

**A RELATIONSHIP OF INCONVENIENCE BETWEEN THE
INTERNATIONAL CRIMINAL COURT AND THE AFRICAN
UNION: AN ASSESSMENT**

By

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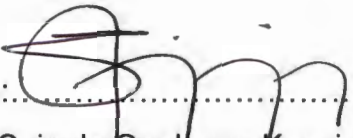
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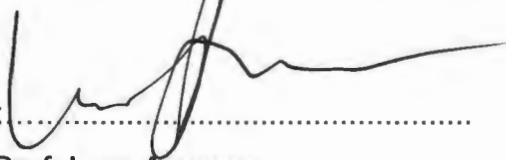
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DECLARATION

I, Seipelo Kgosiejang declare that this mini dissertation represents my own work. All references contained herein have been duly acknowledged. The research itself is the result of my own efforts under the professional guidance of the supervisor whose name appears below:

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Date: 12-04-2016

Supervisor: 
Prof. Lere Amusan

Date: 12-4-16

DEDICATION

This work is dedicated to academic field of African literature in the hope of ensuring positive changes in the African continent.

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First of all I would like to thank the Almighty God for giving me the opportunity to have an education and blessing me with the courage and the help I received in order to complete this project.

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Abstract

The African continent has been at the heart of international security concerns from the time of independence. The continent is prone to conflict due to its hydra headed political instability and lack of development experienced in the individual states the in post-Cold War era of globalisation and liberal capitalism, instability threatens the entire world order and international security. In a bid to assist international law and justice, the International Criminal Court (ICC) was formed to prosecute perpetrators of the most heinous crimes against humanity, genocide, war crimes and the crime of aggression. The African Union (AU) and its member states were very supportive of the establishment of the court and contributed vastly to its formation and implementation. African states were hopeful of the positive impact the court would have on the continent, such as peace, security and stability. However, at formation the courts mandate was for prosecution of perpetrators of international crimes and the promotion of international law and justice for the victims of crimes against humanity. The AU as a continental political body has recently come in conflict with the ICC following the court's indictment of two of its member states' leaders. This has resulted in the volatility of the relationship between the ICC and the AU in recent years. The relationship has become questionable and a topic to be researched. This thesis therefore aims to make an assessment of the relationship between the ICC and the AU following the indictment of President al-Bashir of Sudan and President Uhuru Kenyatta of Kenya.

Abbreviations and acronyms

ACHPR	African Court of Justice and Human Rights
AU	African Union
CAR	Central African Republic
CIPEV	Commission of Inquiry into Post-Election Violence
DRC	Democratic Republic of the Congo
EU	European Union
GATT	General Agreement on Trade and Tariffs
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
IMF	International Monetary Fund
ILC	International Law Commission
NGO	Non-governmental Organisation
OAU	Organisation of African Unity
OTP	Office of the Prosecutor
ODM	Orange Democratic Movement
PNU	Party of National Unity
PTC	Pre-Trial Chambers
SADC	Southern African Development Community
UN	United Nations
UNSC	United Nations Security Council
WTO	World trade Organisation

Chapter One

1 Introduction to the study

1.1 Background of the study

The establishment of the International Criminal Court (ICC) is traced back to the end of the First World War, where the international community attempted to confront the indemnities that resulted from the war. In 1937 The League of Nations spoke of the Draft Convention on an International Criminal Court. Then there were hybrid Courts set up throughout the world to respond to explicitly shocking situations happening around the world. Courts such as the creation in 1945 of the International Military Tribunal, which was also known as the “Nuremberg Tribunal” by the London Agreement (Lee, 1999:48). The tribunal was formed to try suspected Nazi war criminals and bring justice to the victims of those crimes. Later there was another International Military Tribunal in 1946 for the Far East when the Allied Powers of World War II approved the Charter for the Tokyo Tribunal to assist in the prosecution of Japanese war criminals.

The Nuremburg and Tokyo War Crimes Tribunals resolved the pre-eminent international criminal law issue of the mid-twentieth century (Armstead, 1998:5). These tribunals addressed only a single conflict; the legal effect of the special jurisdiction of those Tribunals, and indeed in some quarters, the substantive rules applied by these Courts were not enough to address international injustices. This therefore left the question of permanent and consistent application of the judicial principles established in some doubt.

Since the Nuremberg Tribunal, international human rights law had increasingly superseded the jurisdiction of the State. International law today does not allow a state to treat its nationals whichever way it pleases. Contemporary International Law has created conventions and customs that have recommended a wide range of human rights obligations which all countries must obey. Furthermore some of these human rights standards have such a high status that their violations even by state officials, is considered an international crime (du Plessis, 2008: 249). Both the Nuremberg and Tokyo Tribunals dealt with war crimes, crimes against peace and crimes against humanity. Therefore, it was decided at the 1947 United Nations (UN)

Convention of Prevention and Punishment of the Crimes of Genocide that these crimes would all be recognised as crimes under international law (Maurer, 2004: 2). The UN General Assembly at the convention invited the International Law Commission (ILC) to make preparations and the ICC statute and the drafts were made from 1949-1954. However, because of unresolved issues and differences in opinions there were further delays to progress.

In the late 1990s the ILC was invited by the UN General Assembly to continue with the efforts of creating an international criminal court. There were further Tribunals aimed at holding every individual accountable for all crimes committed. There was an International Criminal Tribunal that was held for the former Yugoslavia and further prosecutions were also made for crimes of ethnic cleansing and ethnic genocides committed in Rwanda. Then in 1994 the ILC had completed the draft for an International Criminal Court and handed it in to the UN General Assembly to discuss the major substantive issues arising from the draft Statute. An ad hoc committee was established for the creation of the ICC and later a preparatory committee was generated to formulate a draft of the courts statute that would be widely acceptable and be submitted to the diplomatic conference. By March and April of 1998 the draft was finally completed (Lee, 1999:155).

The ICC was then established by the international community in 1998 when they adopted the Rome Statute in Plenipotentiaries at the UN Conference in Rome. The court would thus be the first ever permanent international tribunal that would be responsible to try perpetrators of the most atrocious crimes against mankind, while at the same time seeking justice for victims of these crimes. The ICC's Jurisdiction covered genocide, crimes against humanity, war crimes and the crimes of aggression. Though Aggression falls within the capability of the ICC there has not yet been an acceptable definition added to the Statute of what this crime entails. (Du Plessis, 2008: 179). The court's jurisdiction is based on the requirements of the ICC statute and it also has no 'universal jurisdiction'. The statute as understood sets the range and the restrictions of the jurisdiction, but also makes sure to follow the rules of international law (Engelbrecht, 2003). The jurisdiction of the Court is either appealed to or triggered. Ehigialua (2010) explains that a case where the ICC's jurisdiction is invoked would be in cases such as in the Central African Republic (CAR), Uganda and the Democratic Republic of Congo (DRC) where a State Party to

the Rome Statute makes a self-referral for the Court to investigate their country's crimes under Article 13 of the Statute.

According to article 12 of the Statute there are limitations to the jurisdiction of the court. These limitations refer to the ability of state parties to refer cases and prosecutors to initiate investigation by the court. This is due to the membership of the court as per the court's jurisdiction. Those involved in the referrals are to be states which are party to the ICC treaty. However, this might not always be the case as revealed in the cases of Libya and Sudan as states may still be accepted by the courts jurisdiction. Article 12 (2) of the Statute explains that the ICC is bound to the universally accepted principles of jurisdiction based on territory and on the person. This is to say that the involvement of the ICC in cases will depend on crimes being committed on the territory of or by a citizen of a state party to the Statute and also on the state's acceptance of the court's jurisdiction (Engelbrecht, 2003). This description reveals the contradiction of the courts with regards to Sudan as it is not a member state and has also not accepted the court's jurisdiction but it remains investigated and now indicted. If this was the case for all countries, surely, the USA and Britain should have been summoned by now, or is it that the courts rules do not apply equally to all countries? Some countries protect themselves from such prosecution by using economical and hegemonic power to intimidate others, even though the ICC, should be independent.

Schiff (2008: 5) explains that the ICC is bound by international law and that:

"International law is based on an ephemeral society that lacks a legislative structure, and it seeks to constrain sovereign states that recognise no consolidated authority for enforcement. International organisations operate at the allowance of states, subject to their desires, dependent upon their generosity, and victims of their ploys. Moreover, international organisations are subject to the same weaknesses as domestic ones - outside influences, bias, and maladministration".

Therefore the ICC itself, as other international organisations is subject to outside influence. This is explained that there is some level of outside influence, bias, and maladministration which has been argued to be the case as stated by African Leaders. The marginalisation of the peripheral countries particularly in Africa, has been witnessed in organisations such as the UN, International Monetary Fund (IMF),

World Bank, World Trade Organisation (WTO). Africa, due to its economic dependence on first world countries and lack of funds to contribute to these organisations as much as the core countries do appears to be marginalised. Therefore it is worth questioning why would the ICC be any different from these other organisations? The subjecting of states to international law therefore seems not to apply to all states and maybe compromising the sovereignty of some while respecting that of others.

Apart from referrals a case may be pursued by the ICC Prosecutor by exercising his own initiative powers and initiating investigation with a view to prosecution. The court does provide states with the opportunity to handle issues internal, but if they fail to do so it takes action. That became the case for Kenya when the Prosecutor's office in 2009 began investigations after analysing the information on the 2007 violent attacks during the national elections provided by the Commission of Inquiry into Post-Election Violence (CIPEV). From the information provided, the Office of the ICC Prosecutor (OTP) investigated the allegations. This case is therefore the first investigation that was not a referral from a state that is party to the Rome Statute or the United Nations (UN) Security Council (Lynch, 2013: 4).

The Prosecutors' powers are set out in articles 15, 42 and 54 of the Statute. These are said to provide independence and fairness of the office of the prosecutor as well as make sure that the boundaries for the prosecutor are set out clearly as he is the individual mandated to take charge of all ICC investigations as well as prosecute cases that will stand before the court. Moreno Ocampo from Argentina was the first Chief Prosecutor of the ICC and now, elected to this post on 21 April 2003 is his successor Chief prosecutor Fatou Bensouda from Gambia, an African at the very heart of the ICC who assisted with discrediting the Anti-African accusation and suspicions of the ICC being a neo-colonial tool. She took office on 16 June 2003 (Engelbrecht, 2003) (Murithi, 2003:5).

As per article 15 of the Statute the prosecutor's powers when investigating cases are clearly defined. The prosecutor may initiate investigations in terms of information received on crimes within the jurisdiction of the Court as in the Kenyan situation. Sub-article 15(2) further explains the method and sources for the collection of information of crimes within the court's jurisdiction by the prosecutor which include:

individuals, the UN, intergovernmental and non-governmental organisations or any other reliable sources. It is said that this could possibly lead to a better chance of acceptability of the prosecutor on the part of a state and its civil society, but that may not always be the case as African leaders appear to be contesting the cases of the ICC and the methods used.

According to this process it is expected that the prosecutor will have satisfactory information to start analysing information. At this point it is expected that the prosecutor would have a sound basis to continue with the investigation and therefore proceed to trial by requesting the pre-trial chamber of the ICC for authorisation to proceed with the investigation. If the pre-trial chamber authorises investigation, that means that they have reason to believe that there is a reasonable basis in the information provided to them and will therefore allow the prosecutor to investigate the issue. For the ICC this is a method to assist with the oversight of investigation of the court and to prosecute within only reason (Engelbrecht, 2003).

Lastly Engelbrecht (2003) explains that the Statute stipulates that the jurisdiction of the court not only ends within the courts but rather that the United Nations Security Council (UNSC) in its exercise of the Chapter VII powers also has jurisdiction of the court's cases. In this circumstance, the UNSC will therefore have power to request or rather refer a situation or case to the ICC to investigate. This power apparently, as per the Statute, also extends to countries that are not even signatories to the Rome Statute. This in my view reverses article 12 of the Statute which evidently limits the jurisdiction of the court to its members. This points to the fact that as an international organisation the court is subject to prejudice. The UNSC has a permanent members five of the most powerful capitalist countries in the world which by all means will look after their own interests over that of others, despite China's foreign policy explaining otherwise. How is it that the UNSC comes in and overshadows the ICC and its Statute which its members decided to have and signed to have it remain that way, which becomes subject to change by an institution that has a third of its members which are not even parties to the ICC?

