

**The International Criminal Court and Africa: A Critical Analysis of Competing Views
of the Success of the Court in Protecting Human Rights in African Countries**

By

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Abstract

The International Criminal Court (ICC) is the world's first permanent court that was established in 2002 to try individuals charged with genocide, war crimes, crimes against humanity and crimes of aggression. Over the years, the operations of the ICC in Africa have gained global attention due to the controversies that characterize the relationship between the Court, the African Union (AU) and some African countries. The hostile attitude and criticism against the Court by leadership of the AU and some African leaders have created the perception that the ICC has little or no support in Africa. Using the critical post-colonial perspective, this study explores the diverging opinions of African countries on the operations of the ICC in the continent. It seeks to answer the question how is the ICC perceived in Africa? The study collects data from online media sources that include local and international newspapers, documents, reports and articles to critically analyze the different views African countries have of the ICC. This study finds that African leaders that oppose the Court and fail to cooperate do so due for political reasons. It is perceived that they oppose the Court for fear of possible indictment. However, they are quick to use the Court as a weapon against their political opponents. On the other hand, African leaders and civil society groups that support the Court do so because of the role it plays in protecting victims and punishing perpetrators of serious human rights violations.

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Chapter 1

Introduction

1.1 Background

Africa's opposition and non-cooperation with, the International Criminal Court (ICC) have gained global attention in recent years. The African Union's (AU) proposal for African State Parties to withdraw from the Court, and recent threats and the decision by some countries to actually withdraw has generated the debate over the ICC's future. The AU, along with some African statesmen and publicists have criticized the ICC for exclusively focusing on African cases (du Plessis, 2008; Murithi, 2013; Cole, 2013). Despite Africa's active participation in the creation of the ICC, the current relationship between the ICC and Africa is perceived to be hostile and strained (Murithi, 2013; Materu, 2014). Mainly, the relationship between Africa and the Court began to deteriorate following the Court's decision to indict some sitting heads of state (Maunganidze & du Plessis, 2015). Some African states have accused the Court of inappropriately targeting African countries while leaders of some non-African countries are not held accountable for similar crimes (du Plessis, 2008). More broadly, the Court is seen as an imperialist and neo-colonial institution used by the powerful Western countries to prosecute African leaders (du Plessis, 2008; Cole, 2013; Maunganidze & du Plessis, 2015). The operations of the ICC have come under critical scrutiny in Africa and faced many challenges and obstacles. Much of the existing literature on Africa and the ICC highlights the opposition of the African Union and criticisms of the Court. In reality, there are different opinions on the operations of the ICC in the continent. Some African countries such as Botswana have vocally expressed their support for the Court since its establishment (Murithi, 2013). Others such as South Africa have gone further to implement the Rome Statute in their domestic laws (Kemp, 2014; Maunganidze & du Plessis, 2015).

Even though there are a lot of criticisms levelled against the ICC, there is still massive support from some African states (CICC, 2016). Countries such as Botswana and Ghana have clearly expressed their support and cooperation with the Court (Mills, 2013). Civil society groups such as the Coalition for the International Criminal Court (CICC) are constantly supporting the Court and encouraging governments to cooperate with it (CICC, 2016). Civil society groups in Africa are back lashing the move by countries to withdraw from the Court and non-cooperation by the AU (CICC, 2016). They are also raising awareness of the need to seek global justice for victims and punishment for perpetrators of horrendous international crimes. The CICC is advocating for a universal signing, ratification and implementation of the Rome Statute of the ICC (CICC, 2016). It is important to acknowledge that, an institution such as the ICC has its limitations and challenges. However, it has been argued that withdrawal and non-cooperation should not be the response to setbacks faced by the Court (Monageng, 2014). State Parties should rather cooperate with the Court to solve these challenges.

1.2 Research Objectives and Questions

The main objective of this study is to explore the diverging opinions of African countries on the operations of the ICC in the continent. The study seeks to answer the question *“How is the ICC perceived in Africa?”* Toward this end, the study aims to identify countries that are either supporting or against the ICC. It further examines various ways some African countries are demonstrating their support or opposition to the Court. It also attempts to assess allegations that the Court is biased towards Africa countries. Lastly, the study adds to existing literature by clarifying misconceptions on the operations of the ICC in Africa and discusses the future of the Court in light of the diverging views.

In light of these disagreements over the operation of the ICC in Africa, it is important to undertake a study that aims at examining the sources of opposition to the ICC and what the future might bring regarding the continued operation of the ICC in African countries. The study attempts to show that the outward perception that the ICC has little or no support among African countries may be somewhat misleading, since to date it is only the leadership of the African Union (AU) that has pushed for non-cooperation with the ICC. The study attempts to offer a more balanced account of the operation of the ICC in Africa by looking at individual countries' relationships with the ICC. As part of this study, attention will be given to collecting data that can be used to assess the extent to which individual African countries oppose or support the Court. It is important to examine the countries separately because individual countries signed the Rome Statute as sovereign states, rather than as part of the collective African Union.

1.3 Thesis Outline

This thesis is organized into eight chapters. Chapter 1 introduces the research topic; chapter 2 presents the theoretical framework that guides the study. Chapter 3 discusses the methodology employed and provides details on the research approach used for the study, the sources of data and the data analysis technique. Chapter 4 explores the evolution of international law and origins of the International Criminal Court (ICC). Chapter 5 examines the relationship between Africa and the ICC. It looks at events leading to the creation of the Rome Statute of the ICC and the early operation in Africa. Chapter 6 examines the growing opposition and current movement towards non-cooperation. Chapter 7 discusses and analyzes the data gathered while Chapter 8 concludes the thesis.

Chapter 2

Theoretical Framework

This chapter explores the theoretical perspective that guides the current study. There is the need to situate this study in a theoretical framework that provides a broad understanding of the operations of the International Criminal Court in Africa and the competing perceptions African countries have of the Court. The chapter begins with a discussion of the relevance of engaging criminological knowledge with human rights scholarship. The chapter concludes with examining the critical post-colonial perspective that argues for the need to examine human rights issues and institutions from a non-western perspective.

2.1 Criminological Engagement with Human Rights Scholarship

The study falls in research that seeks to integrate criminology and human rights research. Mainstream criminologists are criticized for failing to recognize the broad understanding of crime. They need to broaden their scope for a deeper understanding of criminological issues (Aas, 2013). Criminology remains a self-referential, self-perpetuating practice that lacks the ability to look outside itself (Barton, Corteen, Scott & Whyte, 2007). Mainstream criminologists have been criticised for focusing on the narrow concept of crime, which does not incorporate wider social injuries and harms committed by powerful social actors (Hillyard et al, 2004 cited in Aas, 2013). They fail to incorporate state crimes as an integral part of its subject matter but rather focus on crimes and punishment within nation states (Green and Ward, 2004 cited in Aas, 2013). Several authors have argued that criminological discourse should incorporate all types of state-sponsored crimes such as genocides, torture, war crimes, state terror and corruption of state officials into its subject matter (Green and Ward, 2004 cited in Aas, 2013).

Criminological scholarship has also been criticized for failing to explicitly engage other disciplines into its research area. Criminology cannot be seen distinct from political and human rights discourses because they are closely entangled (Barton, Corteen, Scott & Whyte, 2007). There have been attempts to integrate criminology and human rights and also explore existing criminological scholarship in the area of human rights (Weber, Fishwick & Marmo, 2017). In recent years, criminologists have begun to turn their attention to broad and global issues. Criminological scholarship has entered a complex interdisciplinary terrain that demands an engagement with findings from other discourses which include political science, history, human rights and international criminal law (Aas, 2013). It is important criminology engages with other discourses particularly human rights in order to reshape its nature and boundaries (Barton, Corteen, Scott & Whyte, 2007).

This study contributes to the research on the relevance of human rights within criminology and specifically international law, human rights and justice. It contributes to research that aims at addressing the gap in criminological scholarship and enable criminologists to engage more explicitly with human rights. It also highlights the impact and relevance of criminological research on the understanding of key human rights issues (Weber, Fishwick & Marmo, 2017). Most human rights resources are tailored for other disciplines but not necessarily for criminology (Weber, Fishwick & Marmo, 2017). Therefore, criminologists find it challenging to conduct research regarding human rights issues because resources from other disciplines use different theoretical and methodological approaches. Criminologists have to unpack a lot of material written in other disciplines in order to conduct human rights related research (Weber, Fishwick & Marmo, 2017).

Various authors have demonstrated the growing relevance of human rights in criminological research, theory and criminal justice system. Lopez-Ray for example engaged criminologists to work collaboratively with lawyers and public policy experts and also sought

to harness empirical research and quantitative data to develop what would become post-war settlement around human rights enforcement in the criminal justice systems of sovereign nations (Amatrudo, 2017). As a UN senior official, Lopez-Ray recognized the relevance of linking of criminological research, criminal justice policy with the broader notions of human rights (Amatrudo, 2017). He engaged human rights in criminological scholarship by linking the local nature of criminal justice with the broader international legal framework. Lopez-Ray understood human rights primarily as an issue for social policy and he saw the universal nature of human rights as best promoted by the international agreement involving the United Nations (Amatrudo, 2017). His practical engagement of human rights with the criminal justice system particularly the prison system was able to recast the criminal justice system in terms of the highest ideas of human rights and how this also represents an overall improvement for the community as a whole (Amatrudo, 2017).

Stanley Cohen is identified as one of the early criminologists to champion the use of sociological analysis to illuminate human rights abuses (Weber, Fishwick & Marmo, 2017). He demonstrated the role of the state in controlling people with its political ideologies and cultural forces and structures. Cohen raised concerns about how the state directly and indirectly makes people subject to its surveillance, regulation and control. He argues that state control over the lives of ordinary people through prisons, surveillance and monitoring raises arguments surrounding our human rights. In his book *States of Denial*, Cohen reveals how states deny responsibility for atrocities and human rights violations against citizens. States or individual perpetrators tend to either deny that atrocities happened, conceal truth behind atrocities or turn a blind eye to atrocities and violations (Cohen, 2001).

