

UNIVERSITY OF KWAZULU-NATAL

An examination of the relationship between the African Union (AU) and the International Criminal Court (ICC): The cases of Kenya, Sudan, Rwanda and Liberia.

By

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DECLARATION

I, Bernard Khanyisani Nhlangulela, declare that,

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2. This thesis has not been submitted for any degree or examination at any other university.
3. This thesis does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.
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ABSTRACT

This dissertation examines the relationship between the African Union (AU) and the International Criminal Court (ICC). The case studies of Kenya, Sudan, Rwanda and Liberia were used. These countries have had dealings with the ICC at different moments. The study wanted to establish if the concerns raised by African leaders and their countries about the manner in which the ICC conducts its business in Africa is appropriate, justifiable and credible. Realism was used as a theoretical framework which guided the study.

The study was conducted in the wake of calls for African countries who are signatories of the ICC to pull out of The Hague-Based Court and establish their own court, because there is a perception that the ICC is targeting Africa while leaving out leaders in other continents who continue infringing on the rights of other people. The research methodology which was followed in carrying out research for this dissertation falls within the qualitative paradigm. Both empirical and non-empirical data were collected for the study. The research instrument was a questionnaire which was distributed among purposively selected informants. Non-empirical data was collected through document analysis and the usage of other secondary sources such as books, journals, etc.

The findings revealed that there are certain inconsistencies in the manner in which African countries deal with the international community. They rely on the international community for help, while on the other hand perceiving the international community as the enemy. With regards to the ICC, some African leaders posit the view that they are being singled out and targeted for prosecution. Ironically, some of the staff members of the ICC are African citizens. The second irony is that Africa has the largest number of countries that are signatories to the Rome Statute. Thirdly, there are many cases in Africa where human rights violations have occurred. Given these findings, it is recommended that before taking any drastic action against the ICC, the African political leadership should get the facts right and do self-introspection with the view to establish if their case has strong basis.

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CHAPTER 1

INTRODUCTION AND BACKGROUND

1.1 Introduction

*They have enslaved us, colonized us, beaten us, killed us, discriminated against us,
exploited us, and now they want to judge us?*

(Lynch, November 2013)

The relationship between Africa in the form of the African Union (AU) and the International Criminal Court (ICC) is currently widely talked about and reported across the world. This is the case simply because of the belief and perception Africa has that The Hague based court is out to get African leaders while leaving out leaders in other continents who are doing the same things that African leaders are doing or even worse in some cases. This belief is informed by the fact that since the ICC was established in 2002, the majority of cases that have been investigated and leaders who have been prosecuted or summoned to appear before the court have largely been from Africa. This has resulted to the outcry that Africa is being unfairly targeted by the court. As such, there has been a call that those African leaders accused of committing crimes against humanity which fall within the ambit of the ICC should not be hauled before the court if leaders committing the same crime elsewhere are left off the hook.

The present study and the present chapter in particular will outline the seriousness of these allegations and perceptions. The aim is to establish whether the ICC is indeed guilty of selective prosecution of African leaders as it is claimed or if there are other explanations for the purported African particularism and targeting. An attempt will be made to establish why the AU is so critical of the ICC and why it is threatening to pull out of the court all of a sudden after having been part of it since its inception. In an attempt to present the broader context within which the AU/ICC relationship should be interpreted, this chapter will argue that it should be noted that individual African countries (not as regional blocks or as the present AU) unilaterally and willingly took

decisions to participate or to become signatories of the ICC. This topic also raises some questions regarding disagreements that seem to exist over the international system, mainly over the interpretation of facts using emotions and irrationality.

This is to suggest that international organizations have different interpretations of how the world order or the international relations operate. It is envisaged that the study will shed light on the present status quo as far as the AU and the ICC perceive each other.

1.2 Background

Although the epigraph above does not represent the views of all African leaders, but this comment in the social network by Rwanda's deputy United Nation's Ambassador Olivier Nduhungerehe clearly shows the feelings some African leaders have towards the International Criminal Court (ICC). In the eighteen year history of the ICC, the storm has been brewing with Africa accusing the court of targeting the continent unfairly. However, the African continent is one of the regions in the world considered to be in great need of support from international institutions such as the International Criminal Court due to its caliber of leaders who tend to continuously do things in an unconventional manner. Many of the international institutions are very important in helping Africans in addressing various pressing issues of national importance such as political, economic and social challenges. Given Africa's challenges, the international community has been trying to put Africa on the right path over the years, but some decisions from international institutions have not been welcomed by Africa and her leaders. The method used by the ICC is one of those moves Africa is not entirely happy about, and they have been calling for the body to stop prosecuting African leaders or else they would pull out en masse.

In what has been described as possibly the most high profile case in the ICC's history, the much talked about trial involving a sitting head of state dramatically collapsed to the dismay of many in Africa and across the world. Judges at The Hague-based court gave the prosecution team an ultimatum to find concrete evidence to justify why the trial of Kenyan President Uhuru Kenyatta should proceed or withdraw the charges levelled against him. This left the ICC prosecutor Fatou Bensouda with no option but to withdraw the charges immediately. Bensouda then shifted the blame to the Kenyan

government, accusing it of sabotaging the court's attempts to properly investigate the widely reported crimes against humanity which took place in Kenya following the much contested 2007 election.

The prosecutor also indirectly blamed the behavior of Kenya for depriving the victims of their right to know the truth about what really happened after the 2007 general election in Kenya which was followed by the loss of innocent lives in post-election political violence which erupted soon after the results were announced by the electoral commission (BBC, December 5, 2014). The charges were withdrawn but debates about the wisdom and logic in charging a sitting president (Uhuru Kenyatta) and his deputy (William Ruto) still linger on to-date. In other words, the withdrawal of the charges did not mend the relationship between Africa and the ICC. In fact, the incident polarized Africans too as each country and some individuals within respective countries took difference positions on the issue – some supporting the ICC with others criticizing it for its alleged inconsistent actions.

There are important questions to be asked regarding the relationship between Africa and the ICC. The first one is whether the ICC is indeed targeting Africa as others allege or if this is only a perception. The second one is if politics plays any role in the decision to investigate and prosecute crimes within the jurisdiction of the ICC or if the decision is taken in an objective manner. As far as the African Union is concerned the ICC has simply become a Western court targeting weak African nations and ignoring the atrocities committed by big powers including the five permanent members of the United Nations Security Council (the US, France, Russia, China and the UK), which are commonly known as the P5 countries. The accusation by the African Union against the ICC leads to the argument that the International Criminal Court is currently politicized. This is consistently denied by the prosecutor of the International Criminal Court who claims to be implementing the law objectively and in a non-partisan manner as is expected of her office.

The decision to charge the Kenyan leaders came as the debate raged on and the perception by African leaders that the court has been targeting the continent since its inception gained more currency. The withdrawal of the charges against President Kenyatta might be seen as a victory for those who feel that the court has been unjust

towards Africa and that it acts irrationally and emotionally without getting its facts right. Roth (2014) asks important and pertinent questions which seem to justify Africa's standpoint on the ICC's intervention in the continent when he wonders:

- What are we to make of the fact that in its eleven year history, the ICC has prosecuted only?
- Should the court be condemned for discrimination for taking advantage of Africa's weak global position as some African leaders feel?
- Or should it be applauded for giving long overdue attention to atrocities in Africa, a sign that finally someone is concerned about the victims in Africa who have been ignored?

Roth (2014) further states that the debate between the ICC and Africa is at the heart of one of the most serious challenges the ICC has ever faced. He argues that if the current attack and hostilities persist, the court's future may be in doubt and its credibility questioned widely even by those who currently support it.

While the debate is on-going regarding the relationship between the ICC and Africa, there is a feeling that the International criminal justice system has become a weapon used by some in their political struggles against countries of Africa. This raises questions about the political meaning of the International Criminal Court's judicial interventions in the continent. The big question that is being asked by many African countries is whether the ICC is doing justice to the political arena in Africa, or if it is just inherently making a distinction between the friends and enemies of the International community which it claims to represent (Wouter, 2011).

The ICC's operation has triggered a serious and worrying debate not just in Africa, but across the wider political spectrum. It is a debate that is unlikely to die down as yet, unless an amicable solution is found to improve the relationship between the two international bodies. There are those who have leveled criticism against the ICC for its inefficiency in dealing with its cases and that it has preoccupied itself with Africa since its inception. Many African leaders also argue that the ICC has failed to investigate equally similar severe conflicts in many parts of the world outside the African continent. In their view, this is what

has led to the lack of faith in the court. Although many view the ICC as a mechanism that is used to undermine African leaders and the continent at large, others hail it as one of the best institutions which consolidate democracy, not just in Africa per se but across the world as a whole. All situations and cases that are under investigation by the ICC are in Africa. They include countries such as the Central African Republic (CAR), Darfur/Sudan, Kenya, Libya, Ivory Coast and Mali, to mention but some.

The images of former Liberian President Charles Taylor being arrested and indicted in 2006 for the crimes he committed in Sierra Leone's civil war made the world headlines. For at least two years, Taylor had been locked in a Dutch high security jail, leaving the compound only in an armored vehicle that sped across The Hague as it delivered him to his infamous war crimes trial. When he was finally convicted in 2012, the spectacle was beamed around the world. However, elsewhere, the wheels of justice at the International Criminal Tribunal for Rwanda have been grinding steadily since 1995 following the historic genocide of 1994. While the ICC continues to pursue cases against several African leaders, an attempt to step into the breach by indigenous African institutions goes largely unnoticed.

In recent years, some parts of Africa have witnessed violence on a scale that has shocked even its people, drawn international condemnation and in some cases resulted in a call for intervention by the international community. Recent atrocities in the Central African Republic (CAR) and South Sudan have made news. There have also been other violent eruptions in Ivory Coast, the Democratic Republic of Congo (DRC), Kenya, Libya and Mali, among others (New York Times, March 9, 2008).

Mr. Adama Dieng who is the United Nations Special advisor on the Prevention of Genocide writes that the African Union has been criticized for not doing enough to address impunity on the continent and for failing to expressly condemn and reject impunity. On 30 December 2013, the African Union Peace and Security Council took an unprecedented step. For the first time in the history of the regional organization or its predecessor, the Organization of African Unity (OAU), the Peace and Security Council established a Commission of Inquiry. Its aim is to investigate human rights violations and other abuses committed during the armed conflict in South Sudan, the African Union's newest member and the world's newest nation. Against the backdrop of criticism by some African leaders of the International Criminal Court's focus on African cases and repeated calls for the African

Union to take the lead in prosecutions, this is a groundbreaking development and a policy watershed. The commission has a challenging mandate including investigating human rights violations and abuses by all parties to the conflict and the identification of those most responsible for such atrocities, who will be held to account (Dieng, 2014).

What has also exacerbated the debate is the sentiment that while the ICC has information on alleged abuses in other parts of the world such as those in Iraq, Venezuela, Palestine, Myanmar, Colombia and Afghanistan, it has decided to turn a blind eye on them and not to open investigations into those situations. The question is why? This question remains unanswered and this has led to many speculations. Some argue that the ICC has opened investigations in Africa because its jurisdiction is limited to crimes committed after July 2002, and Africa has had many situations which warrant the ICC's investigation. The question then becomes: Is the ICC targeting Africa inappropriately or are there sound reasons and justification for why all the situations currently under investigation or prosecution happen to be in Africa? This is one of the niggling questions which form the thrust of the discussion in this dissertation. The question becomes even more important if we consider that the Second Gulf War (the coalition forces' attack on Iraq) took place in 2003 under huge speculations that many atrocities were committed and the UNC by-passed by the American-led force.

Answers to the questions posed above depend on the interpretation of relevant provisions of the Statute, views regarding the purpose and mandate of the ICC and a range of other practical considerations. Another big question that should be asked is whether African leaders clearly understand the provisions of the Roman Statute, which they voluntarily signed. These questions need to be cogently addressed if we are to put Africa's concern into perspective and possibly arrive at some very useful conclusions that would help us take the discussion forward.

The developments in recent years between Africa and the Hague-based International Criminal Court have necessitated a serious look into the concerns and arguments between the two bodies. The study sought to understand the underlying reasons for the ICC's resolve to solve Africa's problems in the criminal justice system while on the other hand Africa feels that the former is picking on the continent in terms of prosecuting its leaders while leaving others out. This dissertation examines the relationship between the ICC and Africa using the available evidence

for four case studies that provide useful examples – Kenya, Sudan, Liberia and Rwanda. Despite a debate on the increasing strenuous relationship between the AU and the ICC, Africa has been presented with a rare opportunity to take leadership positions of the very ICC. Noticeably, The Chief Prosecutor of the ICC Fatou Bensouda is from Gambia and some believe that this should be the best opportunity for Africa to change the existing perception of the ICC as an anti-Africa body. In other words, if Africa’s claim that the ICC targets the continent is to be entertained, this then suggests that it also means that fellow Africans have either turned against their continent or Africans are indeed guilty of the charges levelled against them to the extent that even their own people cannot protect them. This is what makes the debate more difficult to understand than it seems at face value.

1.3 A Brief history of the ICC

The International Criminal Court (ICC) began in 2002 under the Rome Statute. Its stated primary aim was to try the most serious and heinous of war crimes, when sovereign nations are unable to do so themselves for one reason or the other. The ICC is an independent international organization, outside of the United Nations system, and runs on funding from state parties that are signatories to the Rome Statute. In order to be able to prosecute people involved in conflict, the ICC needs to have a referral either from the country central to the conflict or by the United Nations Security Council, which is made up of countries such as the US, France, Russia, China and the UK. Alternatively, prosecutors can seek leave to charge leaders themselves if they strongly believe that there is a need to do so and yet there is no referral from either of the two parties referred to above.

What has perhaps created controversy thus far is the fact that to-date almost every referral to the court has been from African, except one conviction of a non-African leader, former Serbian and Yugoslav leader Slobodan Milosevic. The African Union (AU) has consistently complained about ‘biases within the ICC which it argued of unfairly targeting African countries. In January 2014 the organization sent a letter to the ICC highlighting “processes and procedures of the ICC”. One of the criticisms is that the ICC acts “without garnering the cooperation necessary to ensure the integrity of the proceedings” (iccnw.org, 29 January 2014).

In individual statements African governments go further to raise their concerns about the operation of the ICC. For example, Ethiopia's foreign minister Tedros Adhanom once said that the ICC's "unfair treatment of Africa and Africans leaves much to be desired". His Kenyan counterpart Amina Mohamed accused the ICC of "treating us like toddlers" (iccnw.org, 29 January 2014). He was reacting to a situation he saw unfolding before his eyes whereby one African leader after the other was either summoned to appear before the ICC or had a warrant of arrest issued by the court.

However, it should also be noted that not all African leaders hold these sentiments. Former United Nations Secretary General Kofi Annan, who is a Ghanaian by birth, holds a different opinion to that of the general African leadership. He was quoted saying:

In the prospect of an international criminal court lies the promise of universal justice...no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice, that they, too, have rights and that those who violate those rights will be punished (Annan, 1997).

After many years of hard work and struggle, the promise of establishing an International Criminal Court with powers to try genocide, war Crimes against humanity finally became a reality in 1998. The ICC was created amongst other things to end the impunity that reigns in many countries across the world, more especially in Africa. The ICC is also regarded as the most significant international organization to be established after the establishment of the United Nations (UN) in 1945 to replace the defunct League of Nations. The Rome Statute of the ICC puts in place individual criminal liability for those responsible for the most serious and heinous human rights violations. The aim was to create an institution that would operate on a permanent basis and act independently to ensure the punishment of such individuals. Without a doubt, The Court serves as a painful reminder of the atrocities of the past century and the level to which humanity can stoop. International criminal law, if nothing else, is testimony to the fact that we appear doomed to repeat history and fail to read its face properly as should be the case if we are to progress as the human race.

Schabas (2002) argues that the road to establish the International Criminal Court was long and not an easy one given a number of issues that came up along the way. As mentioned earlier,

The ICC was established in 1998 by an international treaty in Rome and was created to provide justice for genocide, crimes against humanity and war crimes when national systems fail. The ICC then brought in a new era in the protection of human rights for citizens in many countries across the globe. The long history of the establishment of the international prosecution included the drafting of the Rome Statute of the ICC and the principles of its operation. But the 17th of July 1998 became the epoch making when 120 states voted to adopt the Rome statute of the ICC. The number of states who showed support for the statute kept on growing and by the early 2003 this number had climbed to nearly ninety (Schabas,2002).

On the creation of the ICC, about one hundred and eight states ratified the Rome statute, but there were notable absentees. Countries such as the United States of America, China and Israel did not sign the Rome Statute. A developed country like Britain had opposed the ICC up until former Prime Minister Tony Blair replaced John Major as Prime Minister in 1997. There were numerous calls for Blair to be hauled before the ICC for lying about weapons of mass destruction and the Iraq invasion. The mere fact that Blair and other leaders were not prosecuted by the Court, different standards appear to have been set for prosecuting African leaders and not the western ones. Many believed that the death toll during and after the Iraq conflict was sufficient enough on its own for Blair to face the prosecution and conviction by the ICC. But he never got his day before the court until his term of office ended in 2007. This and many other scenarios raise serious questions about the objectivity and credibility of the ICC.

Since its inception, questions over the court's legitimacy have inevitably arisen simply because it has not been ratified by key parties such as the prominent states mentioned above. The sustainability of the Hague-based Court hinges mainly on the goodwill of the United Nations Security Council. The Security Council can ask the ICC to start an investigation or the ICC prosecutor can independently initiate investigations, but such action needs approval from the panel of judges. An example of this is when the former ICC prosecutor Luis Moreno Ocampo issued an arrest warrant for Sudanese President Hassan Omar Al-Bashir, on charges of crimes against humanity and genocide. This kind of action by the prosecutor however raised many questions than answers, as many needed evidence of the charges laid against President Al-Bashir.

This trend did not end there, as the ICC prosecutor also independently opened investigations in countries such as the Democratic Republic of Congo (DRC), Uganda and Central African

Republic (CAR). The court investigated allegations of warlords from Congo (Tran, 2009) with the view to find and punish all the wrong-doers.