As The UNSC has power of referral of ICC cases as seen in the present situation in Sudan following the report of the Darfur Commission about the crimes of genocide, war crimes as well as the crimes against humanity that have been alleged to have

been committed in the Darfur region of Sudan. The UNSC consequently also has power to defer ICC cases. This particular process is the very one that the African leaders have requested the ICC to consider with regards to the Sudanese and Kenyan situations. This would be considered to be a way to address the current imbroglio between the court and African leaders particularly those at the AU (Mutua, 2010: 5). Article 16 of the ICC Statute provides more information for cases that may lead to deferrals occurring. Following the exercise of Chapter VII powers as stipulated in article 16, there will be no investigation or prosecution following the deferral by the UNSC for a period of 12 months, which is subject to change and may be extended for another 12 months under the very same conditions. These Chapter VII powers being exercised by the UNSC are still said not to be an abuse of power and that the UNSC has no direct control over the ICC yet they have the power not only to request a case to be investigated but also request that it not be. In a perfect world this is an exercise of direct control of power on the ICC by the UNSC, but according to the ICC, the very institution identified to bring justice to the state parties, this is not (Amstead, 1998: 21).

However, powers are provided for the accused or those who stand not to benefit or may be prosecuted but the court is based on complementarity or subsidiarity as these are the principles on which the ICC operates to assist in trying to balance the haves and the have nots. In a more practical sense, to ensure by norms of international law that both those prosecuting and those prosecuted look like they are equal. In accordance to what Du Plessis, (2010: 56) argues, the complementarity is an expectation that countries would be able to handle their individual cases domestically. This would, as previously discussed mean that a country that would be willing and able to prosecute its own perpetrators; as proclaimed by the Rome Statute the ICC is to cooperate in relation to its investigations and prosecution. This makes sure that the ICC operates more as a reinforcement of the country's justice system at a national level which would therefore make it only a part of the international criminal justice system, rather than a dictator.

This principle proceeds from the belief that a particular country and its criminal justice system should be first to act before the court comes in. It will therefore mean that if the countries or the state parties being investigated are unwilling or unable to act in accordance with international law and prosecute international crimes

committed in their own countries by their nationals, the ICC will then have jurisdiction to take over and investigate till prosecution. This is what happened in Kenya; Sudan on the other hand did not have the opportunity to have its own investigation. Both leaders were indicted and arrest warrants sent out to the world; confirmation of an indictment is also to be understood in this context. It occurs in a hearing in an open court. After drafting the indictment, the victims through their legal representatives can challenge the indictment on a number of grounds (Locke, 2012: 604). This is not what happened in other cases.

In respect of international law and its norms it is worth noting that in the protection of the accused, international law applies the *ne bis in idem* principle, in which no person may be prosecuted twice for the same crime. Another is the *Nulla poena sine lege* principle, which states that the statute will stipulate the punishment of people on trial and the maximum penalty of the court is life imprisonment. This might prove not to be enough by some, as many were unhappy with the International Criminal Tribunal for Rwanda (ICTR) when the death penalty was not imposed (Cryer et al, 2010: 83).

The Rome Statute was later reviewed in June 2010 in Kampala, Uganda to adopt a resolution to amend the Rome Statute to include the definition of the crime of aggression as it was undecided at the formation of the Statute by State Parties about what this definition would entail. On 1 January 2017 the actual exercise of jurisdiction on crimes of aggression is to be decided by State Parties (Mutua, 2010: 2). As with what is regarded as the Court's exercise of jurisdiction, it was decided at the Conference that a situation whereby there is an act of aggression could be referred to the ICC by the UNSC. This would be within Chapter VII powers provided by the UN Charter. This will then be irrespective of whether or not the country is a State Party or non-State Party to the Rome Statute. Other amendments were made to regard the authorization of the prosecutor in the absence of UNSC, the employing of certain poisonous weapons and evaluation of international criminal justice (Padmanbhan, 2010: 4).

Another point to note is that the US was one of the first if not the very first endorser of the idea of the world having an international criminal court. This is after the genocide in Rwanda when President Bill Clinton openly called for a permanent war

crimes tribunal right before the Rome conference. This was not the case when these very vocal endorsers of the court joined China, Israel and Iraq in voting against the Statute at the last days of the Rome conference. The Rome Statute continued to be adopted in 1998 in July on the 19th through a non-recorded vote of 120 in favour, seven against, 21 abstentions. The evidence of the US and those identified to be against the Statute were very visible even though the voting was not documented as they were very explicit about the fact that they were against the adoption of the Statute and had voted accordingly. There were three other states that did vote against the Statute namely; Libya, Iraq and either Algeria, Qatar or Yemen; it was uncertain which of these three countries as the voting country was not documented (Du Plessis, 2010:30)

It can therefore be said that the US, which is a key player in the international arena opposed the establishment of the court from the beginning. Even though they did sign the Rome Statute, Clinton's administration did not ratify the treaty. The objections to the court as professed by the US were a lack of adequate checks and balances on the court, predominantly based on the powers of the ICC prosecutors and judges and that the court does not have a jury system as in the US. However, other reasons if not the main reasons included the issues that Clinton's administration ambassadors remained at large and not charged for war crimes issues that the US was unwilling to explain nor admit.

It is said that the US Senate Foreign Relations Committee was informed that the treaty implications would establish an arrangement whereby US armed forces operating overseas namely in the Arabic countries could be conceivably prosecuted by the ICC even if the US had not agreed to be bound by the treaty. This is surprising as it has not yet occurred despite the power of the UNSC to refer non-party states as in the case of Sudan. New Africa magazine (2012) explains this to be the most fundamental principle of the treaty law, yet the US perpetrators remain free while African Heads of states are charged and indicted. Why would this be possible if not for prejudice? Why is it that the rules only appear to be for a selected few who have a commodity the US is known to want? Countries like Libya and Sudan have oil.

On July 1st 2002 the Rome Statute was entered into force, whereby it was signed by 139 states and ratified by 113 with a significant proportion of the countries being African. African countries have been extensively supportive of the ICC since the beginning, from their governments to civil society and the public at large (Mutua, 2010:2). All these factions of societies have been of great significance in ensuring the success of the Court, including the AU and other regional blocs.

The active involvement of Africans could be accredited to the re-establishment of the Organisation of African Unity (OAU), becoming the AU it is today. Africans needed change and the creation of the court would mean an African transformation that came with the change that this new continental body would bring about (Ehighalua, 2010). As a continental organization the OAU did provide a platform for all member states to adopt corresponding positions on issues that were a common concern to the continent in various international settings, as well as to defend African interests effectively. Through the OAU, African countries acted as one united front in the Coordinating Committee for the Liberation of Africa (AU, 2014). However, this may be described to be only one side of the coin as the OAU had its own regrets.

The other side of the coin as explained by Cilliers and Malan (2005: 1) is that the OAU had not provided appropriate tools for a collective and comprehensive solution for African states when there were violent emergencies coming out in the very liberated continent it assisted. These problems arose from the fact that Africans had a shared value where they viewed non-interference in the internal affairs of member states as a rule to live by. No matter what the other country was doing the OAU continued to ignore the atrocities that African countries inflicted on themselves. This was the case until the 1990s series of violent conflicts in Africa. Of importance is 1994 when the Rwanda genocides erupted.

There was later an urgency for African states to make changes in their common security collaboration as in matters of development, economies, issues of human rights, poverty, HIV/Aids, etc. These factors together with many others led to the establishment of the AU in 2001 where in the case of security, the non-interference clause of the OAU was declared no longer operational. The new Constitutive Act of the AU gave the right of interference in a member state, where there were grave circumstances namely: war crimes, genocide and crimes against humanity (Cilliers &

Malan, 2005:2). With these changes of policies and framework, the AU became a major contributor to the establishment of the ICC in the post OAU era.

To date, 43 African countries are signatories to the Rome Statute and of these 31 are states parties. The African Bloc is the largest representative regional group within the ICC, actively participated in the establishment of the Court and was instrumental in bringing it into being. However, even with that being the case, the relationship of the ICC and AU today has become one of inconvenience. (Hatukusema & Atasema: 2013). The Court today has now opened 20 investigations into criminal activity, eight of which are from African States. In 2014 the cases pursued in Africa were way more than in the rest of the regions around the world combined. This imbalanced focus on the African continent has been a subject of intense scrutiny in recent years.

The intense scrutiny of the relationship between the Court and African states has since 2009 arguably been one of serious disorder in the ICC's short lived life. The crisis between the two began with the arrest warrant that was issued to the Sudanese President Omar al-Bashir by the court on charges that constituted the jurisdiction of the court as stated by the Statute; these are crimes against humanity and war crimes committed in the Darfur conflict (Du Plessis, 2010: 8). Then the case of President Uhuru Kenyatta and his Deputy William Ruto following the 2007 election violence crisis in Kenya also created growing dissatisfaction among African countries, and the future of the ICC and Africa now seems to rest squarely on these two cases (Halakhe, 2014). There have therefore been suggestions that the treaty based Court is nothing but a hegemonic tool used by the core first world countries to target and discriminate against the peripheral Southern countries in Africa and therefore undermining African efforts to solve its own problems. On the other side supporters of the Court have argued that the Court's involvement will manage to break the profoundly entrenched and universal culture of impunity in Africa.

This thesis aims to assess the relationship of the ICC and the AU by providing an analysis of the individual cases of the ICC in Africa from 2009-2014, with special attention to the cases of President al-Bashir and President Kenyatta and his Deputy William Ruto. It will assess the agreements between the ICC and Africa particularly the Rome Statute and the AU Constitutive Act in order to effectively provide an

overview of the relationship of the AU and the ICC, the factors influencing the current state of affairs and ultimately determine the future of the relationship between the two institutions with regards to Africa-Western imperialism or African justice.

1.2 Problem Statement

The AU and its member states were extensively involved in the creation of the ICC, in order for it to assist in bringing peace to the African continent. This commitment demonstrates that historically, the expectations of the signed agreement would be beneficial to the victims of serious crimes and bring about peace and security on the continent (Du Plessis: 2010: 12). African leaders have however come to regard the ICC as a tool for Western domination unfairly focused on Africa while having double standards elsewhere in the world. The Court has been stated to be undermining Africa rather than helping it solve the problems in terms of the Sudanese and Kenyan Presidents' indictments, as well as the fact that most, if not all of the cases presented to the ICC are from Africa. The Court has consequently been accused of putting justice ahead of peace and conflict resolution. This study therefore seeks to evaluate the involvement of the ICC in Africa and the response of the continent's leaders to the Courts efforts, using the cases of the two standing Presidents, Omar al-Bashir and Uhuru Kenyatta as case studies.

1.3 Research questions

- 1.3.1 What is the relationship between the ICC and the AU, with special focus on Africa?
- 1.3.2 What are the factors influencing the current position of the relationship?
- 1.3.3 How does the future for the ICC/AU appear from the current relationship?

1.4 Aims

The main aim of this assessment is to provide an analysis of the relationship between the ICC and the AU with regards to Africa. It will address the similarities and differences of the organisations with regards to their approaches to restoring peace and security, as well as bringing justice to victims of serious human rights abuses on the continent by assessing both the Rome Statute and the AU Constitutive Act's position on the matter.

1.5 Objectives

- 1.5.1 Evaluate the relationship between the ICC and the AU with regards to the African continent.
- 1.5.2 Investigate factors influencing the current state of affairs within the relationship of the ICC and AU.
- 1.5.3 Examine the future of the relationship between the ICC and the AU.

1.6 Data collection

The data used is all secondary. The collected data is from electronic and hard copies of articles, journals, books, databases and publications from different research institutes.

1.7 Method of Data Analysis

The type of data collected for any research study goes a long way to determine the method for its analysis. Therefore, the method of data analysis used for this study will be descriptive. Secondary data being the main source of data collection, the qualitative research method is used to analysis the relationship between the ICC and the AU.

1.8 Limitations

The research is international, looking at the ICC's relationship with the AU, particularly in the decade of the ICC's existence. It also focuses on the case study of the Sudanese and Kenyan Presidents and other prosecutions of the ICC. The research is meant to be completed within a particular time limit. Furthermore, the researcher is a student with course work which limits the ability to travel to The Hague, Sudan or Kenya as well as the inability to finance these trips. To control these restrains of not doing field work, the research will entirely depend on secondary data and information that will be obtained from different research institutes and materials.