Agozino (2017) discusses the relevance of human rights in criminological research from the postcolonial perspective by critiquing the lack of recognition of human rights perspective within criminology. Mainstream criminological research has failed to recognize

the input of Africana scholars in human rights discourse. The failure to acknowledge the contributions of non-Western contributors to the human rights discourse distorts the universal notion of human rights. The contributions of non-western scholars on human rights issues are important because these challenge the assumption that human rights are a western concept and concern (Agozino, 2017). There is evidence that African scholars such as W.E.B Du Bois developed a discourse of human dignity before the West. Agozino describes W.E.B Du Bois work, *the suppression of African slave-trade* as the founding text of human rights criminology or first book of criminological research devoted to human rights.

However, Western scholars, as well as African scholars, are uncritically adopting the argument that suggests human rights originated from the West and it is been imposed on developing countries. Agozino argues that criminological research and its engagement with human rights should be situated within the Africana paradigm of struggles and achievements in thoughts and deeds by people of African descent and their allies who have been subjected by the West to the most heinous crimes (Agozino, 2017). There is a large imbalance in the production of criminological knowledge and this is reflected in the fact that criminology is developed predominately in the former colonial centres of authority (Aas, 2013). Agozino urges Third World criminologists to take control of the production and dissemination of their own indigenously produced criminological knowledge, instead of continuing to rely on the importation of Western theories and models of crime and crime control (Agozino, 2014; 2017).

He provides ways criminology engages with human rights through W.E.B Du Bois writings on the African slave trade. Du Bois analyzed the slave trade as a major form of crimes of the powerful which has completely been ignored by mainstream criminology. Criminologists rather focus narrowly on non-violent crimes committed by the poor which include pick pocketing, vagrants, sex workers and non-violent drug offenders (Agozino,

2017). Agozino argues that human rights crimes are also criminological problems that should no longer be left out of criminology discourse. He adds that there is the need to establish a Third World school of theoretical criminology that could teach the West about crime (Agozino, 2004 cited in Smandych and Larsen, 2008. p. 7). Western criminological research fails to focus its attention on the heinous crimes and human rights violations committed originally against Africa slaves. In his writings Du Bois condemned human rights violations such as lynching, segregation of Black people, kidnapping of African women, men and children and selling them for profit, and sexual abuse committed against slaves (Agozino, 2017). Criminologists need to expand their interest in the criminalization of mass atrocities.

Agozino noted other early non-Western writers who have made major contributions to human rights criminology. Contributions from Nnamdi Azikiwe, Nelson Mandela, Claude Ake, Wale Soyinka, Martin Luther King Jr and Kwame Nkrumah, on colonialism, slavery, racism and other human rights issues are deliberately ignored in human rights discourse and criminological scholarship (Tauri and Porou, 2014 cited in Agozino, 2017). Criminological research has been marked by the hegemony of the West particularly the United States and other Anglophone writers. Developing countries have been at the receiving end of Western criminal justice exports. There is the assumption that criminal justice policies and ideas from the West can be applied to the rest of the world (Aas, 2013).

Chazal (2017) discusses the criminological engagement with human rights by exploring how the International Criminal Court is constructed as a judicial arm of humanitarian intervention measures and enforcer of human rights on the global scale. She highlights the Court's intervention to prevent human rights abuses through the threat of judicial investigation, prosecution and punishment, processes of criminalization of human rights abuses and how they are prosecuted through the international criminal justice process. Chazal (2017) argues that there is a shift in the way human rights are protected. The

traditional role of States to protect the human rights of its people has been shifted to the international community. Through international treaties and conventions, human rights are protected on the international level. Criminologists' narrow focus on the State has created a "blind spot" for crimes and human rights violations committed by states themselves and state-supported agencies (Aas, 2013). Criminology needs to engage with human rights issues on the international level and critically analyze the biases in the criminalization of human rights abuses by politically powerful States. Human rights abuses committed by powerful leaders and countries remain invisible, legal or ignored by the international instruments designed to enforce human rights on the global scale (Chazal, 2017).

Criminology engages with human rights to break down pre-existing divisions between domestic and transnational criminology, between the legal and the socio-political and between the scholarship from the Global North and the South (Weber, Fishwick & Marmo, 2017). The current study engages criminology with human rights by focusing on criminological issues in the domestic and transnational contexts. It critically analyses the commitment of individual African countries to protecting the human rights of their citizens as well as their perception of international institutions such as the ICC in protecting human rights. The study also engages human rights by focusing on theoretical perspectives and literature from non-Western European scholars. The study uses the critical post-colonial perspective to critique the failure of African governments to cooperate with international human rights treaties and institutions that seek to protect the rights of citizens. The post-colonial perspective also critiques international human rights institutions' efforts to protect human rights. It challenges the universality of human rights, perceived selective manner of prosecution at the ICC and the failure of Western criminological discourse to acknowledge the non-Western perspectives of human rights and other legal and social-political issues.

2.2 Critical Post-Colonial Theoretical Perspective

To understand the operations of the Court in Africa, one needs to examine it from an African perspective. Even though the creation of the ICC and the role it plays to bring justice to victims of war crimes and crimes against humanity can arguably benefit African countries, one cannot ignore the criticism that the Court is influenced by imperial powers. It is argued that the mandate and operation of the Court are guided by Western ideas, including at core the conception of “liberal-individualist” human rights that is widely accepted in Western countries. This conflicts with what may be referred to as a more “pluralist-collective” conception of human rights that is more indigenous to African countries, and potentially at the core of the current controversy over the ICC in Africa. In light of this, drawing on work in the field of post-colonial studies, I argue that there is need to adopt a non-Western critical post-colonial theoretical perspective for guiding research aimed at providing a better understanding of the operations of the ICC in Africa.

The post-colonial perspective proposed in recent years by critical criminologists “starts from a critical and reflexive framework that questions the centrality of Western understanding of crime and control” (Cunneen, 2011, p. 252). It considers the importance of history particularly through the understanding of the long term impact of colonization and imperialism; through an analysis of structures of sentiment and ideology that determine the intersection of race, crime and punishment (Cunneen, 2011). Post-colonial theory is an approach that examines and explains the effects of colonialism on both the colonized and the coloniser (Cunneen, 2011; Brown, 2014). It points out that ethnocentrism has been an essential tool in the historic domination of the West over its colonies (Aas, 2013).

Post-colonial theories challenge discourses, ideas and institutions that promote imperialism. Importing post-colonial thinking into criminology can help to decolonize

criminological knowledge as well as theories of crime and methodologies that are rooted in ideas of imperial powers (Agozino, 2003). Leading proponents of critical post-colonial criminology argue that modern Western states were built on the human rights abuses of the colonized and enslaved peoples (Cunneen, 2011). They also question the historical foundations of criminology as part of the imperialist project (Morrison, 2006 cited in Cunneen, 2011).

Western criminological knowledge according to Agozino (2003), is rooted in the history of slavery, colonialism and imperialist reason and how they have shaped the culture, crime and criminal justice systems of both the former colonies and the colonized people. He considers African and other post-colonial literature and contributions to counter-colonial criminology, their originality, relevance and limitations. Post-colonial criminologists are committed to anti-imperialist scholarship that seeks to reconstruct everyday institutions for the purpose of better securing democracy, peace and social justice (Pfohl, 2003 cited in Agozino, 2003), which includes efforts seeking to emancipate and empower the poor and marginalized in less powerful underdeveloped countries (Agozino, 2003; Brown, 2014).

A critical post-colonial perspective is used to examine and attempt to better understand competing conceptions of human rights in Africa and the effect these have had in shaping the current controversy of the ICC in African countries. Importantly, this study does not directly seek to criticize either those who oppose or those who support the ICC but rather it seeks to analyze the varying opinions and perceptions African countries about the Court. Doing so, it adopts a post-colonial anti-imperialist approach to critically examine the Court's limitations and suggests recommendations for the more effective operation of the Court in Africa in the future.

The post-colonial perspective perceives institutions such as the International Criminal Court (ICC) as tools of the West used to promote its imperialist ideas (Cole, 2013). The control and oppression of Africa through slavery and colonization were enforced through unjust social institutions such as penal, police and criminal justice systems (Agozino, 2003). Human rights institutions such as the ICC are presupposed to have originated from the West and in some sense express Western interests. They are also perceived as social institutions through which dominant ideologies of one culture subverts the ideologies of other cultures (Sharma, 2006). The West exerts substantial influence on the nature and shape of international criminal justice and crime control (Andreas & Nadelmann, 2006 cited in Aas, 2013).

Colonialism is a continuous process and its impacts are still felt among the colonized people. Neo-colonialism is the modern form of control and oppression where the West still imposes its imperialist ideas on non-Western countries. The control and oppression are manifested in the culture and social institutions of the colonized people (Cunneen, 2011). The ICC was created to prosecute perpetrators of crimes against humanity, war crimes and genocides that happen globally. The Court is meant to be independent, impartial and universal and to hold perpetrators of horrendous crimes against humanity accountable. Critics of the Court have described it as partial; focusing only on African perpetrators while similar crimes are being committed in Western countries. It has also been perceived as being influenced by states such as the United States and other powerful states that fund the Court (du Plessis, 2008).

2.3 The Human Rights Debate; Western verses Non-western conception of Human Rights

Human rights discourse and ideas are distorted by the imperialist assumptions of the claim that it originated in the West and has been imposed on non-Western countries (Sharma, 2006; Agozino, 2017). To explore how the ICC is perceived in Africa and how it operates, there is the need to depart from Western criminological perspectives that present the criminal justice system and ideas as fair and universal. The world is characterized by a variety of political, socio-economic, cultural and religious manifestations hence the need to have human rights ideas that are suitable globally. However, the western notions of human rights do not take into account the experiences of the majority of humanity especially those living in the global south (Agozino, 2017).

