2012/10/disbanding-libyas-armed-factions-easier-said-than-done.html .

combatants is a war crime."[113] Since Libya is recently recovering from its bloody conflict, some questioned whether Libya can reject vengeance and seek justice instead. Hassiba Hadj Sahraoui, of Amnesty International, said: "Trying Senussi in Libya, where the justice system remains weak and fair trials are still out of reach, is to undermine the victim of his right of fair trial". Instead He added, "the ICC has to try Sail-Al Islam for the charge frame against him if the court want justice takes its cause. Till today there is hostility between different groups. In fact what we are seeing in Libya today is the rule of revenge not the rule of justice."[114]

2.2.6 CURRENT POSITION OF ICC'S JUDGES TO THE CHALLENGE OF ADMISSIBILITY:

The president of the ICC assigned the Libya's case to Pre-Trial Chamber I comprised of Judge Christine Van den Wyngaert (Belgium), Judge Silvia Fernandez Gurmendi (Argentina) and Judge Hans-Peter Kaul (Germany) on March 4, 20011. [115] The PTC on May 31, 2013 rejected the admissibility challenged by Libya's authority and ordered that Saif –Al Islam should be immediately delivered to ICC custody. The court ruled that Libya's domestic system and investigation procedure did not cover the crime that Saif –Al Islam is accused for and conclude that the Libyan authority must transfer the accused to the ICC for the trial. The ICC Judges recognized Libyan authority effort of restoring the rule of law in the country but at same time argue that still Libya is suffering of traditional weak judicial system

[113] Human Rights Watch, *Libya: new proof of mass killings at Gaddafi death site*, October 17, 2012, http://www.hrw.org/news/2012/10/16/libya-new-proof-mass-killings-gaddafi-death-site.

[114] http://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/libya/52027-gaddafi-spy-chief-should-be-tried-by-icc-not-libya-says-family.html?itemid=id#50289 (last accessed 5-2-2014)

[115] http://www.iccnow.org/?mod=newsdetail&news=4985(Last accessed 5-2-2014). For additional information and to view the Court's latest decisions, visit the ICC website.

including the state inability to secure Saif-Al Islam into its own custody.[116]Since then Libya has appealed against the decision of the court but however the decision to surrender Sail-Al Islam remain the last decision of the court during the whole process. [117]

As stated above, the Libyan government wants to conduct Saif Al-Islam Gaddafi's trial in Libya and has issued an admissibility challenge to the ICC. It is currently building up its judicial systems and infrastructure and has requested help from the UN to do so. Ashour Saad Bin Khayal, Minister of Foreign Affairs and International Cooperation asked relevant UN organs to discuss ways for Libya to acquire necessary technical assistance in capacity building and strengthening the governmental performance of the institutions of transitional justice. The UN Support Mission in Libya has reported progress in Libya's new judiciary system. Despite this, NGOs such as Amnesty International are doubtful of Libya's capacities to deliver a fair trial. Moreover, ICC defense counsel representing Saif Al-Islam Gaddafi's interests in ICC proceedings argues that "there is insufficient security and infrastructure to guarantee the independence of the judges, prosecution, defense, and the protection of witnesses."[118] On 23 July 2013, the defense counsel of Saif-Al Islam requested PTC I to make a finding to UN Security Council that Libya has deliberately failed to deliver the accused to the ICC.[119]

As we can see from all these arguments, the matter is biggest challenge to ICC because if the Court is unable to get custody of the accused, this will be mean that the effectiveness or credibility of the court would be undermined in the future as the court has failed to secure and bring to justice many of its arrest warrants issued in Africa.

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[116] Ibid
[117] Ibid
[118] ICC Pre-Trial Chamber I, *Defence Response to the "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute,"* July 31, 2012, http://icc-cpi.int/iccdocs/doc/doc1446165.pdf.
[119] http://www.iccnow.org/?mod=newsdetail&news=4985. for information about current ICC position to Libya admissibility challenge. (last accessed 5-2-2014). For additional information and to view the Court's latest decisions, visit the ICC website.

2.3 THE INTERNATIONAL CRIMINAL COURT (ICC) AND KENYA

2.3.1 PROSECUTION OF KENYAN OFFICIALS BY ICC IN CONNECTION WITH POST-ELECTION VIOLENCE (2007- 2008):

The Kenyan election 2007 was much contested election ever held in Kenya, the two largest parties, the President Mwai Kibaki party (Party of National Unity) and Raila Odinga party (Orange Democratic Movement) were the favorite candidates in the election. It was showing by preliminary result that Odinga was leading the election,[120] however then after the results communicated by Kenya's electoral committee had showed the reverse of the result by giving to Kibaki the winning position. After that announcement, Odinga refused to recognize the result announced by election committee and declare that his victory was stealing from him. Similarly remark was made by European electoral observers by saying that "Kenya election committee had failed to secure the results of election from fraud".[121]

The following day after the announcement of the result, the violence brought out throughout the country in which left more than 1200 dead and an estimated of 500,000 homeless.[122]The two parties started accusing each other of genocide and ethnic cleansing. It was reported that Odinga supporters had "engaged in ethnic ravage" and in other Odinga accused his opponent group of "engaging in genocide".[123] The violence took place in the tribal area and continued till the peace agreement was reach under the mediation of Kofi Annan the former UN

[120] "Odinga in front in Kenya election". BBC News. 29 December 2007

[121] Ibid

[122] "Kenya election violence: ICC names suspects". BBC News. 15 December 2010.:http://www.bbc.com/news/world-africa-11996652 (last accessed 7-2-2014).

[123] Africa "Kenya diplomatic push for peace".BBC News. 2 January 2008.information:http://news.bbc.co.uk/2/hi/7167363.stm . (last accessed 7-2-2014)

GS, whereby it was decided that the post of prime minister will be created for Odinga and Mr Kibaki would remain President as such the two will share the power.[124]

After this peace agreement between the two parties, however it was decided that the case of violence during post-election should be referred to ICC so that justice take its cause.

2.3.2 BACKGROUND OF ICC INVOLVEMENT:

As said above, among the points agreed as part of the mediation between the two leaders Kibaki and Odinga in 2008, was to investigate the post-election violence and to bring perpetrator to justice. The two parties agreed a series of accords; among the agreement, it was agreed that there should be a committee formed to investigate the crimes took place after the election. The committee was formed and Mr Philip Waki was appointed as chair person for the committee. After the investigation, Mr Philip recommended that in his report that the government has to setup a special local tribunal to prosecute those accused of the most heinous crimes. Despite the two parties had agreed the establishment of the tribunal but the National Assembly rejected the idea by declaring that "such tribunal would not be effective to prosecute all the accused genuinely". After a series of dispute over the report how to handle it, Mr Waki passed his report to Kofi Annan with the names of those persons accused to commit the most atrocity during the violence. The report includes the instruction that Kofi Annan shall forward the report to ICC if the progress was not made in national level.[125]When the Mr Philip commission realized that there was no progress to bring the perpetrator to justice, on 16 July 2009 the Philip commission delivered its report to ICC prosecutor with six boxes of supporting documents and one sealed of envelope containing the names of people accused of those crimes.[126] The prosecutor, Luis

[124] Kenya rivals agree to share power. BBC.
[125] Annan hands ICC list of perpetrators of post-election violence in Kenya. The Guardian.
[126] Ibid

Moreno Ocampo opened the sealed inspect it then re-sealed without revel its contents to any third person.[127]As the people of Kenya were eager to know the contents submitted to ICC, there were calls from Kenyan people whether the ICC releases the list or Mr Philip does it.[128]As said Mr Said Omar Hassan of Kenyan National Commission on Human Rights (KNCHR) and majority of Kenyan that "the Kenyan elites have been several time judges in their own causes and in this time, they all welcome the intervention of the ICC".[129]

The majority of the public opinion supported that the ICC should be involved in the prosecution that because the country has a large record of corruption and impunity scandals where almost their political class enjoy total immunity. Kenyans people believed that any prosecution in Kenya could not lead to the true justice. As prove they said that the government had received the list of Waki but still no action was taken by the government. This position of Kenyans people was supported by Western governments who called the ICC to process Kenyan's case if Kenya authority refused to set up local tribunal to prosecute those charged of ethnic cleansing.

At this stage, some commentators had argued that Kenya's delicate coalition could be turned apart if the prosecutions in the country aimed to the few individuals and left out the other perpetrator that could probably launch the country into other ethnic clashes. But this argument was countered by Mr Hassan the KNCHR's activist by saying that "there is no peace over justice, and there can be no peace without justice". The people of Kenya don't trust Kenya's judicial

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[127]Waki Commission list of names in the hands of ICC Prosecutor

[128]Barasa, Lucas (10 July 2009). "Parties ask ICC to disclose violence suspects". Daily Nation

[129]DnialHowden, "Porsecutor Arrives in Kenya on trial of post-Election violence", *the independent* 1.(2009), 1. http://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/48410.html.(last accessed 11-2-2014)

system which has a lot of failure record in its history, and Kenya want justice should be done to its victims and prefer ICC investigation than its own.[130]

Since the submission of the list of suspected perpetrator to ICC's prosecutor, there has been several protests from Kenya masterminded people and senior politicians who argued that Kenya has all the capabilities to try those suspected in Kenya.

2.3.3 CHARGES:

The prosecutor after noticing the sensitivity of the case, decided to form two sheets of charge. Each charge sheet includes the officials of both parties to make it balance in order to easy proceed the case.

The prosecutor of ICC presented to Pre-Trial Chamber II charges and requested to start investigation of election violence (2007-2008).

First charge sheet named: William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, and the second charge sheet named: Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali. [131]

Here are the brief of charges frame against each group:

Raila Odinga's group (Orange Democratic Movement) the opposition party:

Their charges are:

1. Murder; 2. Deportation or forcible transfer of a population; 3. Torture and Persecution

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[130] Ibid

[131] "Prosecutor's Application Pursuant to Article 58 as to Francis KirimiMuthaura, UhuruMuigai Kenyatta and Mohammed Hussein Ali". International Criminal Court. 15 December 2010. p. 6.
"Prosecutor's Application Pursuant to Article 58 as to William SamoeiRuto, Henry KipronoKosgey and Joshua Arap Sang". International Criminal Court. 15 December 2010. p.6.

The President Mwai Kibaki's group (the Party of National Unity):

Their charges are:

1. Murder; 2. Deportation or forcible transfer of a population; 3. Rape and other forms of sexual violence; 4. Persecution and Inhumane acts

The Chamber II accepted the request of prosecutor and summonses for all six suspected before the court on March 8, 2011,[132] as the prosecutor stated that summonses can be enough to ensure their appearance.[133] Hence ICC prosecution started in Kenya.

2.3.4 THE GOVERNMENT OBJECTIONS TO ICC INVOLVEMENT:

The publication by ICC the names of most high-profile officials of government for alleged crimes against humanity has annoyed Kenyan authority, make them decided not to cooperate with ICC in its investigation process in Kenya and to bring perpetrator to justice. This stand is totally contrary from Kenya first declaration to fully cooperate with the court in case Kenya failed to prosecute perpetrator at home as part of agreement. Kenyan authority has taken many steps to obstruct investigation process. Among steps took by authority are:

2.3.5 VOTE BY MEMBER OF PARLIAMENT TO WITHDRAW KENYA FROM ICC (THE ROME STATUTE):

Week after publication of the names by ICC, the first move by Kenyan authority was to remove Kenya from ICC membership. The Kenyan National Assembly on December 22, 2010

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[132] Decision on the Prosecutor's Application for Summons to Appear for William SamoeiRuto, Henry KipronoKosgey and Joshua Arap Sang. International Criminal Court. 8 March 2011. P.22.
"Decision on the Prosecutor's Application for Summonses to Appear for Francis KirimiMuthaura, UhuruMuigai Kenyatta and Mohammed Hussein Ali". International Criminal Court. 8 March 2011. pp. 22–23.
[133] ICC Office of the Prosecutor, *Factsheet: Situation in the Republic of Kenya*, December 15, 2010.

passed a proposal that seek to remove Kenya from ICC membership. The motion was introduced previously to National Assembly but it was thrown out by Deputy Speaker farah Malaam who declared the move as unconstitutional. However the proposal was amended and introduced in second time then was passed.[134]In the vote of passing the motion, the Members of the Parliament descried the Court "as a colonial anti-African court and declare that Kenya will not accept to surrender its sovereignty".