Schabas (2002) reviews the history of International Criminal Court under the following headings:

- Creation of the Court
- About the ICC

1.3.1 Creation of the Court

It is of paramount importance to highlight the key founding principles of the court. The Nuremberg and Tokyo trials whereby the next major attempt to prosecute war criminals took place in Europe and Asia after the Second World War. These trials were founded on the wish that atrocities that are similar to those that had taken place during the Second World War would never happen again. Countries such as the United States, Great Britain, the Soviet Union as well as France signed an agreement which paved the way for the creation of the International Military Tribunal (IMT), which was known as the Nuremberg Tribunal for the prosecution and punishment of the major war criminals of the European axis. When the International Criminal Tribunals were convened in Nuremberg and Tokyo in the mid-1940s, the response from lawyers was mixed. Some believed that the Second World War was an exceptional event requiring special legal remedies, and commended the tribunals for advancing international law. Others condemned them for their legal shortcomings and maintained that some of the changes were retroactive and selectively applied thus defeating the very purpose of the tribunal (Tusa, 2010).

According to the agreement that was reached only four categories of crimes were to be punished at this level. These crimes were:

1. Conspiracy (conspiring to engage in the other three counts),
2. Crimes Against Peace (planning, preparing and waging aggressive war),
3. War Crimes (condemned in Hague Conventions of 1899 and 1907) and

4. Crimes against Humanity (such as genocide), which by their magnitude, shock the conscience of humankind.

To highlight the importance of the court to the United Nations, former Secretary General Kofi Annan said, “For nearly half a century, almost as long as the United Nations has been in existence, the General Assembly has recognized the need to establish such a court to prosecute and punish persons responsible for crimes such as genocide. Many thought that horrors of the Second World War, the camps, the cruelty, the exterminations, the Holocaust, could never happen again. And yet they have, in Cambodia, Bosnia and Herzegovina and Rwanda. Our time, this decade even, has shown us that man’s capacity for evil knows no limits. Genocide is now a word of our time, too, a heinous reality that calls for historic response.” In these words, Annan was reiterating the need for the court so that incidents such as the ones he cited could be rooted out.

1.3.2 About the ICC

Under the Rome Statute, state officials are not immune from being prosecuted for serious international crimes, even if an accused individual holds an official position such as that of head of state, parliament or government member. The Rome statute also removes the immunity that a serving head of state or government might otherwise enjoy under national or international law. There are many cases to highlight where heads of states or senior government officials have been brought before the ICC. Even heads of states who have not accepted the jurisdiction of the ICC are not entitled to the immunity under the Rome Statute, if a situation in that state is referred to the ICC by the UN Security Council. The ICC's indictment of President Omar Al-Bashir of Sudan in March 2009 is a good example. The ICC's position on immunities is in line with other international criminal courts, for example, the International Criminal Tribunal for Rwanda convicted the former Prime Minister of Rwanda Jean Kambanda and sentenced him to life imprisonment for genocide and crimes against humanity. Again the Special Court for Sierra Leone (SCSL) indicted Charles Taylor while he was president of Liberia. The former vice president of DRC Jean Pierre Bemba was also on trial at The Hague for alleged international crimes that were committed in Central African Republic (Lynch, 2013).

The relationship between the ICC and the African Union dates back to many years. It has been enjoying its ups and downs over the years, and has been strained due to many reasons. To try and tackle this head-on, at the end of May 2013, the African Union celebrated its 50th anniversary with a three day summit which was held at the former's headquarters in Addis Ababa, Ethiopia. In this particular meeting, African leaders clearly stated their unhappiness over how the ICC operates in the continent. The AU member states accused the court of being racist and going after African leaders in almost all the cases it is investigating. It did not end there; again on the 12th of October 2013 Africa's relationship with the ICC was discussed during the extraordinary AU Assembly meeting. The continuous prosecution of African leaders by the ICC resulted in yet another meeting by African governments, which was requested by Kenya with the support of the Eastern African region under the auspices of the East Africa Community (EAC). This time around, the idea was to request African leaders to support Kenyan leaders on trial at The Hague. According to the Rules and Procedures of the Assembly, the support of two-thirds majority of AU member states is required for calling an extraordinary session. The Summit was accordingly convened when the required majority had been reached

(ISS, October 15, 2013). This showed the seriousness of the case and the urgency of the matter at hand.

The African Union has been playing a crucial role in peace building and security as well as mediating conflicts in the continent. This however has not been an easy task, with Africa suffering from severe conflicts in countries such as Mali, Democratic Republic of Congo (DRC), the Central African Republic (CAR), Sudan, Libya, Somalia, South Sudan, Kenya, Burundi, Nigeria and many others. These conflicts have been perpetrated by a number of factors including leaders who make questionable decisions. Many African countries which are not affected by conflicts have been expressing their wish to have a continent where the rule of law prevails. It is important to note in this regard that the ICC was created to end impunity for perpetrators of war crimes and to ensure that justice is served for victims. But what is more concerning for African leaders is that most of the suspects who have been brought before the court are from Africa. Some of the suspects that have been targeted by the court over the years include leaders such as Libya's Colonel Muammar Al Qadhafi and his son Saif al Islam al Qadhafi, Kenyan president Uhuru Kenyatta and his deputy William Ruto, Sudanese president Omar Hassan Al-Bashir and former president of Liberia Charles Taylor to name but a few. Many African heads of states and presidents believe that the ICC has an African problem, judging by its decisions. Noticeably, there are about thirty-four of the one hundred and twenty two signatories to the Rome Statute, which paved the way for the establishment of the Hague-based court, and these are African countries (ISS, October 15, 2013)

This number is bigger when compared to countries from any other continents in the world. It is important to note that ever since the ICC was formed back in 2002, it has opened investigations in about twenty or more criminal cases in about eight African countries. Furthermore, more cases are being pursued in Africa. This makes the number more than that of all other world regions combined. This focus on the continent has raised concerns, and of course has been a subject of intense debate in recent years. But the ICC's focus in Africa is largely not of its own doing. In five of the eight countries where it is actively prosecuting suspects, Uganda, Mali, Ivory Coast, the Central African Republic and the Democratic Republic of Congo, the African states in question asked the court to intervene, often with significant encouragement from victims and local rights groups. In two other countries, Sudan and Libya, the United Nations Security Council (UNSC) asked the ICC to get involved and only in the case of Kenya did the ICC act entirely on its own initiative. Other scholars argue

that African leaders perhaps have not read and understood the rules under the Rome Statute (Article 27), which deals with the issue of the immunity of heads of state for serious international crimes being put to rest (ISS, October 15, 2013)

Much of the debate around the ICC's relationship with Africa has tended to focus on the case of Sudan's Darfur region and the Court's decision to issue an arrest warrant for the country's President, Omar al-Bashir. At the July 2009 African Union Assembly of Heads of States and Government summit in Libya, the late Libyan President Muammar Al Qadhafi canvassed his counterparts to sign onto what became known as the "Sirte decision", in which AU states resolved not to cooperate with the ICC. As a matter of international law, the Sirte decision was hollow, but as a political decision it was regarded as a clear position as it paved the way for the international justice on the continent to be at major crossroads. This should not be misinterpreted to mean that the continent is against the ICC. In fact, it is important to note at the outset that the tensions between the ICC and African governments often disguise an important underlying fact. Africa's states are divided about the role that international justice should play in contributing to the continent's fight against impunity for mass crimes.

The other AU decision on a UNSC deferral of the cases against the leaders of Kenya and Sudan is equally worrying. Firstly, the UNSC deferral under Article 16 of the Rome Statute does not end the cases being investigated. It only leads to the suspension of an on-going investigation or prosecution for an initial period of 12 months. More importantly, the suspension of the trials may also result in the loss of the evidence which the ICC Prosecutor may rely on. Secondly, the UNSC can exercise its authority under Article 16 only after determining that continuing with the prosecution constitutes a threat to international peace and security within the framework of Chapter VII of the UN Charter. Looking at the cases against Kenyatta and Ruto, there is little evidence to suggest that their trial would lead to such a threat, unless UNSC members determine that the threat of terrorism facing Kenya, following what was regarded as terrorist attack at Westgate Mall in 2013 and Garissa University College in 2015 are a reason enough to warrant the deferral of the cases against leaders concerned (ISS, 2013).

The concern over the trials' interference in Kenyan leaders' ability to discharge their responsibilities is best left to the Appeals Chamber of the ICC to address. The Appeals Chamber considered the Prosecutor's appeal to reverse the Trial Chamber's decision relieving Kenyatta and Ruto of the obligation to attend all their trial sessions at The Hague and eventually withdrawing the charges altogether. Sadly, the heads of state and government who attended the

summit defended their position to insulate themselves from ICC prosecution based on the famous political ideal of ‘African solutions to African problems’. But others have complained saying that hiding behind this to serve their self-interest is both a misuse and a perversion of the ideal and erodes its moral force as well as its political and institutional importance for allowing the continent to take the lead in dealing with the challenges it faces (ISS, 2013).

Now there is growing unhappiness among African countries about how the ICC handles cases in Africa, this puts the court’s future and its relationship with Africa at risk. The future of this relationship rests upon the outcome of two cases which have led to the latest situation. These recent cases involve the president of Kenya Uhuru Kenyatta, his deputy William Ruto and radio journalist Josiah Sang. These are accused of crimes against humanity, a charge they all deny which is in connection with electoral violence in the aftermath of the highly disputed 2007 presidential elections.

Although the cases against Liberia’s Charles Taylor and Hassan Omar Al-Bashir are worth mentioning, the recent developments have escalated the debate on the relationship between Africa and this international institution which seeks to end impunity in Africa on those perpetrating crimes against humanity. In Kenya, violence erupted in 2008 following the fiercely contested elections in 2007. This resulted in the death of over one thousand people and as many as over half a million fleeing their homes. For the ICC, this warranted a serious investigation and prosecution of those involved in this heinous act (Roth, 2014)

The two Kenyan leaders and the journalist were implicated in the violence, hence the decision by the ICC to call them to appear before it. Although the relationship between Africa and the ICC seems to be marred by the accusations leveled against the latter, the Hague-Based Court as a permanent structure has an important mandate to exercise its powers on most serious crimes in the world which include genocide and war crimes to mention but a few. As mentioned earlier, as the crimes against humanity escalated in many parts of Africa and elsewhere in the world, the International community decided to adopt the Rome Statute of the International Criminal Court in order to establish the first international tribunal, which would try perpetrators of such crimes (Makau, 2010)

While even the signatories of the ICC are critical most countries including those in Africa which supported the formation of this structure believed that global justice would be enhanced with the creation of an institution such as the ICC. Noticeably, the establishment of the ICC

came at a time when Africa was engulfed in war crimes, crimes against humanity etc. But it was the Genocide in Rwanda in 1994 that convinced Africa to support the establishment of the ICC. Currently, about 43 countries in Africa are signatories to the Rome Statute of the ICC. Despite this, many African countries have become very critical of the ICC and the manner in which it has treated African leaders. Scholars like Kenneth Roth are asking questions if the court should be condemned for discrimination for taking advantage of Africa's weak global position as some African leaders contend or if it should be applauded for giving long overdue attention to atrocities in Africa, a sign that finally someone is concerned about the countless ignored African victims, as many African activists contend. This debate is at the heart of one of the most serious challenges the ICC has ever faced and if the current attack on it succeeds, the court's future may be in doubt (Roth, 2014)

As the debate raged on, Uhuru Kenyatta appeared at the Hague-Based court voluntarily and mounted a vigorous defense. He was assisted by the support of other African leaders as he continued his battles with the ICC. The Kenyan government also asked the United Nations Security Council to delay the case. In the meantime, it asked other governments who are members of the ICC to change the rules and at the same time urged other African countries to withdraw from the court. But none of this seemed to have deterred the ICC from proceeding with the prosecution of Kenyatta and Ruto respectively (ISS, 2014).

It is also important to highlight the fact that the anti-ICC attitude of many Africans has been intensified by the indifference shown to the court by the developed countries such as the US, China and Russia. These powerful nations have displayed no interest in joining the ICC to the dismay of many nations across the world. There is a strong feeling in Africa that the court should also be dealing with alleged US, British and Israeli human rights violations in countries such as Iraq, Afghanistan and Palestinian. Although the majority of African leaders share the same view regarding the ICC, Botswana is one country that has disagreed with the African Union over the issue of warrants and prosecution of African leaders. African states generally have a poor record of compliance with obligations under international human rights treaties (Odinkalu, 2003).

The AU does not have the authority to order member states either to stay in the ICC or to leave. This has perhaps led to the existing problems, as the AU does not wield any power when it comes to the dealings of the ICC and individual countries in Africa. It is the choice of individual

countries to pronounce on their stance on this particular matter, although lobbying may take place between countries in order to adopt a particular position. In May 2013, the AU supported Kenya's application for legal proceedings against Kenyatta and Ruto to return to Africa. The justification the AU gave for this decision was that the case in The Hague could inflame ethnic tensions and destabilize the Kenyan economy.

1.4 Objectives of the study

The objectives of the study were to examine the relationship between the ICC and Africa, and to assess the relationship through case studies in countries such as Kenya, Sudan, Rwanda and Liberia, while also establishing if concerns that have been raised about the manner in which the ICC conducts its business in Africa are appropriate. The mentioned countries have had dealings with the ICC due to crimes against humanity committed by either heads of states and even by their civilians. There have been calls for Africa to pull out of The Hague-Based Court and establish its own court, simply because there is a perception that the former is targeting Africa. These concerns raised by different heads of state seem to suggest that the ICC is not applying international law to other countries, but is targeting African leaders only. They say this on the basis that other leaders outside the continent such as former US President George W Bush and former British Prime Minister Tony Blair have committed serious crimes against humanity, but have never been charged by the ICC. The study compares different case studies to see if the complaints are justified and whether African countries have a point when they call for a serious look at the ICC targeting the continent. What will be critical in this study will be to look at the nature of this relationship between the ICC and Africa and what really shapes this relationship.

Those accusing the ICC of imperialism warn that the court's involvement would derail on-growing reconciliation efforts, thus undermining peace in the continent. Proponents of the court say the search for justice and the search for stability and peace are not mutually exclusive. In fact, the ICC intervened because the domestic judicial system failed to prosecute suspected perpetrators. As the relationship between the court and Africa rages on, the Hague-based court will be damned. A continuous conviction of any African leader in the midst of the debate will serve as a self-fulfilling prophecy for those who accuse the court of "race hunt" and selective

justice targeting Africans. A conviction of any African leader will undoubtedly be an outcome that will poison the already tenuous relations between the court and African states.

Despite all sorts of allegations and finger pointing to the ICC, the big question to ask is: wouldn't the African victims be happy to see perpetrators of crimes against humanity brought to justice whether by ICC or any other body? Does it really matter where perpetrators are taken into custody and tried if justice is served for victims? These are pertinent questions.

The most important questions that the study sought to find answers to were the following:

- What is the nature of the relationship between the ICC and the AU?
- What shapes the relationship between the ICC and African union?
- Why is the International Criminal Court picking on Africa (if indeed does that), most importantly,
- In the event that Africa withdraws from the ICC, would she be ready to establish her own court to perform the same function?

1.5 Organisation of the study

The study is organized in the following manner:

Chapter 1: Introduction and background

The introduction dealt with the background into the topic, the relationship between the International Criminal Court (ICC) and Africa (AU). It also explained why the study is important by citing problem areas in the relationship. The research objectives and research questions have been spelt out in this chapter.

Chapter 2: Literature review:

This chapter will focus on the review of the existing literature on this topic. Literature review discusses different divergent views that are held by different authors and commentators about the theme of the study. The case studies of countries in Africa where the ICC had to intervene are used, as well as cases from other parts of the world. Any gaps in the literature are identified as a way of making a case for the present study.

Chapter 3: Theoretical framework

The theories that were used in the study are discussed in this chapter and reasons provided for choosing such a theory (-ies). The history behind the chosen theory (-ies) is provided in order to provide the context that will help the reader make sense of the discussion.

Chapter 4: Research methodology

This chapter outlines the overall research design or methodology of the study. It also includes the list of steps that were taken in conducting the study, from data collection, through data analyses and packaging for presentation in the form of a discussion in the next chapter.

Chapter 5: Research results, analysis and discussion

The findings of the study are presented in this chapter. An analysis and discussion of the results is also done here – linking them to the research questions.

Chapter 6: Summary and conclusions

The dissertation is summarized with emphasis on the results obtained. The contribution of the study is articulated, after which recommendations and suggestions for further research are presented.

1.6 Chapter Summary

This chapter has introduced the theme of the study. It has presented a broader background which looked into the history of the ICC, its founding objectives, its operations to-date and its relationship with the AU. Various cases have been cited to show how the ICC operates. Importantly, the chapter has alluded to the fact that there are divergent opinions about the operation of the ICC and its set goals. While some view this institution in a negative light, the chapter has shown that others commend it for executing its duties appropriately. Such background information was necessary in order to enable readers who are not conversant with the ICC to have a rough idea on why it was established and how it operates. The chapter has also introduced the rest of the chapters to follow with the view to prepare the reader's mindset.

In the next chapter, the views of other scholars and commentators will be discussed under the Literature Review.

CHAPTER 2

LITERATURE REVIEW

2.1 Introduction

According to Boote and Beile (2005), a literature review is an evaluative report of studies found in the literature related to the selected research area. They argue that the review of the literature should describe, summarise, evaluate and clarify existing literature of a particular study. A literature review goes beyond the search for the information and includes the identification and articulation of relationships between the literature and the researcher's field of research. While the form of the literature review may vary with different types of studies (and perhaps according to different academic fields), the basic purpose remains constant. What is also important about the literature review is the fact that you acquire the understanding of the topic in terms of what has already been done on it, how it has been researched and what the key issues are. Importantly, you identify gaps which still need to be filled as far as the theme of the study or the research topic is concerned.

In simple terms, the purpose of literature review is to put information of that particular research project into context by showing how it fits into a particular field of study or into the broader context and perspective. A literature review involves more than just citing as many sources on the theme of the study as possible. It should also highlight relevant arguments and contribute to the field by providing a novel and focused reading of the literature. A common mistake that most researchers make is to include every source they come across under the literature review chapter or section, as they try to impress the reader by demonstrating how many sources they have consulted. Conventionally, a literature review should be organized around a particular theme, and is usually written from the perspective of the reviewer who uses the sources selectively in order to tell a particular story in relation to the topic under discussion. There are various types of literature review and each gives a particular reading of the body of the existing literature. A literature review could include a focus on historical, thematic, theoretical and empirical reviews (Crotty, 1998).