According to the United Nations, human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status, we are all equally entitled to our human rights without discrimination (OHCHR, 2017). Human rights are also defined as norms that help to protect people everywhere from severe political, legal and social abuses (Nickel, 2017). Examples include right to life, liberty and security, right to freedom of speech, movement, right to a fair trial when charged with a crime, right not to be tortured (UNHR, 1948; Nickel, 2017). The core principles of human rights are universality, inalienability, interdependence, interrelated and indivisibility, equality and non-discrimination and human rights entailing both rights and obligations (OHCHR, 2017). The universality of human rights is the cornerstone of international human rights law. It is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems (OHCHR, 2017). This principle emphasizes that human rights exist in all cultures and States are obliged to promote and protect the human rights of its people. According to the UN, all

States have ratified at least one, and 80% of States have ratified four or more, of the core human rights treaties, reflecting the consent of States which creates legal obligations for them and giving concrete expression to universality (OHCHR, 2017). Human rights are interrelated and interdependent meaning the different kinds of rights are not treated separately. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others (OHCHR, 2017).

Human rights are perceived as having emerged during the European enlightenment (Brown, 2014). Others presume human rights to be gifts from the humanitarian west to the rest of the world (Agozino, 2017). Human rights are from the Euro-American historical experience particularly through the French and America revolutions (Sharma, 2006; Brown, 2014). They emerged as the principle of liberation from oppression and domination of the downtrodden of society (Chukwumah, n.d.). There is a tendency to see human rights as something to be encouraged by the West in the post-colonial world (Brown, 2014). International law is likely to be determined by the values and requirements of the West rather than by any objective principle (Cole, 2013).

The Universal Declaration of Human Rights (UDHR), which is generally agreed to be the foundation of international human rights law, was adopted by the United Nations General Assembly on 10 December 1948 (United Nations, 2017). The UDHR was adopted after the experience of the Second World War as a vow to never allow atrocities that occurred during the War to happen again. The UDHR was drafted by the Commission on Human Rights which was made up of 18 members from various political, cultural and religious backgrounds. The major criticism levelled against the UDHR is that it is based on the European way of thinking and it does not respect non-European cultures (Ouko, 2011). Post-colonial theorists argue that the creation and ratification of Universal Declaration of Human Rights were decided by the West and the global North and then applied to the global South,

the largely invisible; "other side of the line" (Brown, 2014). Non-western societies particularly African states were not represented or considered at the drafting and adoption of the Declaration. The drafting committee of the Universal Declaration of Human Rights of 1948 was drawn from the United States, United Kingdom, France, Canada, to mention but a few (United Nations, 2017).

Post-colonial critics argue that universal human rights are expressive of Western cultures and that they are not being applicable to other cultures (Ouko, 2011; Brown, 2014). Western concepts of human rights have dominated international discourse and institutions such as the ICC. Therefore, the post-colonial perspective on human rights emphasizes the need for a new approach that recognizes ways by which Western-grounded ideas have ignored or denigrated other rights, beliefs and practices (Brown, 2014). The West has ignored the fact the non-western cultures had their own theories and systems of rights based on their own conditions and beliefs (Brown, 2014; Agozino, 2017). African societies need to domesticate and recreate human rights taking into consideration its conditions (Ake, 1987). The idea of human rights in the African context needs to be extended to include the concept of communal or collective human rights (Ake, 1987). Human rights should be applicable and meaningful to the people it is meant for. It must be practical to the conditions of the existence of the people to whom they apply (Ake, 1987).

Post-colonial theorists argue that global issues should consider the diverse cultures of people when addressing crime and human rights issues (Cobbah, 1987; Sharma, 2006). There is evidence that non-Western societies including Africa had its own principles of human rights long before their contact with Europeans (Cobbah, 1987; Brown, 2014; Agozino, 2014; 2017). A non-Western notion of human rights places emphasis on collective or community values, social harmony and respect for political authority and institutions compared to the individualism, personal freedom, political and civil rights emphasized by the West (Cobbah,

1987; HURIGHTS n.d; Nickel, 2017). The individualized Western idea of human rights was imposed on non-western parts of the world especially Africa through colonialism as an attempt to modernize it (Cobbah, 1987; Brown, 2014). Western cultures do not understand non-Western cultures and arrogantly assume all cultures are the same and therefore impose their own cultures on others on the grounds of the superiority of ideas (HURIGHTS, n.d).

Post-colonial theories depart from Eurocentrism and focus on contributions of people of African descent to understand international criminal justice and human rights (Agozino, 2014). Thus, the argument is made that the Court needs to recognize cultures and values of African countries while pursuing international justice and peace. Africa's communal culture influences its view and perception of justice, freedom, rights and peace. Some African human rights scholars have argued that the human rights values emphasized by the west are alien to African traditional societies. Ake (1987) stated Africans do not allow the individuals to have claims which may override that of the society. They assume harmony not the divergence of interests, competition and conflict. Africans are more inclined to think of our obligations to other members of society rather than their claims against them. Therefore, the ideas of the ICC should reflect African views as well. International human rights need to reconcile human rights ideas from different social structures to emphasize its universality.

From a post-colonial perspective, there is no such thing as common or universal ideas of human rights since every nation has its own culture and values. According to Pannikar, "No culture, tradition, ideology or religion can today speak for the whole of humankind, let alone solve its problems" (Cobbah, 1987, p.325). People and countries are different in their practices, traditions, social structure, religions, level of economy and political development. Therefore, the notion of universal human rights does not sufficiently accommodate the diversity of people (Nickel, 2017). The political and legal standards of a country are shaped by its traditions, beliefs and conditions thus what is held to be human rights in one society

may be regarded as anti-social by another society (Nickel, 2017). Post-colonial theories argue that rights should come from the oppressed societies rather than being imposed on them by their former oppressors (Brown, 2014). The concept of human rights needs to be readjusted to go beyond the borders of Western traditions and legalism to recognize how human rights are also embedded in other cultures (Brown, 2014). Post-colonial theories also suggest that international discourses take into consideration other worldviews instead of imposing the Western philosophy of human rights on all cultures (Cobbah, 1987).

Post-colonial theorists also question how human rights principles are written down in international legal documents and whose aspirations these documents embody (Wiredu, 2015). The application of international law and justice is seen as the continuation of the imperialist project (Brown, 2014). The continuous process of colonialism and imperialism impacts the universal ideas of human rights through institutions such as the ICC. The codification of human rights laws is being criticized for expressing "Western liberal ideology". It lacks adequate recognition of African thoughts on human dignity (Cobbah, 1987; Wiredu, 2015). International human rights institutions impose their interpretation of human rights on societies that they wish to render civilized and governable in terms of their human rights practices (Agozino, 2014; Brown, 2014). This leads some to argue that the ideas of the Court do not reflect African cultures and values (Wiredu, 2015).

Western criminal justice institutions such as the ICC often criminalize any form of resistance that seeks to challenge discrimination and marginalization (Agozino, 2003). Non-Western societies are identified as the source of all violence and must be suppressed (Anghie & Chimni, 2003). Some of these war crimes and human rights abuses in African countries are believed to be instigated by the powerful actors of the international system or as a result of resistance to imperial imposition or interference (Anghie & Chimni, 2003). However, western criminology and criminal justice institutions fail to criminalize violence by colonial powers

and see them as legitimate because it is humanitarian and seeks to save non-Western people from themselves (Anghie & Chimni, 2003). They criminalize similar atrocities committed by the colonized people (Agozino, 2003; Chazal, 2017). In regards to the study, the ICC is perceived as expressing Western ideologies. The action the ICC defines as crimes and human rights violations applies only to violence in African countries. The mechanism used to define and determine violence by the ICC will always indict perpetrators of crimes in Africa. Atrocities committed by colonial powers against colonized people are not the subject of concern for international law and justice (Anghie & Chimni, 2003).

The definitions of crime and institutional determination of criminality by the West fail to take into account the broader context of historical and contemporary forms of colonialism which play a role in disadvantaging marginalized people. Western law and criminology tend to situate marginalized people within a false universalism in terms of their capacity to seek protection of the law and their experience as law's subjects as victims or offenders. However, in reality, marginalized people have less capacity to utilize legal protections when they are being criminalized (Cunneen, 2011, p. 264). The Western powers have posed as protectors of human rights internationally and the ICC has become their tool to target Africans (Cole, 2013). Western criminal justice institutions also tend to individualize the causes of crime and violence and fail to recognize their contributions to the problems in Africa. They fail to take into account the role economic exploitation and imperialism play in violence in Africa (Agozino, 2003; Cunneen, 2011). The ICC is perceived to hold only Africans accountable for atrocities and it is also seen as a system of accountability that prosecutes individuals in Africa for the crime but fails to inquire into the role international actors' play in promoting or exacerbating violent situations in Africa (Anghie & Chimni, 2003).

According to Anghie & Chimni (2003), any institution that purports to be universal must be assessed in terms of how it deals with the most disadvantaged in society. In this case,

African countries are disadvantaged because of the interference of powerful institutions in their affairs. Economic policies authorized by international institutions such as the World Bank and International Monetary Fund (IMF) continuously place African countries in a disadvantaged position. These international institutions are believed to impose policies on African countries to exploit them instead of helping them solve their problems (Anghie & Chimni 2003). For instance, investigations following the Rwanda genocide in 1994 revealed that programs imposed by international financial institutions exacerbated inflation and unemployment which had negative impacts, particularly on young men. Unemployed and agitated young men were used for the tribal war (Anghie & Chimni, 2003).

Post-colonial writers have questioned international human rights institutions such as the ICC that seek to protect human rights of individuals. States were seen as the primary abusers of human rights as well protectors. International human rights institutions began to intervene in human rights abuses often committed by States including state-sponsored crimes and brutalization of ordinary citizens. However, the postcolonial perspective also criticizes the protectors of human rights (international human rights institutions and states) and mechanisms put in place to protect citizens for also protecting violators of human rights abuses (Chazal, 2017).