Energy Minister Kiraitu Murungi reported to say "No American or British will be tried at the ICC and we should not willingly allow ourselves to return to colonialism."[135]

These entire moves by Kenyan authorities are flagrant signal to tolerate impunity in Kenya, aimed to discredit the court effort, which trying to eradicate the custom of impunity in Kenyan system. And it is a totally indication that the custom of impunity is widespread in this country (Kenya) and the victims can never get redress of their grievance in the hand Kenyan justice. As Martha Karua, the former minister of justice and one of the Member of Parliament said "The ICC did not come to us, we beckoned it, if Kenyans were wondering about impunity, and this is the face of impunity". These declarations of former justice minister demonstrate the raison why people always welcome involvement of ICC, and believed any prosecution in Kenya, will never result to the fair trial.

After this move, the Kenyan authority takes another step which is:

2.3.6 APPEAL FOR DISMISSAL OF THE CASE BY KENYAN AUTHORITY:

The Kenyan government appealed to the ICC to stop the proceedings against the six suspects accused of crimes against humanity. The Government requested the ICC to dismiss the

[134]Rugene, Njeri (22 December 2010). "Parliament pulls Kenya from ICC treaty". Daily Nation
[135] "Parliament pulls Kenya from ICC" (23 December 2010). *BBC's news.*

case since it had initiated its own investigations with constitutional and judicial reforms. However, the Pre-Trial Chamber rejected the appeal and stated that Kenya had not provided sufficient evidence that it was conducting its own investigation. Presiding Judge Daniel David Ntanda Nsereko stated that "for the case to be deemed inadmissible, it must be demonstrated that Kenya was undertaking its own investigation, which deals with the same individuals and the same alleged crimes as before ICC". The PTC decided that the Government of Kenya had failed to provide sufficient evidence that prove that Kenya was investigating the six suspects for the same crimes.[136]The government claimed that it has established a Truth Justice and Reconciliation Commission (TJRC) to investigate the crime. But the true fact is that, this institution has a much broader mandate than the ICC and it is investigating cases of the conflict dating back as far as 1963. Civil Society organizations have, however, claimed that the TJRC lacks credibility. A major concern is the Commission's power to recommend amnesty for perpetrators, which may perpetuate impunity.[137]

When this attempt failed, the authority took another move which is:

2.3.7 KENYA'S AUTHORITIES LOBBYING UN SECURITY COUNCIL TO DEFER THE CASE:

Under the Rome Statutes, the Security Council has power to suspend proceeding before ICC for a period of 12 months.[138]As Kenya was ready to sets up a local process to try the suspects, by virtue of this article, the African Union wrote to the SC to suspend the proceeding in

[136] (31 August 2011), *Hague Justice Portal.*http://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/kenya/50653-kenyas-appeal-dismissed-by-icc-case-against-ocampo-six-will-continue.html?itemid=id#1437

[137](23 May 2011), *IRIN please visit:* http://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/kenya/50255-truth-and-consequences-in-kenya.html?ItemId=1437 to see how this commission has failed in passed to rend true justice in its different intervention.

[138] Art 16 of Rome Statute," deferral of investigation or prosecution"

Kenya for one year. It was argued by Kenyan elites group that "seeking justice at the moment would only inflame existing tensions between the tribes and create further instability in Kenya". However the Council never takes action to honor this request.

These arguments amount to an assertion that ongoing impunity and threat is more preferable than justice, the argument is clearly dishonest disguised as it is menacing the establishment of justice. Also in legal sense this attempt cannot be maintained, because the deferral "under article 16 of Rome Statute" can only be invoked if the Security Council "under Chapter VII of the UN Charter" determines that there is a threat to international peace by court prosecution. But in this case, there is no assessment which shows that the court investigation in Kenya could characterize such treat; in contrast, punishing these perpetrators will be milestone of justice that helps country to flourish by establishing the custom of anti-impunity for future generation.

Prof Plessis argued following this request that "the most challenging issue for Kenya and its AU supporters is that, the request will be associated with established pattern on the part of African states to seek deferrals in cases where political elite are implicated". The result will be the protection of the customs of impunity in Africa. He further argue that "Even if Kenya and its AU supporters were able to gain sufficient political support this time for Kenya in its quest, the problematic is that this round has to be renewed in every year in term of article 16, which mean that Kenya would find itself in track to lobby all the time this large group in its side".[139]

[139] Oliver Mathenge," Rough Road Ahead as Kenya plans to Lobby UN's Big Five", *Daily Nation*1.: (2011), 1. http://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/kenya/49879.html?ItemId=1437

2.3.8 INTERNATIONAL REACTIONS:

Before the reference to ICC, there was no objection in international level that Kenya should try the perpetrators at home. US initially supported this option of domestic trial, but when the authority failed to do so and the case was referred to ICC, US expressed its support to ICC to fight the rooted impunity in Kenyans daily life. In its support statement US President Barak Obama called Kenya authority to co-operate with the ICC by saying "I recommend all of Kenya's leaders, and the people whom they serve, to cooperate fully with The Hague based court investigation and remain focused on implementation of the reform agenda and the future of your nation. Those found guilty will be held accountable of their action individually. No community should be help collectively responsible for the act never done by them. Let the accused carry their own burdens and let us keep this in mind that the accused will remain innocent until proven guilty. As Kenya move forward they can count on US as their partner".[140] James Steinberg the Deputy Secretary of State of US in his visit to Kenya declared that "his government would not support the Kenyans authority lobby for suspension, especially if such suspension meant by them to protect the suspects". Furthermore he said "What is vital is to make sure accountability is achieved and impunity is avoided". He said "as ICC was the mechanism that Kenya chooses and submitted to, as such, US was in full support to it. And US strongly feel that accountability is an important element that makes sure Kenya is moving forward and deal with the past as well as build a strong future for Kenyan people".[141] Among the five powers only China has expressed its

[140] "Statement by President Obama on the International Criminal Court announcement". White House Office of the Press Secretary. 15 December 2010.

[141] Oliver Mathenge, " Rough Road Ahead as Kenya Plans to Lobby UN's Big Five", *Daily Nation1*.: (2011), 1. http://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/kenya/49879.html?ItemId=1437

support to Kenya request. Russia indicated that it will back Kenya's request on the condition that the local investigation process transparency gather international standard.[142]

Of course this stand of America is worthy to appreciate, because leaving the case in hand of Kenyan authority mean that perpetrators will go unpunished and they might get amnesty at any time under Kenyans judicial system.

In other side African Union support of Kenyan's position for deferral of the case and wrote to UN Security Council can be seen as bad indication if the Union mean by this deferral, a total deferral or dismissal of the case from ICC, and the stand is very dangerous for the future of African continent. Because it is big signal to tolerate the custom of impunity in African society which is widespread in all over the continent, especially when it concern to leaders or officials who thought they are above the law and law is for common people, making them claiming impunity all the time.

But in contrast, if the (AU) mean by deferral postponement of the case by considering Kenya actual political situation, then its position need some consideration. Because looking to Kenya actual political reality, we can conclude that no way the proceeding of the case can lead to betterment of Kenya in these days. All indicted persons by ICC are now the key role players in Kenya's politics today and they will never give way to succeed the case. And any attempt may result to the worst; this point can be explained by the present position of the case in ICC.

2.3.9 PRESENT POSITION OF KENYAN'S CASE IN ICC:

The two men accused by ICC as key role player in Kenya post-election violence, once bitter enemies, have come together and conquest the post of president and Deputy

[142] Ibid

President. Both of them have won their seat, Uhuru Kenyatta a former Deputy Premier indicted, has become president of Kenya while William Ruto a former minister of High Education indicted has become Deputy President from the election 2012. The both were accused of killing from each other's tribes. They said that the political marriage of the two men is aimed to end the hostility between their two tribes. It is reported to be declared by William Ruto a couple days before the election:

"We are telling those who doubt that Kikuyus and Kalenjins can't work together, now it is time for Kenya to show their big spirits".[143] In other side Mr Uhuru said: "For the international community to know that, we as Kenyans have gone through difficult times but we also have our own solutions, we have a new constitutional privilege and we demand the respect as citizens of this nation. Don't impose your thoughts and ideas on the people of Kenya".[144]

As both become unchallenging leaders and held the key portfolio of the country, prosecuting them by international forum without their consent and without looking to their official positions can lead to many frustration. This point can be explained by what we are seeing now in Kenya. The authority is using state machinery to obstruct all evidences that were available with prosecutors against their two elite and the case is about to fail in the hand of prosecutor. As prosecutor said "the International Criminal Court has no practical chance of success to prosecute Kenyan President Uhuru Kenyatta in the face of his government pure obstructionism". Prosecution lawyer Ben Gumpert said. "We have been exhausted of all the lead evidence available with us, but we are under the obligation to pursue our investigation. Our evidences are getting less and less promising against Uhuru Kenyatta," he said while explaining

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[143] Mohammed Adow, " Kenya's ICC Accused Unite", *Aljazeera*1.: (2012), 1. http://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/kenya/52124-kenyas-icc-accused-unite.html?itemid=id#49053(last (accessed 07-02-2014)

[144] Ibid

why access to Kenyatta's financial records is important for them. In the declaration of the prosecutor Fatou Bensouda: "my key witness is not willing to testify while another one confessed of giving false evidence on a decisive stage of the case, as such, having carefully examine my evidence and looking to the impact of the two withdrawals, I have come to the conclusion that currently the case against Mr. Kenyatta does not satisfy the high evidentiary standards required by this court,"[145]

By considering this immense obstruction by Kenyans authority, Prosecutors asked judges to rule that Kenya refused to meet its obligation of assisting the court and continuing obstructing the available evidences, and requested the court to adjourn the trial until it acquire further evidences to start the case. The lawyers of Kenyatta, who want judges to dismiss the case said, "the prosecutors are no more interested of their cases because they evidences are flack but attach the blame for their failure on the government of Kenyan".[146]

All these statements are evidence that ICC has to change its strategy toward Kenya's case in these days until the political regime change if it wants see justice done in Kenya. It is worthy to mention that ICC's prosecutor and judges for maintaining their credibility and obtaining people reliance, to play some king of politics while making decisions. For example sitting president never proceed his case when he is the head of state, because any move against such person can be fruitless even though the case against him is genuine, as we are experiencing in Kenya and other African countries.

[145] http://www.cnn.com/2013/12/20/world/africa/kenya-president-icc/

[146] http://www.standardmedia.co.ke/?articleID=2000104092&story_title=kenyatta-trial-doomed-unless-kenya-helps-icc-prosecutors(last accessed 07-02-2014)

Furthermore ICC must know, no country can allow the prosecution of its head of state when serving in office by international forum whatever the case may be against him; because this stands directly challenging the sovereignty of the country.

The trial is important to the ICC, as it has secured only one conviction and suffered a large of cases collapses since it was set up 12 years ago. As Ms Fergal Gaynor the representing of victims said while accusing both the prosecution and government of sending dangerous signal to the world in future, any withdrawal of charges would "result serious damage to the Court's credibility and efficacy, and that will create the possibility of undermining the Court's universal deterrent effect". she added "Withdrawal of charges in this case dare sending out the message that the court is, in fact, powerless in the face of witness terrorization, corruption and state barrier to access to evidence." That why as it was suggested above, ICC should review its position in Kenyan's case if it does not want sees another failure in Africa.

2.3.10 CONCLUSION:

After analyzing all those issues mentioned above, it may be conclude that; the case before ICC there are good reasons to pursue it. For one thing Africa has been many time victim of large number of carnage. Practical speaking, the charge of atrocities in the continent are high which natural make the court to focus in Africa as it is the sole continent where the judicial system is too weak and manipulated at the same time out the reach by the common people. The victims of those crimes want justice and the unique way to reach to that justice is to approach international forum. That why people preferred always international adjudication than national judicial system. The people complaining about the ICC's bias and anti-Africa are political favorite, not

common people or the victims, who always worried that no one is there to pay consideration to their grievances.