1.9 Delimitations

The study will be delimited to the involvement of Africa in the creation of the ICC from 1998 to the present date. It is an assessment focusing on how the relationship of the ICC and the AU has been affected with regards to the responses of African leaders to the warrant of arrest for both the Sudanese President Omar al-Bashir and Kenya's Uhuru Kenyatta by the ICC.

1.10 Scope of the study

This assessment will focus on the relationship between the ICC and the AU. The scope of the study is from 2009 when the al-Bashir's case was presented to the AU when he became the first standing president to be indicted by the Court in June 2014. It then continues with the AU's 21st Summit of Assembly in October 2013, which Kenyatta attended in his capacity as President of Kenya for the first time with a case against him by the ICC and the proceedings thereafter.

1.11 Significance of the research

The research is motivated by the desire to assess the current state of affairs of the relations of the ICC and AU. It investigates the cases of the ICC in Africa and assesses whether or not the ICC's aims on the African continent goes hand in hand with the expectations of Africans as agreed in the Rome Statute. The research is significant as it investigates the rule of international law and institutional guidelines of both the ICC and the AU, using arrest warrants for the Presidents of Sudan and Kenya and their prosecution as case studies. This study thus explains the violation of the president's rights and the country's sovereignty by the ICC. At the same time it also examines African leaders' violation of the AU's Constitutive Act and ICC's Rome Statute at the expense of victims but benefit of the elites. The issue of the ICC and its relationship with Africa has been researched by many scholars. However, the cases of the Sudanese and Kenyan Presidents' relations to the rest of Africa, and how Africans have responded to these cases from the ICC is one of particular interest with few researchers focusing on the issue.

The following stand a chance to gain from this study:

- 1 Academics will benefit from the global body of knowledge. Furthermore, future research made in the case of al-Bashir/Kenyatta and Africa's regard for the ICC will have more references.
- 2 This study may initiate further research of this particular topic.
- 3 This study may improve policy making for future leaders to consider all clauses of the agreements before signatories are endorsed and the implication it may bring to them and their countries.
- 4 Individuals will be better informed about the cases of the ICC other than what journalists from television networks and newspapers report on.

1.12 Research methodology and methods

As indicated in 1.8, the research is subjected to secondary data collection and restrictions. The research therefore uses the qualitative approach for the study in order to adequately address the research question. The choice of the design is informed by the research problem, which requires an in-depth description, evaluation and analysis of the ICC's involvement in Africa and the response of the continents leaders to the efforts of the Court with particular emphasis on the case of Presidents al-Bashir and Kenyatta. The study uses the 2002 Rome Statute as the base of the foundation of Africa's involvement with the ICC as well as the binding clause of the agreement of the Court. The researcher presents the two cases to identify the inconveniences within the relationship between the ICC and AU. The objectives of the research are centred on the case study of Al-Bashir and the warrant of arrest that was issued by the ICC in 2009 and African leaders' unwillingness to arrest him, and now recently the objection to the prosecution of Kenyatta by the AU.

The research explains what African leaders had agreed upon when ratifying the Rome Statute and their expectation when contributing to the creation and on-going support of the ICC. It also evaluates the reaction that has been received from Africans towards the two cases. Another issue is why they have come to regard the ICC as a tool for the West, which undermines and is unfairly focused on Africa, and

leads to accusation of the ICC having double standards. The thesis also provides criticism of the AU and its disregard for justice and impunity.

The ideal research method would have been to collect new data in the field through meeting with civilians, ambassadors, governments and Court officials, and Heads of States from all mentioned countries. However, due to safety and confidentiality of certain information and economic constraints, that type of data is unattainable. In order to address the above mentioned constraints in a much more practical manner, which would allow the researcher to arrive at a complete analytical conclusion regarding the hypothetical propositions, a content analysis will be used. The study therefore relied on secondary sources to determine the findings of the study.

1.13 Structure of dissertation

The study is made up of four chapters.

Chapter One: Introduction, background of the study, problem statement, research question, aims, objectives, data collection, method of data analysis, limitations and delimitations, scope of study, significance of the research and the research methodology.

Chapter Two: Theoretical framework and literature review.

Chapter Three: Analysis of data.

Chapter Four: Conclusion, recommendation and summary.

Chapter Two

2 Theoretical framework and literature review

2.1 Introduction

This chapter presents the theoretical framework of the study and the literature review on the topic. The theoretical framework explains the theory the study uses to explain the literature and findings of the research. The literature review evaluates literature related to the study topic, therefore describes, summarises and clarifies the relationship between the ICC and the AU.

2.2 Theoretical framework

This research has been carried out under the theoretical framework of systemic theories of politics and international relations. This systems approach to international relations and political science is defined by Weltman (1975: 35) as:

“A system of action is a set of variables so related, in contradiction to its environment, that describable behavioural regularities characterise the internal relationships of the variables to each other and the external relationships of the set of individual variables to combinations of external variables”.

Thus the systemic theory of political science and international relations brings out the decisive factors of the relationship between the ICC and the AU. It brings out the relations of the African leaders who the ICC has requested to be arrested even with their distinct features, explaining the relationship that the ICC has had with Africa, and its effectiveness. The case studies regarding al-Bashir and Kenyatta contrasting the behavioural regularities characterised by the internal relationships in Africa among countries, organisations and groups with the external relationship they have with the ICC and the Western world.

Theorising based on systems brings together two fundamental approaches to international relations theory (Dougherty & Pfalzgeaff Jr, 1997:100). The first is termed reductionist and it focuses on actors and the interaction that takes place between them, whether they are individuals, groups of people such as nations, or bureaucratic units. Its focus is the development of explanations and theory at the level of the individual participants or units. The second approach emphasises the

structure that provides the framework within which such interaction occurs. Structure is said to have a decisive impact on the interaction of the actors. According to structural theory, the actions of individuals or groups, when aggregated, produce patterns of behaviour that may be fundamentally different from the behaviour patterns of individual. The structural approach attempts to explain how the structures within which actors exist affect the interactions between the actors, and how and why changes in the structure take place. This structural approach is termed holistic or systemic because it is based on the development of the explanations at a more macro level of analysis which is why the research follows this approach.

The holistic approach focuses on all actors within the structure of the relationship between Africa and the ICC at a micro level. This thus includes all members of the ICC Statute and organisation, African heads of state, organisations and blocs on the continent as well as individual citizens as participating contributors to the study. This approach looks at the individuals who have been presented with arrest warrants, the “perpetrators” as the ICC refers to them. It also focuses on the leaders of Africa, organisations in Africa as contributors to the study and the victims of these “heinous” crimes. The holistic approach considers the entire structure of the relationship all these parties have with the ICC and the framework in which these relations take place. It incorporates all actors of the structure including outside influence as the UN Security Council and the West while still considering the use of the neorealist-structural-realist theories by all actors.

With the realities of human activities within international politics there is no one theory that may be said to explain the entire relationship between the ICC and the AU. The dynamics in social sciences and legal studies that are incorporated in this study bring about a need for the use of several theories. Neorealism theory is one of the theories used in the study, particularly to carry out the interests of the AU and the ICC within their individual structures. According to Waltz, neorealism embraces that anarchy is the ordering principle that defines the structure of the international system. It does this by the distribution of the capabilities which is measured by how many great powers there are in the international system (Frankel, 1996: 391).

The current state of affairs that characterises the relationship between the ICC and African states is one in which states seek their own interests and will not subordinate

their interests to another state or, in this case as characterised by the contemporary world order institutions. Both the AU and the ICC are assumed to want to ensure their own existence as this is a requirement to pursue both institutions' goals of being a united independent Pan-African institution for the former and an international independent Court seeking justice in the name of international law for the latter. Neorealist theory therefore not only determines the interaction between the ICC and the AU as described in the structural approach but rather the objectives of each institution as well.

Two schools of thought have or are emerging in the ICC in relation to Africa thus far; according to Mahmood Mamdani the court is simply another form of neo-colonialism. This is an imperialistic institution that is very focused on the poor in the south and targeting particularly those in Africa. He further goes on to explain that with Africa, the legalistic approach that the court is using is not the best approach. It is anticipated that it would not produce the expected results when dealing with issues such as Justice, reconciliation, post-war reconstruction, and human rights violations on the troubled continent (Ehighalua, 2010: 4).

The two schools of thought, though vaguely highlighted in the systemic theory, are captualised by the peripheral realism theory. The view of neo-colonialism that is said to be resulting in the relationship of the ICC and AU has more roots in the imperialism and dependency theories, which provide the background of the African peripheral status. The peripheral realism theory outlines the concept. This view of international relations provides for the occupational structure of interaction in IR as it views the international system as some form of an emerging hierarchical structure. This is based on the perceived differences between states: those that rule, those that obey the rules and those that rebel against them. This foreign policy theory introduces the viewpoint of states which will be in the forefront of giving orders and then states that do not give orders but rather follow the rules in the international system and which suffer the most should they not follow. Hence periphery African policies are formed and applied in such a way that the countries' national interests are defined in terms of development rather than empowerment. This is because confrontation with those with power is being avoided as witnessed in the ICC/AU relations. Sovereignty is not understood as freedom of action; instead it is the cost of

using that freedom that resulted in the AU Extraordinary Summit in 2013 not having any withdrawals by African nations from the ICC (Escude, 1998: 55).

All these theories on their own do not capture the essence of the relationship between the ICC and AU but are all represented within the study to better convey the relations of the two institutions, at all levels of international politics with particular importance, however, placed on the systemic theories of politics and international relations which the study uses to assess the relationship of the ICC and AU on whether it is one of inconvenience. The systemic theory of politics and international relations is in itself not the only ideal theory to convey the relations between the ICC and AU. It may be better assisted by both the structuralism theory and rationalism theory.

The structural theory places emphasis on the fact that for an object to have structure it must have united parts under ordered relations. This would mean parts themselves are not important, but their significance is evident in the relations among them. The relations between the ICC and AU are themselves significant in order to achieve a structure that will maintain both parties' interests. The structural theory explains that meaning does not necessary remain unchanged when parts change, but it remains unchanged when it comes to systemic change of parts. The theory explains the relations significance that systemic theory does not (Stephen, 1991:403). Rationalism theory views states as being included in an international society not just simply an international system. In this instance states become a part of this international society when they begin to accept the various principles and institutions governing the international system in which they conduct their foreign relations. Both the ICC and AU are institutions that according to rationalism have proven some commitment to the thought that maybe it is inappropriate to promote one's national interest without having any sort of regard for international law and ethics. Therefore, in order for international society and its structures to remain intact both institutions are to address their relation of inconvenience (Beavis. 2014).

2.3 Literature review

2.3.1 Introduction

Following the human rights abuses strategies adopted by the German Kaiser during WWI and the 1915 Turkish campaigns against the Armenians, the need for international Justice was explored and the preservation of human rights developed. War in its own violates human rights at personal, national and international level and states are unable or unwilling to bring perpetrators to justice in accordance to international law and provide redress to victims. International law goes beyond the domestic legal terrain where national sovereignty is subordinated to the higher principles that ensure sustainable peace and security and the respect of human rights internationally (Mensa-Bonsu, 2015: 35). To safeguard the principles of international law and enforcement of international justice, the ICC was established to enforce universal human rights standard and bring about accountability from offenders, be they states or public official. African states have been a great part of the establishment of the ICC, however the relationship between the ICC and AU has been disintegrating in the recent years. Since the Sudanese President Al Bashir's 2009 indictment the relationship has deteriorated and with the latest indictment of the Kenyan President Uhuru Kenyatta the relationship seems to be crumbling. The AU in 2013 had an extraordinary session of Assembly where the future of the ICC and Africa was discussed with particular focus on the Kenyan President and his deputy's indictment as standing Head of State and his Deputy William Ruto. From the developments made from the cases and summits, this thesis will discuss the AU's stand point on the issue of ICC's prosecutions in Africa as well as the ICC's interpretation of the cases based on literature presented in this field by various writers and sources as well as their recommendations for the current situation between the ICC and AU in accordance to international law.