Neuman (2011) goes on to say that the importance of literature review in research is not matched by a common understanding of how a review of related literature can be done, how it can be done, how it can be used in the research or why it needs to be done in the first place.

He argues that an early and essential step in doing a study is to review the accumulated knowledge on the research question, and that it is wise to find out what others have already learned about an issue before you address your own. Doing literature review also builds on the idea that knowledge accumulates and that we can learn from and build on what others have done before us. In this chapter we are also going to build on what other authors have written about the relations between the ICC and African states in compliance with conventional practice as outlined above.

In this chapter, I will review work that has been done regarding the relationship between the International Criminal Court and Africa. In addition to reviewing existing literature from a general perspective, the chapter will also use specific case studies which will illuminate the general discussion points referred to in the literature. This will inject some life to the chapter as opposed to simply listing sources in a dispassionate manner as long as they are relevant to the topic.

2.2 Literature review

As mentioned above, this particular chapter will focus on the review of the existing literature on the relationship between the ICC and Africa, and what scholars/authors say regarding this subject. Such literature is extracted from research studies presented in the form of books, scholarly journal articles, dissertations, government documents and policy reports. The literature review in this regard discusses different views held by different authors and commentators on the theme of this dissertation. The Case studies of countries in Africa where the ICC had to intervene will also be used as well as cases from other parts of the world which bear similarity with the African cases discussed in this dissertation.

As one of the most significant international organizations dealing with international law, the International Criminal Court has all the ingredients of influencing global politics. This includes the African continent given the developments that have happened and that are still happening in Africa. Traditionally, international law has created responsibilities for states only, but with the creation of the ICC, the individuals became responsible in international law. There have recently been divergent views on the relationship between Africa and the International Criminal Court. Various scholars and writers alike have argued their points taking different positions on the functioning of the ICC. Preliminary literature shows that various views are

conflicting about the work of the ICC, especially in Africa. By extension, there are also different views held by various commentators on whether the AU and the ICC should forge a relationship or should just cut ties so that the former can retain its autonomy. In this chapter, the study investigates the nature of the relationship between the ICC and Africa through what various scholars have written about this topic, what published material and articles have to say about this relationship, and also to establish if there is credence in any of the diametrically opposed viewpoints espoused by different scholars and commentators.

As a point of departure, Abdullahi Boru Halakhe, a security and policy analyst on the Horn of Africa and Great Lakes regions argues that the ICC is an African problem on the basis that since the court was established it has opened investigations and instituted 20 criminal cases in eight African states. These cases are more than all other world regions combined. This is the reason why the focus on the continent has been subject to intense scrutiny in recent years. When the study was conducted (2014), it was the view of many authors like Halakhe and others that the future of the ICC with Africa would rest squarely on the outcome of two cases involving Kenyan President Uhuru Kenyatta and his deputy William Ruto, along with radio journalist Josiah Sang. They were all accused of crimes against humanity, a charge they all denied in connection with electoral violence in the aftermath of the disputed 2007 presidential election (Halakhe, 2014).

The trial of Kenyatta was postponed as many as four times, as prosecutors cited that witnesses had withdrawn and requested more time to conduct further investigation. The defence had all along been arguing that the charges should be dropped simply because the prosecution did not seem to have enough evidence to proceed with the case. Halakhe (2014) believed that regardless of the outcome of the case, the ICC would be damned, since a conviction would serve as a self-fulfilling prophecy for those who accuse the court of race hunt and selective justice targeting Africans. To make matters worse, the mere fact that it is for the first time that a sitting head of state is subjected to a trial by the ICC is history in itself. This was bound to poison the already tense relations between the court and African states. However, Halakhe believed that dropping the charges or the acquittal would be a huge blow for the victims of violence in finding justice and closure. Thus, there was no easy way out of this dilemma. As mentioned earlier and as shall be seen later, the charges were indeed eventually dropped thus confirming Halakhe's fear that the victims would not get justice.

Although many have been critical of the ICC for focusing on Africa, the South African Chief Justice Mogoeng Mogoeng called for a review of the way some permanent members of the United Nations Security Council (UNSC) hypocritically refer others to the ICC, but protect themselves and their allies from prosecution for their atrocities. Justice Mogoeng, who was addressing a conference on the 9th of September 2014 in Johannesburg, South Africa, on the troubled relationship between the ICC and Africa, said that the principles of equality and fairness require the ICC to go beyond Africa to track down cases of ongoing gross human rights violations. He argued that this should address the perception that some of the permanent members have rendered themselves and their allies untouchable and that they tend to keep certain cases beyond the reach of the court.

Justice Mogoeng averred that it was hypocritical that three powerful permanent members of the UN Security Council were not parties to the ICC and yet still referred others to it for prosecution. He said that this results in rich and powerful countries exempting themselves and their allies from accountability for the atrocities they have committed, and concluded by stating that as a result of such practices world peace and justice is jeopardized in the process. In his view, “No country, however rich and powerful, should hypocritically enjoy impunity for gross human rights abuses, and yet have the courage to seek to hold smaller countries accountable, and that should never be encountered” (The Mercury, 10, 2014).

This argument is however disputed by Navi Pillay, the former ICC judge who has retired as United Nations High Commissioner for Human rights. She argued that contrary to the impression created by Justice Mogoeng, the ICC was not influenced by political considerations. She went on to argue that even when the UNSC referred cases to it, the ICC considered these cases on their legal merits than anything else. ICC prosecutor Fatou Bensouda is also on record defending the court. Concerns have been raised in the past about the ICC, including its prosecution of former Liberian President Charles Taylor. Invariably, the ICC’s relationship with Africa has been on the spotlight once after the former moved to prosecute the most powerful suspect in Kenyan President Uhuru Kenyatta. The prosecution is as a result of Kenyatta’s alleged role in fomenting violence that claimed more than a thousand lives after the 2007 elections in that country, and the subsequent mayhem which led to thousands of people fleeing their homes. Kenyatta who has been defended by African Leaders has also used his position as Kenyan president to defend himself as he has appeared in The Hague- based court (Roth, 2014).

This issue has triggered an important debate in Africa, with the ICC being viewed as a thorn in the flesh, if not a destructive element in the eyes of many African leaders. While the ICC prides itself for dealing with leaders who have committed serious crimes against humanity, there seems to be a united front by African leaders regarding this debate, as many want out of the ICC. But a number of people have expressed their divergent views on this issue. One such leader is the former United Nations Secretary General Kofi Annan who avers that it would be a badge of shame if the African Union were to pull out of the Rome Statute which established the International Criminal Court. African countries account for 34 of the 122 parties which have ratified the Rome Statute, the court's founding treaty, which took effect on July 1, 2002. The AU accuses the ICC of being racist; saying that it only targets African leaders. But Annan argues that this is not the case as he states that the majority of cases before the ICC were referred to the court by the African countries themselves. He argued that “The leaders are protecting themselves; no one speaks for the victims. If they fight the ICC, vote against it, withdraw their cases, it would be a badge of shame. He further stress that it is the culture of impunity and individuals who are on trial at the International Criminal Court, not Africa”(Annan , 2013). Others who have written on this subject like Tim Murithi talk about Africa’s need for reorientation (Murithi, 2013).

One thing that has perhaps led to this kind of debate about the ICC and Africa has been the question of why there are so many cases in Africa being investigated by the ICC. Since its formation, the ICC has investigated so many cases in Africa, while perhaps ignoring other possible prosecutions in other continents. The prosecutor of the ICC encouraged self-referrals, and the only such referrals have been from African countries. John Washburn of the American NGO coalition for the ICC argues that the question of the ICC picking on Africa is out of the window, as the UN Security Council referred the case of Darfur, while other countries came forward voluntarily. Some legal experts argue that the weakness of Africa’s national legal systems have resulted in individual states referring situations to the ICC. What is also concerning about Africa is that while they are complaining and making accusations against the ICC, most countries have not even implemented the Rome Statutes in their domestic legislation, which makes it hard for their arguments to hold (Hanson, 2008).

Bekou and Shah (2006) write in the *Human Rights Law Review* that strengthening domestic prosecution should be the important goal so that the ICC does not have to intervene. They feel that Africa has not done enough to make sure that domestic prosecution takes place, rather than

waiting for the countries from the global north to take decisions for the continent. But their view is disputed by others who claim that despite the need for Africa to tighten its domestic judiciaries, the continent is still showing its commitment to criminal justice by making sure that crimes against humanity are reported to relevant international bodies. Many countries are still struggling in this regard, hence relying heavily on international law and keeping on referring matters to the ICC.

There are quite a number of criticisms that are leveled against the ICC, mainly by African leaders. Critics say that the court is responsible for exacerbating conflicts in the continent. In countries such as Uganda, the leader of the Lord's Resistance Army (LRA) Joseph Kony refuses a peace deal unless the ICC drops its indictments against himself and three other LRA leaders. Also, people in Uganda were increasingly not happy with the ICC, which they claim fails to respect their desire for traditional reconciliation and argue that it is undermining their efforts for the genuine peace in the country. Some experts say the Sudanese government's opposition to the ICC as well as the LRA's demands for amnesty indicates that the ICC has quickly established itself as a force for the rule of law (Hanson, 2008).

Some African leaders have other ideas on this matter. South African former deputy president Kgalema Motlanthe delivered a speech at the University of Pretoria where he argued that the ICC is indispensable. He further suggested that Africa needs its own court, vested with universal jurisdiction over three core international crimes of genocide, crimes against humanity and war crimes as an extension of the ICC. The reasons for such comments from Motlanthe are challenges that seem to impair the efficacy of the ICC with regards to the African situation. Motlanthe's comments were not dismissive of the ICC per se, but rather raising concerns which could take the discussion further, and what ICC could employ when dealing with African cases (Motlanthe, 2014).

Lamony (2013) who is a senior Advisor at the Coalition for the International Criminal Court has argued that many observers and critics of the ICC argue that the Court has focused entirely on Africa, and that there is a need to expand its investigations to other continents. By other continents we mean that countries which have been at the forefront of orchestrating crimes against humanity, whether in Europe, Asia or America should also get the same attention that Africa is getting. Some even go as far as labeling the ICC as a colonialist tool that is biased against Africans. These insinuations need close scrutiny in order to verify their sources and

credence. Lamony has put it that while it is true that each of the individuals charged by the Court have been Africans, these arguments simply disregards and overshadows the fact that African governments have been largely supportive of the ICC, and were even instrumental in its founding.

In the last decade, the international community has played a leading role in the fight against impunity especially in Africa. The ICC has ensured that it takes care of the prosecution of abusers of human rights. The cases in point are those of countries such as Liberia, Rwanda and Sierra Leone where the rule of law has been undermined by leaders who violate human rights. While there is a perception that the ICC is targeting Africa, countries such as the former Yugoslavia, Kosovo, Cambodia and East Timor have witnessed the prosecutions of their former leaders. In a way, this seems to nullify Africa's claim and renders it baseless. But this seems to have been ignored by those accusing the ICC of targeting Africa and perhaps even the very African leaders have chosen not to look at this point as they put forward their argument. The adoption of the Rome Statute establishing a permanent ICC is regarded as the defining achievement of the post-World War Two criminal accountability movement (Jalloh and Marong, 2005).

The central part of this research is the relationship between the AU and the ICC, which is said to be tense. The AU formerly known as the Organization of African Unity (OAU) was formed in 2002 and the ICC which is governed by the Rome Statute of the International Criminal Court became effective in July 2002. The Rome Statute established four core international crimes that they are dealing with. These include genocide, crimes against humanity, war crimes and the crimes of aggression. In the last decade, the international community has played a leading role in the fight against impunity, especially in Africa.

Although African states seem to be in consensus that the ICC is targeting Africa, authors have not explored enough the point that the very African countries were voluntary signatories of the ICC; they were not forced by anyone to become members of the ICC. But again, it should not be a problem when they want out voluntarily in the same manner that they joined in. However, the big question is how do they move forward without an institution such as the ICC in place in Africa, while serious crimes against humanity are still rife in the continent? This question is at the core of this study.

Authors such as Roth (2014) argue that the ICC is hardly an institution that looks anti-African as its largest block of members is from Africa and they played a pivotal role in negotiating the Rome treaty that established the court. Thirty four of the one hundred and twenty two member states are from Africa and the chief prosecutor of the ICC, Fatou Bensouda is from Gambia in Africa. She assumed the position in 2012 after having served for eight years as the deputy prosecutor. Africa also serves among the court's judges and the prosecutor's staff. This then perhaps weakens the argument that the ICC is a Western institution whose main purpose is to belittle Africa (Roth, 2014).

As mentioned earlier, Botswana is one country that took a different stance on the matter and deviated from the common ground by many African countries. The country pronounced that it would continue to support trials by the ICC of accused human rights abusers in Africa despite opposition by other African countries. Government spokesperson Jeff Ramsey was quoted saying that Botswana would uphold its treaty obligations as a signatory to the Rome Statute which established The Hague-based court (Voice of America, 2011). This stance contradicts the AU summit meeting that was held in Equatorial Guinea, where the African mother body resolved not to cooperate with international arrest warrants issued by the ICC against Sudanese President Omar Hassan al-Bashir and Libyan leader Muammar Gadhafi. Botswana's position seemed as if the Southern African country was breaking ranks with the AU as she promised to arrest the two African leaders if they entered its territory. Critics of the ICC accused Botswana of undermining solidarity among the AU member states thus making this body vulnerable to Western attacks due to evident internal cracks.

There are quite a number of Case studies that can clearly explain the arguments presented above regarding conflicting positions about the ICC and Africa. Some of these countries are even to-date fighting another day to survive from the ICC's persistent investigation and prosecution of its leaders. These cases are discussed below.

2.3 CASE STUDIES

There are quite a few examples of countries in Africa that have a story to tell when it comes to the International Criminal Court and its operations in Africa. Kenya is the recent example. With charges against its president Uhuru Kenyatta withdrawn, it remains to be seen whether this is a victory for Kenya and Africa who have been fighting tooth and nail to ensure that he does not face trial at the Hague despite reports which suggest that he was the mastermind in the violence which claimed thousands of lives during and after the 2007 elections. Other countries such as Sudan, Liberia and Rwanda have also had their grievances with the ICC. This section will begin with the most recent case which is still fresh in the readers' minds, that is, the Kenyan case.

2.3.1 Case 1: Kenya

Kenya is perhaps the most recent example of the kind of relations that exist between the International Criminal Court and Africa under the auspices of the African Union. It appears that from previous cases involving the two institutions, nothing has been done to defuse the tensions between the ICC and Africa. Kenya became party to the Rome Statute on 15 March 2005, which meant that they agreed that effective from that date, the ICC might investigate, prosecute and try individuals accused of crimes against humanity from Kenya regardless of their position or status. Being party to the Rome Statute also meant that the ICC can exercise its jurisdiction only in cases where a state is unwilling or unable to carry out the investigation or prosecution in accordance with the principles of the court (Lynch, 2013).

Over the last few years, ICC cases in Kenya have become a political chess game. With the dropping of the charges against President Uhuru Kenyatta, some of the victims may feel that it makes a mockery of justice. But the two politicians are sticking together. Deputy President William Ruto tweeted: "The truth has set you free," and Mr Kenyatta called him "indispensable", saying he looked "forward to the day when we shall not have the distractions of the trials, so that we can continue delivering our transformational agenda to the people of Kenya". However, this romance is glued together by the ICC, and analysts say if Mr Ruto is not vindicated by the court, where his trial is ongoing, then a political storm may determine the future of Kenya (BBC, December 5, 2014).

Kenya is one example where African leaders came together to defend one another against the ICC. The Kenyan parliament voted on 5 September 2013 to support a call for the government in that country to withdraw from the Rome Statute of the ICC. This kind of action was viewed as a plan to protect the country's president Uhuru Kenyatta and other top leaders from prosecution as they faced allegations of crimes against humanity which fall within the ambit of the ICC. This action by Kenya is a first step in an effort to mobilise other African countries that are state parties to the Rome Statute to follow suite and withdraw from the ICC. The plan was to portray the ICC as an institution targeting Africa, which is also used as a neo-colonialist instrument of developed countries (ISS, 2013).

The ICC's indictment of Uhuru Kenyatta and William Ruto boosted their popularity and support among the Kenyans and other African heads of states. Many people in Kenya were not convinced that the post-violence of 2007 was planned in advance as per the charges of the ICC. The Rome Statute which established the ICC states clearly that immunity is removed when it comes to the Head of state, he or she might have been enjoying under national or international law. Since Kenya is party to the Rome Statute, even if Kenyatta and Ruto are president and vice president respectively, they are still subjected to the rulings of the court (Lynch, 2013).

What has led Kenya into this situation is said to be three mistakes that were made in 2007 when the country went to the elections. Those elections were peaceful, however the results were a close call, but indicated that the opposition party had won the elections. Noticeably, the Kenyan Electoral Commission announced results that were inconsistent with what was coming out of the field and declared then President Mwai Kibaki the winner. He was sworn in by the Supreme Court as a victorious president. But soon after that, there was eruption of violence in many parts of the country, resulting in the death of more than one thousand people and many displaced. The African Union (AU) intervened by appointing former United Nations (UN) Secretary-General Kofi Annan as mediator. Annan convinced Kibaki and his rival, Raila Odinga, to form a coalition government and this calmed the violence somewhat. Furthermore, the Kenyan government appointed the Waki Commission to investigate the post-election violence. The Waki Commission eventually recommended that a local tribunal investigate and prosecutes those suspected of criminal conduct. The Kenyan parliament voted against such a tribunal, which was mistake number one (ISS, 2013).

While the debate rages on about the ICC's relationship with Africa, Lynch (2013) argues that it was the AU Panel of eminent Personalities that forwarded the names of alleged perpetrators to the special prosecutor of the ICC. It became clear that Kenya was never going to undertake any investigation or prosecution. The Waki Commission handed its dossier to Annan with a recommendation that he submit the matter to the ICC, which he eventually did. The ICC prosecutor held discussions with the Kenyan authorities on 17 September 2009 and received their full cooperation. It would appear that the Kenyan politicians felt the matter would be better handled by the ICC, as they wanted to insulate themselves from accusations that one side was prosecuting the other or each was failing to shield its own.