In other hand by looking world political system, it can be argued that, the imbalance formation of UN Security Council, has affected the credibility of ICC a lot. Because the Rome Statute gave power to Security Council to refer cases to the court and this power has been used by the Council for their own political aimed. Out of hundreds of cases around the world, the Council has referred only two cases to the court and all from Africa; Libya, Darfur and neglects others, such as Israel, Gaza, Iraq, Afghanistan, Yemen and Syria etc.... The fact that this referred cases are in Africa, supported the allegation that the court is an-African, targeting the weaker nations which are cutting off in diplomatic relation with powerful countries.

The ICC need to work in just manner for maintaining its credibility. The world aspirations of international criminal system/justice are inconsistent with the focus that limit to Africa only. In the world where powerful countries act with total apparent impunity that tend to undermine international justice. Until unless this problem is not taking seriously by international community, the ICC will be considered always by the weak nations as toll in hand of power nations to control their actions, it is for that raison African leaders have argued that the court is selective.

CHAPTER THREE

IMPLEMENTATION OF ICC MANDATE IN AFRICA

3.1 INTRODUCTION:

The African Union (AU) which represents all African states has raised many objections to ICC activities in Africa. The Union doubted the court credibility and neutrality in investigating the crimes of world concerned. To support its stand the AU has noted many remarks to the prosecutor's investigation related to alleged crimes took place in Africa, whereas at same time ignoring the most heinous crimes that are taking place in other part of the globe.[147] This chapter will discuss in details the reason of African countries non-cooperation decision toward the court. It will be analyzed firstly the background of present position of AU toward implementation of court arrest warrant in Africa, the scope of immunity of state officials under international law in general and under Rome Statute in particular and lastly the view of AU's interpretation of art 27 and 98 of the Rome Statute related to immunity of head of state in the light of other international laws and Rome Statute itself.

3.2 THE POSITION OF AFRICAN UNION (AU) TOWARD IMPLEMENTATION OF ICC DECISIONS:

All started after the arrest warrant was issued to Omar Al-Bashir, the sitting president of Sudan in 2009 for crime committed in Darfur, the African Union (AU) took hostile position against the court. For fully understanding this stand of AU against the court (ICC), it is important

[147]The AU argued that ICC is more political oriented than its effort to eradicate impunity in the world system as its primary duty. The double standard of the court has undermined the African Union to cooperate with the ICC to implement its decisions in Africa. Since the court establishment, it has interested only in African cases whether by self-reference or by UNSC reference or by initiating the case by its own motion. At the same time, the court has severally ignored taking action against the perpetrator of world concerned crimes in other continents (e.g. Iraq, Afghanistan, Syria, Yemen, Myanmar, Gaza, Kashmir etc...) despite receiving a lot of complain to these crimes, this, by fear of confronting the world powerful nations like (USA, China, Russia and India).

to give some background of what happened prior the indictment, between Africa and western masterminded.

3.3 AFRICAN EXPERIENCE OF COLONIZATION:

The continent of Africa had a bad experience of colonialism. Once been victim of western politic of imperialism, had made several challenges to ICC work in Africa.[148] The fact is that, the western imperialism was used the international law to justify all their acts in the African continent. The international law experts such like Chimni and Anghie have argue that "for the expansion of colonial system in Africa, the law was used as one of the tool to achieve the western goal covering by the doctrine of "universality"". [149] These scholars shape how International Laws were used to legitimize and legalize the crackdown of third world countries to be subordinated to European systems. According to them, the former colony has to understand, obey the international law including international criminal law set up by master colonies. According to Mohamed Mamdani "the powerful countries used to interpret the language of law to create "a new humanitarian system" where the freedom of act is larger obtain by the master colonies at the same time the third world countries are totally deprave of their sovereignty of act".[150] These views seem to play important role in political sphere in Africa today; as it is argued that how the powerful countries once been the most violator of human rights against

[148] Neo-colonialism is a term used to describe certain operations at the international level which allegedly have similarities to traditional colonialism of the 16th to the 19th centuries. The contention is that governments aim to control other nations through indirect means; that in lieu of direct military-political control, neo-colonialist powers employ various economic, financial and legal policies to dominate less powerful countries. The effect is *de facto* control over targeted nations.

[149] A Anghie and B Chimni 'Third world approaches to international law and individual responsibility in conflicts' (2003) 2 *Chinese Journal of International Law* 88.

[150] M Mamdani 'Darfur, ICC and the new humanitarian order: How the ICC's "responsibility to protect" is being turned into an assertion of neo-colonial domination' *Pambazuka News* 396 http://books.google.com.pk/books?id=V8PXClUso4C&pg=PA155&lpg=PA155&dq=Pambazuka+News+396+http://www.pambazuka.&source=bl&ots=WgKosnZzhC&sig=gq0u4QpFavoroyxwuHxn341HbLk&hl=en&sa=X&ei=UUtFU_rQNqrV0QWDo4HADQ&ved=0CDoQ6AEwAw#v=onepage&q=Pambazuka%20News%20396%20http%A%2F%2Fwww.pambazuka.&f=false (last accessed 09-03-2014)

African people, claim themselves today as protectors of that rights for Africa, after many decades of suppression of their basic fundamental rights.[151]

While this historical fact never forget, the scholars and African leaders experience another misused of international law to crackdown African leaders; the principle of universal jurisdiction.

3.4 THE MISUSED OF UNIVERSAL JURISDICTION'S PRINCIPLE BY THE WEST:

The starting point was in 2000 when Belgium' government issued arrest warrant for Abdoulaye Yerodia Ndombasi the then- foreign minister of Democratic Republic of Congo (DRC).[152] This warrant was badly perceived in Africa, where African countries warn Europe of misusing the doctrine of universal jurisdiction to humiliate their leaders. While this was not forgetting, another incident came in 2008 when the Germany government arrested Rose Kabuye the chief of protocol to President Paul Kagame of Rwanda in pursuance of arrest warrant issued by French's government for his connection of shooting down the plane of the then Rwanda president that lead to the war of genocide in 1994.[153] However Mr Kagame took the issue to UN declaring that the European countries are misusing the principle of universal jurisdiction to embarrass African leaders. Only these are two examples among multiples where European countries based on universal jurisdiction to pursue African political elites.

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[151] Ibid

[152] The case was brought to the ICJ; see Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) available on the ICJ website: http://graduateinstitute.ch/faculty/clapham/hrdoc/docs/ICJcongovbelgium.PDF. (last accessed 09-03-2014)

[153] Mark Tran, 'Rwandan President Kagame Threatens French Nationals with Arrest,' The Guardian, 12 November 2008, http://www.guardian.co.uk/world/2008/nov/12/rwanda-france. (last accessed 09-03-2014)

After this event in 2008, the African Union reacted by adopting a resolution declaring that no African country should co-operate with European countries of any arrest warrant issued to any African leaders or personalities in the cover of doctrine of universal jurisdiction.[154]
By giving this background, now it is easy to understand the current position of AU in implementation of ICC's decision against its leaders.

3.5 THE AU'S POSITION IN IMPLEMENTATION OF ICC'S ARREST WARRANT IN AFRICA:

Africa once was the most active supporter for the creation of the court (ICC),[155] turns to be the first enemy of the court, so what happen?

As said above, the issuance of arrest warrant against Al-Bashir, was staring point of deteriorating relationship between ICC and African Union (AU). Before the issuance of arrest warrant by ICC, the African Union took many steps to prevent the actual conflict between the

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[154] Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/14(XI), http://www.minec.gov.mz/index2.php?option=com_docman&task=doc_view&gid=12&Itemid=48. (last accessed 09-03-14).

[155] On 14th January 1999, the Senegalese National Assembly authorized its national Government to ratify the Rome Statute, making Senegal, an African country, to become the first state in the world to demonstrate support for the new era of international justice. see, International Commission of Jurists," Senegal: Senegal is the First State to Ratify the International Criminal Court's Statute" Available at <"http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=2182 2>. Last accessed 10-03-14). The Democratic Republic of Congo was also the 60th State to ratify the Rome Statute, thereby allowing it to enter into force.
As of May 2013, 122 states are states parties to the Statute of the Court,http://en.wikipedia.org/wiki/States_parties_to_the_Rome_Statute_of_the_International_Criminal_Court (last accessed 10-03-2014). Out of these, 33 are African States, 18 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin America and Caribbean States and 25 are from Western Europe and other States. http://www.iccnow.org/?mod=download&doc=4348 (last accessed 10-03-2014).
The above facts and statistics show that the African continent has the highest number of state parties to the Rome Statute and has played a fundamental role in firming up the Rome Statute system over the years. The ideal expectation is that these high numbers automatically translate into tremendous support for the Court in Africa, therefore, the high number of Rome Statute ratifications from the African States, turn and became quantitative rather than qualitative support for the Court particularly within the African political circles.

court and Africa and to protect the fragile peace treaty that was agreed between the two conflicting party in Dafur.

After the application of 14 July 2008 to arrest Al-Bashir, the Peace and Security Council of the African Union adopted a resolution. In this resolution, the Council reiterated its commitment to fight impunity in Africa and also condemned all the violations of human rights in Darfur.[156] However, it focused that "the search for justice should be followed in a way that does not hamper or damage efforts aimed of promoting lasting tranquility", thereby the council considered the application to arrest Al –Bashir in present situation in Darfur as "wrong moment".

In addition, the Council reaffirmed its statement of 14th July 2008, and highlight African Union's concern over the wrongful indictments of African leaders as it has conformed in its "Assembly's decision/AU/Dec.199 (XI)" regarding to the abuse of doctrine of universal jurisdiction.

Despite all these objections and oppositions by AU, the PTC I went ahead and issued in March 2009 arrest warrant to Al-Bashir.[157] This move was very criticized by African Union, Jean Ping, the ex-chairman of African Union Commission, reported to say "our position is clear, we are against impunity, and we cannot tolerate impunity in Africa and let criminals go scot-free. But we say that peace and justice should not collide, the need for justice should not override the need of lasting peace".[158]

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[156]Peace and Security Council Communique arising out of its 142nd Meeting held on 21st July 2008 in Addis Ababa, Ethiopia PSC/MIN/Comm (CXLII) Found at http://www.africa-union.org/root/au/organs/142-Communique-Eng.pdf (last accessed 10-03-2014).

[157] The warrant was issued under Art 58 of the Statute.

[158] "World Reaction-Bashir Arrest" (4th March 2009) BBC, available at: http://news.bbc.co.uk/2/hi/africa/7923797.stm(last accessed on 9th March 2014) also an opinion by Mubarak M. Musa, the Deputy Head of Mission-Consulate General Uganda, "International Criminal Court has lost its impartiality" in the Daily Monitor Newspaper (22nd June 2010) in which the he argued that the ICC's selectively against the Sudanese Government during the quest for peace and efforts of national reconciliation in Africa.

The ICC has since then found strong resistance to penetrate in the rank of African leaders forming the AU. The Court requested to create an ICC link office in Addis Ababa, the AU base in Africa but this request was rejected by states assembly of AU.[159] Then the AU called its member states to observe a policy of non-collaboration with the ICC, and this stand remain the position of African Union toward ICC. Since then, Al-Bashir has safely traveled to many African and non-African countries including states party to ICC.[160]

In fact, in 2011, when Al-Bashir visited Malawi for the Summit of Common Market for Eastern and Southern States, the Malawian's authority permitted him to attend the summit and support its decision by relying on following argument:

1. The resolution of African Union passed in response to President Bashir's arrest warrant, urging African states not to cooperate with ICC.
2. The doctrine of customary international law regarding to the immunity of head-of-state.
3. The fact that Sudan was not a party to the Rome Statute, therefore Malawi could not found itself under any obligation to arrest Al-Bashir.[161]

The same stand was taking by AU regarding to Muhammad Al-Qaddafi's case, the former Libyan president. In its summit July 2011, the AU decided non co-operation with the court, and declared that this warrant complicates its effort of negotiation to find political solution in Libya. [162] The AU condemns the call to arrest Qaddafi as being colonialism. Jean ping the

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[159] "Addis Ababa Office Opening Still on Hold" (4th February 2011) Radio Netherlands Worldwide(RNW) Available at http://www.rnw.nl/international-justice/print/292628(last accessed on 10 th March, 2014)

[160] Bashir has traveled to Chad, Djibouti, Eritrea, Kenya, Malawi and Nigeria, all states party to ICC. he has also traveled to non-states party to ICC in Africa(Egypt, Ethiopia, Libya) and other non-African countries such like(China, Qatar, Saudi Arabia, Kuwait, Iran, Iraq). For full information: http://bashirwatch.org/. (last accessed on 10th March, 2014).