2.3.2 The situation in Sudan and ICC's case against al-Bashir

Dating back to the British colonisation of the country Sudan has always been a troubled nation. Mutua (2010) explains that the factors to be considered are the deep divide between the Arabised north and the black African south. These conflicts he says are rooted in the country's religious and racial conflicts as well as the competition that seems to occur over resources in the country. Another problem for

this weak but violent nation has is the dictatorship of its leaders. These problems have combined create one of the most horrific humanitarian crises in the world today. Though today the country has separated and become North and South Sudan, it had a previous long-running conflict between the two territories. Even though at the time the conflict had toned down, the government of President Omar al-Bashir has been convincingly accused of war crimes, crimes against humanity, and genocide in the Darfur region which is in West Sudan and home to the black African Muslims in the country.

The government security together with the Janjaweed which is an Arab militia have been said to be responsible for the atrocities experienced in the region. Following these events, within their Chapter VII powers the UNSC expressed their concern about the region being a possible threat to international peace and security as well as stability within the region. Therefore in July 2014 the UNSC recommended the deployment of the international presence in the region with monitors, as well as the protection force proposed by the AU to the Durfur region in Sudan (Edstrom & Gyllensporre, 2013: 183).

Subsequent to raising concern, the UNSC within their powers referred the case to the ICC and had the Darfur situation reported to the ICC, which then launched their pre-trial investigations even though Sudan was not party to the court under article 12, but as a result of Chapter VII powers from the UN Charter, the ICC was within its jurisdiction. With the pre-trial investigations taking place, an arrest warrant was issued for al-Bashir in March 2009 for war crimes and crimes against humanity in Darfur. Then in the following year in July 2010, a second arrest warrant was issued for genocide committed in Darfur (Mutua, 2010: 4). The warrants of arrest for the Sudanese President are for his alleged role as either an indirect perpetrator or indirect co-perpetrator in the genocide that took place in Darfur. He is accused of having a hand in the killing, causing of bodily and mental harm as well as deliberately inflicting conditions of life which would result in physical devastation to victims in Darfur. These alleged crimes; also had five other Sudanese officials charged, of which Bahr Abu Garda has already appeared before the court voluntarily while the others remain at large. They have also been charged with war crimes and crimes against humanity (Bassiouni, 2011: 206).

International Criminal Courts (2010) reports explain that the Pre-Trial Chamber I issued an arrest warrant for Omar Al-Bashir for seven counts of crimes against humanity and war crimes before Judge Cuno Tarfusser, Sanji Mmasenono Monageng and Sylvia Steiner. The judges concluded that the arrest warrant for al-Bashir under article 58 (1) of the Rome Statute was one of importance to ensure that three of these conditions were made possible. Firstly was that he eventually appears before the court, secondly to keep him from interfering in ongoing investigations and lastly that he does not continue with the very crimes he is accused of. In his individual capacity al-Bashir has been held criminally responsible on ten counts: five counts of crimes against humanity, two counts for war crimes and lastly three counts of genocide (International Criminal Courts, 2010).

The jurisdiction of the ICC over international crimes committed in Darfur is due to Security Council Resolution 1593 which gives them the right to continue with the case and eventually prosecute al-Bashir despite Sudan not being party to the Statute (Human Rights Watch, 2010). The first warrant of arrest did not include genocide as decided by the pretrial chamber. The OTP appealed this decision stating that the material investigated proves the need to include it and accused the chamber of using inappropriate standards to have this declined in the first place. The question is, how many other inappropriate standards are there that the pre-trial chambers of the ICC will make with other cases. What standards were they using to prove that this is to be declined? Anyway, the OTP managed to have this turned around and in 2010 a new arrest warrant that included genocide was issued for al-Bashir.

al-Bashir has had restricted movements since the warrant of arrest was issued. Many countries like South Africa have declared that they will arrest him should he be on their territories. He has not been attending many international meetings as the invitations do not go out to him due to the warrants. Countries all over the world specifically those in the South, mainly Africa, fear to have him enter their states even though they do not really agree with his indictment. This takes us back to the issue presented by peripheral realism theory where those that follow orders fear to rebel against those that give orders because they cannot afford to bear the costs that follow thereafter. Al-Bashir has been denied invitations to several international meetings and several states, including South Africa, which has vowed to arrest and turn him over to the ICC should he set foot on their soil.

The President of Sudan after the indictment counteracted this decision to have him arrested by expelling humanitarian agencies and further escalating the violence in Darfur. Though he had restrictions in movements they were not unanimous, as in Nairobi he was invited to the 2010 promulgation of the new constitution on 27th of August by the government of Kenya. Both African countries and the West predominantly the European Union (EU) criticised Kenya for its failure to arrest him and going against its duties under the Rome Statute (BBC News Africa, 2011). And in 2013 he visited Nigeria for an AU summit on HIV and Aids but left early due to calls for his arrest. Nigeria's action in allowing him to participate in the summit was in line with instruction from the AU's decision not to cooperate with the Court in 2012 (Aljazeera, 2013), a stand the AU decided to take which may be considered to be a milestone for the fragile institution at the hands of those who rule.

Although reluctant to pursue their ambitions, many Africans have openly rejected and criticised the warrant of arrest against al-Bashir, clearly disregarding the efforts of the ICC (Du Plessis, 2010: 11). The Arab League has been very vocal about its support for the Sudanese President, the AU also made strides in 2009; despite Botswana's protest it passed a resolution to reject the ICC's arrest warrants against al-Bashir. Africa's most populous state, Nigeria, openly supported this resolution, and even South Africa invited him for President Zuma's inauguration but secretly asked him not to attend, stating later that they invited the Sudanese government but not al-Bashir. This could be considered to be a step in the right direction as far as the AU goes; with two of the continent hegemonic countries backing al-Bashir, they showed a united front.

Even though rumoured to have had widespread intimidation of voters and fraud, the April 2010 Sudanese elections saw the re-election of al-Bashir assisted by the boycott from the opposition. In 2012 the African Union changed the venue for the annual meeting to accommodate al-Bashir as Malawi had promised to arrest him on arrival after being threatened with sanctions by the West should they not arrest him. This followed after Malawi was questioned by the ICC on allowing al-Bashir to visit in November of 2011. The now deceased President Bingu wa Mutharika of Malawi was one of several leaders on the continent that were vocal in their condemnation of the court for investigating war crimes only in Africa disregarding the rest of the world. (BBC News Africa: 2011). Malawi experienced what it cost to not obey the rulers

following the 2011 visit, which showed other states what they stand to endure should they follow suit. This is no wonder small, dependent countries like Botswana dare not go against those at the top of the food chain. Since his re-election the Sudanese President's movements still remain limited and Sudan remains unstable with the secession of South Sudan becoming an independent state and numerous attempts for his arrest continue as he is still at large.

The main complaint about al-Bashir's case by African states is that he is a sitting Head of State. The fact that the ICC has continued to pursue a case against a sitting Head of State, furthermore that of a country that is not even a signatory to the Statute of the ICC is the problem. This has brought about concerns to other African leaders, including those that are party to the Statute. Though the ICC has proven its Jurisdiction in this case, article 98 and 27 of the Rome Statute provides evidence for head of state immunity under customary international law. The dissatisfaction with this case is seen in the various responses given by African governments, its leaders and the AU's bold statement of taking a decision to disregard the courts mandate, even with states party to the court. In this sense, a clear picture is painted by the responses of Africans to the developments of the case against a Head of State and the position they hold as the complainants against the ICC's methods.

2.3.3 The Kenyan situation and the ICC's case against Uhuru Kenyatta

Kenya like many other African countries has had longstanding troubles such as issues of historical injustice, inequalities whether social, cultural, economic or political, violent crisis and like all others on the rise, issues of unemployment rates going high and corruption increasing as political power is monopolised by an elite few in the country. These problems resulted in an unprecedented inter-communal violent crisis that erupted after the December 2007 general elections in Kenya. These violent events resulted in over 1,000 Kenyans dead and almost 700,000 displaced. The AU in an effort to assist with the problem called in its Panel of Eminent African Personalities led by Kofi Annan as the chairperson to lead mediations which led to a power-sharing agreement between President Mwai Kibaki's Party of National Unity (PNU) and the then-opposition Orange Democratic Movement (ODM) (Lynch, 2013: 4).

In the mediation process that saw the end of the 2007-8 post-election crisis, it was established in the negotiations that there was a need to have a few commissions of inquiry in this matter by both PNU and ODM officials. The AU Panel of Eminent African Personalities would oversee the inquiries which included the CIPEV. This is to say that the court allowed the country to investigate its own cases in its own capacity, using its own judicial authority. The CIPEV, after working on its own investigation and from existing documentation about the violent attacks that appeared to have occurred due to the issues faced by the country as in many other African countries, was made to believe otherwise. It concluded that, though it might be true that the post-election violence came as a surprise in some parts of the country, in many others they seemed staged, more like they were organised to happen the way they did. Additionally the commission found that the country's state security agencies as institutions formed for the protection of the country failed to protect the country. These institutions were expected to anticipate, prepare and therefore contain the violence in 2007. It was declared that they themselves were guilty of acts of violence and human rights violations (Lynch, 2013: 5).

The findings of the commission led to the recommendation of a special tribunal to be formed, which was then mandated to prosecute and bring to trial those who had been held responsible for what was said to be crimes committed to overcome chronic impunity in the country that became considered the reason for the post-election violence. This was followed by a number of failed efforts by the Kenyan government to form a special tribunal and through a new popular slogan in the political world '*don't be vague, let's go to The Hague*' names of those suspected to be responsible for the crimes were handed to the ICC's prosecutor's office. This was done in 2009, by 2012 then Deputy Prime Minister Kenyatta and now Vice President William Ruto were alleged to have had indirect co-perpetration of the violent murders that were identified as crimes against humanity (Lynch, 2013:6).

The ICC was now involved in the Kenyan case whereby the prosecutor could exercise her power to refer a case before the court. The Kenyan government with a few of its members implicated challenged the admissibility of the cases the court had in March 2011 (Lynch, 2013:6). The government maintained that it had full power to conduct its own prosecution relating to the violence of 2007 as a new constitution had been adopted in Kenya. Kenya would then be at liberty to have the cases

investigated within its borders because the constitution also meant that they had legal reforms that would assist in achieving this. The Pre-Trial Chambers (PTC) on 30 May 2011 denied the Kenyan government the opportunity to do so, arguing that the investigations were already done on their side whereas the government had yet to start conducting investigations. This decision by the PTC was confirmed by the ICC Appeals Chamber in August 2011 which then allowed all those accused to remain free including Kenyatta and Ruto while pending trial. They were free from ICC custody, so they had the opportunity to campaign for the 2013 presidential election.

Uhuru Kenyatta and William Ruto benefited from this time out of custody when they were elected President and Vice President of Kenya. After being elected into power through a generally free and fair election Kenyatta and Ruto took advantage of the situation and questioned the cases opened against them by the ICC. This situation was different from before, there was now an obvious conflict between popular sovereignty as expressed through the ballot box at the elections and ICC's call for international law and justice. The newly elected president was voted into power by his country to lead the nation, he now is a sitting Head of State like al-Bashir facing the possibility of prosecution. How is the President to lead his country if facing possible jail time it was argued at the AU summit in May 2013. The issue of Kenyatta and his Deputy was on the agenda and the Assembly debated this case, which undermined the sovereignty of Kenyan nations as they voted for their leader to be Kenyatta. This they said threatened the stability of the country and the success of reconciliation. The AU Assembly decided to adopt a request to the ICC to refer the case back to Kenya and allow it to make its own prosecution as it had requested initially (Dersso, 2013).

The ICC suspended this request by the AU as the Trial Chamber continued to issue the President and his Vice with dates to appear in court and information how the proceedings will be conducted. This showed that the ICC had no intentions of considering the appeal made by the AU and completely disregarded the positions held by both men. When the Vice President's trial began the AU sent another letter to the ICC reiterating its earlier communications, and briefly requesting the court to at least allow the Deputy to attend cases that he would manage. This might have been in respect of the position Ruto holds in his country as Deputy President as per the

constitution, nonetheless the AU was making its presence felt but to no avail. This was apparent in the ICC's response to the AU when it explained that this was not within its legal framework; it is to be considered that this is a court which is within its rights not to have to consider the day-to-day dealings of the accused. This brought the ICC/AU relation to its knees when the AU called a summit to deliberate on this issue following Kenya's request to have the summit, which was supported by the majority of the members voting by a two-third majority (Dersso, 2013), (Maru, 2013).