The ICC provided the critical element of political deniability. The ICC proceeded with its investigation and initiated prosecutions, including those against Kenyatta and Ruto, who later won the 2013 elections and became President and Deputy President of Kenya respectively. The new government now led by two leaders accused of crimes against humanity quickly hatched plans to put the ICC on the back foot. African leaders have been trying in unison to create empathy with African leaders accused of committing serious crimes at the expense of the victims of those crimes by playing on Africa's anti colonialist sentiments. President Omar al-Bashir of Sudan, Kenya's President Uhuru Kenyatta and Kenya's Deputy President William Ruto, and Jean-Pierre Bemba of the Democratic Republic of Congo (DRC), are some African leaders who have been targeted for prosecution (ISS, 2013).

The difference however that was not considered was that neither Kenyatta nor Ruto were subject to a warrant of arrest, but here they were throwing themselves in the same basket as al-Bashir, who is wanted by the ICC. In fact, up to that date both Kenyatta and Ruto were cooperating with the ICC. According to the Rome Statute, a withdrawal can only take effect after one year following receipt of notification. It further provides that a 'State shall not be discharged, by reason of withdrawal from its obligations arising from while it was a Party nor shall it prejudice in anyway the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective' This means that the ICC would be compelled to continue the cases against Kenyatta and Ruto, despite Kenya's withdrawal. The Kenyan case thus gives us something to ruminate about in our assessment of the functioning of the ICC and its relations with Africa (ISS, 2013).

The ICC prosecutor subsequently surprised many by dropping the charges against Kenyatta, citing lack of evidence due to non-cooperation by the Kenyan government. Many observers had been saying that this case would be a complex one for the ICC, compared to cases in the Democratic Republic of Congo and Sudan. Many feel that the collapse of the case has some interesting implications for Kenya's political situation. This is mainly because the political ties between president Kenyatta and his deputy Ruto before the 2013 elections was mainly driven by their ICC cases. Now that Kenyatta's case has collapsed while that of Ruto's one is ongoing, this might diminish his bargaining power in their alliance. The situation will also demand that Kenyatta's allies tread carefully and make sure that they do not show Ruto's supporters that they no longer need them now that Kenyatta is off the hook. This in simple terms means that without the ICC bond, the union between Kenyatta and Ruto will become more transactional, and mistakes are bound to happen as each side will be trying hard to make sure that disagreements on specific issues do not get out of hand (BBC, 2014).

Now that the ICC is behind him, in all likelihood, President Kenyatta might now focus on tackling the issue of insecurity in Kenya. It is common knowledge that since he took over, his approach to security matters has been informed by the desire to rid his administration of anyone who might have been on the side of the ICC. Kenyans are surely desperate to move forward and forget about the 2007-08 violence which left indelible scars. Without a doubt, what happened in 2007 and 2008 will remain part of historical injustices, inequalities and the continued failure to address them. However, the activities of the terrorist group Al-Shabaab are more expedient than the effects of the post-2007 elections which, although still relevant, are gradually fading away.

2.3.2 Case 2: Liberia

To further highlight the nature of the relationship between the African Union and the International Court, Liberia is another case in point where the ICC made its presence felt. The conviction of Charles Taylor reinforced the new reality, that heads of state would be held to account for war crimes or crimes against humanity. The Kenyan case discussed above bears testimony to this. Human Rights Watch also argued that the trial of Taylor signaled an end to an era of impunity in Africa and that it was significant for people in West Africa who suffered of violence in Sierra Leone, Guinea, Liberia and Ivory Coast (Vunyingah, 2011).

The trial of Charles Taylor heralded a new era in African leadership. In spite of conflicting western and African ideologies or dichotomies as analysed in the policy brief, there is a general view that Taylor's trial must be celebrated by Africans as a triumph of democratic governance, transparency, the rule of law, accountability and impunity free Africa. The basis of Taylor's indictment before the Special Court for Sierra Leone (SCSL) was the Sierra Leone civil war. The conflict started in early March 1991 and was formally ended only on 18 January 2002 following an announcement by President Tejan Kabbah. Taylor's indictment was related to 11 counts of crimes against humanity and violations of international humanitarian law, including sexual slavery, recruitment of child soldiers and mutilations, during Sierra Leone's civil war. It is estimated that more than 200 000 people lost their lives during the fighting (Bhoke, 2006).

A Security Council Resolution 1688 passed on 16 June 2006 paved the way for Taylor's indictment by the SCSL. His trial then began on 7 January 2008 in The Hague. But this trial, unlike many others, in principle was not an ICC trial, as it only complied with Security Council Resolution 1688 of 2006. African Nations represented by former Nigerian President Olusegun Obasanjo and former South African President Thabo Mbeki, and the International community then brokered a deal, with Taylor's government which forced him to step down in 2003 and leave the country.

The agreement specified that:

- Taylor would give up the presidency of Liberia;
- Leave Liberia for Nigeria;
- Never interfere with the politics of Liberia directly or indirectly;
- In return, the agreement assured Taylor's safety from arrest and prosecution either by the Liberian government, the Nigerian government or any other international court constituted by the UN and its various agencies.

But on 24 February 2005, the European parliament unanimously passed a resolution calling for Nigeria to transfer Taylor to the SCSL, and this was followed by the US House of Representatives on 4 May 2005, and the US Senate House representative's resolutions on 11 May 2005, respectively. This raised questions regarding the influence and political will of the African Union (ISS Paper, 2006).

Taylor became the first former head of state to face judgment in an international court on war crimes charges. This was for the first time since judges in Nuremberg trials convicted Karl Doenitz, an admiral who led Nazi Germany for a brief period following Adolf Hitler's suicide. Former president of Yugoslavia Slobodan Milosevic also faced trial by an International Criminal Tribunal, but sadly died before a judgment was issued. Taylor became the first head of state in Africa to be prosecuted by the ICC and be found guilty of war crimes and crimes against humanity. This was the landmark judgment as it left Charles Taylor facing a 50 years sentence in a British prison. This certainly set a precedent that heads of state can no longer consider themselves immune to International justice. Taylor spent four years undergoing hearings at the United Nations backed special court for Sierra Leone in The Hague in Netherlands, as he was convicted on eleven charges including that of murder, rape, sexual slavery and enforced amputations. Taylor, who was dubbed “warlord”, was also accused of aiding and abetting war crimes and for supporting the rebels who carried out atrocities in Sierra Leone in return for blood diamonds (The Guardian, 2012).

The three judge panel who were presiding over the Taylor trial agreed unanimously that the former Liberian president had been responsible for assisting the rebel group, the Revolutionary United Front (RUF) and other factions in carrying out atrocities in Sierra Leone between 1996 and 2002. Taylor’s lead counsel, Courtenay Griffiths argued that the conviction of his client was based on "tainted and corrupt evidence and accused the international justice community of targeting African leaders excessively. He argued: "I have for long expressed my concerns about the way in which international justice has been targeting African countries, and that all those currently awaiting trial at the International Criminal Court are from Africa” (The Guardian, date, 2012).

In this regard, Liberia presents yet another very fascinating case where the operation of the ICC has been put under the spotlight, although in a slightly different context to that of Kenya discussed above.

2.3.3 Case 3: Sudan

March 12, 2008 in Geneva, Switzerland is when the International Criminal Court started its deliberations on Sudan. International experts estimate that more than 200,000 people died in Sudan during the conflict. But on the other hand, the Sudanese government claimed that 9,000 people were killed during the war. The prosecutor of the ICC announced that he had finalized two investigations into the Darfur war crimes by the end of 2008. The then ICC prosecutor Jose Moremo Ocampo told Swiss Info news portal that one of the investigations related to the involvement of Sudanese officials in attacks against civilians while the other looked at rebel attacks against peacekeepers and aid workers. The judges of the ICC then issued their first arrest warrants for suspects accused of war crimes in Sudan's Darfur region in early May. The warrants were issued for Ahmed Haroun who was state minister for humanitarian affairs and militia commander Ali Mohamed Ali Abdel-Rahman who was also known as Ali Kushayb. Sudan rejected handing over the two suspects to the court, simply because they did not recognise the International Criminal Court (Sudan Tribune, March 12, 2008).

The case of Sudan demonstrates the difficulty that international partners face in maintaining normal economic and diplomatic relationships with countries whose heads of states have been charged by the ICC. Sudanese president Omar Hassan Al-Bashir has been fighting the arrest warrant by the International Criminal Court for many years now. Like other African leaders who have been hauled before the court, Al-Bashir was accused of committing crimes against humanity, war crimes and genocide he allegedly committed in the capital of Sudan, Darfur. Soon after the ICC made its intention clear that it wanted Al-Bashir to answer the alleged crimes before the court, he made a defiant speech in front of thousands of people who even went as far as burning the sculpture of the then ICC chief prosecutor Luis Moreno Ocampo.

Sudan has been ravaged by war since it gained its independence in 1956. The civil war that erupted between the Muslim North and the Christians on the South resulted in the death of about two million people, while many others had to flee their homes. By year 2003, the Sudanese government and the rebel Sudan People's Liberation Army (SPLA) managed to reach a peace agreement mediated by the US, Britain, Norway and Italy. This particular agreement was aimed at ensuring that there was a ceasefire, and that conditions for power sharing were in place. But the strategic interests of outside powers and escalating violence in Darfur resulted in the collapse of the peace deal. Foreign governments and companies were after the lucrative

oil in that country. But in July 2004, the United Nations Security Council Resolution 1556 endorsed the deployment of a protection force by the African Union to monitor the April 2004 ceasefire in Darfur.

As the North-South conflict eased, rebels in the Western Darfur province decided to challenge the government and were met with brutal repression. In November 2004, the Security Council of the United Nations held an extraordinary meeting in the Kenyan Capital Nairobi, but the efforts of some council members to impose sanctions on Khartoum were thwarted by China and Russia, veto wielding members with significant oil interests in Sudan (United Nations, December, 2012).

The International Criminal Court issued a warrant of arrest for Al-Bashir, who became the first sitting head of state to be charged by the Hague-based court since its inception in 2002. This kind of order was in response to an urgent request from the ICC prosecutor Fatou Bensouda, seeking cooperation of Saudi Arabia in nabbing Al-Bashir. Saudi Arabia is one of the world countries who were not party to the ICC's founding charter. This meant that there was no obligation for the country to cooperate with the court. The ICC issued two arrest warrants against Al-Bashir in 2009 and 2010 for alleged war crimes, crimes against humanity and genocide committed in Darfur. The United Nations Security Council (UNSC) referred the Darfur case to the ICC under a Chapter VII resolution in 2005 since Sudan is not a state party to the court (Sudan Tribune, 2014).

Human rights campaigners said the warrant or summons for Al-Bashir to go on trial in The Hague would send a strong message about ending impunity, and pressure the government to seek a swift and peaceful end to the six-year conflict in Darfur. But there are concerns that Al-Bashir's regime would retaliate against foreigners and local opposition groups. Western embassies, aid agencies and the United Nations, which has more than 26,000 peacekeepers in the country, all made contingency plans in case of violence or expulsion orders (The Guardian, 2009).

The UN Security Council voted to refer the issue of Darfur to the ICC in March 2005 in response to ongoing reports from UN experts and others about atrocities committed against civilians on a mass scale. In July 2008, the ICC's chief prosecutor presented evidence that Sudanese President Omar Al-Bashir had committed genocide, war crimes, and crimes against

humanity in Darfur. The court had several months to decide whether to indict Al-Bashir or not (Hanson, 2008).

It is interesting to note that to this day President Al-Bashir has not yet been arrested. In fact, it is equally important to note that the case of President Al-Bashir has divided African leaders with some indicating that they would not hesitate to arrest and hand him over to the ICC should he land on their shores. Countries like Botswana seem to put national interests before those of the SADC region or those of the AU. This is evidenced in the country's stance which is opposed to both the regional and continental position on various pertinent issues.

2.3.4 Case 4: Rwanda

Rwanda is another example where the relationship between Africa and the ICC has been tested. This is one country in Africa where the ICC had to intervene due to serious crimes against humanity that were committed on many occasions but reached a saturation point with the 1994 genocide which saw the Hutu and the Tutsi preying on each other, and incident which left thousands of people dead, over half a million injured or displaced. This was one of the sad episodes in Rwandan history. Chris Maina Peter who is an Associate professor at the faculty of law at the University of Dares Salaam in Tanzania argued that no matter how many atrocities cases the international tribunals might eventually try, their very existence sent a powerful message; their statutes, rules of procedure and evidence stimulated the development of the law. The mass killing of people which became known as the genocide was sparked by the death of the then Rwandan President Juvenal Habyarimana, who was a Hutu. His plane was sadly shot down above Kigali airport on 6 April 1994.

The current President of Rwanda Paul Kagame who was the leader of a Tutsi rebel group and some of his friends were blamed for carrying out the rocket attack. However, Kagame denied the accusations, saying it was the work of Hutu extremists. In fact, in retrospect President Kagame might be right. There would have been no reason or incentive for him to assassinate President Habyarimana. Firstly, all the eyes were on him and it would have been foolhardy for him to do what most people expected him to do. Secondly, President Kagame stood to benefit from the peace talk the president had just concluded. It remains a mystery as to who shot the plane. However, intelligence reports could assist in this regard. The fact that almost all the witnesses disappeared mysteriously means that the real truth of what happened will never be known. Be that as it may, whoever was responsible for that attack, violence erupted

in a larger scale and soon spread from the capital throughout the country and it lasted for about three months (BBC, May 17, 2011).

The crimes against humanity in Rwanda started in 1994 where more than half a million people were killed in what was described as the worst case of genocide in history (although the build-up to this crisis can be traced as far back as 1959 when the Belgians polarised the Hutu and the Tutsi). The Atrocities began shortly after the plane bringing the presidents of Rwanda and Burundi back from peace negotiations in Tanzania was shot down as it approached Kigali Airport, the country's capital (Peter, 1997).

There have been always questions about Rwandan President Paul Kagame's involvement in the Genocide. He was accused of boasting in 1994 that he ordered the shooting down of the plane carrying Habyarimana. But Kagame has repeatedly denied any involvement in the attack. But these allegations were made by Theogene Rudasingwa, who was by far the most senior ally of Paul Kagame. Similar claims were made in 2006 by a French judge who accused Kagame of the act, but again he dismissed such claims as ridiculous, insisting that extremist Hutus shot down the plane and shifted the blame on him. He told the BBC's Hard Talk programme in 2007: "I am not responsible for Habyarimana's death and I don't care. I wasn't responsible for the security and he wasn't responsible for mine either. He wouldn't have cared if I had died and I don't care that it happened to him" (BBC News, 2011)

The Rwandan society comprised the three population groups of Hutu, Tutsi und Twa. Among these groups, a line can be drawn between victims and perpetrators along their ethnic affiliation, although the ethnic dimension was not only visible in the social structure of the Rwandan society, the different ethnic affiliations of perpetrators and victims and the ideology behind the genocide. There was also an ethnic dimension to the way human bodies were mutilated or destroyed. Distinction was also drawn on the basis of ethnic identity of a person, by looking at the nose, fingers and legs of the victims. Ethnic stereotypes from colonial times were revived and gained importance through the recourse to commonly shared cultural symbols. Hutu extremists propagated a scenario of ethnic threats which was based on the racial distinction of people during colonial times and which found its prominent expression in the physiognomic stereotypes of the people. The mutilations of Tutsi with machetes, the cutting of the Achilles tendon and the mass raping of girls and women were interpreted by the international community as a sign of the anomaly of Rwandan society (Kruger, 1994).

Rwanda has a turbulent history as the scale of the slaughter left people and the international community reeling from shock. Between April and June 1994, more than 800,000 Rwandans were killed within a short space of time, approximately 100 days. This had never been seen before. Most of those who lost their lives were Tutsis, while those who ignited and perpetrated the violence were Hutus. The death of president Habyarimana was not the only cause of what is perceived as Africa's largest genocide in modern times. However, ethnic tensions in Rwanda had always been there, with disagreements between the majority Hutus and minority Tutsis. The two ethnic groups are very similar and speak the same language, live in the same areas and follow the same traditions. They differentiated these two clans by looking at physical conditions, as the Tutsis are often taller and thinner than the Hutus, with some saying their origins lie in neighboring Ethiopia. During the genocide, the bodies of Tutsis were thrown into rivers, with their killers saying they were being sent back to Ethiopia where they belong (BBC, May 17, 2011).

With the genocide grabbing the international headlines amid condemnation of the violence in that country, the International Criminal Tribunal was created on 8 November 1994 by the United Nations Security Council. The Tribunal had a wide jurisdiction and was supposed to prosecute persons responsible for genocide and other serious violations of international humanitarian law. Its main task was to help restore and maintain peace and bring about national reconciliation by trying persons allegedly responsible for acts of genocide and other grave breaches of international humanitarian law committed in Rwanda, and Rwandan citizens suspected of committing such acts and violations in the territory of neighboring states between 1 January and 31 December 1994. The International Criminal Tribunal for Rwanda consisted of three organs: the Chambers, the Office of the Prosecutor and Registry (Peter, 1997).

The United Nations forces were then sent to Rwanda to help restore order and calm the situation in that country. Again this mayhem posed a challenge to the international law system. The statute for the International Criminal Tribunal for Rwanda was then adopted at the end of 1994. The court was authorized to prosecute for genocide, crimes against humanity and war crimes regardless of whether the strife was called an international conflict or a civil war (Res.955).

The then Secretary-General of the United Nations Boutros Boutros-Ghali informed the Security Council on 19 June 1994, that the UN expected in the best of circumstances, to complete the deployment of the first phase of UNAMIR in the first week of July 1994. Deployment of the

second phase could not be determined lacking final confirmations of required resources. The International Criminal Court's dealing with a country such as Rwanda dates back as far as 1994, when the infamous brutal civil war between rival ethnic tribes (the Hutu and the Tutsi) erupted in the country. The brutal civil war shocked the entire world as thousands of people were killed during ethnic violence. An estimated half a million Tutsis and their supporters were killed brutally, allegedly by the dominant Hutu government soldiers. As a result of this unforeseen manslaughter the United Nation's Security Council then established a commission to investigate the massacre (Res. 935, July 1994). This was to get into the bottom of the situation in that era many would hope not to remember.