[161] Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, Case No.ICC-02/05-01/09, 12 December 2011, http://www.icc-cpi.int/iccdocs/doc/doc1287184.pdf. (last accessed 10-03-2014)

[162] 17th AU summit decision on the ICC, para 6, Draft Decision on the implementation of the

then AU chairman said "the ICC is "discriminatory" because it only pursues Africans". He said "the Hague-based court called ICC ignores crimes committed by Western powers in Iraq, Afghanistan and Pakistan". The spokesman of Libyan's government Moussa Ibrahim agreed and said: "The ICC is nothing but European Guantanamo Bay to punish African leaders, it will never deal with the crimes committed by its European master and USA".[163]

The view in Africa is that, if one demands accountability for African leaders then the same justice should be demanded from Western leaders. Russian and Chinese leaders have patronage Al-Asaad in Syria, neither UN or ICC could take any action to investigate those crimes committed thereof. In the absence of fairness and justice in international political system, international criminal justice and its custodian ICC will always be subject to the political whims of individual nation states.

The AU has argued while planning to take immunity issue to international court of justice that the Rome Statute cannot override the doctrine of immunity of state officials under customary law, in particular of those countries who are not party to Rome Statute.

Let analyze here the scope of immunity of head of the state under international law.

3.6 HEAD STATE IMMUNITY VERSUS PROSECUTION OF INTERNATIONAL CRIME:

It has been hot debate between scholars whether the customary immunity that states officials enjoined since long time under customary international law still available to them and it can be claim by states at any time even before international courts, tribunals; or this privilege has been override by new trend of international law since the establishment of Nuremberg Tribunal

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Assembly decisions on the International Criminal Court, Doc.EX.CL/670(XIX), 30 June – 1 July 2011, Malabo, Equatorial Guinea.

[163] *"Breaking News English"* http://www.breakingnewsenglish.com/1107/110703-african_union.html (last accessed on 10th March 2014).

after the world war II. The statute which create the court, denied all immunity claim by German officials in connection of international crimes. Since then the doctrine has been developed that no immunity can be claim before international tribunals that has jurisdiction to try international crimes.

Before entering into the details, here are attempts to define the meaning of "immunity". Immunity has been defined by oxford as "the state of being protected from something".[164] The origin of the word come from late Middle-English, and symbolizes "exemption from liability". It also defined in Latin word "*immunitas*" meaning "exempt from something". In other words, immunity means any discharge from an obligation of responsibility, especially to the public service. Thus, "*immunity from prosecution*" means abandonment of prosecution. This immunity can be demanded at any time of prosecution before deliverance of decree.[165]It is a bar or exemption from the prosecution of the crime committed. Whether this defense of immunity as it defined here is applicable under international law, is a debatable topic. However, it enough to point out here as a defense or claim that usually state officials recourse whenever they pursued for international criminal.

After this attempt of clarifying the meaning of "immunity", let examine the scope and developments of the concept of immunity of state officials under customary international law.

3.7 CUSTOMARY INTERNATIONAL LAW:

For any rule or practice to attain the status of customary international law, there are certain conditions to be satisfied. First there must be "evidence of a general practice by states accepted as law".[166]Second, those practices must consist of the "rules which, states considered

[164] *Oxford Advanced Learner's Dictionary* 7th edition (2007), 776.
[165] (2005) 549-550; *Jashir Singh v Vipin Kumar Jaggi*AIR 2001 SC 2734.Aiyar
[166] Art 38(1) Statute of the International Court of Justice.

over period of time as legally binding". In other word "A rule of customary law is created by widespread state practice called *(usus)* coupled with jurist opinion (*opinion juris)*, at stand that states considered those rules as international binding".[167] Thus, the customary law rules depending on widespread practice of states but not necessary the practice should be for all the states.

The state official's immunity found its origin from this customary international law then developed into convention and international treaties[168]. As WA Schabas said "the immunity of head of states and certain other state officials from prosecution while serving is recognized under customary international law".[169] This immunity under customary law has been justified several times by many judicial systems of different states including the International Court of Justice. [170]Despite an existence of certain convention waiving the immunity of head of state and calling to prosecute any person committing crime that has concern of international community as a

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[167] UK Ministry of Defence*The Manual of the law of armed conflict* (2004) 5 (secs 1.12- 1.12.2); *Asylum* case *(Colombia v Peru)* Judgment, 20 November 1950, ICJ Reports (1950) 126; *North Sea Continental Shelf (Federal Republic of Germany v Denmark; FederalRepublic of Germany v Netherlands)* Judgment, 20 February 1969, ICJ Reports (1969) paras 70-78*; Case Concerning Military and Paramilitary Activities In and Against Nicaragua,(Nicaragua v USA)* Judgment, 27 June 1986, ICJ Reports (1986) paras 77; 183-186; JE Ackerman and E O'Sullivan *Practice and procedure of the International Criminal Tribunal forthe Former Yugoslavia* (2000) 2-3; E Kwakwa*The international law of armed conflict:Personal and material fields of application* (1992) 30; T Maluwa*International law in Post-Colonial Africa* (1999) 5. But see ICTY's view in *Prosecutor v Kuperšk̆ićet al* (Case IT-95- 16-T), Trial Chamber II, Judgment dated 14 January 2000 para 540.

[168] B Stern 'Immunities for heads of state: Where do we stand?' in M Lattimer and P Sands *Justice for crimes against humanity* (2003) 73-106, particularly 73 ('Some of the tenets used in order to grant immunity to heads of state have their origin in customary international law…'). But see G Mettraux*International crimes and the Ad hoc tribunals* (2005) 13 (arguing that identifying customary international law is a daunting task).

[168] WA Schabas*Genocide in international law* (2000) 316; *Attorney-General of Israel v Adolf Eichmann* (1968) 36 ILR 18 (District Court of Jerusalem) para 28; *Attorney-General of Israel v Adolf Eichmann* (1968) 36 ILR 227 (Supreme Court of Israel) para 14; *Prosecutor v*

[169] WA Schabas*Genocide in international law* (2000) 316; *Attorney-General of Israel v Adolf Eichmann* (1968) 36 ILR 18 (District Court of Jerusalem) para 28; *Attorney-General of Israel v Adolf Eichmann* (1968) 36 ILR 227 (Supreme Court of Israel) para 14; *Prosecutor v*

[170]*The Case Concerning the Arrest Warrant of 11 April 2000 (The Democratic Republic of Congo v Belgium)*, 2002 ICJ Reports 14 February 2002 paras 58 – 59; *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France) Provisional Measures* Order of
17 June 2003 ICJ Reports 2003 paras 1-39, particularly paras 1 and 28.

whole and refuse to recognize any defense of immunity to such crime, there is plenty of support to this immunity.[171] Here are the justifications of granting this immunity under international law:

Firstly, the main idea of this traditional doctrine of immunity granted to head of states is based on preservation of state sovereignty. This comes from the notion that, a sovereign state should not disgrace itself by submitting its head to the jurisdiction of another state.[172]The moral commitment for the states to preserve their dignity has contributed to the development of head of states and state official's immunity under international law. This is expressed in the voice of "do to other as you wish they do to you".[173] In the vein of this spirit, each state agreed and maintained the concept of immunity for the hope that others will do the same to their officials while travailing in the foreign land. Hence the practice of immunity to head of state was preserved by states.

Secondly, state officials are granted this immunity in order to facilitate diplomatic relations between states, as it is crucial to maintain diplomatic relations to solve out any outstanding between states.

However, this rule appeared to be too absolute as many masterminded committed crimes and go scot-free with the cover of state immunity. In order to control this wide freedom of act preserved by this rule of immunity under customary international law, there are been many steps taken to limit this diplomatic immunity. What was thought to be illegal in the past that state officials cannot be prosecuted before national or international court even for international crimes became possible today judicial system in both national and international courts. In these days,

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[171] Here hopefully ICJ is referring to those international tribunals statutes that outlawed the immunity claim of the state officials before the court such like (Nuremburg tribunal, East Far of Tokyo tribunal, ICTY, ICTR, SCSL).
[172] Dissenting Opinion of Judge Jean Yves De Cara in the *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France), Provisional Measures*, Order of 17 June 2003, ICJ Reports 2003, 123.
[173] D Aversano 'Can the Pope be a defendant in American courts? The grant of head of state immunity and the judiciary's role to answer this question' (2006) 18 *Pace International Law Review* 495, 506.

officials are trying and punished for the crime committed by them. In fact, it has been one the international criminal justice requirement that all individuals should be responsible of their criminal act regardless of their rank if the crime committed is kind of international concern. All States in nowadays have started sort of prosecution of their former officials accused of committing international crimes.

One might ask question here; is this new trend means that no more immunity is available to state officials for international crimes, especially before international court or tribunals? Let examine the scope of state officials' immunity under international law and find out what left for them and never waived by this trend.

3.8 THE SCOPE OF STATE OFFICIALS' IMMUNITY UNDER CONTEMPORARY INTERNATIONAL LAW:

As mentioned above, the scope of immunity of state officials under international law remain undefined, particularly those acts related to international crimes. In contrast to diplomatic immunity; where there is a comprehensive treaty based which regulate the head and diplomatic missions immunity upon which states can rely whenever it required.

As far as concern state official's personal immunity, the case is largely depending on the customary international law which is based on states practice.[174]

There are two types of immunity under international law giving to the states and its senior officials: first, the functional immunity called *immunity materiae.* This type of immunity is attached to the office itself for any act done in pursuant to the person's official capacity. This type of immunity is only applies to those acts performed during the tenure of the office no more.

[174] European Convention on State Immunity, ETS No 74; United Nations Convention on the Jurisdictional Immunities of States and their Property, adopted by the General Assembly on 2 December 2004.

Which mean that officials can still be prosecuted for those acts carry out in personal account before and after their entrance into the office. Because this immunity is only limited to official act done on behave of state hence state is held responsible. This immunity (*ratione materiae)* is deemed to survive even after the official left the office, thus, the former official may claim it in case of any proceeding related to such act.

The second type of immunity is called immunity "*ratione personae*". This immunity aimed to protect state officials as far as he remains in the office. It has been states practice under customary international law for the long time that "the Head of State and diplomats accredited to foreign land has to possess this immunity to avoid any malign prosecution from the host state".[175] In addition, the same immunity is conferred to "representatives of international organizations and other officials on special mission in foreign sold".[176]The main justification for granting this immunity as argued by many scholars is that "they ensure the smooth running of international affairs for state representative in international level, as international diplomatic relation requires constant movements and communications between states".[177] So charging those officials in their conduct while abroad will totally turn down such relation and create a bit of tension between states.[178]This immunity is planned to easy the international relations, therefore,

[175] Watts, 'The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers', 247 *Recueil des Cours*(1994-III) 13; Wickremasinghe, 'Immunities Enjoyed by Officials of States and International Organizations', in M. Evans (ed.), *International Law* (3rd edn, 2010), at 380.

[176] Arts 21, 39, and 31 N Convention on Special Missions 1969, 1400 UNTS 231.

[177] Whomersley, 'Some Reflections on the Immunity of Individuals for Official Acts', 41 *ICLQ* (1992) 848; Tomonori, 'The Individual as Beneficiary of State Immunity: Problems of the Attribution of Ultra Vires Conduct', 29 *Denver J Int'l L and Policy* (2001) 261; H. Fox, *The Law of State Immunity* (2nd edn, 2008), at 406.