2.3.4 Proceedings of the Extraordinary Session at the AU in Addis Ababa

The summit commenced at a point when the relationship between the ICC and the AU was somewhat at a crossroads, with rumours circulating that this meeting was planned to organise for a mass withdrawal from the ICC by member states of the AU. The summit did take place and as a collective the African states decided to create an executive council which would set up meetings with the five permanent members of the UNSC in order to better deal with this issue following the failed attempts to deal with this issue with the ICC directly. As the UNSC with article 16 of the Statute has the power to make referral and deferrals as they did with Sudan, the AU anticipated that they would be able to make all the necessary changes for the Kenya and Sudan cases because both accused are Heads of States. This was to be done before Kenyatta's trial in the hope that it could be stopped from happening. Kenya was ordered by the Assembly to send a letter endorsed by all African States Party to the Statute to the UNSC requesting deferral of its case (AU, 2013).

The argument raised at the summit to motivate the request of a deferral on both the Kenya and Sudan cases was derived from the principles of national and international law. The law indicates that Heads of States and senior officials still in office are granted immunity during their elected term. This implies that as long as an accused is still serving their term in office they are not to stand before any international court or tribunal. The reason as detailed at the summit was that this would undermine the country's peace and stability plan as well as its sovereignty. By endorsing this, the AU aims to safeguard the integrity, constitutional order, peace and stability of its member states. Therefore it stood as one in proclaiming that no AU serving Head of State or any person acting or entitled to act in such a capacity, will be requested to stand trial by any international court or tribunal while still serving their term in office

(AU, 2013). This united declaration was emphasised by the Assembly mainly in regard to the indictment of Kenyatta and Ruto being that they would be the first sitting Head of State and his deputy to be tried in an international court as al-Bashir is still at large. To justify this further the Assembly emphasised Kenya's critical role in African politics and the fight against terrorism and how a trial would distract and prevent the two leaders from fulfilling their duties to the nation as per the constitution regionally and nationally.

The summit similarly brought back to the AU drawing board a way in which Africa could contribute to solving its own **problems or predicaments** it is in with the ICC through fast tracking its proposal to have an African Court on Human Rights. This was a possible measure outlined to resolve this issue of Heads of States by also including immunity for those in office suggested at the ICC amendments at the Assembly of State Parties. The establishment of the court was not a new suggestion by the Assembly. It initially came in 2009 when the AU strived for ways to claim independence from the ICC's intervening tactics and its promoters. Drafts to amend the protocol of the Statute of the African Court of Justice and Human Rights (ACHPR) to expand its jurisdiction began in 2010.

The jurisdiction would now include international and transnational crimes. This would add a criminal jurisdiction over the international crimes of genocide, war crimes and crimes against humanity as at the ICC. In addition to that, the African court would include several transnational crimes such as terrorism, piracy and corruption. This came as a possible solution by the AU, however given the African continent's record of impunity, dictatorships and corruption, is it really a worthy development to end impunity and bring about justice? (Dersso, 2013), (Du Plessis, 2013: 8).

Even with procedures in place to set up an independent court by expanding the obligations of the ACHPR to include international crimes, the AU Assembly echoed their unwavering commitment to fight impunity, promote human rights and democracy, and the rule of law and good governance on the continent. The Assembly chairperson reaffirmed this when he said *"Our goal is not and should not be a crusade against the ICC, but a solemn call for the organization to take Africa's concerns seriously"*. It was validated by the AU Commission Chairperson Dr Nkosazana Dlamini-Zuma who explained that it was critical for the Assembly to remain within the

legal framework of the Rome Statutes. By these two bold statements, rumours of a complete withdrawal from the ICC were squashed. The Assembly also reflected on the actions of the AU in respect to the 2007 post-election violence in Kenya, the progress made by the AU Panel of Eminent African Personalities leading a mediation process and ending with a National Accord and Reconciliation Act where there was an agreement reached to consolidate the government. This was to show that the AU does have capacity to handle the issues on the continent without interference. However, the AU still relies heavily on the sponsorship, manpower, expertise, equipment, etc. of those they don't want interfering in the AU cases (AU, 2013).

2.3.5 The reviews of the summit and overall literature on the ICC/AU relations

Consequential the anticipated mass withdrawal from the ICC by member states of the AU did not pass. Kenya was the only member, given its circumstances, that was ready to proceed with the withdrawal. However, none of the other members, not even one country came out and openly declared withdrawal from the court. It cannot be said that it comes as shock that African countries fear the possibility of not being at the feet of the might, Western countries. African countries survival depends highly on their Western counterparts. Individually they do not stand a chance, but collectively Africa may have a chance to make changes to these conditions.

The challenges between the West and South are yet to be conquered. The debates about the ICC and AU relationship always come to the power struggles of the two different worlds. In academia and at public level, criticism of the court, its cases and the Chief Prosecutor, or having opposing views to those of the ICC is deemed to be anti-ICC. This would mean support of everything the court stands against; the support of impunity, injustice as well as al-Bashir. On the other hand, criticism of the court as associated with an anti-Africa, neo-colonial tool for the West, pre-dominant powers and generally seen as an attack on Africa. These criticisms seem sensible. Closer exploration into the topic, however, reveals that these criticisms are to a large extent misplaced, biased, and more often than not, incorrect. These claims are the motive for what has resulted in the ICC/AU relationship, the reason it is the inconvenient relationship it is today (Maru, 2013).

There has been numerous literature with diverse interpretation of the relationship between the ICC and the AU in recent years, literature that has come to explain what

the relationship between the ICC and AU is about, how this relationship came to be, who are the parties involved in this relationship and why the relationship is what it is today and possibly explain what it may become. This literature evaluates the involvement of the ICC in Africa from the ratification of the Rome Statute to the current state of affairs. It examines the impact of the Court in the events occurring on the African continent, the Court systems in dealing with the events and the outcomes of these occurrences. The outcomes are examined from the context of the contribution of African states, those parties to the Statute and those that are not, the impacts of these outcomes on nations and the responses of the leaders of Africa and their populations. This thesis provides a clear understanding to assist with the assessment of the current condition of the ICC/AU relationship from past to present and the future.

Du Plessis and Murithi have both taken a diplomatic stance in their individual work. They make use of the structuralism and rationalism theories to provide justifiable observations of the relationship between the ICC and the AU. They place emphasis on the two institutions needing to have a fundamental structure where all parties to this structure are united under ordered relations which places more significance on the relationship the two have. Du Plessis and Murithi both provide a background of the ICC/AU relationship from the beginning, documenting the events as they happened in order to provide a substantial analysis of where the two institutions are today. Both writers substantiate both African leaders and ICC's views of the relationship. They explain how the ICC/AU have come to the observations they express today and also give supporting evidence of reasons and validations as per the Rome Statute and AU Constitutive Act, while at the same time providing recommendations as to what could better the relations between the ICC and AU.

The relationship between the ICC and the AU started on an unlevel playing field as proclaimed by Du Plessis (2010: 3) and Murithi (2014: 187). The two institutions came together in respect of their similar mandates of addressing issues of impunity that have become an immense problem on the African continent. The AU and ICC share a responsibility to safeguard accountability for violations, atrocities and harm caused to the people of Africa and provide justice to the victims of these injustices. Nevertheless, there is a point of separation for the two institutions. The former is generally a political entity; by being so, the AU is expected to always descend to a

more political approach to the issues it needs to address. When formulating a solution to the problem of impunity, violations, atrocities and harm caused on its territory, it goes without saying that the AU will seek first political actions such as reconciliation, peace, security and stability before condemnation. The latter being a court of justice on the other hand will first condemn before providing solutions. The court in its nature is there to prove innocent or guilty, find the wrongs and then make them right in a legal framework. It is understandable that the court will therefore handle the same problem by pursuing international prosecution as it is mandated to work under the written laws of the Rome Statute which is its foundation.

The two institutions seem to not be meeting each other half way. In order for a way forward to be achieved there should be a possibility of both AU and ICC to see eye to eye in respect of each other's mandate. The AU is to consider that in law, justice is to be accomplished apart from the identity or position held. It should become more distinct in the situations in which it would reach agreement and support the ICC involvement to encourage accountability for violations and crimes on the continent. Subsequently the ICC is to come to terms with the fact that it is operating in an international political milieu although it claims it does not. It is however a very large aspect of the political spheres and international politics whether it likes it or not and needs to start embracing political lessons of its past wrongdoings and blunders by acknowledging the efforts of the AU of peace and stability (Murithi, 2014: 188).

The ICC presenting this Afro-centric attention in its cases does not assist the conflicting institutions relationship. This focus on Africa has generally created a somewhat distorted opinion among African leaders in the AU about the real intentions behind the establishment of the court. The political interference within the ICC by non-party nations can be traced back from 2002 when African leaders raised concerns about the self-exclusion of the powerful nations from the Rome Statute. This objection questions the intentions of the court, and whether or not its creation would contribute to the increasing supremacy of the world's greatest powers. This is an observation with factual findings as since the creation of the ICC and even before, there have been past and present crimes against humanity committed as a result of war and conflict throughout the world; however, none have been cases of the ICC. The exclusive focus has been on Africa with one being a self-initiated intervention the PTO with Chief Prosecutor Luis Moreno Ocampo as head, two of which were a

UN Security Council referral and lastly the submission of African countries (Murithi, 2013: 2). (Keppler, 2011:6) and Du Plessis (2010: 40).

Although it is true that most crimes against humanity have occurred on African soil given the hydra-headed political instability in Africa, hence the focus by the Court on the continent, it is however, of importance that the ICC starts to maintain equality and promote universal justice in the international system. The ICC's ability to do so has been weakened in a few cases. An example is of how UNSC referred the ICC to investigate al-Bashir and it thus credibly accused him of having committed war crimes and crimes against humanity and genocide in Darfur. The ICC therefore has reason and ability as it is in its jurisdiction despite Sudan not being party to the Court. It is because of that the leaders of Africa question the ICC, considering that al-Bashir is a sitting head of state and not even party to the ICC. Thus even though it may not be possible to fully point out all the horrific crimes that have been committed by the imperialist powers since the creation of the ICC, these crimes have not been tried at The Hague. The most awful of the crimes committed is the 2003 invasion of Iraq. The question however, is why leaders like Tony Blair and George Bush have not been subject to this jurisdiction for war crimes and crimes against humanity in both Iraq and Afghanistan? How come these leaders of the most powerful nations in the world are still not indicted? How does their case differ from that of al-Bashir? (Inside Story, 2012)

Other obvious cases are that of Syria and Israel (Du Plessis, 2013: 3). The UNSC is able to refer cases to the ICC. However, international politics in reality has proven how the members of the UNSC have the opportunity to inflict their own views, pursue their political agendas internally in the ICC and apply their powers in a bid to promote self-interests and hence the lack of universal law application in the ICC which Africans question.

The crimes that have been allegedly committed in Syria by its leader, President Bashar al-Assad credibly qualify to be referred to the ICC. Reports were made in 2012 expressing an increasing abuse of human rights in Syria. By 2013 the death toll was increasing, with mass murders, multiple violations of human rights and even concerns about the use of chemical weapons in the country continuing at the hands of the Syrian government led by President al-Assad. This has led researchers to

question the deadlock the UNSC has indicated. The question asked is why the Security Council has not made any referrals to the ICC about its concerns in Syria. Are the events at Syria not the same if not worse considering the use of chemical weapons as those in Sudan and Kenya? Why have Russia and China committed themselves to protecting al-Assad by threatening to veto to keep him safe? These are questions leaders of Africa ask and why this same treatment cannot apply to them? The situation in Syria despite an international awareness campaign by countries worldwide, which includes such diverse partners signing the letter to the UNSC from Switzerland requesting that Syria be referred to the ICC, has not been referred. This issue has given credibility to the AU's accusations of the ICC's focus on Africa.

The other case that brings questions of concern to the validity of the court and credits the AU accusations is the Israel/Palestine conflict. One could actually think that this would be at the top of the list for the ICC being that these are two different countries, with one generally oppressing the human rights of the other and completely violating international law as well as obstructing international peace and security. As a surprising outcome the Prosecutor has done nothing about this case. No investigation has been opened in respect of Operation Cast Lead –the codename for the killing of hundreds and wounding of thousands in Gaza by Israel in 2008.