The international community reacted with shock and anger over what was happening in Rwanda as this had a great impact in Africa. Be that as it may, most of the world stood on the sidelines, hoping that loss of life would be stopped. The Security Council of the United Nations also supplied more than five thousand troops to give a strong force. But because of the delay and denial of recommendations, the deployed prevented the force from getting there on time and arrived months after the genocide was over. Many government officials in the community mourned over the loss of many and were surprised about the world was not aware of the situation that could have prevented the massacre from taking place (BBC, 17 May 2011 last updated at 16:58 GMT).

Thus, the Rwandan case study is one of the most critical cases which remain relevant to the discussion on the ICC and its operation. Its importance or relevance is not only occasioned by the fact that thousands of people had to die before the international community took action (important as that might be). Another reason why this case study is important is the fact that some ICC-related activities took place soon after this regrettable incident and the saddest episode in the history of Rwanda and Africa as a whole.

2.4 Chapter Summary

This chapter has reviewed existing literature on the relationship between Africa and the ICC. The views of different authors and commentators have been discussed with the view to demonstrate how they illuminate our understanding on the theme of this dissertation. The information shared above confirms that indeed the ICC has mainly opened cases exclusively

in Africa to-date. But it is common knowledge that the ICC has been acting on the basis of the Statute of the court which is commonly known as the Rome Statute that was entered into and came into force on July 1 2002. The ICC has been defending itself on accusations that Africa is its prime target by saying that all prosecutions are on the basis of defending human rights. But again although ICC prosecutions have been praised by those advocating human rights, the ICC's choice of prosecution has focused on Africa which is something that has led to the existing controversy. It should be noted, however, that in most cases it is the very African countries who sought justice through the ICC after being failed by their very own courts. The AU seems to have been consistent in defending its leaders, although citizens in those particular countries are aggrieved and seek justice. Defending Kenyan President Uhuru Kenyatta was not a first stance by the continent. At some stage, the prosecutor's attempt to prosecute two sitting heads of state in Sudan's Omar Hassan Al-Bashir and the slain Libya's Muammar Qadhafi were in vain. The AU decided not to enforce ICC arrest warrants for either leader. Perhaps, as argued above, this decision was motivated by the double standards of the some of the UNSC members who push others (African countries) to go to the ICC while defending themselves and those close to them. In a way, there is no fairness in the entire exercise of referring cases to the ICC; there is no consistency whatsoever.

The case studies discussed above clearly show us that crimes against humanity in African states were rampant and clearly needed some sort of intervention from international institutions like the ICC. It is however common knowledge that the ICC intervened on the request of the very African states who today bemoan lack of credibility from the court. It is also clear that the ICC is the common enemy for African States. But African countries and leaders seem to forget that they were not forced to be signatories as the process was voluntary.

The chapter has highlighted these complexities. In a nutshell, Chapter two has presented divergent views about the relationship between the ICC and the AU. The sources discussed show that lack of understanding about the contents of the Rome Statute which established the ICC, misinformation, political agitation, dishonesty by some superpowers, and many other factors are responsible for making the relationship between the ICC and AU tense. It is for this reason that a study of this nature is timely and relevant. In the next chapter the study will use the selected case studies to demonstrate the complex nature of the relationship between the two institutions with the view to mapping the way forward making informed decisions.

The next chapter will focus on the theoretical framework which guided the study. This is another very important chapter which locates the study within the research convention. Although theoretical framework alone cannot provide a comprehensive explanation on the issue being studied, the role of theory in the field of social science has proved to be a valuable part of any study in that it gives the study a theoretical conceptualization.

CHAPTER 3

THEORETICAL FRAMEWORK

3.1 Introduction

The previous chapter has reviewed existing literature on the theme of this dissertation. It has addressed the different viewpoints held by various authors and commentators regarding the relationship between the ICC and the African continent. The various positions held about the activities of the court have been explicated, juxtaposed and given contextual analysis. Importantly, the UNSC's double standards whereby its members refer other countries to the ICC while staying out of it and keeping their friends away have also been discussed in the literature review chapter. In a nutshell, we now know what the main arguments are about the ICC and its operation as well as its relationship with the African continent.

This chapter is about the theoretical framework of this dissertation. It presents and explicates the theoretical framework on which the dissertation is anchored. This is done for two reasons. In the first instance the theoretical framework is discussed as conventional practice; the aim is to do what all other studies of this nature do as a matter of principle. Secondly, the theoretical framework is discussed in order to locate the study and give it a much broader context. It should be stated at this juncture that the realist theory guided this study. Thus, realism and its other arms such as Classical realism, neo realism and Neo classical realism will be discussed below and their relevance to the study spelt out. These tools are pivotal as they make sense of the international system, especially with regards to the topic of this dissertation, which deals with the relationship between the AU and the ICC.

3.1.1 A Definition of Theoretical Framework

Anfara and Mertz (2006:xxvii) define theoretical framework as an “empirical or quasi-empirical theories of social or psychological processes which exist at a variety of different levels and apply to the understanding of phenomena”. This definition however does not include what Guba and Lincoln (1994) stated about theoretical a framework, which refers to the “paradigm” of social science research such as post-positivist, constructivist, critical and feminist. As a contrary, the definition offered by Anfara and Mertz (2006) does not assume methodological approaches to be the same as theoretical frameworks, for example, narrative

analysis, systems and symbolic interactionism. Qualitative researchers can consider a high variety of theoretical frameworks which stem from the vast domain of disciplines in both social and natural sciences. Therefore, researchers of different academic fields of study, such as political science and anthropology for instance, investigate a method for applying any of the available frameworks to their research problem. Indeed, the high diversity and richness of theoretical frameworks give researchers a valuable opportunity to see what could seem familiar through a new and clear perspective.

Silverman argued that “theory without some observation to work upon is like a tractor without a field” (Silverman, 2001, p. 294). Therefore, a theoretical framework gives the researcher a chance to “observe” and “perceive” just certain aspects of the phenomenon under study while some are concealed. This means that theoretical framework alone cannot provide a comprehensive explanation on the issue being studied but provides some useful direction and contextualization of the study. It gives the study a broader perspective. The role of theory in the field of social science and where it situates itself in the research framework has always created a challenge for the researchers. However, inconclusive and differing opinions have so far been documented about the role and position of theory in qualitative research.

The purpose of this dissertation is to build a general perspective in terms of the position of theory in qualitative research methodology applicable to social science research. The review of literatures on these issues was presented and discussed in chapter two. As a result, a deep comprehension of a phenomenon, event or experience in real-life cannot always or necessarily be based on theory, yet the significant role of theory in literature review is an undeniable fact (Mehdi, 2010, p. 570).

Over the years, International Relations (IR) theory, as a branch of political science has animated some of the most interesting scholarship in international law. IR just like international law comprised several clear theoretical approaches or methods which are worth mentioning in this regard. This particular chapter on theoretical framework will provide a perspective on the relationship which is under scrutiny between the International Criminal Court (ICC) and Africa, through the African Union. To get that perspective, we will draw from certain theories that are relevant to this subject and each gives a different perspective on the theme of the study. However, it is important to note that from a general perspective, International relations theory can be described as the study of international relations from a theoretical perspective, and it

attempts to provide a conceptual framework upon which international relations can be analyzed (Holsti, 1992).

The big question perhaps in international relations and foreign policy is why do states and international institutions behave the way they do in the international system? Some people argue that this is a question of international relations theory and others say it is a question of foreign policy theory. For the purposes of this study, we can consider them as referring to the same issue. Why do states in Africa behave the way they do is the question that theories of international relations and theories of foreign policy are trying to answer. The fact that these are treated as separate theories says more about political scientists than it does about the nature of state behavior. Different scholars and political scientists of International relations employ three theories to explain and predict how world politics plays out. These are realism, Liberalism and constructivism.

Although this study focuses on international law, it is imperative to define the important theories of Realism, Liberalism and Constructivism and how these theories view power between states or institutions, state interests, anarchy and causes of war. International relations theories can be divided into different types. But the most popular theories are realism, liberalism and constructivism. Realism was used in this case study because of its relevance in explaining the decisions taken by states when engaging with other states or institutions. According to realism which is one of the theories of international relations states work only to increase their own power relative to that of other states. Realism claims that the world is a harsh and dangerous place, and the only certainty in the world is power. A powerful state will always be able to outdo and outlast weaker competitors. There have been authors who viewed international relations from a realist perspective (Holsti, 1992).

3.2 Theories of International Relations which guided the study

Academics and scholars alike have developed various sets of conceptual tools in order to make sense of the international system. There are however disagreements over the international system and over the interpretation of facts. In other words, people have different theories of how the international relations system operates. Some theories concentrate on the actors of the international system, though followers of different theories disagree on which actors are more important than others and what the goals of the actors are at any given time. The realists concentrate on states as the main actors and hold that the major goal of each state is the pursuit of power. In contrast, while the pluralists agree with the realists that to understand IR we must

understand the behaviour of actors, they however disagree on the overwhelming significance given to the state. They think of states as one of many actors, albeit important ones. Not only do they stress the importance of other actors such as Multinational corporations (MNCs) but are sceptical of the central role that realists give to state power and security within the international system (Nicholson, 2002). Within this context, realism was chosen as the most appropriate theory to guide this study.

3.2.1 Realism

Realism is very much relevant in the International relations system. Realists believe that they are being realistic and looking at the world as it is. Historically, realism is deemed to be the most important theoretical approach in international relations. It is sometimes referred to as traditionalism given its old history. Realism has been the dominant way of explaining international behaviour. While it is true that other theories have since emerged, many still believe in it as the best theory to explain international relations and state behaviour. Realists argue that states are the most important actors in the international system, to the exclusion of all other actors, such as international organisations and institutions. This would include the ICC in the context of this study. In other words, realists believe that individual states which eventually join institutions should determine how the world operates, not the institutions they are members of. If this is indeed the case, neither the ICC nor the AU should decide the way forward as far as the relations between the ICC and the AU are concerned. On the contrary, individual states should make informed decisions on what should happen.

It is true that, like any other theory of international relations, realism has its own imperfections and cannot claim to be able to present universal solutions to universal problems. But despite these imperfections, it is one theory that best describes the relationship between the ICC and the AU, a relationship which is somewhat under scrutiny in many regards. Like any other theory of international relations, realism is able to make a contribution to understanding the modern world and addressing the challenges it now faces. In this respect it appears expedient to explore some of realism's key concepts that still can be seen as relevant to present day international realities.

One of the advantages of realism is that it is capable of providing practical solutions to a number of major issues confronting the international community today. This includes the ICC and AU's seeming tensions in the international front (Burchill, 2005). In other words, realism helps us understand why individual states and their political leadership make certain pronouncements regarding the relationship between the two institutions. For example, the decision by the Kenyan government to call for the country's withdrawal from the ICC was informed by the realist thinking that the interests of Kenya were not served by the ICC. While it is true that the ICC is an institution and not a state, the logic remains the same that national interests guide states/governments in making certain decisions. In the same vein, when a country like Botswana decides to uphold the view that it will abide by the rules set out in the Rome Statute even if other African countries are opposed to that idea, it is propelled by realism to make such a pronouncement. In other words, Botswana is primarily concerned about its own political image internationally than that of the AU as an institution. In a way, this is not surprising. In as much as African countries work as a collective through the AU, international relations are forged by individual countries. In the case of the ICC, Botswana joined as an individual country, not as a continental body. The same applies to Kenya and all other African countries that signed the Rome Statute.

Realism is also regarded as one of the most influential theories among the IR approaches, although it is also regarded as problematic in many respects. However three shortcomings of this paradigm are particularly significant to note as enumerated by some scholars. These are: core misconceptions on power, state and state behavior; problematic perception of realists on the nature of the international system, based on some core concepts such as anarchy, balance of power, self-help and survival (Morgenthau, March 21, 2013). One of the central problems of explaining the effectiveness of the ICC is that not all states can be expected to cooperate with the Office of the Prosecutor of The Hague-based court. While such uncertainty involves primarily the interests of non-State Parties, it is not entirely clear as to how territorial States Parties will seek to maximize their interests in their dealings with the Court.

The present chapter addresses this issue by focusing on the relationship between the institutional effectiveness of the ICC and the interests of State Parties, under the AU in this case. A key issue examined is the maximization of interests of these states regarding the ICC prosecutorial discretion, and the problem that this raises for full cooperation. If the theory of institutionalism were to be used, then an institution like the AU would immediately take center-

stage. However, given that it is not the AU that signed the Rome Statute, the importance of the AU in the debate is reduced to a bare minimum; individual states matter.

African states believe that it cannot be right that an international institution such as the ICC can dominate and take decisions for them as that supersedes their supposed domination and importance in the international system. The international scene is still without a world government and there seems little reason to suppose that one will appear in the near future. As a result, the international system is anarchical and security must be the dominant goal of any state as realists believe. The realists do not deny that there may be other forms of international behaviour such as trade that may occur. But they regard these as subordinate to the issue of military power and security. In other words, even if the ICC matters in terms of ensuring that international order is maintained, that democratic processes are followed and that the international justice system is respected, realism espouses the view that all these things should be determined by states not institutions.

There are basic tenets of realism that we need to take into consideration at this point. They include the fact that States are the dominant actors in the international system, that states pursue power by trying to get more powerful positions at the expense of rivals and by defending themselves against encroachments of rivals. As the relationships of states with each other are dependant entirely on their power relationships with each other, they have nothing to do with the internal structure of the state or the type of regime embraced by that state. Internal and external politics are therefore separate and should be kept that way. In other words, if the ICC represents external power and politics, its decisions should not temper with internal arrangements of individual states. Whenever internal national sovereignty is under threat, realism dictates that state power should prevail over institutional power. It is this logic that the AU needs to appreciate in its engagement with the ICC. While it is true that the AU represents all its African member states, the reality is that those states and those states alone can decide either to remain within the ICC as Botswana did or pull out as Kenya decided to do.

Realism theory is relevant to the examination of the relationship between the ICC and Africa in the sense that the present study seeks to investigate the power dynamics between the ICC and the AU taking into consideration the powers vested in individual African states. The battle between the two bodies is about power to take decisions and this has led to the two important international institutions becoming rivals due to obvious differences. Realism provides answers as to why states behave in the way they do at an international level. As such, this theory helps

us understand why the two institutions seem to compete for supremacy in global politics. Realism also shows how African states want to protect their power even at the expense of important international institutions like the ICC.

The realist theory is also relevant to the study simply because this theory suggests that there is anarchy in the International world. The realist theory believes that greater power is the only way for states to secure their sovereignty. This then leads to the belief that states are the main players in international politics than any other structure or institution. The irony is that some of the African states used double standard. On the one hand they assiduously strive to protect their sovereignty and do not want any institution (in this case the ICC) to interfere in their internal affairs. On the other hand, the very same African countries allow another institution (the AU) to determine their fate and decide on their behalf. This is ironic. The realist theory holds the view that events in the world follow one basic system, a Hobbesian system where everyone must be viewed as a threat and the only way to survive is to gain more power than your rivals (Holsti, 1992). Within this context, a question arises, when claiming more power than the ICC do African states not also give their power away to the AU? If this is the case, how does the Hobbesian system apply in this context? This is one of the most intriguing questions.

According to Rourke (1998), realism holds the view that world politics is driven by competitive self-interest. He argues that the decisive dynamic among countries is a struggle for power, in an effort by each to preserve or improve its military security and economic welfare in competition with other countries. For the purpose of this study, the theory of realism was looked at and applied given the power dynamics involved in the study. As mentioned earlier, realism has a long history and is therefore one of the oldest theories of international relations. It emerged in the years surrounding World War two (1939-1945) as the dominant theory in the developing academic discipline of the International Relations scholarship. Realists also believe that greater power is the only way for states to secure their sovereignty, and this leads to the belief that states are the main players in international politics because the system discourages individuality in favor of these types of power struggles. Central to realists is the belief that power must be defined in military terms and stronger military power will lead states to what realists believe are their ultimate interests either a hegemon for offensive realists or balance of two powerful states for defensive realists. This for realists is the ultimate goal because of the belief that states view politics with an eye to gaining more power than their competition in order to secure their safety.

As the realist theory evolved, it split into two schools of thought based primarily on different views of the root causes of conflict. Classic Realism is associated with Hans Morgenthau and other realists who are pessimistic about human nature. As one realist put it, “The sad fact is that international politics has always been ruthless and dangerous business and it is likely to remain that way” (Mearshumer, 2001:2). This arm of realism is discussed below.

3.2.1.1 Classical realism

Classical realism as an arm of realism theory argues that all states seek power no matter what. It also goes on to claim that states seek to increase their power in order to decrease the power of their enemies. Furthermore, it argues that everything states do is in the name of amassing power. States see other powerful states as rivals because power, when it is not in your hands, is threatening. People are greedy, insecure, and aggressive, so the states they govern will have those same characteristics (Lebow, (2001). This doesn't mean war, however. Although there can be peace, it is however based on a balance of power the big players in the international systems are roughly equal in power resources so that no one thinks they can win a war. If you don't think you can win a war, you generally don't start one. The US and USSR were rivals in the cold war because they were the two most powerful states after WW II. However, they were both wary of each other's power and this led to them becoming enemies. But they did not go to war because they were roughly equal in power (Vasquez, 1998). According to this arm of realism, once the state loses its power, it has no justification to exist anymore because power is accompanied by the ability to protect. If the state can no longer protect its citizens, it might as well cease to exist.

In the context of this study, both individual states and the AU subscribe to this notion. For example, if countries like Kenya, Sudan, Liberia, DRC, Central African Republic, Uganda, Rwanda, etc., cannot wield power and determine their fate because such power has gone to the ICC, what would be the justification for their continued existence? In a similar vein, the AU's decision to urge its member states to pull out of the ICC is informed by the same logic. The argument is that power should reside with the AU not the ICC.