[178] Tunks, 'Diplomats or Defendants? Defining the Future of Head-of-State Immunity', 52 *Duke LJ* (2002) 651, at 656: 'Head-of-State immunity allows a nation's leader to engage in his official duties, including travel to foreign countries, without fearing arrest, detention, or other treatment inconsistent with his role as the head of a sovereign State. Without the guarantee that they will not be subjected to trial in foreign courts, heads of State may simply choose to stay at home rather than assume the risks of engaging in international diplomacy'. The same may be said of others entitled to immunity *ratione personae*. In 2010, Gordon Brown, then prime minister of the UK, expressed a similar concern: 'there is already growing reason to believe that some people are not prepared to travel to this country for fear that such a private arrest warrant – motivated purely by political gesture – might be sought against them. These are sometimes people representing countries and interests with which the UK must engage if we are not

it absolute and extends to all crimes whether personal or officials capacity,[179] regardless of whether such act was committed before or after entering to the office.[180] However, as this immunity is privilege giving to the state to be enjoined by individual, cannot be claimed or enjoined after dismissal or termination of office.[181]

Despite it not clear of what category official shall enjoy of this type of immunity (personal immunity), the ICJ pointed out that it applied to "diplomatic and consular agents and certain high-rank officials in a State, such as the Head of State, Head of Government and foreign Ministers".[182] Here the word "such as" indicates that people entitle to this immunity is not exhausted but it totally depending of negotiation clause by states. Thus, the personal immunity is one of the key bars for official prosecution as far as the officials are in the office.[183]

The International Court of Justice (ICJ) has confirmed in its judgment that the immunity of serving head of states and foreign ministers is absolute and they cannot subject to the arrest while travailing abroad or neither they can be compel to appear before foreign courts of justice as far as they serving in the office.[184] To this immunity there are four exceptions that the ICJ pointed out; first, "where immunity accorded under international law does not bar a person from criminal prosecution under their own national law". Second, "where state waived the immunity of the person enjoying it", since this immunity belongs to the state not to the official. Third, when "the official left the office but subject to any subsisting immunity *ratione materiae*".

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only to defend our national interest but maintain and extend an influence for good across the globe': 'Britain must protect foreign leaders from private arrest warrants', *The Guardian,* 3 Mar. 2010.

[179] *ICJ Arrest Warrant*case, para. 54.

[180] *Ibid.* paras.54–55.

[181] D. Akande, 'International Law Immunities and the International Criminal Court', (2004) 98 *AJIL* p. 410. Also see Fox, 'The Resolution of the Institute of International Law on the Immunities of Heads of State and Government', (2002) 51 *ICLQ* 119.

[182] Advisory opinion of ICJ in arrest warrant case at Para. 53.

[183] M. Frulli, 'The Question of Charles Taylor's Immunity: Still in Search of a Balanced Application of Personal Immunities', (2002) 2 *JICJ* 1118, 1126.

[184] Case concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgian), (hereinafter referred to as Arrest Warrant Case), 2002 ICJ REP. 121; 41 ILM 536, 541 (2002).

Lastly, and the most important for the present case at hand (the President Omar Al-Bashir's case), the Court indicated that in certain circumstance the serving heads of state may be prosecuted before certain international court. To support this statement, the court referred to the relevant provisions of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the special court of Sierra Leone (SCSL) and Art 27(2) of the Rome Statute.[185]

It can be concluded here that; functional immunity (*immunity materiae*) protect state officials from any legal proceeding after termination of their office as far as the act was doing in the official capacity. Whereas, personal immunity (*immunity personae*) protect state officials from legal proceeding during office time to any act done, whether "private or criminal" until the person left the office. Also it can be understood by the word of the ICJ in reference to "certain international criminal tribunals" that is not permitted for all international criminal tribunals to prosecute an actual heads of states. The court been international in nature is not the sole ground to remove the serving head of state immunity.[186] In order to determine whether a tribunal falls within the saying of the ICJ in the "*Arrest Warrant case*", it is important to examine the nature and method of establishment of the court. For example, in cases where a tribunal is created by a treaty concluded between nations, the international nature of that tribunal does not itself permit to exercise its jurisdiction over nationals of state not party to the treaty created the court; such as it is the case of ICC (the Rome Statute).[187]

Bearing in mind this distinction, let turn to analyze the immunity of head of state under ICC statute. What is the effect of been state party to Rome Statute and not been state -party to?

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[185] *Ibid.*,para. 61.
[186] W. Schabas, 'Is an International Tribunal Equivalent to an International Criminal Court?', (2008) 21 *LJIL* 513, 523–534.
[187] D. Akande, 'International Law Immunities and the International Criminal Court', (2004) 98 *AJIL*. P. 418.

Is the ICC has power to waive the immunity of all head of states once case is initiated before it? As the goal here is to determine whether the ICC as international court can waive the immunity that enjoin head of state under customary international law regardless the concern state has ratified the treaty or not.

3.9 The Immunity of Head of the State and Rome Statue:

What is this the stand of International Criminal Court regarding to immunity of head states under Rome Statute?

In order to give a comprehensive answer to this question, it is necessary to separate between state party to Rome Statute and states not party. As ICC is treaty base, thus, the obligation and rights of states ratifying the statute are different from those of non- state party; as it will explain bellow.

3.10 The Rome Statute and Immunity of Head of State party to the Treaty:

The Rome Statute has explicitly removed any claim of official capacity of the person when the case is before the court in its art 27(1). It is clear by this article that the protection that usually enjoined state officials under national law or customary international law cannot be claimed before the ICC. To further emphasized that impunity can't be more tolerate by the court, ICC went ahead to remove procedural immunities or rules that may attach to the state officials under national law or international law in its art 27(2). These two articles confer to ICC the jurisdiction over all states party in all crimes the court is set for, without waiting any waiver from

the state concern.[188] That because states by rectifying Rome Statute, agreed to waive all immunities of their officials that may enjoin under customary international law or national law. The better example for this is the current situation of Kenya where the incumbent president Uhurru Kenyatta is prosecuted by ICC.[189] For Kenyatta no immunity can be claimed as Kenya has ratified the treaty including these two articles "the waiver of immunity to any official capacity" before the court. Whilst it is understandable the bar of immunity of state party to ICC by the virtue of these articles, it is remain unclear whether the immunity of states not party to ICC and never agreed to its jurisdiction can be waived by these articles in situation where the case is referred by Security Council to ICC as it is in the case of Sudan?. Here are the details of immunity of head of state not party to Rome Statute.

3.11 THE ROME STATUTE AND IMMUNITY OF HEAD OF STATE NOT PARTY TO THE TREATY:

It is well-known doctrine in the law of treaty, under international law that no state can be bounded by the terms of any treaty where it is not party. "A treaty does not create either obligations or rights for a third State without its consent".[190] As Rome Statute is treaty based, it cannot oblige any third state to be bounded into its terms without consent of that state. Therefore, the jurisdiction of the ICC ought to be exercised over crimes committed by individuals of state parties and within those territories, not to the third state which not party to the treaty. And the waiver of immunity mentioned in the art 27 has nothing to do with a non-party state to Rome

[188] O. Triffterer, 'Article 27: Irrelevance of Official Capacity' in O. Triffterer (ed.), *Commentary of the Rome Statute: Observers' Notes, Article by Article* (1999) 501.
[189] Kenyatta does not have immunity from the ICC as he is the head of State of a country that has ratified the Rome Statute. Article 143(4) of the Constitution of Kenya (2010) specifies that the immunity of the President "shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is a party and which prohibits such immunity".
[190] Art. (34) "*general rules regarding to third state*" of Vienna Convention of Law of Treaty in Section(4)

Statute. In the light of this argument, it can be confidentially asserted that Omar Al-Bashir enjoined personal immunity as head of state in Sudan and the ICC as treaty based court cannot remove such immunity as far as Sudan is not party to the treaty and never agreed to the court jurisdiction by entering to special agreement with the court as mentioned in article (4) paragraph (2) of the ICC Statute.

One might raise question here, what about the effect of UN Security Council referral's to ICC? In order to give a comprehensive answer to this question, it necessary to analyze the legality of UNSC referral the cases of non-party state to ICC, the obligation of the court in dealing with those cases and the obligation of states in implementing the court arrest warrant in those cases. The first part of this question will be dealt in details in chapter (3) under the "validity of UNSC referral to ICC". The second part, which is the obligation of the ICC under its Statute and states obligations to cooperate are herein details.

3.12 THE OBLIGATION OF THE COURT UNDER THE ROME STATUTE:

As the ICC is working under the Statute which established it, the court is bound to abide its obligation under the Statute.

By analyzing its Art 98[191] as Paola Gaeta observes, it is very necessary to differentiate of what the obligation of ICC and its states party under Rome Statute. For example, is it permitted for ICC under the Statute to issue to states party to arrest Bashir? And, is it legal for states other than Sudan to arrest Al-Bashir and surrender to ICC under customary international law? Or to

[191] Art. 98(1,2) of Rome Statute"*Cooperation with respect to waiver of immunity and consent to Surrender*"

put it another way, would not commit a wrongful act *vis-à-vis* Sudan if any states other than Sudan attempt to arrest Sudanese president?[192]

The answer of these questions is of affirmative. States will do wrong to Sudan if they try to arrest the president of Sudan without expressly consent by Sudanese's authority. In reading word by word of art 98 of the statute, it is clear that the ICC is not permitted under the Statute to issue request to states to arrest Omar Al-Bashir as Sudan is third party state, and it will be wrong act by any state if it try to honor the request. As both 98(1, 2) concern themselves with what the Court may not do, not what States Parties may do.[193] It is clear in art 98(1) which said that "the court is prohibited to carry on with request of assistance or to surrender a person or property of third state (like Sudan) in which the requested state would act inconsistently to its obligation under international law"; (such like violation of personal immunity accorded under international customary law). Prior getting such free hand from government of Sudan, any proceeding of Bashir's case is illegal under international law. Likewise in art 98(2) it is said "the court prohibited to go on with the demand for surrender a person of third state (Sudan) in which the requested State would act inconsistently with its obligations under international agreements"; (such like US bilateral agreement known as "*article 98 agreement*" which prohibit states not to surrender US citizen to ICC, akin Art 23 (2) of the Constitutive Act of the African Union that obligate AU Member States "*to comply with the decisions and policies of the Union*"), "unless ICC get consent of the sending state (Sudan) for cooperation". It can be said that these two articles are clearly prohibition articles to the court not to go ahead by proceeding or issuing arrest warrant to the element of any third state that enjoined immunity under customary international law or international agreement unless the court obtain first the consent of the concerned state.

[192] P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?' 7 *Journal of International Criminal Justice* (2009) 2, 327-329.
[193] Ibid.

As such it can be conclude here that ratification of the Rome Statute, Art 27, becomes operative in the removal of immunities possessed by officials of states parties to Statute. In other hand art 98 prevents ICC from issuing an arrest warrant for a state official not party to treaty, prior obtaining the consent of cooperation of that non-party state to remove the immunity of its state officials. Acting otherwise would be inconsistent with the rules of customary international law on immunities and violate these articles of Rome Statute itself.

If the court is not permitted to issue a request for surrender of Al-Bashir because of his status of been third state to the Rome Statute and enjoined the immunity under customary international law, however if the court proceed to issue such request, the next question is, are states are obliged to comply with this request?, by considering art 87(7) of the Statute?[194]

3.13 THE OBLIGATION OF THE STATES VIS-À-VIS THE ROME STATUTE:

As the Rome Statute in its rules does not allowed trial in "*absentia*", it necessary for court that the accused person surrender himself voluntary before the court for trial or the court issue and circulate the arrest warrant to states to cooperate to arrest indicted person.[195] Therefore this cooperation is made obligatory on the states so that the court can exercise its authority smoothly. But the obligation here is different as been state party to the Statute and not been state party to the Statute. The prevailing rule in international law is that if states become part of any international conventions, treaties by ratification, the ratifying state is bound by the terms of that convention or treaties, if in time of signing it, it does not make any objection or reservation to

[194] In this article it is said: Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

[195] That because ICC does not has its own police to implement its arrest warrant, it has to rely on cooperation of states to affect its arrest warrant.

any article thereto. Accordingly, states that are party to the Rome Statute are obliged to abide by the ICC's arrest warrant in pursuant to law of treaty which provided that: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".[196] And also by reading of Rome Statute which provided that "The Court shall have the authority to make requests to States Parties for cooperation". [197] These two articles precisely obliged state parties to ICC to fulfill their obligations under the statute. Hence the cooperation with the court in its arrest warrant is compulsory upon those states rectified the Statute.