States' emphasis on sovereignty has the potential to cause them not to cooperate with international human treaties that seek to protect human rights. The post-colonial perspective is also critical of African leaders who often act in ways which are against the interest of their people. Some of these leaders play the race card to win popular support from the people (Anghie & Chimni, 2003). They use intense violence to suppress local citizen-led political resistance and pursue their individual political ambitions. Some of the Africans leaders indicted by the Court are accused of their unwillingness to give up political power leading to post-election violence and using of innocent children as soldiers to fight their political

enemies. These selfish acts of some African leaders give room for international criminal institutions such as the ICC to interfere in their affairs with the aim of bringing justice to victims. African leaders are believed to be critical of the ICC only when their colleagues in power or allies are indicted but not when their political opponents are indicted (Materu, 2014). Their criticisms of the Court and human rights, in particular, are perceived to be excuses for repression and authoritarianism and a way to evade their human rights obligations (Nickel, 2017). African leaders are urged to adjust their behaviours to the changes in the protection of human rights and put in place measures to protect human rights of citizens on the regional level (Ake, 1987; Nickel, 2017).

Chapter 3

Methodology

This chapter provides a detailed account of the thesis methodology. It begins with a detailed outline of the approach that defines research objectives and questions, data collection, data analysis and interpretation of the study. This chapter concludes with an examination of the advantages and limitations of the methodology.

3.1 Research Design

The main objective of the study is to examine the different perceptions African countries have of the operations of the ICC in the continent. It also seeks to clarify the allegations by providing a more balanced account of the operations of the Court. The current study employs a post-colonial perspective which suggests the need for a nuanced understanding of social reality in relation to reflections on broader questions related to crime, victimization, punishment, and justice, to arrive at culturally appropriate and acceptable interventions (Cunneen, 2011). It recognizes the need to understand the multiple realities of social life (Agozino 2003; Cunneen, 2011; Shearing & Marks, 2011). A post-colonial perspective also suggests a research approach that is able to provide insights into the divergent meanings that the range of actors (those in power and the marginalized) give to crime, violence and transitional justice (Shearing & Marks, 2011).

For the above reasons, the study employs a qualitative approach that provides meaning and understanding from the African viewpoints. Qualitative approaches therefore generally aim at developing a thorough and holistic picture of social phenomena. Unlike quantitative approaches, qualitative approaches often provide deeper, more realistic and integrated meanings behind crime statistics, and broader understanding and appreciation of crime problems and control models (Shearing & Marks, 2011). The study seeks to explore in

detail the why some African countries support the ICC and the measures they have put in place to cooperate with the Court to protect human rights. On the other hand, the study looks at the strong opposition and non-cooperation being demonstrated by some African countries and the possible reasons behind their decision. A qualitative research approach, therefore, makes it possible to achieve the objectives of this study.

3.2 Data Type and Selection of Countries

The study is document-based which draws on secondary data to understand the competing perceptions of the operations of the ICC in Africa. The study used online scholarly articles obtained from University of Manitoba libraries and Google scholar written by criminal justice experts such as University professors, judges at the ICC and lawyers from Africa and the Court. These articles describe in detail events that led to the creation of the International Criminal Court, Africa's active participation and support for the Court as well as its opposition and non-cooperation. It also employed documents and factsheets obtained from the International Criminal Court (ICC) website. The ICC website provides information on the evolution of international law and the origin of the ICC, operations of the ICC in Africa, and a list of countries that have signed and ratified the Rome Statute of the ICC. It also provides information about situations and cases under investigation at the Court and live screening of ongoing trial sessions.

In order to analyze the competing views of the ICC in Africa, I reviewed documents from the Coalition for International Criminal Court (CICC) website. The CICC is the world's largest civil society partnership advancing international justice. It is made up of several human rights organizations, whose objectives include promoting civil society voices on international justice and strengthening state support for and cooperation with the ICC. The CICC provides weekly global justice and civil society news on African Union's opposition

and growing non-cooperation to the Court. It provides news on efforts African countries are putting in place to promote and protect human rights. It also provides interviews and public speeches of some African leaders, civil society activists on the involvement of the Court in human rights violations in Africa.

I also obtained data from the Human Rights Watch website. Human Rights Watch is a non-profit human rights organization that seeks to defend human rights worldwide. It consists of human rights experts including lawyers, journalists and academics from across the world. Human Rights Watch is known for its accurate fact-finding, impartial reporting, effective use of media, and targeted advocacy, often in partnership with local human rights groups (Human Rights Watch, 2017). The organization publishes reports on human rights conditions in countries around the world. The Human Rights Watch website provides data on human rights violations in Africa, and information on cooperation with and opposition to the Court in African countries. It also provides articles written by experts who critically analyze the relationship between Africa and the Court.

Online media sources such as international newspapers and news agencies play an important role in capturing information on the operations of the Court in Africa. Data were obtained from both local and international newspapers published between 2009 and 2017. During this period, the ICC was seen to have started active operations in Africa. Table 1 below summarizes all the online media sources used as well as the origin of the news they reported. Local newspapers such as the *East African*, the *Lusaka Times*, *Vanguard*, the *Namibian*, *Daily Guide*, and the *Herald* mainly reported on situations that happened in their countries. International newspapers and news agencies such as the *Globe and Mail*, *Reuters*, *British Broadcasting Corporation (BBC)*, *CNN* and *Al-Jazeera* provided information on statements and decisions that were made during the African Union Summit and Assembly of State Parties of the ICC meetings. The views of African leaders attending these meeting are

captured in detail by these online sources. Finally, I used media narratives on political unrest, war crimes, genocides and crimes against humanity reported by *Reuters*, *British Broadcasting Corporation (BBC)* and *Al-Jazeera*. I also looked at narratives of victims of war crimes reported by the media to examine the views of ordinary Africans on human rights violations and the Court.

Table 1: List of Online Media Sources

Online newspapers and articles	Origin of information
The East African	Nigeria, Kenya
Vanguard	Nigeria
The Herald	Namibia
The Zimbabwean	Zimbabwe
The Guardian	Kenya, Sudan
Addis Standard	Ethiopia
Daily Guide	Ghana
Sudan Tribune	Sudan
Sunday Standard	Botswana
BBC	Zimbabwe
Lusaka Times	Zambia
The Namibian	Namibia
Graphic online	Ghana
Geeska Africa online	Ethiopia
Newsweek	Uganda
Reuters	Sudan, African Union
CNN	Kenya
Globe and Mail	African Union
Al-Jazeera	Kenya, South Africa, Gambia, Uganda, Zimbabwe, Sudan

As mentioned earlier, the study seeks to critically analyze how the ICC is perceived by African countries. However, it is important to note that the current study is limited to African countries that are in the news for either explicitly supporting or opposing the ICC. Some African countries have little or no information about their relationship with the Court being reported by both local or international media and organizations. Countries were selected based on the availability of information and relevance to the objectives of the study. Secondly, due to limits on the time available to carry out this research, it is impossible to report on all 54 states in Africa. The study examined the relationship between African countries that are known to vocally support the ICC as well as demonstrate their support. These countries include Botswana, Ghana, Zambia, Tanzania, Malawi, South Africa, Sierra Leone just to mention but few. It also examines support from civil society groups such as the African Commission on Human and Peoples' Rights (ACHPR) and the Coalition for the International Criminal Court (CICC) and local activists groups in these countries. The study also selected African countries that are noted for opposing the ICC and strongly criticising its operations. These countries include Kenya, Sudan, Rwanda, Uganda, Chad, and Burundi. It also examined opposition from the African Union and individuals who are main critics of the Court.

3.3 Data Analysis and Interpretation

The study employs an interpretive analysis to carefully examine and analyze secondary data to discover meanings, implications and assumptions on how African countries perceive the ICC. The study also employs the thematic analysis method to provide meaning to gathered data. It is the process that summarizes the main themes to gain insight and knowledge from gathered data (Attride-Stirling, 2001). Ryan and Bernard (2003) recommend that in searching for themes one should look out for topics that recur again and again, similarities and differences and theory-related ideas (Bryman, 2008).

The current study generated themes related to the post-colonial perspective to critically analyze and attempt to explain the different perceptions African countries have of the ICC. Other themes were generated by identifying relevant and recurring ideas and topics related to the guiding research question and objectives of the study. In order to have an in-depth understanding and insight into how African countries perceive the ICC, the study analyzed the similarities between countries that support or oppose the Court. It also analyzed the extent to which these competing views shape the current controversy of the ICC in Africa.

3.4 Advantages and Limitations of Research Design

The selection of secondary data for this study is based on its availability and relevance to the research objectives and questions. Using secondary data is also convenient and more economical than other methods of data collection, since there are no travel expenses, and no cost to organize interviews and get incentives for participants of the research. There is no need to seek ethical approval since participants are not directly involved in this research.

However, this research approach has some limitations. Searching for data and analyzing the data collected, can be tedious and time-consuming as the researcher must go through a lot of information to find relevant data on the topic (Singleton & Straits, 2005; Bryman, 2008). In the past few months, recurring news of withdrawal threats by some African countries and sudden changes in stance regarding perceptions about the Court meant I had to always add or change already gathered data. Finally, there is also the tendency for the researcher's personal biases, expectations and perceptions to influence the outcome of the study.

Chapter 4

Evolution of International Criminal Law and the Origin of the International Criminal Court

This chapter provides a historical account of the development of the Rome Statute of the International Criminal Court. It explores how the ICC was created and how it has developed over time by examining events that led to the establishment of the Court. This is followed by examining various negotiations and activities including the Rome Conference that established the ICC. It continues with examining the number of signatories and ratification the Rome Statute has received. It also explores the aims and operations of the Court, its criminal jurisdiction and its structure. The chapter concludes with examining the ICC prosecution process and the number of cases and situations under investigation.

4.1 The Historical Development of the ICC

The idea of a permanent International Criminal Court can be traced to the 1800s (Schabas, 2011; Chazal, 2016). Prior to that, war criminals in the time of the ancient Greek were prosecuted according to the early laws that were documented in the writings of classical authors and historians (Schabas, 2011). Modern codification of laws that proscribed inhumane acts and set out sanctions such as the death penalty for the rape of civilians, abuse of prisoners, and other atrocities was applied by Abraham Lincoln to the Union army during the American Civil War in 1863 (Schiff, 2008; Schabas, 2011). Historically, prosecution of inhumane conduct and war crimes was restricted to the vanquished or to the isolated cases of rogue combatants in the victor's army (Schabas, 2011). National courts had the mandate to prosecute war crimes but were hampered by their inability to remain balanced, impartial and independent of those in power (Schabas, 2011).