3.2.1.2 Neo-realism

This system level theory argues all of what classical realism does. But it sees the cause of all the power struggles and rivalries not as a function of the nature of states, but as a function of the nature of the international system within which individual states operate. States are out there alone and there is no world government, no one looking out for states, no rules that can't be easily broken. The world is anarchy and states do what they can get away with to gain power and they do what they must to protect themselves. Power creates rivalry because it is threatening by its nature. If some other state is more powerful than your state, you have no way to protect yourself but to defend yourself or attack your rival first. A neorealist might say the cold war was caused by the fact that there were only two powerful states that survived WW II. Since there was no world government or rules of behavior to restrain the rivalry it became the cold war (Chiaromonte, 1953).

We can see that this arm of realism is relevant to the present study. The idea that states will do anything they can in order to gain power is relevant here. When the ICC summoned leaders like President Al-Bashir, President Kenyatta (and his deputy Ruto), President Taylor and others, all avenues had to be explored as last-ditch attempts to avoid prosecution and retain the power and integrity of the states concerned. Similarly, by having a Special Summit to decide not to cooperate with the ICC the AU was also subscribing to this arm of realism.

3.2.1.3 Neo-classical realism

Neo-classical realism accepts all of the above about power rivalries, but it suggests that state characteristics (state level variables) play a large role in the behavior of states. States don't just seek power and they don't just fear other powerful states, there are reasons that states seek power and there are also reasons that states fear other states. It's a sort of combination of classical and neo-realism that factors in both system level and state level variables. For example, a neo-classical realist might look at the cold war and say that the differences in ideology between the US and USSR was a factor in the US-USSR rivalry that exacerbated the tendency for two powerful states to form rivalries (Rose, 1998).

In the context of this study, the issues discussed above as motivating factors behind the decisions of individual African states and those of the AU are applicable to this arm of realism. At an institutional level, the rivalry between the ICC and the AU could be likened to the state-

to-state rivalry which prevailed between the US and the USSR. For these reasons, while the ICC and the AU are institutions and not states, the realist theory which emphasizes state power is the most appropriate in this study. The theory enables us to better understand why certain decisions have been taken by African countries when dealing with the ICC. Importantly, it is this theory that enables us to identify inconsistencies and at times lack of understanding by the African leadership on how international politics and global institutions operate. This is the educative role of the realism theory.

3.3 Chapter summary

This chapter covered a myriad of issues such as providing a clear perspective on the relationship between Africa and the ICC drawing from theories that are relevant to the topic of this thesis. A theory such realism provided a conceptual framework upon which international relations can be analyzed. Realism and other arms of this theory such as Classical realism, neo realism and Neo classical realism gave sense of the international system and clarified as to why states (those that are physically located in Africa in this case) and international institutions (such as the ICC) behave the way they do in the international system. Realism was deemed to be a relevant theory in this study given its characteristic traits. For example, it has been shown above that under realism each state wants to amass power and is primarily concerned about national interests. Within this framework, African countries feel that the ICC tempers with their sovereignty by taking away some of their power. Realism thus lands itself as a relevant theory in the sense that it emphasizes power and control. The other arms of realism have been included and discussed in this chapter simply to give more meaning and substance to the chosen theoretical framework. Now that this goal has been achieved, the dissertation will now move further.

The next chapter of this dissertation will focus more specifically on methodology that was followed in collecting both empirical and secondary data for this study. The chapter will basically outline the overall research design or methodology of the study, which deals with the relationship between the ICC and the AU. Included in the discussion will be the steps that were taken in conducting the study. Any problems experienced during the data collection process will be highlighted and information provided on how such problems and challenges were addressed or resolved.

CHAPTER 4

RESEARCH METHODOLOGY

4.1 Introduction

Now that the theoretical framework which guided this study has been explicated above and the reasons provided for choosing the theory, we can safely move on to discuss how the study was carried out. This takes us to the research methodology chapter of this dissertation –which is yet another important standard chapter in research in general and in academic dissertations in particular as per the standard conventional practice.

From a general perspective, the research method is an important strategy of enquiry, which basically moves from underlying assumptions to research design, and data collection (Myers, 2009). Although there are other distinctions in the research modes, the most common classification of research methods is into the qualitative and quantitative paradigms – each of which has its advantages and disadvantages thus meaning that they should be used advisedly by any researcher. Occasionally, research also uses the mixed methods approach or triangulation.

This chapter will primarily outline the overall research design or methodology of the study, which deals with the relationship between the International Criminal Court (ICC) and Africa (AU). This chapter includes a chronological list of steps that were taken in conducting the study, from data collection, through data analyses and packaging of the information for presentation in the form of a discussion in the next chapter. It is important to mention that all research is based on some underlying philosophical assumptions about what constitutes valid research and which research methods are appropriate for the development of knowledge in a given study. This chapter presents the research design and specific procedures used in conducting the study.

From the outset, it is important to mention that research methodology is critical in any study, in the sense that it spells out how the study has been carried out. In the initial phase it constitutes the roadmap to be followed by the researcher(s) before the research is conducted or the

roadmap that was followed when the research has already been conducted. As such, the study on the International Criminal Court (ICC) and Africa leaned more towards the qualitative paradigm, which is one of the most common approaches in social science research. According to Newman (2011), Qualitative researchers collect data in the form of written or spoken language or in the form of observations that are recorded in language and analyse the data by identifying and categorizing themes (Terre Blanche, 1999). In a qualitative study, researchers rely more on the principles from interpretative or critical science (Neuman, 2011). It is for this reason, therefore, that this approach was used in examining the relationship between the ICC and Africa. The approach was deemed relevant due to the nature of the study and the research methods that were available to and considered feasible for the researcher.

The data collection method was two-pronged. This means that most of the qualitative data were obtained from written sources (books, journal articles, newspapers, AU documents, etc.) while others were obtained empirically. Empirical qualitative data was sourced using purposive non-probability sampling in selecting informants considered knowledgeable on the theme of the study. In other words, information was obtained from purposively selected informants based on their understanding of the issue at hand. Information from these purposively selected informants was solicited through survey questionnaires which were emailed to them.

The decision to use this method of data collection was informed by two reasons. Firstly, it is the fact that as a researcher I knew that I was going to experience financial and time constraints. Secondly, I knew beforehand that some of the potential informants have tight schedules and that this would make it impossible to set up oral interviews with them to discuss the issues on the study verbally. The list of the informants used in the study included: the African Union officials, ICC and International Relations analysts and scholars who have knowledge about the subject under investigation. Preliminary arrangements were made with some of these potential informants while the research proposal was still being put together. The aim was to establish the possibility of involving them in the study so that if this proved to be impossible other data collection methods could be considered on time to avoid any delay in finishing this dissertation. Formal arrangements were then made once the proposal had been dully approved by the School of Social Science's Research Higher Degrees Committee.

4.2 Research design

Research design can be thought of as the logic or master plan of a research that throws light on how the study is to be conducted. It shows how all of the major parts of the research study, the samples or groups, measures, treatment or progress etc., work together in an attempt to address the research questions. According to Mouton (1996: 175) the research design serves to plan, structure and execute the research to maximize the validity of the findings. It gives direction from the underlying philosophical assumptions to research design and data collection. Yin (2003) states that a research design is an action plan for getting from “here to there”, where here may be defined as the initial set of questions to be answered by the study to be embarked upon.

The research design for this study which sought to examine the relationship between Africa and the ICC is a descriptive and interpretive paradigm; this is a study that is analyzed largely through qualitative methods with a small quantitative component. In descriptive and interpretive studies, the researcher analyses, interprets and theorizes about the phenomenon against the backdrop of a theoretical framework.

This project was a qualitative research study in the form of interviews (in-depth interviews). The function of research design is to make sure that the evidence obtained enables you as a researcher to effectively address the research problem logically and as unambiguously as possible. In social sciences research, obtaining information that is relevant to the research problem generally entails specifying the type of evidence needed to test a theory, to evaluate a program, or to accurately describe and assess meaning related to an observable phenomenon. The research design refers to the overall strategy that you as a researcher choose to integrate the different components of the study in a coherent and logical manner, ensuring that you will effectively address the research problem. It constitutes the blueprint for the collection, measurement, and analysis of data. (De Vaus, 2006).

A qualitative research methodology was selected as it would enable one to interact directly with those who understand international relations and international law and they would be able to share their views on the subject. Many authors and scholars alike such as Domegon and Fleming (2007) as well as Denzin and Lincoln (2003) argue that human learning is best researched by using qualitative data. In selecting research methodology, Guba (1981:76)

argues that it is correct to select a paradigm whose assumptions are best met by phenomena being investigated. It is also generally recognized that qualitative researchers are concerned with processes rather than the outcomes or products. Price (2002) argues that qualitative approaches are becoming more widely used as analysis methods and improve how people search for better ways of gathering data about the problem.

4.3 Sample description

The research design for this study is a descriptive and interpretive case study that is analyzed through qualitative methods. This study was conducted amongst those in the know when it comes to international relations matters, Africa and International law in general. It became necessary to use informants who are knowledgeable on these matters so that relevant and useful information could be solicited from them and be used to make sense of the developments that are currently underway as far as the ICC and the AU are concerned.

In this case, as a researcher, I had prior knowledge of the subjects and had a clear picture about the information I was looking for. Therefore, the purposive (non-probability) sampling method was used since it proved relevant to the study based on the information presented above. However, one cannot mention the sample size because this was not the intention of the study to use a specific sample. As mentioned earlier, the informants were purposively selected based on their knowledge on the subject matter relying on the snowball sampling method.

When the study was initially conceptualized, the sample size was estimated to be between 7 and 10 participants or informants who are well informed about the study being conducted. At that stage it was envisaged that participants would be selected according to their knowledge of the subject matter, availability as well as their willingness to participate in the study through self-administered questionnaires (Durheim and Painter, 2006). This sampling method was going to be used until the saturation point was reached whereby no new information was forthcoming from the informants. However, this did not go according to plan as some of the intended informants could not return the answered questionnaires for whatever reason. However, the study could not be stopped for this reason, although the initial sample size had to change from the origin anticipated number to five participants and not the intended ten.

In a nutshell, sampling is the selection of research participants from an entire population. It involves decisions about which people, settings, events, behaviors and social processes to observe. In terms of who will be sampled in a study this is influenced by the unit of analysis. A researcher must also justify why a particular sampling strategy suits that particular research study (Terre Blanche, et al, 1999). I was also guided by the same principles when I selected my sample for this study. I had to use five informants who managed to participate. They are all academics and have knowledge of the subject matters discussed in this dissertation. Importantly, all the informants were happy to disclose their identity because they deemed the subject of the thesis to be valuable but not sensitive. These informants were Professor Tinyiko Maluleke who is a respected academic and well known social and political commentator and Executive Director Research and Innovation at the University of Pretoria, Dr Siphamandla Zondi who is a Foreign policy analyst and the Director for the Institute for Global Dialogue in South Africa, Nkosikhulule Nyembezi who is a researcher, Policy Analyst and Human Rights Activist, Ralph Mathekga who is the Managing Director at Clear content Research and Consulting, an Academic and a Political scientists as well as a Public Policy analyst, as well as Billy Mzamo who is an International Relations post-graduate student and a consultant for political parties.

I used these informants simply because of their understanding of the topic and some of them have published on the issue and they all have strong views about international relations matters.

4.4 Research Instruments

The research method that one employed in order to collect data included instruments such as survey questionnaires, case studies, newspaper articles and journals. One also got the views of analysts who are familiar with the subject, others have commented quite extensively on it, done research and even published. Thus secondary and primary data were collected using these methods. The latter (primary data collection) was done through self-administered questionnaires. As for data collection method, questionnaires or survey questions were sent via email to International Relations analysts who have knowledge on the subject. Their participation was voluntary. The questionnaire was developed by myself as a researcher bearing in mind the research questions I intended to answer. All questionnaires were written in English because the informants converse easily in that language. I then emailed the questionnaire to the informants who answered and returned them to me electronically. All the

questions were based on the topic which is the relationship between the ICC and Africa. As mentioned earlier, all five questionnaires were returned with the appropriate answers to enable me to do the analysis.

4.5 Data collection and ethical procedures

Data are the basic material with which researchers work. Data comes in part from observation and can take the form of numbers or language. It is important that the researcher has sound data to analyse and interpret, in order to draw a valid conclusion(s) from a research study. By sound data, it is meant that data should capture the meaning of what the researcher is observing (Terre Blanche, 1999). It would be foolhardy to collect tons of data that have no relevance to the study or data that do not answer the research questions. As a researcher I was guided by this philosophy when I formulated the questions. In the end, the responses I received from the informants were very useful and enabled me to make sense of the issues under investigation.

When the questionnaires were sent out to the informants, ethical considerations were adhered to. For example, the informants were made aware that their participation was voluntary. They were also assured that the information provided would be used for the purposes of the study only. Once this was done, the aims and objectives of the study were clearly outlined to the participants. In a nutshell, the informants participated in the study having been made aware of what they were participating in. Fortunately, all the informants are public figures who comment on the issues covered in the study on a regular basis. As such, even though an option was given to them to provide their answers anonymously in line with ethical practice, they were all comfortable with their identity being disclosed, arguing that there was nothing secret about their views since they share them with the public anyway in the media and through their writings. Therefore, the names used in the reports are the informants' real names as per their consent.

Once received, the responses were transcribed verbatim to capture the verbal data for use during later analysis. The data has been kept in a secure environment (as promised in the Ethics Form during the proposal stage of the study). Ethical consent was sought from the Humanities and Social Sciences Research Ethics committee. Transparency was adhered to. As mentioned above, the issue of confidentiality and anonymity did not arise because the informants had no

objection to their identities being revealed. This was due to the fact that they are all public figures who comment on the issues addressed in the study on a regular basis. However, it was still necessary to obtain their informed consent. This was done by giving them the informed consent form to sign.

Silverman (2000, p.201) reminds researchers that they should invariably remember that while they are doing their research in respective studies, they are in actual fact entering the private spaces of their participants. This then raises several ethical issues that should be addressed during and after the research has been conducted. As a researcher I was always mindful of this convention practice.

Creswell (2003), states that the researcher has an obligation to respect the rights, needs, values and desires of the informants. Miles and Huberman (1994) list several issues that researchers must consider when analyzing data. They warn researchers to be aware of these and other issues before, during and after the research has been conducted. Some of the issues involve the following:

- Informed consent, which raises the question of whether participants have full knowledge of what is involved in the process
- Harm and risk, is another issue which deals with whether the study can hurt participants or not
- The honesty and trust issue looks at whether the researcher is being truthful in presenting data.
- Privacy, confidentiality and anonymity

It was made clear to the participants that research was for academic purposes only and that their participation in it was absolutely voluntary, and no one was forced to participate. Informants were also told that they could opt out of the study at any stage without any negative consequences.

4.6 Data analysis

In this section, researchers have to report on how they managed, organized, and analyzed data in preparation to write up and present findings of the study. Moreover, they need to spell out how they went on to analyze and interpret the findings. This process of data analysis begins with putting in place a plan to manage the large volume of data already collected and reducing it in a meaningful way (Bloomberg & Volpe, 2008). This is the basic method of dealing with obtained data regardless of whether such data was qualitative or quantitative in nature.

Data analysis issues should be carefully considered when designing a study, since the aim of data analysis is to transform information into an answer to the original research question(s) bearing in mind the objectives of the study. Careful consideration of data analysis strategies ensures that the design is coherent, as the researcher matches the analysis to a particular type of data, to the purpose of the research and to the research paradigm which was employed in the study (Terre Blanche, 1999).

In simple terms, data analysis refers to organizing, integrating, and examining collected data while searching for relationships and patterns which emerge among the specific details. Data analysis also allows for the improvement of understanding, expansion of the theory as well as the advancement of knowledge. In this particular study, qualitative data analysis was used to understand the nature of the relationship between the ICC and Africa (specifically the AU). Different approaches were used when implementing qualitative data analysis. These mainly included creating themes since there was no statistical data to be analysed and identifying similarities and differences in the responses provided by the informants.

Interpretive researchers attempt to derive their data through direct interaction with the phenomenon being studied. One of the important aspects of data analysis in a qualitative study is the search for meaning through direct interpretation of what is observed by themselves as well as what is experienced and reported by the subjects (Neuman, 2011). These guiding assumptions were followed in the present study. Collected data were interpreted in line with the research questions and objectives in order to establish the meaning of what such data created.

Bogdan and Bi Klein (2003) define qualitative data analysis as “working with the data, organizing them, breaking them into manageable limits, coding them, synthesizing them, and searching for patterns” The aim of analysing qualitative data is to discover patterns, concepts, themes and meanings. The process of data analysis begins with the categorization and organization of data in search for patterns, critical themes and meanings that emerge from the data. A process sometimes referred to as “open coding” (Strauss and Corbin, 1990) is commonly employed whereby the researcher describes and names the conceptual categories into which the phenomena observed would be grouped. The interpretative social science approach was used in this study, specifically the interpretative phenomenological analysis.

The aim of the interpretative approach is to explore in detail how participants are making sense of their personal and social world. In essence, interpretative analysis emphasizes the meanings’ particular experiences for the participants. This approach is phenomenological because it involves detailed examination of the participants’ world; it attempts to explore personal experience and is concerned with an individual’s personal perception or account of an object or event, instead of an attempt to produce an objective statement of the event. (Smith and Osborn, 2007). In this study, this approach emphasizes the participants’ (scholars, authors and analysts, etc.) perceptions, feelings and experiences as the most important objects of study. It can further be stated that the interpretative approach is related to phenomenology in that it focuses on the human experience subjectively (Guest, 2012). For example, in the context of the present study, each of the informants responded to the questionnaire by reflecting on individual subjective experience of the issues under investigation. Where similarity of experiences was witnessed, it was a coincidence than planned occurrence.

The interpretative approach also emphasizes the active role of the researcher in the research process, which is a dynamic one. Since this is a qualitative research, a thematic approach was used to analyze data given that it emphasizes the focus on themes within data. Particular themes such as academic background of informants, their experience and particular focus on politics and international relations were analyzed. This was the case simply because a theme captures something important about the data regarding research questions, and represents some level of patterned response or meaning within the data to ensure that the research report flows nicely.

4.7 Chapter Summary

This chapter has outlined the research paradigm, research methodologies, strategies and design used in the study. Included in the discussion were procedures followed to collect data, the profiles of the participants, data collection tools, data collection process and methods of data analysis, as well as data credibility issues. Importantly, the problems encountered during the data collection process were highlighted and some explanations provided on how such problems were resolved or attended to in order to ensure that the study was a success. The issue of ethical considerations was also outlined and information provided on how these ethical issues were adhered to. As mentioned above, the research design for this particular study was descriptive and interpretive in nature. As such, collected data were analysed through the qualitative analytical methods using what would be generally referred to as descriptive statistics. The chapter also described the several stages that were involved in the design, development and execution of this research.