The question remains here is that, is these obligations are general without any exception to it? By reading Rome Statute itself, the cooperation that requested from states are restricted. Article 98 of Rome Statute made two kind restrictions on that general obligation of cooperation. Firstly where, "state is not party to the Statute and enjoined immunity under international customary law, Secondly, where state is not party to the Statute and enjoined immunity under international agreement". In all these cases state party to ICC are not obliged for any cooperation, since their cooperation will be inconsistent to their obligation toward that state. In the light of this argument, it can be asserted in Sudan's case that states would do wrong vis-à-vis to Sudan if they try to arrest Omar Al-Bashir and surrender to ICC. As Sudan is considered to be third state to ICC and enjoined all immunities under customary international law which protect him from prosecution before any foreign court or group of foreigner's court (like ICC).

Similarly by reading the Vienna Convention on Law of Treaty, the third state (like Sudan) does not have any right or obligation to any treaty is not party to.[198] Therefore Sudan is not legally binding to cooperate with any court it does not recognized in its arrest warrant including the ICC. Again we shall recall here that, it might be argued that the obligation to

[196] Vienna Convention on Law of Treaty part 3, section 1, *article 26: Pactasuntserwanda*
[197] Rome Statute art 87(1)(a) requests for cooperation: general provisions
[198] Article 34 :(*General rule regarding third States)* of Vienna Convention on law of treaty

cooperate urged from UNSC referral on Darfur.[199] For this argument we will return to it in next chapter to see at what extend this resolution affect Sudan.

3.14 CONCLUSION:

Omar Al-Bashir's case has been one of the most contentious cases in international level. As the case is the first in its kind, no precedent for it under international case law. The case is open to debate amongst international jurist.

The anti-Sudan jurist may argue that Sudan is under an obligation to cooperate, by reasoning that the resolution of UN Security Council is binding on all states party to UN including Sudan by virtue of art 25 of chapter 5 of UN charter[200]. And the ICC has fulfilled its entire procedural requirement after UNSC reference to ICC prosecutor to investigate the Darfur's issue as provided by art 13(b) of ICC Statute.

In other hand the pro-Sudan may argue that Sudan is not bound to cooperate, as the referral UNSC to ICC is illegal under international law. This argument is based on law of treaty which governs all international relation between states.[201] Sudan been not party to Rome Statute, enjoined all immunities provided to states under international law. Furthermore it may argue that by reading Rome Statute itself, ICC is prohibited by article 98 to pursue the case of states protected by international law or by international agreement.

By carefully examining the two arguments, we conclude that Omar Bashir enjoined and protected by immunity provided to him in international law. This immunity is part of customary

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[199] United Nations Security Council Resolution 1593, (Paragraph 2): Decides that the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.

[200] "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter"

[201] Art 34, 35 of VCLT on obligation of states to the treaty.

international law and it has been a historically wide practice of states in their international relations. As such many jurists considered it (immunity of Head of State) to enjoin the status of *Jus Cogen* which is supported by International Court of Justice (ICJ) in its advisory opinion in the case of Arrest warrant (Republic Democratic of Congo v Belgium) where the court determined that it could not find any exception under international law which denied the inviolability of head of state immunity

CHAPTER FOUR

THE VALIDITY OF SECURITY COUNCIL RESOLUTION TO REFER THE CASE OF SUDAN TO ICC AND JURISDICTION OF ICC OVER NATIONALS OF STATE NOT PARTY TO ROME STATUTE

4.1 INTRODUCTION:

After analyzing the issue of immunity of head of state in chapter two in different angle of international law, we come to the conclusion that Omar AlBashir enjoined and protected by those immunities as head of state. In this chapter we will examine the validity of Security Council resolution in Sudanese's case and its referral to ICC.

It will be considered first the power that enjoin Security Council in UN system, then it will be examined the limit of those powers under UN chapter itself and other international laws. After then it will determine whether Sudan is bound to cooperate with ICC in its arrest warrant against Omar Al-Bashir by virtue of UNSC resolution or not. Similarly it will be considered how far other states are under obligation to cooperate with the court in this particular case without breaching their obligation vis a vis Sudan in immunity clause under international law. Lastly it will examine the position of USA on the issue of the court (ICC) jurisdiction over nationals of states not party to Rome statute.

In case to reach to the conclusion in this issue, we will first examine the different possibility of ICC jurisdiction over nationals of states not party to Rome Statute, and then legality of delegation of state jurisdiction to other states or to international tribunals by treaties, what are the practices of states and its acceptance under international law, then after it will be concluded whether the opposition of US to court on this issue is justified can be maintained or not.

4.2 THE VALIDITY OF UNSC REFERRAL THE CASES OF NON-PARTY STATE TO ICC:

As mentioned above Sudan is not party to Rome Statute, and never consent to its jurisdiction, as such, can UN Security Council's resolution bind Sudan to this treaty based court (ICC) by using its power under chapter 7 in consideration of art 25[202] of the charter and art 13(b)[203] of ICC's Statute?.

Here it is important to determine first whether UN Security Council has power to waive the immunity that enjoined Sudanese president under customary international law and make him bound by its resolution.

4.3 THE EXTEND LIMIT OF UN SECURITY COUNCIL'S POWER:

The Security Council is most important organ in the United Nations system; therefore it has been giving important role under UN charter to play in world political system. Amongst its role, it has been giving the duty to monitor international peace and take prompt action where there is treat or breach of world peace. [204] And the states of United Nations are urged to comply with the recommendation of Security Council as it is carrying out these duties on behalf of all UN members. [205] Furthermore it is asserted in art 103 of the charter "that in case of conflict

[202] Article 25 of the charter stated that: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

[203] This article said that "the ICC shall has jurisdiction on matters when the UN security council referred to it".

[204] "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security". UN charter, chapter7, art. 39.

[205] "1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII".

between this charter and any other international agreement, the present charter shall prevail".[206] After seen all these powers giving to the Security Council, the turning point is that can these powers be used discretionally without any limit or bound?

By analyzing carefully different international law, in the light of the case at hand (Al-Bashir's case), it can be asserted that there is many restriction on these powers of Security Council. First the Security Council cannot delegate these powers to non-organ institution of UN. Even if it is assumed by seek of argument that the Security Council can remove the immunities of Omar Al-Bashir, this does not mean it can transfer this privilege to ICC. For UNSC to assign this power to any tribunal, it is necessary to prove that the tribunal is in fact competent court to receive and exercise these privileges assigned.[207] In the term of UN Charter, these competent organs are: "UN member States;[208] regional arrangements as contemplated by Article 52 of UN Charter;[209] and organs of the UN itself such like ICTY, SCSL etc..."[210] And the ICC as treaty based court does not fall within any of these organs.

As well knowing ICC is not a UN member State, nor it is a regional arrangement as contemplated in Article 52 of the Charter. Yes despite "regional arrangement" is not defined by the Charter, but the category of regional arrangements contemplated are such like; the Arab League, the Western European Union (WEU), and the African Union (AU) etc...[211], To permit

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"The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". UN charter, chapter 5, art 24, 25 respectively.

[206] "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." UN Charter, art. 103.

[207] See DaneshSarooshi, "The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers" (2000), 247

[208] An example of such delegation occurred in Operation Artemis, the French-led Interim Multinational Emergency Force to assist troops in the UN Mission in the Democratic Republic of Congo, authorized by SC Res 1484 (30 May 2003).

[209] Such as NATO operations in Kosovo which was authorized by SC Res 1244 (10 June 1999).

[210] Such as UN peacekeeper mission agents deployed in any area of the world for maintaining peace.

[211] Along with the AU,WEU, and Arab League, it is includes the Commonwealth of Independent States (CIS), the Organization for Security and Cooperation in Europe (OSCE), the Arab League, the Economic Community of West

an agency such like ICC to be "regional arrangement" under Chapter VIII would defeat and rend meaningless the role of regional arrangement stipulated in Article 53.[212] Even though ICC was considered to be categories as "regional arrangement" by seek of argument, the problem is that only power the Security Council can transfer to regional arrangements under Chapter VIII is military operations permissions,[213] as indicated by article 53(1) of the Charter.[214] The aim of this Article is explained by UN Secretary-General's Agenda for Peace plan; "which sought to utilize regional organizations to fulfill political and military tasks for peacekeeping".[215]This agenda never reflect to judicial tasks.[216]

Only way remaining for ICC to receive the power of Chapter VIII is to consider the court as organ of the UN system, and no legal document can demonstrate that The Hague based court (ICC) is primary or auxiliary part of United Nations system. The Rome Statute was independently negotiated from United Nations, and Articles 1 and 4(1) of the Statute stated "that the ICC is independent and permanent (it does not exist at the pleasure of the UN) and that it has "international legal personality"". And also the Preamble and Article 2 of the UN-ICC Agreement similarly recognized the independency of the Court from the UN system.[217]

African States (ECOWAS), and the Organization of Eastern Caribbean States (OECS). See Benedetto Conforti, The Law and Practice of the United Nations (2005), 235–238.
NATO also may be cited amongst regional agency as well notwithstanding its establishment as a collective security group. See Danesh Sarooshi.

[212] The states parties to Rome Statute are not regional or geographically located but they are dispersing in world as UN membership. At the time of writing this thesis, the members of Rome Statute is represented as follow "122 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 34 are African States, 18 are Asia-pacific States, 18 are from Eastern European States, 27 are from Latin American and Caribbean States, and 25 are from western European and other states". See this link online: http://www.icc cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx for full information(last accessed 26-04-2014)

[213]DaneshSarooshi, as above n.251 , p.248–251.

[214] Jurgen Bröhmer and Georg Ress, Article 53, "The majority of the member States assumed that the non-military sanctions were not enforcement actions which, from a systematic perspective (relation between Art. 53 and Art. 2(4)), is a conclusive interpretation"

[215] Christine Gray, International Law and the Use of Force (2004), 282–294.

[216] ICJ is the sole organ that can play the role of agency as the court is part of UN system.

[217]The negotiation clause between the International Criminal Court and the United Nations (ICC—UN), ICC-ASP/3/Res.1 (4 October 2004).

Unlike the "International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL)", the ICC is entirely governed by its Assembly of States Members. While ICTY, ICTR, SCSL were created by Security Council under the authority of UN hence they are integrate part of UN system, and as such they are competent courts to receive the power of chapter VIII by delegation.[218]

In other hand the authority and the power of the ICC come from its state members which is declared to be totally independent from UN, as such it cannot exercise any power of UN organ. Therefore it can be asserted that neither Security Council nor ICC has power to bind non-parties state to ICC Statute.

The second set of argument is that, it may argue that since the UN's charter has supremacy over other international agreement, whenever there is clash of obligations, by the virtue of article 103,[219] therefore the resolution of Security Council can override the immunity of Al-Bashir under customary international law. This argument is flawed because the supremacy of UN charter over other international laws is limited to the international treaties and agreements, not to the international customary laws such as immunity of head of state under customary law or law of treaties which are considered to be a status of *jus cogen*. The drafting history of article 103 actually indicates this position. After the hot debate between drafter whether the charter shall prevail over all international laws or not, the drafter deliberately choice to use the word of "international agreements" in lieu of "all international obligations", which indicate that the

[218]Danesh Sarooshi, as above p. 107. The scope of this Chapter VII authority is limited in two ways. Firstly, by the restrictions on subject-matter, personal, temporal and territorial jurisdiction contained within the ICTY and ICTR statutes. Secondly, by the purpose of Chapter VII delegation, as established by the tribunal statutes and the Security Council resolutions establishing the tribunals, See SC Res 827 (25 May 1993), para.4 and the ICTY Statute, art. 29; and of SC Res 955 (8 November 1994), para.2 and the ICTR Statute, art. 28.