Over time, the concept of an international justice system has gone through a number of historical, political and social developments (Chazal, 2016). Initially, there were calls for

the international prosecution of humanitarian abuses (Schabas, 2011). The first genuine call for the creation of a permanent international criminal court was by Gustave Moynier in 1872 (Schabas, 2011; Chazal, 2016). He was a lawyer and one of the founders of the International Committee of the Red Cross in Geneva and he proposed an international criminal court to prosecute crimes committed during the Franco-Prussian War (Chazal, 2016). He also urged for a draft statute for an international criminal court that would prosecute breaches of the Geneva Convention of 1864 and other humanitarian norms. However, Moynier's proposal was seen too radical at that time (Schabas, 2011).

The next call for an international criminal court to try individuals, not states came in 1919 when the drafters of the Treaty of Versailles envisaged an ad hoc court to try Kaiser Wilhelm II and German war criminals of the World War I (Schiff, 2008; Schabas, 2011; Werle & Jessberger, 2014; Bassiouni, 1995 cited in Chazal, 2016). However, this attempt to establish a war crimes court was never implemented. There was no criminal prosecution of crimes under international law committed by Germans in the World War I (Werle & Jessberger, 2014). The prosecution of war criminals such as Kaiser Wilhelm II by Allied military courts was unsuccessful because the German's were stubborn and refused to surrender persons named by the court. Kaiser Wilhelm II was granted asylum in the Netherlands. (Werle & Jessberger, 2014). Many of the accused persons were acquitted and those found guilty were sentenced to modest terms of imprisonment (Schabas, 2011). Another attempt to create a permanent international court came in the period before World War II. This attempt to create an international criminal court to prosecute terrorist crimes within the framework of the League of Nations failed in 1937. Another attempt, *Convention pour la Creation d'une Cour Penale Internationale of 1937* was signed by thirteen countries but never came into effect (Werle & Jessberger, 2014).

After World War II, allied forces created the International Military Court Charter, known as the Nuremberg Tribunal in 1945 (Schabas, 2011; Werle & Jessberger, 2014). This move has been described as the birth of international criminal law. The Charter's main statement was that crimes against peace, war crimes and crimes against humanity entail individual responsibility under international law (Werle & Jessberger, 2014). The basis of the Charter states that crimes against international law are committed by men not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced (Werle & Jessberger, 2014). The International Military Tribunal was created to prosecute war criminals whose offences had no particular geographical location. These war criminals included key leaders of the Nazi Regime who were responsible for massacres and atrocities (Arieff, Margesson, Browne & Weed, 2011; Werle & Jessberger, 2014; Chazal, 2016). Nazi war criminals were charged and convicted of crimes against humanity and atrocities committed against Jewish people of Europe (Schabas, 2011). Another tribunal, the International Military Tribunal for the Far East was established in Tokyo to deal with war crimes (Chazal, 2016). Despite their limitations, these tribunals brought the idea of international criminal justice into the spotlight of the international arena (Bassiouni, 1997 cited in Chazal, 2016).

The failure of national courts and tribunals to prosecute international crimes and deliver justice to perpetrators of crimes against humanity led to more calls to establish a permanent court to deal with war crimes (Jurdi, 2011; Chazal, 2016). After the World War II and failed attempts to create an international court, the International Law Commission (ILC) was tasked by the General Assembly of the United Nations to draft a statute for the establishment of an international criminal court. The ILC submitted its report and draft to the General Assembly in 1952 (Schabas, 2011; Chazal, 2016). Their efforts were suspended due to the inability of adequately defining the crime of aggression (Schabas, 2011; Jurdi, 2011;

Chazal, 2016). The attempts by the ILC to draft an international criminal law statute fell into the background throughout the Cold War (Chazal, 2016).

The turning point came in 1989 when the Prime Minister of Trinidad and Tobago suggested to the UN General Assembly to establish an international criminal court to try individuals accused of transnational drug trafficking and other crimes (Broomhall, 2003; Schiff, 2008; Schabas, 2011; Chazal, 2016). In addition, the 1990s witnessed atrocities and crimes against humanity and the rise of human rights movements calling for the perpetrators to be held accountable (Schabas, 2011; Chazal, 2016). The United Nations activated its peace enforcement mechanisms following the end of the Cold War in the early 1990s (Werle & Jessberger, 2014). The General Assembly of the United Nations mandated the International Law Commission (ILC) to prepare a draft code for a permanent international court (Broomhall, 2003; Schabas, 2011; Chazal, 2016). Importantly also, the United Nations Security Council had to respond to calls by the human rights movements to seek justice for victims of the atrocities in former Yugoslavia and Rwanda (Chazal, 2016).

An ad hoc tribunal known as the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague was set up to try persons responsible for serious violations of international humanitarian law (Schabas, 2011). The tribunal was established in February 1993 to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 (Schabas, 2011). The atrocities in the former Yugoslavia came about as a result of heightening tensions between ethnic groups after the death of Josip Broz Tito in 1982. The mass violations of international law included “ethnic cleansing” that was committed on the territory of former Yugoslavia (Werle & Jessberger, 2014). Serious atrocities such as these were seen as a threat to international peace and used to justify the need to create a criminal court for the purpose of

prosecuting persons responsible for committing serious violations of international humanitarian law in the territory of the former Yugoslavia (Werle & Jessberger, 2014).

The United Nations Security Council created another ad hoc tribunal, the International Criminal Tribunal for Rwanda (ICTR) in 1995 for the 1994 genocide in Rwanda (Chazal, 2016). The United Nations Security Council acted on the request from Rwanda to create a tribunal to charge persons responsible for the genocide that took the lives of about 800,000 people and other serious violations of international humanitarian law committed in Rwanda and neighbouring countries during the year 1994 (Schabas, 2011; Werle & Jessberger, 2014). In the early 2000s, other temporary institutions such as the Special Court in Sierra Leone and Special Tribunal for Lebanon were established to deal with atrocities committed in the 1990s (Schabas, 2011; Arieff et al, 2011). These tribunals were temporary, case-specific and limited in jurisdiction (Arieff et al, 2011). However, their presence generated the momentum for the establishment of a permanent international court to hold perpetrators of serious violations of human rights responsible (Cole, 2013).

4.2 The Establishment of the Rome Statute of the ICC

The highpoint of international criminal law is the Rome Statute and the subsequent establishment of the Court in The Hague. There was now a perceived need to create a permanent and independent court to prosecute perpetrators of ongoing violations of international humanitarian law and also serve as deterrence to others in the future. The international political climate had improved with the end of the Cold War and it was possible to make significant progress in the effort to create a permanent international criminal court (Werle & Jessberger, 2014). In 1994, the United Nations handed the International Law Commission (ILC) draft over to an Ad Hoc Committee which met twice in 1995 (Broomhall, 2003; Schabas, 2011). The committee took the ILC's draft as a basis to prepare a final draft

statute to establish the ICC. In 1995, the United Nations General Assembly established a Preparatory Committee on the Establishment of the ICC to prepare a consolidated draft text leading up to the Rome Conference in 1998 (Werle & Jessberger, 2014; CICC, 2015 cited in Chazal, 2016). The Preparatory Committee in 1996 and 1997 invited Member states, non-governmental organizations and international organizations to participate in discussions (Schabas, 2011). The groups suggested some amendments to the draft of the proposed statute aimed at creating an international criminal court (Broomhall, 2003; Schabas, 2011).

Finally, in March and April 1998, the Preparatory Committee prepared a consolidated text of its Draft statute and Draft Final Act for presentation to the Diplomatic Conference (Broomhall, 2003). The Diplomatic Conference of Plenipotentiaries on the Establishment of the ICC was opened from June 15 to July 17, 1998, in Rome, Italy (Bassiouni, 1999; Broomhall, 2003; Schabas, 2011; Jurdi, 2011). The conference was attended by thousands of individuals and groups representing potential States Parties, international bodies such as the United Nations, many representations of global civil society, including advocates for human rights and victims' and media organizations (Glasius, 2006 cited in Chazal, 2016). About one-hundred and sixty (160) State delegates participated in the five-week intensive conference to discuss the draft text prepared by the Preparatory Committee. Mr. Giovanni Conso of Italy was elected as the President of the Conference while other committees were set up and assigned with specific tasks that promoted the effectiveness of the conference (United Nations, 2002; Broomhall, 2003). The Committee of the Whole was chaired by Ambassador Philippe Kirsch of Canada. This committee was assigned to examine the draft Convention on the Establishment of the ICC adopted by the Preparatory Committee. The Drafting Committee was chaired by Professor M. Cherif Bassiouni of Egypt. The Drafting Committee was tasked to coordinate and refine the drafting of all texts referred to them without altering their substance, formulating drafts as well as giving advice on drafting (United Nations,

2002). The Credential Committee was chaired by Angela Hannelone Benjamin from Dominica. The committee was responsible for reviewing the credentials of delegates participating in the conference (Bassiouni, 1999).

There were strong negotiations and statements in support of the Rome Statute from groups such Southern African Development Community (SADC), the like-minded countries including Canada, Australia and Germany, and the Coalition for the International Criminal Court (CICC), that promoted the early adoption of the Rome Statute (Broomhall, 2003; Schabas, 2011; Werle & Jessberger, 2014; Chazal, 2016). The negotiation process was not smooth as some states especially members of the Non-Aligned Movement and the Permanent Five members of the UN Security Council including the United States did not have common views on certain issues. They opposed the idea of creating a permanent court because they worried about their sovereignty and about protecting their own citizens. They sought a court that was a sort of at-the-ready ad hoc criminal court which the UN Security Council could activate in crisis situations (Werle & Jessberger, 2014). These differences and irreconcilable proposals by delegates made the negotiation process difficult and left some observers skeptical about the Court (Bassiouni, 1999; Broomhall, 2003). The main areas of contention involved defining the Court's jurisdiction, how investigations would be initiated ("trigger mechanisms"), the role and status of the prosecutor and the Court's relationship with the United Nations especially the Security Council (Schabas, 2011; Werle & Jessberger, 2014).