The Prosecutor clarified this in reference to article 12(1) of the Rome Statute and how the court did not recognise Palestine as a state for the purpose of the court's jurisdiction as per paragraph 3 of the article. Does the court only recognise states it chooses to recognise as it did both Libya and Sudan under article 12 without the countries being party to the Statute and Libya being one of the most vocal countries about not wanting to be a part of the ICC; why not Palestine then? Palestine made a declaration to allow jurisdiction of the court in accordance with article 12(3) for the purpose of the Prosecutor's investigation, possible trial and prosecution of Israel for violent acts committed in Palestine since 2002. Even with the corrections made to the Prosecutor's claims by Palestine, Israel is yet to be referred to the ICC. The Prosecutor's failure to act is accredited to the possible wrath the case will cause in Washington and in many powerful European states (Du Plessis, 2013: 4).

The ICC has thus proven from previous events within the relationship that it has no regard for the African standpoint. According to many in the AU this is a Court that has failed to apply its laws universally so it therefore cannot be given the label of being a court. How is a court's jurisdiction selective to some and does not apply to others. Even when invited to intervene it fails to do so, but cannot respect the request from Africa to just allow a leader of a country to finish his time in office and then go for prosecution. The AU never said cancel the possible prosecution, but rather hold off on the case for the period a leader is still in office to allow him to do his constitutional duties as elected by the people of his nation. The point made by Africans is that if requests for accountability are made for African leaders then it should apply equally to Western nations as well as Russia and China, even those they protect like Syria and Israel.

This unfair treatment by the court on the African continent keeps increasing and grows tension between the ICC and the AU. The worst part of it is that most of the issues of concern are not even produced by the court but rather by interfering forces from outside. The issue of how the Court and the UNSC have disregarded requests from the AU to exercise article 16 of the Rome Statute and use its Chapter VII powers to make a deferral of both cases of al-Bashir and Kenyatta in 2009 and 2013 in respect of them being sitting Heads of States has caused animosity. The AU in 2009 at a summit decided not to cooperate with the court in coordinating al-Bashir's arrest which was the beginning of the AU/ICC souring relationship. The AU/ICC relationship though still civil was crumbling when rumours of a mass withdrawal from the court occurred and the reiteration of a continued lack of cooperation with the court was announced. Failure to cooperate with the Union was the threat of sanctions from African states. AU has thus clear determination to achieve the goal set out, but their efforts have gone to waste as they aimed at achieving the UNSC's deferrals of both Sudan and Kenya case from the ICC but Ruto still faces trial and Kenyatta is to follow Maru, (2013), Dersso, (2013) and Murithi, (2013: 4).

Maru (2013) and Dersso (2013) have both rather focused on the rationalism theory which considers states to comprise international society and not only of the international system. The two writers describe the relationship of the ICC and AU from the view of the international society providing the laws that bind the states as per the various principles of the institutions that govern them. They explain that from

a legal standpoint African states which are party to the Rome Statute have already accepted the jurisdiction of the court on their leaders and therefore consensually accepted Article 27 of the Statute. This allows for the prosecution of Heads of States, even those still in office. Of the total of 122 states that are party to the Rome Statute, members of the AU consist of a third of the ICC which legally does not justify the AU's request for Article 16 for the UNSC to defer the cases of al-Bashir and Kenyatta.

All states parties to the Rome Statute remain bound by the law of the Statute. According to Maru (2013) and Dersso (2013) there might be no chance that the options requested by the AU in its relations to the ICC would yield the outcomes that the AU expected. The assumption to be made from these writers literature is that of peripheral realism theory where in the "international society" of rationalism a hierarchical structure exists. Their work explains that in this structure Africa must obey in accordance with the orders given by those who rule.

This disregard presented by the ICC and UNSC for the AU's request has continued since the Sudanese case and as witnessed at the extraordinary session in 2013 the ICC and UNSC continue to disregard the AU and in 2014 Kenyatta and Ruto are facing trial proceedings and al-Bashir remains at large but still Head of State of Sudan. The ICC once again excluded itself from the political connotation and held that the AU's requests had a resolution that was rather more political in its statement following the legal procedures of the Court itself. The problem with this as echoed by the AU is that by indicting or arresting Heads of States not only does the ICC neglect state sovereignty but it also undermines the African peace process, security possibilities and maintaining of stability as the ambitions of the continent. It further disrupts ongoing peace processes and peace rebuilding in those individual countries (Sudan/Kenya). The problem is that the individuals and leaders that are called to The Hague are the same people who will be called to engage in the processes of rebuilding peace in the country and they need to be present to lead, and sign the agreements made, and continue to ensure the implementation of those agreements (Lynch, 2013: 5) and Murithi (2013: 3).

Although the ICC/AU relationship has been tainted, Keppler (2011: 7) and Murithi (2013: 4) explain that despite the setbacks that the relationship between the

institutions has experienced, there are still signs of positive relations, with others noting how some in the AU are continuously poisoning the relations. There are countries within the AU that have taken advantage of the situation of the conflict between the ICC and AU and using the disregard for the AU's request and the unequal justice application of the ICC to paint the court as an imperialistic tool that should be opposed. This has been the case with the North African States namely Libya and Algeria; though there is a somewhat unanimous view of these opinions some countries are using it to embrace their interests rather than act in the interests of all.

Patel (2013) has expressed these views further by going against the view that there is some kind of conspiracy that the ICC has formed against Africa. There is no conspiracy neither is the AU to be thought of as an African rights defender against the mighty Western nations. He claims that the AU is nothing more than an exclusive club for the presidents of African nations out to protect each other as members of the elite club such as al-Bashir and Kenyatta. By getting the two leader out of the prosecutions this will ensure the protection of the other members in future should they have any legal problems. This claim goes with the point that an African leader will now maintain staying in power for extended terms to avoid prosecution and the victims of those leaders will never get justice as they will now have to wait for the leader to retire from office in order to get justice as the leader stays in power for more terms than he should. This is not new to African leaders as they have forced themselves to stay in power from independence to today. The Arabic uprisings in North Africa were a result of presidents who do not want to give up their power. Presidents like Robert Mugabe still maintain power. How then will a person like that ever be taken to court, as it is this very technique argued against that al-Bashir is using to stay out of the ICC.

Patel (2013) has expressed a neorealist theory approach to this ICC/AU relationship, where he focuses on African leaders motives as compared to the good of their nations. In his work Patel reveals that African leaders aim to survive by maximising their relative power where only they gain, with their biggest priority being about warranting that the Presidents themselves are protected from justice whatever the cost, as compared to development, good governance or even respecting basic rights. The notion of having a sitting Head of States provided with immunity from

facing prosecution for genocides, war crimes and crimes against humanity does not protect the people but it is self-serving on the part of the AU leaders. It is unacceptable to do so, given the kind of encouragement it would then create for all those in power to never leave and therefore use all they have to continue being in power at all cost including coups, murder, intimidation, even fraudulent elections. Patel's work communicates the fear of a completely powerful AU without the ICC given the history of the continent.

The dispute that the Court is being anti-African and unfairly targeting Africans, although there is some truth to it, it is not entirely correct as realised. This results in the fact that to date Africa has the most instability and highest rate of conflict and war than any other regions of the world. Therefore it is worth concluding that it is bound to have the most cases of crimes against humanity than any other region. The majority of the cases investigated will be from the continent; many of which came as self-referral by African states themselves, the other two were UNSC referrals (Darfur and Libya) and the last of these was the Prosecutor acting independently by investigating Kenya and the Ivory Coast. Even with this being the case the bulk of the African officials and views on public debate maintain that this is a ploy by the West on Africa. This is because the ICC has failed on numerous occasions to act elsewhere in the world even when requested to, while protecting leaders from powerful countries as well as those that they protect and their less powerful counterparts when it is deemed necessary to prosecute them.

However, even with all the negativity that surrounds the ICC/AU relationship there has been diverging African opinion about the ICC, proving that the Court nevertheless continues to enjoy strong support across the continent. There may not be many, but African states have continued to ratify the ICC treaty. Tunisia is one of the countries that have acceded to the ICC treaty increasing the numbers that occupy the Assembly of the court to 32. Other party states have also been working with the liaison office of the court in Addis Ababa even with the resistance requested by the AU (Keppler, 2011: 7). Botswana has been the most vocal of the countries or maybe the country that has continued to disregard the AU's request for non-cooperation with the court which resulted from the 21st Summit. These actions reiterate that not all African countries are against the ICC as some have a continued hope that it will bring about changes for them with backing from the civil society.

2.3.6 The ICC/AU relationship: the way forward and future aspects

However, even with all the positivities that have occurred within the AU/ICC relations there still remains a high degree of disregard for the ICC as an institution among Africans. The unfortunate part though is that in actual fact, because of Article 27 of the Rome Statute African states who are party to the Statute put themselves in a compromising position when ratifying the Statute. This is because the article allows for Heads of States and their colleagues to be brought to justice even when in office. The only way to reverse this, would be through an amendment process of the Rome Statute. This in consequence means that even with all the issues surrounding the AU and its decisions concerning the ICC, the AU summit request will however still not be considered and is not legal. Kenyatta and Ruto will have to continue and allow their trials to commence as they are bound by the laws of the court (Dersso, 2013). The same thus applies to President al-Bashir. The only other option the AU will have in regard to the cases of Kenya and Sudan is having the UNSC defer cases. Unfortunately there is no guarantee that this chance will ever present itself, nor is it guaranteed that the results be those expected by the AU.

Being unable to revoke article 27 of the ICC Statute should not be the point of departure for the AU in respect to its relationship with the ICC. The AU is urged to remember the reasons it became Parties to the court and why the continent needs the court by simply looking back into its history. The inability to protect the constitutional duties of the President should not be a reason to act hastily as echoed by the Chairperson of the AU hence the continued relations even in times of disagreement. The AU and ICC are to work together and the AU is to respect the laws of the court as it has a third of its members as signatories of the ICC. AU members contributed immensely to the establishment of the court and because of this there is an ensured promise for justice to millions of victims of human right violations throughout the continent. This progress is not to be undermined by a selected few who seem solely interested in self-gain. Having deferrals will only keep justice away, which might also lead to repeats of these monstrous crimes committed in Africa and allow impunity to continue (Amnesty International, 2013). Event such as the 1994 Rwanda genocide are to remain in the past, with the presence of the court maintaining this reality does not seem that far-fetched. It is because of these issues that the relationship between the two organisations needs to be reviewed.

The essence of both institutions is the overcoming of impunity, serious crimes that have international concern and the violation of human rights. It then goes without saying that a mass withdrawal from the ICC by Africans and the continuation of inconveniences in the relationship will hurt both Africa and the ICC. Africa for one has the highest incidences of flawed systems, human rights violations internationally and for reasons such as these there should be no doubt about how Africans need the ICC. Many of Africa's states genuinely want to end war crimes, crimes against humanity and genocides, being the largest bloc that ratified the ICC Rome Statute validated that as well as Africa's continued support of the Court. The Court is able to assist in discouraging many political entities from continuing to commit these crimes and hence one-third of the ICC state parties are also members of the AU proving that the ICC too needs Africa (Maru, 2013).

Maru (2013) and Murithi (2013: 9) declare that, while it is evident that Africa appears to be at the heart of most crises situations requiring the intervention of the Court it is worth mentioning that the Court is not doing itself a favor by continuing the biased nature of: 1) only having cases in Africa when it fails to intervene in Afghanistan, Chechnya, Gaza, Iraq, Sri Lanka, Colombia, Nepal and Syria, 2) allowing referral and deferral powers to the UNSC of which three of its members are not even parties of the Rome Statute (US, China and Russia) 3) continued support of prosecutorial policy that were encouraged by the former ICC Prosecutor Mr Ocampo, and lastly 4) to come to the party in terms of the AU's political nature and respect the need for political declarations within the AU.

The ICC needs to also respect the obligations of the AU to its members and stop the interference of Western states in the issues of the Court, and because of such motivations the AU ought to keep putting pressures on the ICC and also on the UNSC to start addressing Africa and AU's major concerns. The AU has regional bloc advantage and through that, the AU is to ensure that its concerns about the Courts operations and its frequent request for reform as the withdrawal of the UNSC referral and deferral powers to be rather transferred to the General Assembly of States Parties to the Statute or if not the UN General Assembly would be a better fit as compared to the UNSC. And at the same time it is to develop mechanisms that will strict enough for Africans to ensure accountability of all states parties of the ICC. It is

thought that these actions will enable AU/ICC relations to move forward and expect a better relationship will emerge.