[219]" In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". UN charter, chapter 116, art.103.

Charter has supremacy only over treaties which are not codified customary international law and other international agreements but not all international laws; such like the general practice of states, which refer to us the custom of states in international relations.[220] This position is agreed by the General Assembly in the Declaration on Friendly Relations.[221] This declaration differentiated between "obligations under the generally recognized principles as rules of international law and obligations under international valid agreements", and clearly stated that the charter is prevailing only over the latter.[222] Without any contraction, this stand has been maintained several times by the General Assembly subsequent declarations,[223] also affirmed by international court of justice ICJ[224] and by various scholars writing or commenting on UN matters.[225]

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[220] The Report of the Rapporteur of Committee IV/2, as approved by the Committee, "Privileges and Immunities" in: Documents of the United Nations Conference on International Organization (1945) Vol. XIII, 707. and see also Rain Liivoja, The Scope of the Supremacy Clause of the United Nations Charter, 57 ICLQ (2008), 583, 602–605.

[221] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,GARes 2625 (XXV), UN Doc. A/RES/25/2625, 121, 124 (24 October 1970).

[222] Ibid

[223] The Declaration on the Strengthening of International Security, GA Res 2734 (XXV), UN Doc A/RES/25/2734 (16 December 1970), para.3; the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, GA Res 42/22, UN Doc A/ RES/42/22 (18 November 1987) para.4; and the Preamble of Respect for the Purposes and Principles Contained in the Charter of the United Nations to Achieve International Cooperation in Promoting and Encouraging Respect for Human Rights and for Fundamental Freedoms and in Solving International Problems of a Humanitarian Character, GA Res 55/101, UN Doc A/RES/55/101 (2 March 2001).

[224] Interpretation of the Agreement of 25 March 1951 Between the World Health Organization and Egypt, Advisory Opinion, ICJ Reports 1980, 73, 89–90, para.37 (all international organizations are bound by the rules of general international law). See also Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK), Provisional Measures, [1992] ICJ Reports 1992, 3, 15, para.39 ("in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention").

[225] Judith Gardam, Legal Restraints on Security Council Military Enforcement Action, *17 Michigan JIL* (1996), 285, 304 ("[T]he presence of Article 103 in the Charter has no impact on the need for the Security Council to comply with general international law....It is not necessarily inconsistent for the Security Council to override other treaty obligations of States while remaining bound itself by customary rules. States have differing treaty obligations but customary obligations bind all States equally").

See Derek Bowett, The Impact of Security Council Decisions on Dispute Settlement Procedures, *5 EJIL* (1994), 89, 92 ("It is true that this reasoning confined to the supremacy of a Council decision over inconsistent treaty rights or obligations, because Article 103 is concerned solely with compatibility between Charter obligations and obligations 'under any other international agreement'. Accordingly the reasoning would not apply where a member relied on its rights under general international law");

Thus, if we accept that the charter can only prevail over "international agreements" and not "international customary law", any direction of UN Security Council which violate those norms of international law; states are not bound to comply. That because such orders or directions are declared to be *ultra vires* hence no effect to it. This statement was first made by Hans Kelsen in 1950,[226] and the same was repeated by ICJ in "*Lockerbie case*"[227] furthermore supported by different scholars.[228] In other words, states are obliged to abide SC's resolution passed under Chapter VII, but on condition that those resolutions are on limit of SC power and not exceeding it. As Al-Bashir enjoined immunity which cannot be removed by Security Council because of restriction of its power by those rules and norms mentioned above, the Sudan or any other states are not under any obligation to comply with the Security Council resolution which is *ultra vires* to those rules and norms.

Lastly by looking to the law of the treaties as mentioned above, which are codified rules of customary international law, the ICC, the UN Security Council are not allowed to operate over the boundaries set by the law of treaties, as both organizations are treaty based institutions. As such, the Security Council, the ICC and any other international organization or group of States are prevented to extend their jurisdiction or bind a third State to any treaty which it is not party.

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also Aleksander Orakhelashvili, "The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions", *16 EJIL* (2005), 59, 69. ("Article 103 makes the Charter prevail over international agreements...but this is not the case for the general international law, of which *jus cogens* is a part). See also Geoffrey RWatson, Constitutionalism, Judicial Review, and the World Court, *34 Harvard ILJ* (1993), 1, 25 ("Article 103, relied on so heavily by the majority, provides that Charter obligations prevail over 'other international agreements'; it does not provide that Charter obligations prevail over *jus cogens* and other forms of customary international law");

And Judith Gardam, Legal Restraints on Security Council Military Enforcement Action, *17 Michigan JIL* (1996), 285, 304 ("[T]he presence of Article 103 in the Charter has no impact on the need for the Security Council to comply with general international law....It is not necessarily inconsistent for the Security Council to override other treaty obligations of States while remaining bound itself by customary rules. States have differing treaty obligations but customary obligations bind all States equally").

[226] Hans Kelsen, "The Law of the United Nations: A Critical Analysis of Its Fundamental Problems" (1950), 95. ("The meaning of Article 25 is that the Members are obliged to carry out these decisions which the Security Council has taken in accordance with the Charter").

[227] footnote 268 above

[228] footnote 269 above

What is remain here, is that not to recognize at all the validity of Security Council referral, as it is *ultra vires* to the customary international law of head of state's immunity which is considered to have the status of *jus cogens*, and also *ultra vires* to the codified rules of law of treaties which preclude Security Council to bind a non-party state to the treaty without its consent.[229]

Someone may argue here that this interpretation rend the art 13(b) of Rome Statute which permit the Security Council referral to ICC redundant. The answer is that, this power of Security Council can be still existed even though it cannot extend the ICC' jurisdiction to non-party state. This can be done in the cases where the states party are in direct violation of human rights maltreating its own citizens, the said state may not go for self-reference as it is mentioned in article 13(a), while the prosecutor may not prioritize the situation because of multiple cases in his/her desk. Here after investigation of Security Council, come to the conclusion that the situation prevailing in that state can be a threat to world peace and it is needed prompt action. In this case the Security Council may recommend the prosecutor to step in with instruction to prioritize the issue. In this way the Security Council will not exceed its limit at the same time it can help ICC to reach its goal; the fighting of impunity around the world.

4.4 THE POSITION OF US ON THE ISSUE OF ICC JURISDICTION OVER NATIONALS OF NON-PARTY STATE TO ROME STATUTE:

As we slightly mentioned in chapter one that United State of America is not party to Rome Statute, and as such it refuses to recognize any obligation of US and its citizens to ICC. The US has raised many objections to ICC possible jurisdiction over its citizens. Amongst the

[229] Ibid

objection raised by US is that ICC cannot have jurisdiction or prosecute any US citizen without the express consent of US's authority.

Before entering to the details, let overview the different possibility of jurisdiction of ICC over nationals of non-party states to Rome Statute under the Treaty.

The Statute mentioned three types of possibility that ICC could have exercised its jurisdiction over nationals of states not party to treaty; first, "where the case of non-party to Rome Statute is referred by UN Security Council to ICC".[230]Secondly, "where non-party state has consented to the jurisdiction of the court in a particular situation", as it is in the case of Ivory Coast.[231] Thirdly, "where the crime is committed by non-party state's national to the court in the territory of state party to Rome statute".[232] In all these two first situations, the court does not need the consent of the third state or state non-party to exercise its jurisdiction over nationals not party to ICC Statute.

The US does not has objection to the referral of non-party state's case to the court by Security Council, because she knows, it has veto power in Security Council and it can struck down any resolution of the Council by its veto, nor it has objection to the jurisdiction of the court where the consent of non-party state is obtained prior proceeding the case before ICC. The remained objected issue by US is the possibility of the court jurisdiction over nationals of non-party state for the crime allegedly committed in the territory of state party to Rome Statute without the consent of the third state.[233] In this issue the USA has took a strong hostile opposition to the court's jurisdiction over US's citizen without its consent. Among the objection of US and its defenses are as followed:

[230] Art. 13(b) of the Rome Statute.
[231] Art. 12(3) of the Rome Statute.
[232] Art. 12(2)(a) of the Rome Statute.
[233] Remember whenever we use the word "third state" we mean by it the state not party to the Rome Statute.

The US argues that "the exercise of the court's jurisdiction over US's citizen without the consent of US will be contrary to the established international law". It said that the Rome statute is treaty based institution and as such the third state does not have any right or obligation to the treaty which it is not party to.[234]

Those supported this argument of US are in view that the exercise of the court jurisdiction over nationals of state not party to the treaty is illegal in the following ground;

Firstly, as Professor Madeline Morris has argued that "the ICC cannot impose its jurisdiction over a state not party to Rome Treaty nor it can abrogate the right of third state by bounding it to the jurisdiction which not recognized by international law".[235]Then she argued that "there is no precedent which shows that states can delegate their criminal jurisdiction to another state or international court, tribunal over a national of another state without the consent of that state".[236]

Secondly, Professor Ruth Wedgwood argues that the ICC jurisdiction over an individual who acted in pursuant of the policy, interest, of third state will be unlawful to international law, this because, this person is protected by the doctrine of *immunity materiea.*[237] ICC has only individual jurisdiction not state jurisdiction, and the person indicted by the court was acted on behalf of the state which mean that the individual is indicted by the act which supposed to be the responsibility of the state. This kind of jurisdiction of ICC will create dispute between states whose interest has been affected by such prosecution. As such ICC will be considered as part of problem not as part of solution.

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[234] Art 34 of the Vienna convention of law of treaties.
[235] M. Morris, "High Crimes and Misconceptions: The ICC and Non-Party States", *Law and Contemporary Problems* (2001) 13, 27.
[236] Ibid
[237] M. Morris, Ibid, and see R. Wedgwood, "the resolution of Rome", *64 Law and Cotemporary Problems* (2001) 193, 199.

This argument is solid and it carries its own values in looking to state perceptive and subject matter of jurisdiction of the court. But the question here is that, is it all the criminals can be classified in this category? Implementing the policy of origin state? In my opinion the answer is that not all the criminals are acting on the behalf of their origin countries or on the guide line of implementing the policy of their origin countries.

In other side these arguments has been countered by some other scholars such as M. Scharf, D.Arnaut, M. Danilinko, and DapoAkande etc…the arguments forwarded by them are as it is followed:

First, it is clear that every state has jurisdiction to try a crime committed in its territory regardless the nationality of the perpetrator, this is incumbent right of every nation. And it is clear by treaty, states can extend the jurisdiction of their respective countries, for example an anti-terrorism treaty provided that states have to try offender of this crime or extradite him to the state with jurisdiction.[238] This treaty is one of example where universal jurisdiction is created by treaty. Professor Scharf, and others have stated that "this treaty imposed an obligation on third state to prosecute an offender even though it has no connection with the crime committed".[239]Scharf argues that "since this treaty allows the trial of nationals of non-party state to the treaty, it constitutes a standard for this court (ICC) with regard of acceptance of countries rights to delegate their jurisdiction over other national to another state".[240] But the main question raises here is that whether the states can delegate their jurisdictional rights to international

[238] These treaties usually require states to prohibit certain acts, and contain a list of crimes to be punished for these acts. Example of such treaties include: Convention Against Torture and other Cruel, Inhuman and Degrading Treatment, 1984; UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988; the International Convention on the Suppression of Terrorism Bombings, 1998; the international Convention for the suppression of the financing of Terrorism, 1999.

[239] M. Scharf." The ICC's jurisdiction over the Nationals of non-Party States: A Critique of the U.S International Criminal Court and the avenues for U.S participation", 43 *VJIL* (2003) 525- 541, 542; Van Krieken, *terrorism and the International Legal Order*, 36 (2002).

[240]Scharf, Ibid

tribunals without the consent of the state of national of accused person? It has been argued that "such transfer of jurisdiction without the consent of the state of accused person is impermissible and unlawful under international law". It is also argued that "even if delegation of jurisdiction by one state to another state can be permitted, but such delegation to an international court, tribunal is unprecedented".[241]

This argument and others has been countered that there are many precedents which demonstrated that states have several time delegate their judicial jurisdiction to international court over non-party national without the consent of the state of nationality. In fact this has been long time practice of states without any objection from states of nationals involved which is not party to the treaty.