The conference was organized in smaller committees, working groups and informal groups to promote the effective negotiation on issues presented for discussion. There were several informal working groups that met to discuss issues among themselves. This move accelerated the negotiation process and gave smaller and developing states the opportunity to make their submissions (Bassiouni, 1999; United Nations, 2002). The tireless efforts of these working groups settled some of the core issues including the role of the UN Security Council

and the list of crimes over which the court would have jurisdiction (Schabas, 2011). However, it was impossible to reconcile and resolve the differences of the delegates by the time the conference was ending (Bassiouni, 1999; Schabas, 2011). The United States strongly opposed most of the ideas being discussed and was perceived to be unwilling to make flexible compromises (Bassiouni, 1999). The Chairman of the Committee of the Whole Ambassador Philippe Kirsch (Canada) issued a proposed draft that addressed the difficult issues and guided the focus of the negotiation. He proposed a “compromise package” that provided a level ground that incorporated aspects of the competing concerns while proposing imaginative solutions to some of the difficult issues (Bassiouni, 1999; Broomhall, 2003; Schabas, 2011).

The final stage of the negotiation process was characterized by suspense and skepticism since there was strong opposition from countries such as the United States that rejected the proposed compromise package (Bassiouni, 1999). On the other hand, the majority of the delegates expressed their support for the proposed package and resisted any attempts by the United States to alter or adjust it out of fear that the entire compromise might unravel (Bassiouni, 1999; Schabas, 2011). On 17 July 1998, the proposed draft was presented for a vote. Surprisingly, one hundred and twenty (120) states voted in favour of adopting the Statute, seven (7) voted against while twenty-one (21) abstained (Bassiouni, 1999, Broomhall, 2003; Werle & Jessberger, 2014). Even though the votes were unrecorded, the United States, China, Israel, Libya, Iraq, Yemen and Qatar are reported to be the 7 states that voted against the Statute (Schabas, 2011; Werle & Jessberger, 2014). It is reported that China, Israel and the United States voted against the Rome Statute and made statements to express their opposition to the Statute. It is also noted that the abstainers included some Arab and Islamic states as well as a number of delegations from the Commonwealth Caribbean (Schabas, 2011).

4.3 The Rome Statute of the ICC

By 31 December 2000, the deadline for signing the Statute, 139 states had signed while 27 had ratified the Statute in their national legislatures (Broomhall, 2003; Werle & Jessberger, 2014). On 11 April 2002, the number of ratifications exceeded the 60 required to formally begin operation of the ICC. In total, sixty- six states ratified the Rome Statute before it was put into force on 1 July 2002 (Broomhall, 2003). The Rome Statute was thus the founding multilateral treaty that established the International Criminal Court (ICC, 2017). The Statute is organized into 13 parts with 128 Articles that govern the Court's functions, jurisdiction, the composition and administration of the Court, the trial process, and international cooperation and judicial assistance the Court provides to states (Rome Statute, 1998; United Nations, 2002). To date, 124 countries have ratified the Rome Statute and are State Parties of the International Criminal Court while 139 countries are signatories to the Rome Statute (Chazal, 2016, CICC, 2016; ICC, 2017). Out of the 124 State Parties, 34 are the African States, 19 are the Asia-Pacific States, 18 are Eastern Europe states, 28 are from Latin America and the Caribbean and 25 are from Western Europe and other states (ICC, 2017; ASP, 2017). Provided below (in Table 2) is a list of the African countries that are State Parties to the Rome Statute.

Table 2: List of African State Parties to the Rome Statute of the ICC

Countries	Date of ratification
Senegal	02 February 1999
Ghana	20 December 1999
Mali	16 August 2000
Lesotho	06 September 2000
Botswana	08 September 2000
Sierra Leone	15 September 2000
Gabon	20 September 2000
South Africa	27 November 2000
Nigeria	27 September 2001
Central African Republic	03 October 2001
Benin	22 January 2002
Mauritius	05 March 2002
The Democratic Republic Of Congo	11 April 2002
Niger	11 April 2002
Uganda	14 June 2002
Namibia	25 June 2002
Gambia	28 June 2002
The United Republic Of Tanzania	20 August 2002
Malawi	19 September 2002
Djibouti	05 November 2002
Zambia	13 November 2002
Guinea	14 July 2003
Burkina Faso	16 April 2004
Congo	03 May 2004
Burundi	21 September 2004
Liberia	22 September 2004
Kenya	15 March 2005
Comoros	01 November 2006
Chad	01 January 2007
Madagascar	14 March 2008
Seychelles	10 August 2010
Tunisia	24 June 2011
Cape Verde	10 October 2011
Cote D' Ivoire	15 February 2013

Source: Assembly of State Parties, 2017

4.4 Jurisdiction of the ICC

The ICC is the world's first permanent International Criminal Court that seeks to try individuals for the gravest war crimes. The Court is unique because it was established by a treaty. It investigates and tries individuals, not states charged with atrocious crimes that are of concern to the international community (ICC, 2017). The ICC aims to provide justice for victims of serious crimes, promote the rule of law, human rights, peace and security by joining the global fight to end impunity through international criminal justice. It also seeks to bring an end to serious crimes and also prevent them from happening in the future (ICC, 2017). The Court has no retroactive jurisdiction which means it has jurisdiction over crimes committed on or after July 1 2002 (ICC, 2017). The Court also has jurisdiction in situations where crimes committed were by a State Party national, or in the territory of the State Party, or in a State that has acquired the jurisdiction of the Court. It also has jurisdiction when crimes are referred to the ICC prosecutor by the United Nations Security Council pursuant to a resolution adopted under Chapter VII of the UN Charter (ICC, 2017).

The Rome Statute of the ICC grants jurisdiction over four crimes namely genocide, crimes against humanity, war crimes, and crime of aggression, the last of which was introduced in an amendment to the Rome Statute in 2010 but is yet to be ratified by State Parties in order to activate the Court's jurisdiction (Chazal, 2016; ICC, 2017). The Rome Statute defines crime of genocide as any act committed with the intent to destroy, in whole or part, a national, ethnical, racial or religious group (Rome Statute, 1998 Article 6; ICC, 2017). These acts include killing members of a group, causing serious bodily and mental harm to members of a group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group or forcibly transferring children of the group to another group (Rome Statute, 1998 Article, 6; ICC, 2017). Crimes against humanity involve serious violations

committed as part of a widespread, large-scale or systematic attack directed against any civilian population, with knowledge of the attack (Rome Statute 1998, Article 7; ICC, 2017). The forms of crimes against humanity include murder, rape, imprisonment, enforced disappearances, extermination, enslavement – particularly of women and children, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, torture, apartheid and deportation (Rome Statute 1998, Article 7). Thirdly, war crimes according to the Rome Statute mean grave breaches of the Geneva Convention of 12 August 1949 (Rome Statute, 1998). This includes the use of child soldiers; the killing or torture of persons such as civilians or prisoners of war; inhumane treatment including biological experiments, unlawful deportation or transfer or confinement; intentionally directing attacks against hospitals, historic monuments, or buildings dedicated to religion, education, art, science or charitable purposes (Rome Statute, 1998 Article, 8; ICC, 2017).

Finally, crime of aggression refers to the use of armed force by a State against the sovereignty, integrity or independence of another State or in any other manner inconsistent with the Charter of the United Nations (ICC, 2017; ASP, 2017). Crime of aggression means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations (Review Conference of the Rome Statute, 2010). These acts include attack by the armed forces of a State on the land, sea and air forces or marine or air fleets of another State and blockade of the coasts and ports of a State by the armed forces of another State (Review Conference of the Rome Statute, 2010). The definition of this crime was adopted at the Review Conference of the Rome Statute held in Kampala, Uganda in 2010. After the conference, State Parties had to agree on the definition of crime of aggression, ratify and vote on the amendment to grant the Court jurisdiction over the crime

by January 2017 (Review Conference of the Rome Statute, 2010). To date, the 30 ratifications required to put into force the amendment has not been met hence the Court still lacks formal jurisdiction over the crime of aggression (ASP, 2017).

4.5 Principle of Complementarity and Cooperation

The core features of the International Criminal Court include complementarity and cooperation. The ICC is a Court of last resort that seeks to complement not replace national courts. The Court only prosecutes persons responsible for serious crimes when States are unwilling to or unable to do so genuinely (Rome Statute, 1998 Article 17; ICC, 2017). The Court will not begin investigating a crime if the State concerned is already investigating or prosecuting it (du Plessis 2008). The Court is intended to act in cases where domestic legal systems of states are not well developed to prosecute international crimes. The Court also seeks to complement domestic courts by providing mutual assistance to State Parties to investigate and prosecute cases at their national courts (du Plessis & Maunganidze, 2015). This is done through capacity building to strengthen national courts and encourage states to implement the Rome Statute in their domestic jurisdictions (du Plessis & Maunganidze, 2015).

State Parties and non-state parties are obliged to cooperate with the Court as well as provide judicial assistance in relation to investigation and prosecution of crimes. (Rome Statute, 1998 Article 86; du Plessis, 2008; ICC, 2017). The Court relies heavily on the assistance and cooperation of State Parties to gather information and evidence; make arrest and surrender accused persons who visit their territory. The ICC does not have its own police force; it relies on cooperation with States for support, particularly for making arrests, transferring arrested persons to the ICC detention centre in The Hague, freezing suspects' assets, and enforcing sentences (ICC, 2017). The Court may also ask non- governmental

groups to cooperate by providing information or documents required to investigate a situation, putting mechanisms in place to protect victims and raising awareness of the Court and building support for the Court and its mandate (Rome Statute, 1998 Article 87; ICC, 2017). Where a State Party fails to comply with a request to cooperate with the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council (Rome Statute, 1998 Article 87(7)).