2.4 Conclusion

This chapter presents the theoretical framework of the thesis, which makes use of Weltman's systemic theory of politics and international relations to better portray the relationship between the ICC and the AU. The systems theory is used to generally explain the relationship, however, in social sciences there is no one theory to explain human activities let alone the entire relations between the ICC and AU. The thesis therefore makes use of numerous other theories to counteract and support the systemic theory as the neorealism and peripheral realism theories and the structuralism and rationalism theories. The chapter also reviews the literature of various authors in related topics and how they have conveyed the relationship between the ICC and the AU. It makes note of the work of seasoned authors such as Du Plessis and Murithi, Maru, Dersso, Patel and Keppler to explain the current state of affairs of the relationship between the ICC and the AU. The literature review documents the situation in Sudan and ICC's case against al-Bashir, the Kenyan situation and the ICC's case against Uhuru Kenyatta, the proceedings of the extraordinary session at the AU headquarters in Addis Ababa. Then the reviews of the summit and overall literature on the ICC/AU relations and lastly the ICC/AU relationship: the way forward and future aspects. These are used to explain the relationship of the ICC/AU, the factors influencing the current position of the relationship and the future of the relationship.

Chapter Three

3 Data analysis

3.1. Introduction

From the secondary data collection method used in the study, the data analysis will therefore follow a descriptive method to analyses the data provided from the literature review and therefore make an assessment of the relationship between the ICC and the AU. This method will be used to answer the three research questions in summary in this chapter: 1) what is the relationship between the ICC and the AU, with focus on Africa? 2) what are the factors influencing the current position of the relationship? 3) How does the future for the ICC/AU appear from the current relationship? The chapter ends with the conclusion of the work providing insight, observations and recommendations.

3.2 The involvement of the ICC in Africa and the response of the AU to the Court's efforts and a way forward

The relations between the ICC and AU regarding Africa appear to be inconvenienced. The strong stand in support of the ICC that characterised Africa's positions in the early stages of international criminal justice is less evident today. This transformation tracks a broader 'push-back' in contradiction of the ICC on the African continent. Countries in Africa have been actively involved in the establishment of the ICC and the Rome Statute since the negotiations for setting up the court began in 1998. Africa's support can be traced back to 2002 when the Rome Statute was entered into and 31, of a significant proportion of supporters of the Statute were Africans and the number rose recently. The relationship has however deteriorated through the years following recent events. The year 2009 was arguably the most disorderly in the ICC/AU relations. The start of this disorder began with the warrant of arrest that was issued to the Sudanese President Omar al-Bashir by the court on charges of crimes against humanity, genocide and war crimes committed in the continued Darfur conflict.

That was the flashpoint of the conflict between the two institutions with suggestions from the AU that the ICC is an imperialistic tool for the Western powers to use by specifically targeting cases in Africa and therefore discrimination against it. This the

AU explained as having undermined its ability and the ability of its national leaders to resolve the problems on the continent. There were then numerous complaints and criticisms of the court, mainly because of the UNSC's referral of the Sudanese case to the court and the indictment of the country's first citizen. Through the AU, African states therefore called on the UNSC to invoke article 16 of the Statute and therein defer the ICC from investigation of al-Bashir.

The matter escalated following the presidential elections in Kenya in 2013. The elections ended with the victory of President Uhuru Kenyatta being democratically elected by popular votes. The problems occurred when the newly elected President Kenyatta took advantage of the cases opened against him and his deputy by the ICC when tension between popular sovereignty and demand for international justice occurred. At the AU summit he expressed these views and was exceedingly supported by his fellow African leaders. Kenyatta and Ruto were both accused of contributing to the crimes committed against humanity during the 2007-8 violence in Kenya in 2010 when the Prosecutor Ocampo announced their indictments together with six other people. Following this an AU summit was launched and the AU adopted a decision to not work corporately with the ICC should it not refer back to Kenya the case it had against its President and his deputy.

The Security Council chose not to consent to the request made by the AU for both the deferral of the Sudanese investigation and in the case against Kenya, the ICC suspended the appeal. Complaints by AU members intensified about how the Security Council is ignoring Africa's calls for peace while putting law and justice before progress of nations. And after the Kenyan case an extraordinary summit by the AU was convened in 2013 to further debate the future of the relationship Africa had with the ICC. At this point the African perception of the ICC was unclear. The ICC had disregarded the AU's request for the deferral of the cases of two Heads of States. The AU questioned Head of State immunity under customary international law known as article 98 and 27 of the Rome Statute. The ICC counteracted this through Article 27 of the Statute which explained that as long as a nation signed the statute it is bound for prosecution by the existing rules of the ICC even for a high ranking official like a President. Africa once again had reason to question the ICC's operation with regards to Africa.

Due to the failure of this law applying universally, Africans came to the conclusion that the ICC was unfair and unjust, focusing solely on the African continent when the court was required elsewhere in the world, as in Gaza, Iraq and Syria to name a few. The court allowed interference by Western powers and emerging powers in its proceedings. Africa saw this as a witch-hunt against it thus creating an uncomfortable and questionable atmosphere within relations between the two institutions relations. All these events combined eventually to bring about a threat of complete African withdrawal from the ICC during the period pending the extraordinary summit in 2013. Many resolutions and conclusions were made at the summit however, the decision of African withdrawal from the ICC did not occur. This might be fortunate or unfortunate but what it means that there still remains a relationship between the AU and the ICC even if it is one of inconvenience.

The factors affecting the current position of the relationship between the ICC and the AU may be rooted in globalisation as a result of the post-Cold War era which now appears exclusively to pay special attention to Africa. The controversy that surrounds the court may be related to the order of the international system, which is characterised by liberal capitalistic policies that only aim to benefit the powerful to the detriment of the less powerful. Professor Mamdani pointed out that this “new” international humanitarian order is not really “new”. It is drawn from the background of Western capitalism, where in the 18th and 19th centuries during the colonial expansion, leading powers such as Britain, France and Spain had claimed that they were protecting the “vulnerable groups” while expanding their colonial power on the African continent during the scramble for Africa. The same reasoning is used in what many may call the neo-colonial era of Western domination of peripheral African states, creating a new age of the scramble for Africa (Amusan & Oyewole, 2014).

From independence African nations have only received political independence but even so, the nations’ policies are still a consequence of the ex-colonial powers. Africa has never really been “about Africa for Africa” as all of its actions were triggered from above (imperialist nations in the West). Africans are unable to produce a complete African stance on Africa affaires. They are compelled to always follow what their western counterparts allow. This is achieved through the debt trap, foreign aid and the ever so powerful Structural Adjustment Policies. Africa however cannot help itself given its lack of expertise and effective institutions and systems,

technological disadvantage and low level economies and above all, the high level of corruption in African countries (Amusan & Oyewole, 2014). The corruption level in Africa seems not to be assisting the AU's case as critics of the AU in the ICC situation portray the AU as a club of presidents which seeks to protect its members at the cost of the victims. Even at the establishment level of the ICC, African leaders were not only aiming for peace and stability in their countries, but rather to use the ICC as an instrument of checking against rebels and to silence oppositions that may restrict their terms in power.

Given the nature of the world order and the events that have occurred between the ICC and AU there is no doubt that there is foul play. The court came into existence under the illusion that it would assist Africans and was glorified by NGO's as being a good initiative to assist Africa with the atrocities of the conflicts that had emerged. The truth is that the ICC does not have the wellbeing of Africa at heart but rather maintains its existence by employing Western policies to assist its budget and expand power into Africa. The fact is that although the Statutes so highly regarded, it came into effect with less than half the world's nations ratifying it, 60 out of 189 UN Assembly members. These were states that did not even have that much impact in international affairs. This number is not enough for a court to claim it has worldwide jurisdiction, more so, for it to claim this jurisdiction even over citizens of countries that did not sign the treaty such as Sudan. These imbalances have all contributed to the factors that make the relationship between the ICC and AU what it is today.

The continued disregard of AU requests by the ICC to the deferral of standing Heads of States in respect of their national sovereignty has proven the imbalances and contributed to the perception of the ICC being unfair and unjust. The ICC's inability to equally apply policies it has in Africa internationally has even worsened the relations. This focus on Africa is justified as all of the court cases have truly only been in Africa while in the meantime there are "vulnerable groups" elsewhere around the globe. The court is unable to politicise its institution to correspond with the nature of the AU, while similarly the AU is expected to respect its judicial nature but it cannot waive its power in respect of African peace-keeping and national stability. The interference of western nations as explained is a major implication of inconvenience. The UNSC should not have veto power over the courts dealings. Only two out of the three members are party to the Statute with no representation of African nations within the

Permanent five. How this can continue is beyond rational reasoning. An institution that has power over the court's proceedings should at least have members that are parties to the ICC.

The future for the ICC and AU's relationship has evidently been given another chance by the AU's lack of withdrawal from the court. With this new opportunity both institutions need to consider the implications of their actions and how these actions affect their relationship. It is however, of great importance that the two institutions realise that in order for them to coexist there needs to be changes made in their relations. These changes would include the ICC acknowledging the factors that have created the current state of affairs and changing its systems to accommodate the AU. The AU is to make changes too. The continental body is to ensure that its members abide by the rule of international law, strengthen their policies and systems regarding human rights to avoid indictments and respect of the ICC Statute as agreed during ratification. The AU is also to ensure that the reform of the ICC is fast tracked and that changes to the systems of the ICC are made in order to avoid external interferences and injustice to African nations. Changes made by both institutions will reaffirm the relationship and hopefully bring about effectiveness to the court's impact on the continent without opposition from African leaders.

3.3 Conclusion

Rising out of a number of temporary and other failed tribunals, the International Criminal Court was established by the international community in 1998 to be a successful international tribunal which would be permanent and take to trial perpetrators of the most dreadful crimes, seeking justice for victims of these crimes. It was to have a Jurisdiction that covered crimes committed against humanity, genocide, war crimes and aggression. When the Rome Statute came into power in 2002 July it was signed by 139 states while only ratified by 113, a significant proportion of the countries that ratified were the African continent. African nations formed the growth that led to the establishment of the court, and were fully involved in the making of this institution which however, they have in recent years come to disregard and accuse the Court of being "unfair and unjust" against them.

When assessing the relationship that exists between the AU and the ICC currently, it is worth noting that Africans themselves signed the Rome Statute with no super

power enforcing this but rather for the simple reason of the court being necessary for the continent. Africans themselves ratified and signed the Statute with no Western power threatening to take away foreign aid, increase debt collection, nor even to boycott their products among other possible threats. This is to say that African states had to have known what they were getting themselves into before ratifying the Rome Statute. Senegal was one of the first countries to ratify the Rome Statute, after that followed many others like South Africa which included the Statute as one of the well respected laws in the land. Regional blocs like SADC contributed largely to the enforcement of the Statute and Non-governmental Organisations (NGO's) from around the continent lobbied for it. This is to say the very same Statute that has come to be a problem for African states, was one that was favored by them from the beginning. How then had the Statute come to be regarded as unfair and a tool of western powers targeting Africa? Africans must take note that they wanted the ICC's creation and they contributed to the establishment and therefore should have included all their values, views, requests, recommendations and interests from the beginning as they thought they did. The Western nations did, why not Africa?

It wouldn't be wrong to state that Africa in the course of enforcing the principles of the ICC on their continent repeated the same mistake they make in all institutions they join. Falling behind in what they signed up for, it has been seen in Africa's relations with the IMF, World Bank, WTO and in individual bilateral agreements they joined. African states always find themselves to be the tails following the lead of other powers. This may have resulted from the clearly undisputed environment created by the international system of North and South, where the rich get what they want and the poor beg and shadow them. Even though this is the case, Africa better start making some changes in the way it runs its agreements and start leading their continent instead of always following.

The Rome Statute evidently explains that the jurisdiction of the ICC is either summoned or triggered by self-referral, referral from the UNSC and the OTP for any of the crimes it covers. This therefore explains why and how it can indict President al-Bashir despite the criticism from African states. The cases being investigated and launched by the ICC are from Africa. The Sudan-Darfur conflict case, was recommended to the court by the UN Security Council as it possibly merged with the foreign policies of the very institutions that referred it, the US and European powers.