The first example of this kind of delegation can be dated in the *"Rhine Navigation Convention of Mannheim 1868"*. In this convention the court was given power to act as a court of appeal from national court's decisions in civil and criminal matters regarding Rhine shipping.[242]Some of the matters before the court were concerned of nationals of the states that are not party to this convention and those concerned states have never complained about the jurisdiction of the court over their nationals without their consent.[243]The cited case is very important because it was the first case on the delegation of criminal jurisdiction to international organization ever created.[244]Another example is that of *the "Caribbean Court of Justice (CCJ)"*, which was established by Caribbean community under treaty, and which permit the delegation of

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[241] M. Morris, Ibid, and R. Wedgwood supra 282, argues that: " There is no ordinary precedent for delegating national criminal jurisdiction to another tribunal, international or national, without the consent of the affected states, except in the aftermath of international belligerency "

[242] Arts. 37, 45(c) of Mannheim Convention, The parties to the treaty are: Belgium, Germany, France, the Netherlands and Switzerland. See also, Rules of procedure of the Chamber of Appeals of the Central Commission for the Navigation of the Rhine (1969).

[243]Telephone conversation with MrBour, Registrar of the Appeals chamber of the Central Commission (18 July 2003).

[244] This organization was created by the Final Act of the Congress of Vienna (1815) and it still now exists.

criminal jurisdiction to Caribbean court of Justice (CCJ).[245]In addition to its status of court of first instance, the court was given power to settle on criminal and civil appeals from its member states' court as final court of appeal of all states party to the treaty.[246]Since the CCJ is permitted to exercise the jurisdiction which belongs to the states party to, the court may deal with the cases of nationals of non-members to this treaty without the consent of those states including those cases where the court exercise its jurisdiction on universal basis.

Lastly the international law permits all states to exercise their criminal jurisdiction with regard to certain crimes such as (crime of genocide, crime of torture and its kind and any other inhuman treatment of human being that shock the conscience of humanity). That because these crimes are thought to be detrimental to the interest of international community.[247]States are permitted to take action against the perpetrators of these crimes regardless whether crime is committed in their territory or by their nationals. That because, given states such wide jurisdiction will help to deter those criminals doing these crimes of international concern. The states exercising their jurisdiction on these matters are thought to act for international community by protecting their interest as whole.[248]

If this is true and permitted, that a state may act individually on the behalf of international community in cases concern universal crimes for protection of universal interest, it more effective and logic that the international community come together to prevent those crimes of international concern. As such, the ICC acting on the behalf of its states members is rooted and preceded in international law, especially as it is knowing that all ICC's concern crimes are

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[245] Agreement Establishing the Carbbean Court of Justice, 2001.http://en.wikipedia.org/wiki/Caribbean_Court_of_Justice (last accessed 05-05-2014).

[246] Ibid

[247] B. Broomhall, "International justice and the International Court: Between Sovereignty and Rules of law", *Oxford: Oxford University Press.*(2003). 107.

[248] A. Cassese, "International Criminal Law", *Oxford: Oxford University Press.*(2003), 284,285; Broomhall, ibid. at 108,109.

known to be international crime. So delegating these crimes to ICC by its state members is more lawful than anything else in international practice.

When taken together, the precedents discussed above it can be conclude that, the practice of states to delegate part of their criminal jurisdiction over non-national either to another state or courts created by bilateral or international agreements, without attempt to obtain the consent of state of nationality, is not something new.[249]This practice without objection by states of accused persons, show the general recognition and its legality in international level. This is particularly true in cases where the crime is the nature of international concern, where there are many principles which support the rights of states to act together to protect their common interest.

4.5 CONCLUSION:

After carefully analyzing the different powers given to Security Council under UN system, and the limit of those powers under international law, it can asserted that the resolution of Security Council which permit to delegate its power to the institution other than UN authorized institution is invalid. That because for institution to be competent to receive this power, it has to be part of UN system. As such the ICC is an independent institution and did not exist at pleasure of UN, cannot exercise any power of Security Council. The sole institution can exercise these powers is ICJ as it is the integral part of UN system and those ad hoc institutions which are established by UNSC such as ICTY, ICTR, SCSL supervised by UNGA are also competent institutions but not ICC which is totally independent from UN system and governed

[249] The US delegation of its judicial jurisdiction in administrative matters to an International tribunal is the binational panels established under chapter19 North America Free trade Agreement (NAFTA). Non-National of NAFTA parties may be forced to have recourse to these panels. Whilst some of the US have questioned the constitutionality of the delegation of US judicial authority to the NAFTA binational panels, there has been no assertion that it was invalid under international law. see M. Burton. "Assigning the Judicial Power to International tribunals: NAFTA Binational panels and Foreign Affairs flexibility", 88 *Virginia Law Review* (2002), 1529.

by its own member states. As such any direction of SC violating these norms, states are not bound to comply.

As far as the possibility of ICC jurisdiction over nationals of states not party to Rome Statute, it can be conclude that if the nationals of those are found in the countries of those are party to ICC, the ICC can exercise its jurisdiction on them. And this is generally practice accepted by the states in their international relations as concluded above. And US objection to this practice is not valid and is just to give itself the freedom of act in international level to protect its own interest.

4.6 RECOMMENDATIONS:

4.6.1 RECOMMENDATION TO AFRICAN LEADERSHIP:

For the past six (6) years the relationship between the ICC and Africa has been critical, and there has been many efforts made to overcome these differences but still no possible way could be found. What are the roles of African leaders to play for amelioration of this crisis? And is there any alternative solution to fight impunity in Africa rather than seeking justice from ICC? First of all the African leaders have to recognize that the continent has many problems from leadership to economic and cultural. This custom of impunity in the continent has aggravated these problems where the criminals feel safe to do whatever they feel without any fear of prosecution for the crime committed. The situation has encouraged commission of multiple crimes in the continent at large, crimes of corruption, crimes of political disappearance, and crimes of ethnic cleansing etc...which have contribution to the backwardness of the continent.

As there is no proper system in Africa which could deal with this crisis, the sole way and opportunity that was open for African people to address some of their grievances was the adoption of ICC. For this raison there was an overwhelming campaign in Africa to be part of ICC. At present, Africa is the largest regional group which has ratified the Rome Statute.[250] But the situation in the ground today between the court and Africa is not helping, especially at the level of political elite, where the African political leaders have resentment of the court's bias against Africa and selectivity of cases by the prosecutor.[251]

The African leaders have to realize something here is that whether their arguments against the court are founded facts or not, they first priority should be how to eradicate the custom of impunity in the continent which has led to the sufferance of the people of this continent. Since there is no any alternative court available right now in the continent that could deal with this crisis,[252] the African leaders should not totally oppose to the court, as they still need the court's help for many issues in the continent.

In contrast the political leaders have to deal with the court on case to case bases; where there is solid ground to prosecute, they have to cooperate with the court. In the other hand where

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[250] The present regional group to Rome Statute is as follow: "122 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 34 are African States, 18 are Asia-pacific States, 18 are from Eastern European States, 27 are from Latin American and Caribbean States, and 25 are from western European and other states" http://www.icc cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last accessed 26-04-2014)

[251] Jean ping the ex AU chairman said" the ICC is "discriminatory" because it only pursues Africans. He said "the Hague-based court ignores crimes committed by Western powers in Iraq, Afghanistan, Pakistan, Yemen and Syria". Libyan government spokesman Moussa Ibrahim agreed and reported to said: "The ICC is a European Guantanamo Bay. It's only against the African leaders. It never deals with the crimes committed by the United States of America" *"Breaking News English"* http://www.breakingnewsenglish.com/1107/110703-african_union.html (last accessed on 10th March 2014).

[252] There is an effort under way to make African Court of Justice and Human Rights (ACJHR) which is main judicial organ of AU operative, but still now there is some obstacle to its effectiveness. Please see page 13 under subtitle: need to strength African Court of Justice and Human Rights, for full understanding the development of this court.

the prosecution is motivated and dominated by politics, they have to make their stand clear as they did in the case of Sudan and Libya.

4.6.2 Recommendation to ICC and the World Community:

The creation of International Criminal Court (ICC) with its headquarter in Hague is one of the biggest achievements that Human race had achieved as common goal. Live together in peace with the respect to human dignity.

Human history is full of war crimes that had made human race lives miserable in this world. In order to prevent this sorrowful act taking place again and again in the future time, it was best idea for human being to come together to create a system which can deal to such atrocities in future, hence the idea of creation of a permanent International Criminal Court came to being.

Nowadays the court is created, but the question remained is that, whether the court fulfilled that dream of human race? Or is it on the way of fulfilling that dream of human community? The answer is clear, probably not. As it has been proved in this thesis that the court has failed to attain its goal and gain the confidence of people of globe in many of its intervention around the world. The second question is that, what are the causes of this failure?

By looking to the world political system, which is dominated by politics of interest, the ICC could not be saved of the influence of these politics. Where the great powers have arranged themselves to overcome any possibility of court investigation into their criminal actions and their allies which is aimed to protect their interest around the globe, as such the weaker countries are

desperate to see justice take its course around the world and to see the ICC credibility in its intervention in different conflicts, the accusation of selectivity should be taken care off.[253]

If the world community is really serious to see the world system free of impunity, see justice take its cause, it has to give the ICC freehand to investigate all the crimes where it has jurisdiction regardless against whom the case is brought before the court. And this can be done if the world powers decide to do so, as they hold all the capability to make court effective.[254]In this regard the ICC governing board has little effect to establish its own influence as the court is almost entirely financed by these powers.[255] Until unless the world power; US, Russia, China, did not consider themselves bound by Rome Statute by rectifying it, there is lack of chance for ICC to maintain the international justice. That because these countries are the key players in international conflicts.[256]

4.6.3 RECOMMENDATION TO CIVIL SOCIETY ORGANIZATION:

No doubt the civil society has important role to play in restoring the court in its initial intended position; fighting the impunity in the world system. The civil society as they are the

[253] Since the establishment of the court in Hague in 2002 up today, the court has fully investigate only crimes took place in African despite the similar crimes took place in other part of the world such like (Afghanistan, Iraq, Gaza, Syria etc...). Despite there are been many reports and complaining about these crimes of the court concern in those places, the court could not take any action, that maybe by fear of confronting the world powers in dealing to those cases.

[254] The five veto powers (US, Russia, England, China, and France) plus German and Japan are the key players in world political system. They held manpower, economic power to do whatever it pleases to them. They cooperation would help the court to stand into its feet and any opposition by them can damage the whole system of the court as we are noticing today of what is going between the court and US.

[255] M. CherifBassiouni's lecture on Efficiency and the ICC said: there was judge elected in ICC who never go to law school because she were from Japan and Japan was ready to assist ICC of its short budget of 35, ooo,ooo US$ dollar. The lecture can be found here http://iccforum.com/forum/efficiency-lecture (last accessed 28-05-2014)

[256] The current situation in Syria is typical example of compromising the world justice where the interests of superpower are not protected, likewise what happened in Gaza in 2007 conflict with Israel, till now no justice could be done to the victims because of opposition of US and Russia in these situations. At the same time the poor countries in Africa are prosecuting for the crimes happen in their countries because of cutting off their diplomatic relations with world superpowers.

bridge which link different institutions, and bring them to the table of dialogue, their active movement is very helpful for the success of the court to fulfill its mandate. And this can be done by the following ways:

Firstly the civil society organizations have to monitor the court activities and point out any short coming of the court for its better improvement.

Secondly the civil society organizations have to play the role of ambassador of ICC to other institutions such like AU, EU, and OIC etc… to promote dialogue and international justice.

Thirdly the civil society organizations have to be the voice of victims by helping them to access to justice in worldwide and criticize any masterminded behavior by different key players in the world system.

Fourthly and finally the civil society organizations should have an agenda of general campaign for awareness of important of restoring international justice.

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