Having explained how data for the study were collected, the next chapter will focus on the findings of the study. In other words, the findings of the study will be presented in the next chapter. An analysis and discussion of the results will also be done, linking them to the research questions and research objectives presented in chapter one. The results dealing with biographic and background information of the respondents by looking at gender, age, experience and qualifications will also be shared so that readers can appreciate the background and experience of each of the informants used in the study. In short, the next chapter deals with the results as obtained from the questionnaire but also links these results with secondary data obtained from books and journal articles. This is done in order to place empirical data within the broader context. The summary and analysis of the results will shed light on what the study has established. This will constitute the contribution made by the present study to knowledge production as is expected of any dissertation from this academic level and beyond. In a nutshell, this dissertation is guided by conventional practice in research. The next chapter is not a deviation from this general focus.

CHAPTER 5

RESEARCH RESULTS, ANALYSIS AND DISCUSSION

5.1 Introduction

The previous chapter outlined the methodology of the study, which deals with the relationship between the ICC and Africa (the AU). Included in the chapter was a discussion on the steps that were taken in conducting this study, from data collection, through data analysis and packaging for presentation in the form of this chapter. The previous chapter also presented the research design and specific procedures that were used in conducting the study. The problems encountered during the data collection process were highlighted and information provided on how those problems were addressed so that the study could still be a success. Through this exercise, the reader was made aware of how data for this study was collected. The same data will now be presented in the present chapter.

This particular chapter then presents, analyses, and discusses the results obtained from various sources as outlined in chapter 4. In other words this chapter presents empirical data blended with secondary information obtained from books, journal articles, newspapers and other sources. The results deal with biographic information of the respondents by looking at their gender, age bracket, experience and qualifications. It also deals with the analysis and discussion of data from the questionnaire, and will also present a summary of the results.

In so far as demographic data is concerned, the biographic and background information of the informants is presented and analyzed in order to show the distribution of the respondents by their gender, age bracket, experience and qualifications. This information is important to the study simply because it helps the reader to understand some relevant issues that may have a bearing on the analysis. The majority of the respondents were male between the ages of 30 and 55. The absence of women amongst the respondents shows the gender imbalance and that perhaps women scholars dealing with this particular topic are not exposed enough for them to be easily noticed by the general public and by relevant institutions such as the South African Broadcasting Corporation (SABC) which provides a platform for almost all the male informants used in this study. Most respondents in this particular instance are academics and hold important positions in society.

The participants had divergent views on this topic regarding the relationship between the International Criminal Court and Africa. The participants gave different responses on this issue. The Questionnaires were emailed to eight participants, all of whom are males. They were Africans between the ages of 30 and 55. Five of the eight participants responded, while the other three did not respond to the questionnaires emailed to them. This was despite their earlier commitment to do so when they were contacted before the study commenced. The questionnaires were also sent to the African Union via the office of the African Union Commission Chair, Dr Nkosazana Zuma. Attempts to reach the ICC were made through emails but in vain. So, the results presented below were obtained from the five informants who responded to the questionnaire. Those who did not respond were automatically excluded from the study.

5.2 Results

The results presented and discussed in this chapter were obtained from the questionnaires that were sent to various respondents. As mentioned earlier, the issues that are under discussion here are not sensitive; hence the informants gave permission for their names to be used. The questions on the questionnaire were the following.

1. There have been calls for Africa to pull out of the ICC, would this be in Africa's best interest?
2. Do you share the view that the ICC is targeting African countries?
3. Is the ICC treating war crimes in other continents the same way as in Africa?
4. Many observers and critics of the ICC argue that the Court has focused entirely on Africa; some even go as far as labeling the ICC as a colonialist tool that is biased against Africans, what do you make of this?
5. The international community has played a leading role in the fight against impunity especially in Africa over the years. The ICC has ensured that it takes care of prosecution of abusers of human rights in countries such as Liberia, Rwanda and Sierra Leone, what is the fuss about now?
6. Africa is always at the forefront in crimes against humanity, can she cope without the involvement of important international institutions such as the ICC?

7. If the International criminal justice in Africa is undermined, shouldn't then the ICC intervene in order to hold alleged perpetrators accountable?
8. How will this rocky relationship between the ICC and Africa impact on peace and stability in the continent?
9. Former United Nation Secretary General Kofi Annan says that it will be a badge of shame if the African Union pulls out of the Rome Statute which established the International Criminal Court, what do you make of this view?
10. Is Africa ready to establish its own court of justice?
11. Would that move by the African Union be a sign of disrespect for the rule of law?

As mentioned above, five informants participated in this study, and they are all academics and have knowledge of the subject matter. They are Professor Tinyiko Maluleke who is a respected academic and well known social and political commentator and Executive Director Research and Innovation at the University of Pretoria; Dr Siphamandla Zondi who is a Foreign policy analyst and the Director for the Institute for Global Dialogue; Nkosikhulule Nyembezi who is a researcher, Policy Analyst and Human Rights Activist; Ralph Mathekga who is the Managing Director at Clear Content Research and Consulting, an Academic and a Political Scientists as well as a Public Policy Analyst; as well as Billy Mzamo who is an International Relations post graduate student and a consultant for political parties.

Firstly, on the question regarding calls for Africa to pull out of the ICC, Professor Tinyiko Maluleke shared his views on the relationship between the ICC and Africa, especially on calls for Africa to pull out of the ICC. He argued that Africa cannot pull out of the ICC as Africa did not sign up to the ICC conventions in the first place. Individual countries did and did so as countries not as a continent or the AU. He reminds us that it is not a crime for a country not to sign up or even to pull out. The USA for example did not sign up for membership of the Rome Statute, hence each country must determine whether it would be in its own national interest to join, not to join or to pull out, depending on how each country defines its national interest.

His counterpart Ralph Mathekga, agrees with Maluleke. He does not think that this will be a good step for Africa to pull out of the ICC. His argument is that Africa does not have its own continental instrument equivalent to the ICC, and believes that there is a need for Africa to continue to subscribe to and abide by the ICC in the interest of justice, law and order.

Dr Siphamandla Zondi too believes that this call for Africa to pull out of the ICC is unjustified, simply because where the calls are designed to enable Africa to resume its responsibility to discharge justice and deal with problems taking place in Africa through more effective national and regional justice mechanisms, the call is justified. He says the very idea of the ICC exists because of failure to deal with justice questions adequately within the continent. He responds: ‘The continent has already decided to strengthen the African Court of Human and People’s Rights in Arusha precisely to enable it to try the cases of crimes against humanity, crimes of aggression and so forth that currently are handed over to the ICC. It is also seeking to discourage African governments for referring cases to the ICC through the Security Council whose key members shun the ICC anyway’.

There seems to be general consensus that it will not be in Africa’s interest to pull out of the ICC since the continent is part of the global Community and shares problems and challenges facing the world which require cooperation by states at both regional and international level through institutions such as the ICC. Nkosikhulule Nyembezi and Billy Mzamo argue that the ICC forms part of an extremely vital intergovernmental institution that is meant to ensure that heads of states and other individuals are held accountable and brought before the criminal justice system for crimes against humanity and war crimes. Thus it is in the best interests of Africa to remain part of it and, instead, lobby for greater power and influence as the continent is struggling to maintain peace and uphold basic human rights.

Secondly, on the second question regarding concerns by African leaders that the continent is being targeted by the ICC, Maluleke doesn’t think this is the case. ‘I don’t know about targeting. It is a fact that more African heads of state have been tried at the ICC than heads of state of any other continent. This is a fact - and I rather we dealt with this fact, what it reveals and what it implies, rather than speculate about targeting of African countries. In any case, to deal with targeting allegation, we would have to tally the number of country heads from Africa, work out the genesis of each indictment/complainant and then check also the numbers from other countries’, said Maluleke. Mathekga on the other hand says the concern that the ICC is targeting Africa is based on the observation that the majority of individuals who have appeared before the court and have been prosecuted are Africans. The reality on the other hand is that Africa is still a stage for some of the atrocities characterized as crimes against humanity. ‘As long as Africa continues to be a stage for such, it would follow that African leaders presumably at the

forefront of such atrocities would have to appear before court. I think that Western leaders who might have committed atrocities also need to be hauled at the ICC, so that the court can be seen to be fair’.

Dr Zondi agrees with Mathekga’s observation and he says that the ICC appears to be targeting African countries merely because all the cases it has processed involve African actors. His view is that the court could have taken up cases in other parts of the world including the West to ensure that it is seen to be objective and non-partisan. He argues that it chose easy targets mainly because it wanted to avert major political ramifications of trying figures from big countries like the USA. Now it is paying the price as weaker countries of Africa decide to reconsider their cooperation with the ICC and take decisions to pull back from using it in favour of their own systems. ‘Given the painful history of colonization and enslavement by Europeans in the last five hundred years, it was unwise for the ICC to allow itself to be perceived to be bias by not actively seeking to appear even handed. It is immaterial that it is African countries that have sometimes referred cases to the ICC if the ICC itself cannot show that it has seriously looked beyond the African litigants and African culprits’ said Zondi.

Nyembezi doesn’t share the view that the ICC is targeting African countries. “I do not share this view. Experience so far has shown that, in most cases, it was Africans that sought justice from the ICC, when courts in their own countries had failed them. In four of the cases on Africa before the court, African leaders themselves made the referral to the ICC. In two others – Darfur and more recently Libya – it was the United Nations Security Council, and not the court, which initiated proceedings’. For him, the most important thing is that the ICC is attending to cases brought before it by the aggrieved parties, and in the case of Africa considerable time and resources of the ICC have been invested in cases involving Africa. It remains to be seen whether war crimes committed in other continents will receive appropriate attention as should be the case.

Billy believes that Africa is still slightly behind in terms of practicing and guarding key democratic principles such as human rights, free and fair elections etc. He argues that because of this, many unjust practices emerge in the continent consequently making it the supreme target. However foreign policy decisions of certain countries such as the US have resulted in massive human rights violations (i.e. War on Terror) and surprisingly the international community including the ICC did not follow this. ‘This may to a certain extent seem as if

certain powerful countries are exempted from accountability and tribunal but states voluntarily choose to become member states and those who choose not to may appear unchallenged,' said Billy.

Thirdly, while many African leaders argue that the ICC is not treating war crimes in other continents the same way as in Africa, Maluleke has a different view. "It must be remembered that the ICC institution is itself a relatively young one. We must be careful not to fall into a trap here. The trap is that the question is asking: whose criminals are more deserving of prosecution? This is an inane question. All criminals must be prosecuted". The international community has played a leading role in the fight against impunity, especially in Africa over the years. The ICC has ensured that it takes care of prosecution of abusers of human rights in countries such as Liberia, Rwanda and Sierra Leone. But what is the fuss about now? Maluleke argues that it is important to look at the work of either its predecessors or similar bodies over the past few years given the novelty of the ICC. He opines: "Your basic assumption should be that all criminals and abusers of human rights should be prosecuted. If you look at the Geneva Convention and seek out if and when its precepts have been violated whether it is by Israeli or British leaders". On whether Africa can cope without the involvement of important international institutions such as the ICC, Maluleke says some of the worst human rights abuses in the world are reported from the DRC, Sudan, Somalia, Syria, Palestine, Gaza and Australia, and it is important not to generalize and essentialise human rights abuses.

Mathekga believes that war crimes that might have been committed by western countries seem not to end at the ICC. He makes an example of some of the atrocities committed by the CIA and listed in the CIA torture report, and those particular atrocities are dealt with in those countries through war tribunals. "It would be fair if the ICC took over those cases to ensure they are dealt with fairly and thoroughly and on an open international stage such as the ICC." However, Mathekga says it is incorrect to say the court has focused only on Africa. He argues that there are individuals from former Yugoslavia (Bosnia, Croatia, Serbia, and Montenegro, for example) who have been brought before the ICC. "Indeed the ICC has not indicted leaders from western democracies, but it is inaccurate to say the court has only targeted leaders from Africa."

Dr Zondi argues that the war crimes, terrible ones committed by major western powers in Iraq and Afghanistan in the early 2000s and more recently in Libya and Syria go without even an inkling that the ICC might at least investigate. “Then in the past 3 years, Israel has committed heinous crimes on Palestinian children and women in the full glare of the mass media, but the ICC has still not been moved enough until pressure recently forced them to explore an investigation”. For him, it seems clear that the ICC has allowed western powers too to enthusiastically encourage it to pursue their own enemies with vigour thus turning itself into an instrument of global imperial designs.

Many observers and critics of the ICC argue that, the Court has focused entirely on Africa; some even go as far as labeling the ICC as a colonialist tool that is biased against Africans. Nyembezi argues that if African victims can get justice at home and we have credible courts and they do take action there'll be no need for the ICC as it deals with cases brought before it or calls for it to initiate investigations on violations of laws under its jurisdiction. “What would be appreciated is for African countries to own the ICC as an international institution to fight injustice, for African countries to promote human rights and act against abuses instead of blaming the ICC”. For example, it was wise for the African Union to choose 2008 to highlight the association between peace and the realization of human rights in a manner that serves as a good reminder for people in the continent of the challenges we are confronted with in demanding accountability for violations of human rights to dignity and security by governments, rebel groups, and other actors on the continent.

Billy argued that wars are not the same, and for the ICC to pursue each case it must follow a certain criteria. Each incident is unique and therefore requires an exclusive response and as such the ICC may not necessarily respond in a uniformly manner. Africa has been characterized by massive crimes against humanity from Ugandan rebel leader Joseph Kony, Kenyan president Uhuru Kenyatta and Libyan leader Muammar Gaddafi. The crimes committed by these individuals are enormous.

Fourthly, asked if the International criminal justice in Africa is undermined and shouldn't then the ICC intervene in order to hold alleged perpetrators accountable, Maluleke said “You must remember that the ICC is an additional instrument not a replacement of national instruments

of criminal justice. The first ports of call are the national courts of each country and ultimately the citizens of each country.” He also argues that the ICC is there to assist when national courts and citizens cannot help themselves. So how about the strengthening of local courts and civil society?

Others have been arguing that the international community has played a leading role in the fight against impunity especially in Africa over the years. To this, Mathekga responded: “My sense however that is there are still powerful African leaders who prefer to be left alone to do as they wish, on the pretext that Africans should be allowed to bring about African solutions. The reality however is that the local justice system in Africa is often subdued to political pressure by the ruling elites, hence their insistence that the ICC need to be booted out of Africa. It is a disingenuous argument”, concludes Mathekga who also believes that the ICC will strengthen capacity where needed.

Zondi however agrees that the international community has done a great job to fight impunity in Africa and to arrest the situations in various countries. “They have always worked with African institutions and with great respect. But there has not been an international community behind the ICC, but there has been a community of western states. The international community is the General Assembly of 194 countries, not five Security Council states. That is certainly the problem”. He concludes on this point by saying there is no international community involvement in this case but a few states that cannot constitute a community on their own. Nyembezi also stated that it appears as though politics of expediency are taking precedence over protection and promotion of human rights. While political agendas of the day tend to promote narrow political interests, a human rights agenda is universal and promotes reinforcing and supporting political agendas. Billy argued that Africa is not always on the forefront, particularly the AU; it has proven to be extremely ineffective in dealing with the ever growing problem of wars, human rights violations within the continent. Any form of assistance coming from the international community is at this stage inevitably necessary and that of the ICC as well despite the contending views.

Countries have the flexibility to become member states of the ICC and as such the ICC shall intervene based on this understanding, unless the conditions and the judicial independence of the country is compromised and not in a position to try the perpetrator fairly.

An international response to peacekeeping in the continent is indispensable and any unscrupulous relationship between the two is certainly undesirable at this stage. Any bad blood between the two will delay peacekeeping initiatives and peace building in the continent. It is imperative for both to work hand in hand in order for culprits to be brought to book and be prosecuted if need be. Mathegka said there is no doubt in his mind that African countries need partnership with the global community regarding building peace and stability. This includes also the fight against terrorism on the continent. African countries are also varied in terms of their perspective regarding the ICC. “I think that the relationship between ICC and Africa is not as bad as some make it to be. There are differences, but there is a common commitment to peace and stability.”

Maluleke also disputed Former United Nations Secretary General Kofi Annan’s assertion that should Africa pull out of the Rome Statute which established the ICC it will be a badge of shame. “African countries relate to the ICC individually and many of them approach the ICC for help individually”. However, Mathegka disagrees with Maluleke on this view. “Indeed it would be sad if Africa decided to isolate itself from the ICC. They should rather work on rebuilding the relationship and lobbying for more fairness within the ICC.” But he doesn’t believe that Africa is ready to establish its own court of Justice. “I don’t think so. There has not been demonstration of that. This will require serious collaboration and commitment to peace and stability. It is possible, but there need to be political commitment. Self-sustainability is progress, if Africa can establish its own court and abide by the principles of peace and stability that should be a welcome step,” said Mathegka.

However, Zondi says Kofi Annan must explain when he approves of the fact that African countries alone submit themselves to the judgment of the court when powerful countries in which he now has citizenship do not. “He is too enthusiastic to appear reasonable where his bread is buttered I think. It would have been fair to concede first that there is a problem and then argue that Africans must stay while problems are being fixed.”

According to Nyembezi, this is an understandable view given the fact that African States are signatories of the Rome Statute and many stand to benefit from its provisions. He further states that Africa is ready to establish its own court of justice. However, he says that the readiness must be informed by a commitment to protect and promote human rights as opposed to

protecting perpetrators of human rights violations. “Only an independent court of justice that is adequately resourced, backed by other State institutions can have a meaningful role in administering justice in the continent. That is a prerequisite without which that readiness cannot be confirmed”. On whether it would be a sign of disrespect for the rule of law if Africa were to pull out and create their court, he said it is the purpose and function of that court that will confirm the true intentions for its formation.