4.6 Structure of the ICC

The permanent ICC building is located at The Hague, The Netherlands. The Court also has field offices in some countries in which investigations are being conducted. There are currently field offices in Kinshasa and Bunia (Democratic Republic of the Congo), Kampala (Uganda), Bangui (Central African Republic), Nairobi (Kenya) and Abidjan (Côte d'Ivoire) (ICC, 2017). The International Criminal Court is composed of four separate organs namely the Presidency, the Chambers or Judiciary, the Office of the Prosecutor and the Registry (Schabas, 2011; Chazal, 2016; ICC, 2017). The Presidency is responsible for the overall administration of the Court, legal functions and external relations of the Court (Chazal, 2016; ICC, 2017). It is made up of three judges that are the President and the First and Second Vice- Presidents who are elected by their fellow judges from the Judiciary to serve a three-year renewable term (Schabas, 2011; Chazal, 2016; ICC, 2017). The Presidency is also responsible for constituting and assigning cases to the Chambers, and conducts judicial reviews of certain decisions of the Registry. With the exception of the Office of the Prosecutor, the Presidency is responsible for the proper administration of the Court and oversees the work of the Registry (ICC, 2017). The current President of the Court is Judge Silvia Fernandez de Gurmendi of Argentina, the current First- Vice President is Judge Joyce

Alucho of Kenya and Judge Kuniko Ozaki of Japan as Second- Vice President (ICC, 2017). The current Presidency was elected on 11 March 2015 (ICC, 2017).

The Judicial Division is composed of 18 judges and is separated into 3 distinct divisions. The divisions are the Pre-Trial Division, the Trial Division and the Appeals Division (Chazal, 2016; ICC, 2017). The 18 judges are elected by the Assembly of States Parties for their qualifications, impartiality and integrity to serve a 9-year, non-renewable term (ICC, 2017). They ensure fair trials and render decisions, but also issue arrest warrants or summonses to appear, authorize victims to participate and order witness protection measures. They also elect, from among themselves, the ICC President and two Vice-Presidents, who head the Court (ICC, 2017). The judges at the Judicial Division include Judge Antoine Kesia- Mbe Mindua of the Democratic Republic of Congo. He was elected in March 2015 and is currently assigned to the Pre-Trial Division (ICC, 2017). Judge Chile Eboe- Osuji from Nigeria was elected in March 2012 to serve on the Trial Division and Judge Sanji Monageng of Botswana is assigned to the Appeals Division (ICC, 2017).

The third organ of the ICC is the Office of the Prosecutor (OTP). It is an independent and separate organ of the Court that is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, examining situations and carrying out investigations and prosecutions against the individuals who are allegedly most responsible for those crimes (Chazal, 2016; ICC, 2017). The OTP is composed of three main Divisions namely the Jurisdiction, Complementarity and Cooperation Division which conducts preliminary examinations, provides advice on issues of jurisdiction, admissibility and cooperation, and coordinates judicial cooperation and external relations for the OTP. The Investigation Division is in charge of providing investigative expertise and support, coordinating field deployment of staff and security plans and protection policies, and

providing crime analysis and analysis of information and evidence. The Prosecution Division prepares the litigation strategies and conducts prosecutions, including through written and oral submissions to the judges (ICC, 2017). The Chief Prosecutor and Deputy Prosecutor are elected by the Assembly of State Parties (ASP) for a non-renewable 9-year mandate (ICC, 2017). The current Prosecutor is Fatou Bensouda from the Gambia and the Deputy Prosecutor is James Stewart from Canada and the Head of Jurisdiction, Complementarity and Cooperation Division is Phakiso Mochochoko of Lesotho (ICC, 2017).

The Registry is a neutral organ of the Court that provides services to all other organs so the ICC can function and conduct fair and effective public proceedings (ICC, 2017). The Registry provides judicial support which includes general court management and court records, translation and interpretation, and counsel support (ICC, 2017). They are also responsible for the operation of the detention centre and provide support for victims to attend proceedings at the Court. In addition, they assist victims to apply for reparation and for witnesses to receive support and protection (ICC, 2017). Moreover, the Registry is responsible for public information and outreach, field office support, recording the Court proceedings, engaging with media through conferences and press releases and disseminating information (ICC, 2017).

The Rome Statute of the ICC also established the Assembly of State Parties (ASP). It is made of representatives of countries that have ratified and acceded to the Rome Statute (ASP, 2017). Each State Party is represented by a representative who is proposed to the Credential Committee by the Head of State of government or the Minister of Foreign Affairs (ASP, 2017). The ASP provides management oversight for the Presidency, Prosecutor and the Registry, electing judges, prosecutor and deputy prosecutor as well as approving the ICC budget (Rome Statute, 1998 Article 112; ASP, 2017). The ASP may also decide, by secret

ballot, on the removal from office of a Judge, the Prosecutor or Deputy Prosecutors (ICC, 2017). The Rome Statute further provides that each State Party has one vote, although every effort shall be made to reach decisions by consensus. States that are not party to the Rome Statute may take part in the work of the Assembly as observers, without the right to vote (ICC, 2017). The Assembly of States Parties has a Bureau, consisting of a President, two Vice Presidents and 18 members elected by the Assembly for a three-year term, taking into consideration principles of equitable geographic distribution and adequate representation of the principal legal systems of the world (ASP, 2017). The current President of the Assembly of State Parties is Mr. Sidiki Kaba of Senegal; the Vice Presidents are Mr. Sergio Ugalde of Costa Rica and Mr. Sebastiano Cardi of Italy (ASP, 2017). Other members of the Bureau include Ghana, Nigeria, South Africa, Uganda, Sweden, Germany and Colombia (ASP, 2017).

There are other semi-autonomous bodies that work with the Court but are separate from the main structure of the ICC (Chazal, 2016; ICC, 2017). The Trust Fund for Victims is one of the bodies that aim to support and implement programmes that address harms resulting from genocide, crimes of humanity and war crimes. It provides assistance and reparations to victims of atrocious crimes (ICC, 2017). The Fund provides physical, psychological, and material support to victims and their families (ICC, 2017).

4.7 Initiation of Cases and Prosecution Process

Possible cases that are investigated at the Court are initially referred to as situations. These situations are referred to the Court in one of these three ways. Firstly, a situation can be investigated upon the request of the State Party (Rome Statute, 1998 Article 14; ICC, 2017). A State party can refer its situation to the ICC Prosecutor and ask the Court to prosecute due to its inability to achieve legitimate or effective national prosecution (Chazal,

2016). Another way a situation can be brought to the ICC is through a referral from the United Nations Security Council (Rome Statute, 1998 Article 13b). The UNSC grants universal jurisdictions to all State Parties and Non-State Parties to the ICC. Lastly, the Prosecutor may open *proprio muto* power investigations with authorization of 3 judges of the Pre-Trial Chamber on the basis of information of crimes within the Court's jurisdiction (Rome Statute, 1998 Article 15; Cole, 2013; ICC, 2017).

Situations brought to the Court begin with preliminary examinations, where the Office of the Prosecutor (OTP) conducts examinations to decide whether there are enough information and evidence of crimes falling within the jurisdiction of the Court (Cole, 2013; ICC, 2017). The OTP also conducts preliminary examinations to determine whether an investigation would be admissible and there is complementarity meaning a national court is not already dealing with it and whether the investigation would be in the interests of justice and of victims (ICC, 2017). In the second stage, investigations are conducted to gather evidence and information about the crime. The information and evidence are gathered through questioning suspects as well as victims and witnesses of the crime. The individual (suspect) accused of the crimes is identified and the Prosecutor requests ICC judges to issue an arrest warrant or a summons to appear at the Court voluntarily (ICC, 2017). The OTP must satisfy the Chamber that there are reasonable grounds to believe that the suspects committed the crimes in question (Cole, 2013). The individual is considered innocent until proven guilty therefore his or her human rights are protected during the prosecution process. The accused also has the right to a lawyer and an interpreter when necessary without any charge (Rome Statute, 1998 Article 67; ICC, 2017).

The third stage is the pre-trial where the suspects appear before the Court. The process begins with an initial appearance where the 3 pre-trial judges confirm the suspect's identity and ensure the suspect understands in detail the charges. The suspect has the right to

information in a language he or she fully understands (ICC, 2017). There is also a confirmation of charges hearing where the Defence, the Legal representatives of victims and judges decide if there is enough evidence for the case to go to trial (ICC, 2017). In situations where the identified suspects have not been arrested or appear at the Court voluntarily, legal submissions can be made but hearings cannot proceed (ICC, 2017).

At the trial stage, in order to convict, the pre-trial Judges and the Prosecution need to prove beyond reasonable doubt that the accused is guilty of the crime. The Judges issue a verdict and when the accused is found guilty, and a sentence is issued. A sentence may be up to 30 years of imprisonment and under exceptional circumstances a life sentence may be given (ICC, 2017). The fifth stage is the appeals stage. An appeal is decided by 5 judges of the Appeal Chamber, who are never the same judges who gave the original verdict (ICC, 2017). At this stage both the Prosecution and Defence have the right to appeal the decision on the verdict and the sentence. The Appeals Chamber decides whether to uphold the appealed decision, amend it, or reverse it. This is thus the final judgment, unless the Appeals Chamber orders a re-trial before the Trial Chamber (ICC, 2017). The final stage of the prosecution process is the enforcement of sentence. Suspects who are found guilty of charges against them and whose appeals are upheld by the Appeal Chamber, can be sentenced to prison terms. Currently these sentences are served in countries that as part of their cooperation with the ICC have agreed to enforce ICC sentences (ICC, 2017). These countries include Austria, United Kingdom, Denmark, Finland, Colombia, Serbia and Mali (United Nations, 2011; ASP, 2011; Al-Jazeera, 2013).