The Kenyan case was the first that the Prosecutor investigated “independently” and referred it to the ICC following the CIPEV findings. As a collective these investigations somehow seem to coincide with a reintroduced drive of the US and its European counterparts to take control of African raw material once again. Recently emerging powers like Russia and China are following suit in regards to take over the struggling South, not only in Africa but judging the two states protection of Syria, mixed interest come to mind.

The UNSC referred the ICC to investigate al-Bashir and it thus credibly accused him of having committed war crimes in Darfur as well as crimes against humanity and genocide. The ICC therefore has reason and ability as it is in its jurisdiction despite Sudan not being party to the court as in Kenya, but Kenya is a State Party to the Statute as its withdrawal is still pending. It is because of these indictments that the leaders of Africa are questioning the ICC’s prosecutions, as these are sitting Heads of State and one (al-Bashir) is not even party to the ICC. Therefore, Africa seeks for the deferral of these cases having openly requested this in the summit in 2012 for al-Bashir and in 2013 for Kenyatta.

Africa is within its right to request deferral. One of the biggest reasons for the current state of the AU/ICC relationship is because of the lack of universalising in the ICC. That the court’s cases have mainly focused on Africa is no secret, though it may be true that Africa composes the highest number of cases of human rights offences, therefore committing the most crimes that constitute the ICC Statute; it is however also a fact that Africa is not the only region that does. Tony Blair and George Bush have not been subject to this jurisdiction for crimes of war and crimes committed against humanity in Iraq or even Afghanistan. How do their actions differ from that of al-Bashir’s and Kenyatta? Inside Story (2012) revealed that 240 communications about the invasion of Iraq was received by Moreno-Ocampo in 2006 but he then published a letter acknowledging that he had received them but yet the court has not shown any signs of acting on them and he is no longer in office. This is where African should start drawing the line, stating the facts and bringing Justice and fairness to nations around the world such as Chechnya, Sri Lanka, Colombia, Nepal, Gaza, China, Ukraine, Russia, Vietnam and Syria.

In its discouragement of the Court during Clinton's administration the US mentioned the danger of politicised prosecutions of the ICC. The US claimed that the court was autonomous as an institution answering to nobody, no state nor institution. Therefore it concluded that without external checks on the court and its prosecutor, there is not enough protection for nation states against the possibility of politicised prosecution or maybe other abuses as well. President George W. Bush on the other hand went further than Clinton when he adopted the American Service Members Protection Act 2002 and went against the ICC. It became known as "The Hague Invasion Act". The Act was formulated in such a way as to protect the US and US citizens (the troops) from going to The Hague by threatening all American lawyers not to assist in any cases that may result in those protected under the act going to the ICC. To aggravate their stance on the ICC the US even made members of the Statute sign bilateral immunity agreements which would then exempt US citizens from being sent to the ICC by other states, those who did not sign were cut off from foreign aid. It used its power as an international hegemonic power to endorse and pursue the very danger of politicised prosecutions they warned against (New Africa magazine, 2012).

The warnings against political prosecutions that the US was so vocal about, by states who wish to follow a political vendetta, was exposed by the actions of the US when it had an anti-Sudan agenda by pushing forward the UNSC to refer al-Bashir to the ICC. It proved its own point about the ICC, however; only those that are weak and under attack for their minerals will be on the receiving end of this political agenda, as in the General Agreement on Trade and Tariffs (GATT) and other international institutions such as the IMF, World Bank and WTO. It is not possible to divorce politics from international organisations and it becomes selective to those who are politically favoured, wanting assistance from allies, while for some reasons withholding it from other states (Balaam & Dillman, 2011:140), as in the case of Africa which in all mentioned institutions remain inferior while others have preferential treatments and use economic power to achieve their foreign agendas.

It is commendable that Africans have shown unity in the disagreement with the ICC even in countries like South Africa which state that they will abide by the law of the court but still remain reluctant to make an arrest, and Nigeria which announced its intent to support the AU's resolution on not cooperating with the ICC. There needs to be greater change than unity to bring forth equality to the ICC and prevention of

outside influence. There are events occurring in other parts of the world that require just as much attention as the prosecutor of the ICC gives to Africa. There is an imbalance in the justice system of the court and the ICC together with those who lead and control it need to start taking it seriously and concentrate on other parts of the world and not only Africa. The AU needs to continue urging for a reform for the ICC to eliminate the influence on the court of powerful nations through the UNSC. Regardless of these findings, it is however concluded that there still remains the possibility of the ICC/AU relationship being a “win-win” situation for all if all necessary measures are taken.

Chapter Four

4 Summary, recommendation and conclusion

4.1 Introduction

This last chapter is divided into three sections. First is the summary which gives a discussion of the findings. Then the second part is the recommendations of the study explaining possible solutions and other topics that can be studied from using this research. The last section is the conclusion which simply sums up the discussed topic and ends with the list of references.

4.2 Summary of the study

The first chapter produced the introduction to the study by discussing the background of the study, problem statement, research question, aims, objectives, data collection, method of data analysis, limitations and delimitations, scope of study, significance of the research and the research methodology.

The second chapter discussed the theoretical framework of the study and the literature review. The study used a theoretical framework of systemic theories of politics and international relations. The systemic theory was then incorporated and contrasted with the neorealism theory and the imperialism and dependency theories under the umbrella of the peripheral realism theory.

The literature review provided a detailed discussion of all the previous studies done on the topic of the ICC and AU's relationship of inconvenience. The review discussed the ICC/AU relationship from the genesis of the relationship to the indictments of the Heads of States of Sudan and Kenya. It further examined the developments made from the cases and the results of these cases on the relationship between the two institutions, the way forward based on literature presented in this field by various writers and sources, and their recommendations for the current state of events in the ICC/AU relationship.

The third chapter explained that from the type of data collection the study used the charter analysis data using the descriptive method of analysing data. This method was used to answer the three research questions:

- 1) What is the relationship between the ICC and the AU, with focus on Africa?
- 2) What are the factors influencing the current position of the relationship?
- 3) How does the future for the ICC/AU appear from the current relationship?

The fourth chapter provides the study with a summary, recommendations and conclusion.

4.3 Recommendations

If the ICC does not want to become another failed international tribunal, it needs to start making some changes predominantly in its relations with Africa and so does the AU. Africa is a continent that has witnessed the most heinous crimes. The instability of many countries' politics, civil wars and genocides as well as many other atrocities have occurred on the continent. It is thus important to note that African nations should be celebrating the work of the ICC rather than denouncing it. It is realised that the ICC has managed to prosecute perpetrators for crimes they committed against humanity therefore giving hope to the victims of their actions. However, with the same importance it must be stated that there needs to be changes within the ICC and AU in order for their relationship to continue in cooperation and integrity.

The claim of the ICC's unfair focus on Africa may be highly exaggerated, but has some truth. It is important to evaluate the cases of Africa conducted by the ICC particularly the case studies of al-Bashir and Kenyatta. The Court in its short life has had two prosecutions; that of DRC's rebel boss Thomas Lubanga Dyilo and Libya's blood diamond king Charles Taylor, giving the ICC credibility and showing that it does promote justice. However, the case of Taylor is deemed to be relevant to the cases of the two currently indicted presidents of Sudan and Kenya. Like al-Bashir and Kenyatta, Taylor was a head of state when the Court was investigating him. However, in the case of Taylor, with interference from the US and the UN, Taylor was out of office before he got his indictment. This shows how effective the ICC could have been if it had followed this route in the case of al-Bashir and Kenyatta and his deputy Ruto as well (Du Plessis, 2010: 38) (Vine, 2012).

This brings us to the question of why does the ICC have authority over a head of state despite immunity of a Head of State as proclaimed under customary

international law by article 98 and 27 of the Rome Statute. This law was set out to protect the sovereignty of a nation and its leader as regarded by international law. How is a country to have the quality of having supreme, independent authority over its territory if it is constantly interfered with by the Court? The ICC should respond and respect Africa's request through the AU's call for the UNSC about possibility of a deferral the ICC's indictments of al-Bashir and Kenyatta by summoning article 16. However, in this case the Assembly is requesting the UNSC to honour its request.

Unfortunately or fortunately the above mentioned suggestions were not followed and the ICC has found itself sleeping with the lions as the AU has brought it into disrepute and it has exposed the AU for also possibly being a leaders' club then a continental organisation considering its population. The constant involvement of the western nations and emerging powers in the cases and referrals to the ICC as in the case of al-Bashir, despite his country not being party to the Court, should be minimised. The UNSC's power of referral and deferrals should rather be transferred to a body that would be representative of the State parties, an organisation such as the State Parties as the General Assembly to the ICC or rather the UN General Assembly. It should not be left to the judgment of the UNSC of which three of its members are not member states of the ICC. And the continued support for former ICC prosecutor Mr Ocampo's policies needs to be ended and rather the prosecutor should universalise his cases aimed at international justice to include other regions of the globe and not only focus on Africa by making a case where one law applies to the powerful while another applies to the weak. By doing so the current prosecutor Bensouda may assist the Court to demonstrate that it is credible as a judicial institution which is protected from external influence.

As African states were highly involved in the internal creation of this international institution, they should be able to make references and contribute to the shaping of the future of the ICC, call for changes and improvements of the Court's systems and with that a better relationship and acceptance between the ICC and Africa will emerge and the international tribunal that was longed for at its establishment will therefore come to pass. Yet again the AU may focus on fast tracking the institutions of the African Court and therefore withdraw completely from the ICC, though it is highly unlikely.

4.4 Conclusion

This thesis has discussed the creation of the ICC and the ratification in 2002 of the Rome Statute by many states from African and other sectors of the continent. It has shown how the Court and its Statute which was largely supported by Africans in the hope that it will restore peace and security to the continent has come to be under serious scrutiny and criticism from the very countries that helped establish it. The Court has come to be regarded as a tool for the West unfairly focused on Africa while having double standards. This is then said to be undermining Africa rather than helping it solve its problems in terms of the Sudanese and Kenyan President's indictments by the Court, by putting justice over peace and conflict resolution. This is the standpoint of Africans while in all fairness the very introduction of the court was that it will recognise that Africa has experienced grave crimes that have threatened its move for peace and security as well as the well-being of the entire world. It is therefore expected of the court to further elaborate how it will contribute positively towards peace in Africa's borders, beyond only ensuring the punishment of perpetrators and the crimes committed (Murithi, 2013: 8.).

The relationship between the ICC and AU declined after the indictment of President al-Bashir based on the UNSC referral and took a further nose dive after the indictment of President Kenyatta and his Deputy. The Rome Statute has clearly proven that the case against al-Bashir is legitimate, but the issue is that AU representing African states, called on the UNSC to defer the court's investigations against sitting Heads of States by invoking article 16 of the Rome Statute and this has not been dishonored by the UNSC. Sudan did not become party to the ICC Statute and Kenya is in the process of attempting to withdraw from the Statute. However, to date the Security Council has disregarded the AU's request for the deferral of both the al-Bashir and Kenyatta cases. The former still has an arrest warrant against him and the latter is to be on trial. It is true that Africa is a continent that has experienced atrocities for centuries and the ICC was to be an institution that restores peace to the continent. Although justice has been witnessed through the prosecution of Lumbanga and Taylor, the AU aims to proclaim and emphasise that "these are sitting Heads of States". However, at the same time the exploitation of the ICC by Western powers and emerging powers and the geographical restrictions of the Court cases all seem to be a major concern and setback to AU/ICC relations.

What this thesis has shown is that the relationship between the two institutions (ICC and AU) has proven to indeed be one of inconvenience for both parties. The one is faced with the overwhelming responsibility of being an international judicial organisation aimed at promoting a legal stand point and pursuing justice, while the other is a political organisation emphasising peacekeeping and political reconciliation. From the start the relationship was in trouble. The inability of the ICC to politicise its interaction with the AU, the request for deferral as well as the UNSC involvement in the ICC and its focus mainly on Africa and the AU's continued disrespect of the ICC's ruling – the resolution of non-cooperation and the refusal to arrest, have all brought about the current state of affairs of the ICC/AU relation. There has not been a key event such as a withdrawal of an AU member state from the ICC to completely write off the possibility of salvaging the relationship nor is there a sign of the culminating of the relations either. And because of these reasons it is recommended that the ICC and the AU both reorient their stance towards each other in order to create a way forward.

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