On the question of how the seemingly rocky relationship between the ICC and Africa impacts on peace and stability in the continent, Zondi argues that the ICC has had very limited effect on peace and stability in Africa. He says the most effect has come from peace-keeping and peace building efforts with UN sanction which accounts for the end of most wars and conflict and the transition to peaceful states in almost all states we know. For him the ICC has had a negligible effect, “even the argument that it has been using to dissuade wrong doers from acting bad, we can only speculate without evidence”.

Africa is always at the forefront in crimes against humanity, can she cope without the involvement of important international institutions such as the ICC? Zondi responded as follows: “I do not know what it means that Africa has always been at the forefront of crimes against humanity. Does it mean it has been the culprit in committed crimes or that it has been at the forefront in the fight against crimes? I agree with the latter as the record testifies, Africa has voted enthusiastically for all resolutions on international justice in the UN General Assembly and has been quick to join any initiative in this direction”. It was African countries that showed the most enthusiasm with the ICC when the big players were dragging their feet, but it thought this would work with an even hand, not realizing that western powers had other ideas. If the International criminal justice in Africa is undermined, shouldn't then the ICC intervene in order to hold alleged perpetrators accountable? Zondi says this is what the Rome Statute provides for. This has never been a question at all. “African countries have always cooperated. But they are embarrassed to find that they are the only ones that cooperate and not are forcing a change in the behavior or they would too not cooperate”.

Nyembezi said ultimately problems in Africa require African solutions and an inclusive approach to finding and pursuing solutions. Global challenges such as terrorism require employment of international institutions such as the ICC in order to find lasting solutions. Africa needs and will continue to need the ICC in the foreseeable future.

On whether it would be a sign of disrespect for the rule of Law if the African Union were to establish its court of Law, Zondi believes that it should be regarded as a strengthening law. “Africans have been forced by the injustices of the ICC to now do what they should have long time: strengthen regional mechanisms in Africa”, he concluded. Billy doesn’t believe so. “No. Africa must focus on building an effective and capable AU and this body shall consequently be in a position to lead any campaigns of establishing an African driven Court of Justice that would be in line with the international law. Conversely African countries must prove themselves in the international community and seek for ways of influencing and becoming active players in institutions such as the UN’s Security Council and so on”.

Nyembezi states that if African victims can get justice at home and we have credible courts and they do take action there'll be no need for ICC. However, we are still far from that, and hence the support for an active role of the ICC in finding justice and promoting human rights by holding perpetrators of war crimes and other human rights violations accountable.

In so far as how will this relationship between the ICC and Africa impact on dealing with peace and stability in the continent, Nyembezi says that remains to be seen as the contest between those who continue to seek justice from the ICC, when courts in their own countries had failed them, and those who say ICC has no role in resolving cases of human rights violations in the continent. This will also depend on a strong voice of players from all pillars of a democratic state, including opposition parties, pre-press, and vibrant civil society formations. These were the views of the informants on the questions asked.

5.3 DISCUSSION

The results presented above lead to the conclusion that the debate about the relationship between the ICC and Africa should not be confined to interpreting the treaty obligations between the former and the latter. However, it must also and equally address issues of African equity in the global criminal law process. While there is general consensus from the participants that Africa should not pull out of the ICC, the reasons for this argument differ. This also differs with what many African leaders are advocating for. In other words, the different views held by the informants are reminiscent of the views of the African political leadership and their countries; they are not always in agreement on all the issues.

There is a general feeling from all and sundry that it would not be proper for Africa to pull out of the ICC for a number of reasons that have been clearly highlighted. But again there is a feeling amongst the informants that be that as it may, a lot still needs to be done to create a platform for Africa to properly address these issues with the ICC. One critical reason that has been put forward is the fact that African countries signed up voluntarily to the ICC conventions; hence they cannot hold the court at ransom by avoiding necessary prosecutions. It should be the decision of individual countries to pull out if and when they deem fit. There is an agreement that it would not be a good step for Africa to pull out of the ICC in the interest of justice. There is also an outcry of Africa's failure to deal with her problems.

There is also a great sense that Africa should remain part of the global community as the ICC forms part of the vital intergovernmental institutions in the world. While many African leaders are convinced that the ICC is targeting African countries; it is the same picture that informants are painting albeit with certain reservations. They claim that it is a fact that many African heads of states have been tried by the international court than in any other continent, it is important to deal with what are the implications of this, rather than dealing with speculations. On the other hand, there is this perception of African leaders which is based on an observation that the majority of the individuals who have appeared before the court and prosecuted are Africans. This should not be avoided or ignored as it talks to the reality that Africa is still the stage for some atrocities that are characterised by crimes against humanity. The view of the informants is that for this perception to go away, Western leaders who might have committed atrocities also need to be hauled before the court, so that it would be seen as fair.

There is also a general view that Africa is a target of the court. This view is predicated on the fact that the ICC could have taken up cases in other parts of the world including the west to

make sure that it is seen to be objective and non-partisan and yet this has not been the case thus far. But others don't agree with this view, which brings us to the conclusion that there are different perspectives on whether Africa is indeed the target of the ICC or Not.

There is also a general belief held by many authors and commentators that war crimes committed by major western powers go without even an inkling that the ICC might at least investigate them. This perspective is however disputed by others who claim the importance of being careful of not falling into a trap as all criminals must be prosecuted regardless of where they reside or who they are. The assertion that it will be a badge of shame should Africa pull out of the ICC has been strongly rejected by the participants. From what appears here, informants have varied opinions, although there is a general agreement that the ICC needs to start to be seen as fair when dealing with cases in Africa. If not, the idea that the court is targeting Africa while exonerating the west will remain. What will perhaps lead to a less complex relationship between the ICC and Africa would be serious engagement which would clarify the conventions and the treaties and the methods of operation followed by the court. In a nutshell, while the informants are in agreement on many issues, there are areas of divergence in the same manner that political leaders and other commentators disagree on some issues. In the process, the debate rages on and mud-slinging continues between the ICC and the AU.

5.4. Chapter summary

This chapter has presented the results of the study from empirical data collected through the questionnaire. In presenting the results, the chapter has considered each of the questions contained in the questionnaire. An attempt has been made to consider the views of all the informants on each of the questions before moving on to the next one. This was done in all the questions in order to ensure consistency. Summarising the responses of each responded to each question made it easier to identify similarities and differences in the responses thus making the reading of the results much easier for any reader who might be interested in establishing the pattern of the responses.

Having presented the results by paraphrasing the responses and quoting the informants directly in some cases, the chapter proceeded to try and make sense of the findings. This was done by drawing meaning from what was presented by the informants. This has assisted in making sense of the responses within the context of the research questions the study aimed to address.

The next chapter will build on chapter five. It will summarize the dissertation with emphasis on the results obtained from the field and presented above. The contribution of the study will be articulated after which recommendations and suggestions for further research will be presented. The study was set out to examine the relationship between the International Criminal court and Africa. It has also sought to know whether the ICC is targeting Africa while ignoring atrocities carried out in other continents. As part of the summary in the next chapter, an attempt will be made to re-visit these study aims and research objectives with the view to establishing how the study has helped us find answers to the questions raised in chapter one and reiterated at different times in other chapters.

CHAPTER 6:

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

6.1 Introduction

Chapter five above marked the end of this dissertation in terms of presenting and analyzing the results. The chapter presented and analysed empirical data obtained from the field. Once this aim was achieved and attempt was made to discuss and analyze the findings with the view to giving them context and meaning. Now that the goal of finding answers to the research questions has been achieved we can safely move on to pull the dissertation together and map the way forward. This will be the focus of the present chapter which will present a summary of the key points, draw some overall conclusions and make a few recommendations on the way forward in as far as the theme of this study is concerned.

The study was set out to examine the relationship between the International Criminal court and Africa, which has been under scrutiny for quite some time now. The study also sought to know whether the ICC is targeting Africa while leaving out other continents which are committing similar (and sometimes worse) crimes against humanity, as leaders of the African continent claim. The world has witnessed populations ravaged by heinous crimes and atrocities, and this certainly poses a challenge to the entire international law system. The ICC was meant to offer hope to those affected by crimes against humanity, but a threat by the African Union to pull out has somehow dashed any possibility of that hope. The general theoretical literature on this subject and specifically in the context of Africa and the ICC raises vital questions on both ends that need to be considered in order for any disagreements to resolved.

This chapter summarizes the dissertation with specific emphasis on the results obtained from the literature and empirical data obtained from informants who are knowledgeable about the subject of this study. The contribution of the study to the body of knowledge is articulated after which recommendations and suggestions for further research are presented. The debate considered in this study is very important as it deals with the justice system that is performed by an international institution over a continent. In this respect, I can conclude that the debate will go on indefinitely unless it receives an urgent attention by all parties involved. This attention could lead to a decision taken by individual countries to pull out of the ICC, since they are signatories, or it could be the ICC that changes the perception that currently exists.

The change of this perception will come by ensuring that fairness prevails in the prosecution of those accused of perpetrating crimes against humanity. What has been revealed in this study is that there are two types of commentators, those who premise their arguments on facts, and those who rely on perceptions. The present chapter will revisit these divergent views about the ICC.

6.2 Summary

The information provided in this study indicates that the nature of the relations between the ICC and Africa is still a point for discussion and concern amongst many African leaders and other commentators from Africa and beyond. There is a general feeling that the ICC should not intervene in African affairs in the manner that it currently does. But again there is another view that the Hague-based court is doing a great job in maintaining law and order in Africa and around the world and that it should therefore be accorded the status it deserves. Apart from uncoordinated comments by different individuals and institutions, there is still a huge gap in the literature on these particular topics. Perhaps this is partly because the debate has reached its pick only recently – not ignoring the fact that the ICC itself does not have a very long history given that it came into being in 200. This study is one of the initial attempts to broaden the debate and give it an academic angle. It will therefore serve to contribute to the literature on this particular topic and hopefully urge more detailed studies to be conducted so that both Africa and the international community could be better educated about the ICC and its functioning. An implicit argument made in this study is that emotions should be kept out of the equation if the work of the ICC is to be acknowledged. The existing thin literature on the subject to-date shows how the ICC has all the ingredients of influencing global politics given the developments that are happening in Africa but has thus far failed to operate at its full potential.

Again, the views of different authors and commentators discussed in this dissertation have demonstrated how critical thinking which goes beyond the obvious could assist to illuminate our understanding of the work done by the ICC. The information they shared confirms that indeed the ICC has mainly opened cases exclusively in Africa to-date. But it is common knowledge that the ICC has been acting on the basis of the Statute of the court which is also known as the Rome Statute that was entered into force on July 1 2002. The study also revealed evidence that the ICC has been defending itself on accusations that Africa is its

prime target. The court has been disputing this on the basis that all prosecutions are on the basis of defending human rights. But again the ICC prosecutions have been praised by those advocating human rights on the basis that it protects those who have no power to protect themselves. Noticeably, most Africans commentators (excluding people like Kofi Annan) hold the view that the ICC's choice of prosecution has focused on Africa which is something that has led to the existing controversy. It should be noted, however, that in most cases it is the very African countries who seek justice through the ICC after being failed by their very own courts. The AU seems to have been consistent in defending its leaders, although citizens in those particular countries are aggrieved and seek justice. The noticeable examples of this which are articulated in case studies include situations involving Kenyan President Uhuru Kenyatta who has been defended by the African continent.

The case studies discussed in this dissertation show that crimes against humanity in African states have been rampant and clearly needed some sort of intervention from international institutions like the ICC. But the most important point to note is that it is common that the ICC intervened on the request of the very African states who today cry foul about the lack of credibility of the court. The study also outlined research methodologies, strategies and design that were employed to obtain evidence which tends to challenge some these articulations by the African leadership against the ICC.

The methodology chapter addressed procedures followed to obtain secondary and empirical data, participants and their profiles, data collection tools, data collection and analysis methods and data credibility issues. The research design was reported to have been descriptive and the analysis to have been interpretive. It was noted that what was analysed through the qualitative methods of data analysis were employed using descriptive statistics. The results were presented in a narrative and interpretive format. While some concerns raised by the AU were found to be plausible given the number of cases involving African leaders, these could not stand when tested against hard evidence. In other words, the study revealed that those who accuse the ICC of bias lack a clear understanding of how the ICC was established and how it operates. To a large degree, emotions supersede logical reasoning and consideration of facts.

6.3 Conclusions

In conclusion, I can safely say that there was a general agreement that Africa should and cannot pull out of the ICC as a collective as she did not sign up to the ICC conventions as the continent or represented by the AU in the first place. On the contrary, it was individual countries who signed up and as a result, it should be individual countries who should take their own decisions whether to pull out or not. This is very important and I think it is one critical point that Africa must continue to discuss in their pursuit of pulling out. At the moment it appears that African leaders are acting based on emotions more than anything else. It is common knowledge now based on what the scholars and the informants of this study said that the allegations of the ICC being biased against Africa are not going anywhere, at least for now. African countries have individually decided how they want to relate to it. Countries like Botswana have already taken a stance that collective action by African countries to denounce the ICC is not a viable option and Botswana will not support it. There is a sense that the ICC is not being fair towards Africa, however, even if some cases are not before the court as they should be, no case or situation currently before the court should not be there in the first place. Based on what the literature tells us, while it may be true that the ICC can be lambasted for inconsistent case selection, there is not a single case before the court that one could dismiss as being frivolous.

Another conclusion is that the UNSC has double standards. Some of its members deliberately decided not to sign the Rome Statue. As such, they are not bound by it. While there is nothing inherently wrong with this, the problem is that the same countries see no problem in referring other countries (especially African countries) to the ICC they do not seem to take seriously. In the meantime, they continue to commit crimes which fit the description of those that fall within the ambit of the ICC and yet they see no need to appear before the ICC to account for these crimes. Moreover, these UNSC member states tend to protect the countries they have befriended over the years. This makes a mockery of the ICC and gives African leaders more reason to doubt its fairness and relevance.

What the informants of this study proposed was that facts (as opposed to emotions) should drive any decision taken by African countries. Secondly, the conclusion is that African leaders should remind themselves on how they got into signing the Rome Statute, i.e. whether they did so as collective or as individual countries. If the latter is the case, then it goes without saying that individual countries should decide whether to remain there or not. All the AU can do as a collective would be to urge member states to put the continent first and support one another.

However, the issue of national interests is critical in this regard. Individual countries would want to nurture their relations with the international community outside of the AU. As things stand, the debate will rage on.

Having pulled the dissertation together in the preceding paragraphs, it is now opportune time to make some recommendations drawn from the study. These recommendations will be divided into two sub-sections. The first one will focus on the content while the second one will focus primarily on what further research might focus on.

6.4 Recommendations

6.4.1 Recommendations on the content of the study

Firstly, what is clear from this study is that there is evident lack of knowledge among the critics of the ICC. Some do not seem to understand how it was established and how it operates. I would therefore recommend that these critics go back and educate themselves about both these areas (the ICC's establishment and operation).

Secondly, while it is true that a number of cases heard by the ICC in the past or currently under investigation are from Africa, there is a need for Africans to do self-introspection. By so doing, they will be able to understand why Africa has so many of its leaders hauled before the ICC. Only after they have started doing things the right way and avoid the crimes falling under the ambit of the ICC can they start complaining that the continent is being targeted.

Thirdly, while it is correct and in fact justifiable for African leaders to support one another, it appears that doing so even when one of their own is in the wrong is not benefitting anyone. Therefore, I would recommend that such support is given to those who deserve it because they are being unfairly treated by the international community. In cases where an African leader is in the wrong, fellow African leaders should sit down with that leader and address the issue. In any case, an African country that does not uphold the rule of law paints the entire African continent in a bad light.

6.4.2 Recommendations on further research

The scale of the debate in this study is extensive and deserves more attention than has been given in this dissertation. The study has offered an evaluative perspective on an important international relations issue that needs to be addressed assiduously especially given that it has a potential to divide the international community and cause unimaginable damage in international relations than it has already done to-date. As a direct consequence of the methodology used and outlined in the respective chapter above, the study encountered a number of limitations which need to be considered. The African Union representatives and the ICC Chief Prosecutor or representatives could not be reached to answer some of the most critical and pertinent questions. Perhaps if and when the study is pursued in the near future, that could be the first port of call to take the discussion forward. A one-on-one interview with these relevant stakeholders in the discussion would be recommended as this would enrich the discussion.

Again, the informants used in this study were all male and South African nationals. I would recommend that for future research of this kind, such a study should include people from different continents and be diversified in terms of gender and race. In the same vein, the sample size could be expanded somewhat as a means to pushing forward the diversification agenda.

Lastly, a number of African countries and their nationals have been mentioned in this dissertation and their positions regarding the ICC-Africa relations spelt out. However, these positions were simply summarized. It is recommended that further research should afford these individuals the opportunity to present their case verbally or in writing so that the context within which they made such pronouncements could be better understood.

If taken seriously and adhered to, these recommendations would assist in bringing about much better results than the present study has done. But to do all of this and do it well, more time and resources would be needed. Moreover, for these recommendations to succeed more human power would also be needed in order to ease the job.

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QUESTIONNAIRE ON INTERNATIONAL CRIMINAL COURT AND AFRICA

1. There have been calls for Africa to pull out of the ICC, would this be in Africa's best interest?

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2. Do you share the view that the ICC targeting African countries?

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3. Is the ICC treating war crimes in other continents the same way as in Africa?

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4. **Many observers and critics of the ICC argue that, the Court has focused entirely on Africa, some even go as far as labeling the ICC as a colonialist tool that is biased against Africans, what do you make of this?**

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5. **The international community has played a leading role in in the fight against impunity especially in Africa over the years. The ICC has ensured that it takes care of prosecution of abusers of human rights in countries such countries such as Liberia, Rwanda and Sierra Leone, what is the fuss about now?**

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6. **Africa is always at the forefront in crimes against humanity, can she cope without the involvement of important international institutions such as the ICC?**

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7. **If the International criminal justice in Africa is undermined, shouldn't then the ICC intervene in order to hold alleged perpetrators accountable?**

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8. **How will this rocky relationship between the ICC and Africa impact on dealing with peace and stability in the continent?**

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9. **Former United Nation Secretary General Kofi Annan says will be a badge of shame if the African Union pulls out of the Rome Statute which established the International Criminal Court, what do you make of this view?**

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10. **Is Africa ready to establish its own court of justice?**

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11. **Would that move by the African Union a sign of disrespect for the rule of law?**

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APPENDIX B