4.8 Situations and Cases under investigation at the ICC

Currently, there are eight (8) situations undergoing preliminary examinations at the ICC (ICC, 2017). Five of these situations are from African State Parties (Burundi, Gabon,

Guinea, Nigeria and Comoros). There are also eleven (11) situations under investigation at the Court with ten (10) of them from African countries (ICC, 2017). There have been 25 cases before with some of cases having more than one suspect (ICC, 2017). Five of these cases are at the trial stage, 5 of the cases have been closed because there has been a sentence or acquittal. Cases can also be closed when there is lack of evidence or due to the defendant's death (ICC, 2017). For instance, the cases against President of Kenya and his deputy were withdrawn due to insufficient evidence (ICC, 2017). One case against DRC military commander Bemba is at the appeal stage after he was found guilty and sentenced to 18 years imprisonment for crimes against humanity (ICC, 2017).

In summary, the Court has issued 30 arrest warrants, issued 9 summonses to appear before the Court, 8 persons have been detained in ICC Detention centres and have appeared before the Court. There have also been 6 verdicts, 9 convictions and 1 acquittal. However, 15 of the accused persons remain at large with 3 charges dropped due to their death (ICC, 2017). Provided below (in Tables 2 and 3) is more detailed information on situations currently undergoing preliminary examination and investigation before the ICC.

Table 3: Ongoing Preliminary Examinations at the ICC

Preliminary examination	Alleged crimes	How situations were initiated
Afghanistan	Alleged war crimes and crimes against humanity committed since May 2003	Initiated by the Prosecutor's <i>proprio motu</i> under Article 15 of the Rome Statute of the ICC
Colombia	Alleged war crimes committed since November 2009 and crimes against humanity committed since November 2002	Initiated by the Prosecutor's <i>proprio motu</i> under Article 15 of the Rome Statute of the ICC
Gabon	Alleged crimes committed in May 2016 in the context of presidential elections held in 2016	Situation was initiated at the request of the Government of Gabonese Republic in September 2016
Guinea	Alleged crimes against humanity committed during events at the Conakry Stadium on 28 September 2009	Initiated by the Prosecutor's <i>proprio motu</i> under Article 15 of the Rome Statute of the ICC
United Kingdom/Iraq	Alleged ICC crimes committed by nationals of the United Kingdom in the Iraq conflict and invasion from 2003 to 2008	Initiated by the Prosecutor's <i>proprio motu</i> under Article 15 of the Rome Statute of the ICC
Nigeria	Alleged crimes against humanity and war crimes committed in the Niger Delta, Middle-Belt States and armed conflicts between Boko Haram and Nigerian security forces	Initiated by the Prosecutor's <i>proprio motu</i> under Article 15 of the Rome Statute of the ICC
Palestine	Alleged crimes committed in the occupied Palestinian territory, including East Jerusalem, since 13 June 2014	Initiated by the Prosecutor's <i>proprio motu</i> under Article 15 of the Rome Statute of the ICC after a referral was received or a valid declaration made pursuant to Article 12 (3) of the Rome Statute

Ukraine	Alleged crimes committed in the context of the "Maidan" protests since 21 November and other events in Ukraine since 20 February 2014	Initiated by the Prosecutor's <i>proprio motu</i> under Article 15 of the Rome Statute of the ICC
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Source: ICC, 2017

Table 4: Situations under Investigations

Burundi	Alleged crimes against humanity committed in Burundi or by nationals of Burundi outside Burundi since 26 April 2015 until 26 October 2017	Initiated by the ICC Prosecutor's <i>proprio motu</i> on 25 October 2017
Georgia	Alleged war crimes and crimes against humanity in the context of international armed conflicts between 1 July and 10 October 2008 in and around South Ossetia	ICC Prosecutor authorized to open <i>proprio motu</i> investigations in January 2016
Cote d'Ivoire	Alleged crimes within the jurisdiction of the Court committed in the context of post-election violence in Côte d'Ivoire in 2010/2011, but also since 19 September 2002 to the present	ICC Prosecutor opened <i>proprio motu</i> investigations after authorization of Pre-trial Chamber in October 2011
Kenya	Alleged crimes against humanity committed in the context of post-election violence in Kenya in 2007/2008.	ICC Prosecutor opened <i>proprio motu</i> investigation in March 2010
Mali	Alleged war crimes committed in Mali since January 2012	Referred by Government of Mali in July 2012
Central African Republic 1	Alleged war crimes and crimes against humanity committed in the context of a conflict in CAR since 1 July 2002, with the peak of violence in 2002 and 2003.	Referred by Government of Central African Republic in December 2004
Central African Republic 2	Alleged war crimes and crimes against humanity committed in the context of renewed violence starting in 2012 throughout CAR.	Referred by Government of Central African Republic
Uganda	Alleged war crimes and crimes against humanity committed during conflicts	Referred by Government of Uganda in January 2004

	between the Lord's Resistance Army (LRA) and national authorities in Northern Uganda	
The Democratic Republic of Congo	Alleged war crimes and crimes against humanity committed during armed conflicts in Eastern DRC, the Ituri region and North and South Kivu provinces	Referred by the Government of Democratic Republic of Congo in April 2004
Libya	Alleged crimes against humanity committed in the context of the situation in Libya since 15 February 2011	Situation referred to the ICC by the United Nations Security Council in March 2011
Sudan, Darfur	Alleged genocide, war crimes and crimes against humanity committed in Darfur, Sudan	Situation referred to the ICC by the United Nations Security Council in March 2005

Source: ICC, 2017

Chapter 5

Africa and the International Criminal Court

This chapter explores in detail the active participation of African countries in the establishment of the Rome Statute of the International Criminal Court. It provides a detailed account of individual African countries, the African Union and civil society groups' efforts and participation prior to and during the Diplomatic Conference that led to the creation of the Rome Statute of the ICC. The chapter concludes with an outline of the various ways some African countries have demonstrated their support and commitment since the adoption of the Rome Statute of the ICC. Various ways countries and civil society groups demonstrate their continuous support and cooperation with the Court aside signing and ratifying the Rome Statute include implementing the Rome Statute into their domestic laws and making statements in favour of the ICC.

5.1 African Participation in the Creation of the Rome Statute of the ICC

The relationship between the International Criminal Court (ICC) and African states can be traced back to the establishment of the Court. African states and institutions played a crucial role in the creation of the Court (Cole, 2013; Murithi, 2013; Monageng, 2014). They actively participated in the negotiation process of the Rome Statute and the establishment of the Court (Monageng, 2014). African countries were committed to seeing the establishment of an International Court aimed at prosecuting perpetrators of serious crimes against humanity, genocide, war crimes and crimes of aggression (Murithi, 2013; Monageng, 2014; ICC, 2016). The history of the ICC's creation and the serious involvement of African states in that history demonstrates the ICC to be an institution created in part by Africans and ultimately for the benefit of African victims of serious crimes (du Plessis, 2010).

Africa's past relationship with the Court and the crucial role African states and institutions played in the creation of the ICC cannot be easily forgotten. Individual African states, the African Union (AU) and various African civil societies were instrumental in the creation of the Rome Statute which gave birth to the ICC in July 2002 (Cole, 2013). They put in a lot of effort and support in the establishment of the Court. African countries took the initiative prior to the Diplomatic Conference in Rome 1998, to cooperate and together support the Court after it was established. Groups such as the Southern African Development Community (SADC) organized conferences, workshops and other ICC related activities to agree on a common goal of the Court (du Plessis, 2008, 2010; Jallow & Bensouda, 2008; Cole, 2013; Monageng, 2014).

It is particularly important to document the active and important role played by the Southern African Development Community (SADC). SADC is made of fifteen Southern African countries and is committed to regional integration and poverty eradication within Southern Africa through economic development and ensuring peace and security (SADC, 2012). They met in September 1997 and June 1999 in Pretoria, South Africa to set out the basic principles of consensus that they wanted to be included in forming the ICC (Jele, 1997; Cole, 2013; Monageng, 2014). During the two year period, meetings and conferences that were held aimed at giving countries a better understanding of the proposed Court, its importance and possible implications (Jele, 1997; Maqungo, 2000; Mochochoko, 2005:246 as cited in du Plessis, 2008; Jallow & Bensouda, 2008).

Prior to SADC's meeting in Pretoria, delegations from Lesotho, Malawi, Swaziland, Tanzania and South Africa participated in a discussion in relation to the creation of the Court when the International Law Commission (ILC) presented a draft statute to the United Nations General Assembly in 1993 (Maqungo, 2000; Cole, 2013). Southern African Development Community (SADC) member states later decided to come together and have a common voice

in order to make their negotiations meaningful (Maqungo, 2000). Legal experts from SADC states met in September 1997 and adopted principles of consensus which were transmitted for review by Ministers of justice and Attorneys-General of SADC states (Maqungo, 2000). SADC states were clearly supportive of the proposed establishment of the ICC. At the meeting, the Head of The Permanent Mission of South Africa to the United Nations, His Excellency Khiphusizi Josiah Jele declared SADC's full commitment to the Court and their preparedness to attend the diplomatic conference in Rome (Jele, 1997). Speaking on behalf of SADC states, he said

We are convinced that the creation of such a permanent court will, besides meeting out punishment to the perpetrators of such heinous crimes, also act as a strong deterrent to their possible commission in the future (Jele, 1997).

Key players, which included legal experts, academics and non-governmental agencies of the participating states proposed the following basic principles or Common Statement as the basis of their negotiations for the formation of the ICC. SADC states agreed:

- To affirm their support for the early establishment of an international criminal court.
- The ICC should be effective, independent and impartial and should operate within the highest standards of international justice. Also, the composition of the Court should reflect equitable geographical representation.
- The Court should be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective. Moreover, States should not attempt to shield the accused from justice.
- To affirm that human rights must be fully respected in all aspects of the ICC Statute, particularly those relating to the rights of the accused and the right to a fair trial. The

ICC should also be responsible, sensitive and give special consideration to victims, particularly women and children.

- The ICC should be unfettered by the veto of the Security Council. The independence and operations of the Court and its judicial functions must not be unduly prejudiced by political considerations.
- The independence of the prosecutor must be guaranteed by the Statute and should have the necessary powers to initiate investigations on his or her own and prosecute ex-officials without influence from states or the Security Council, subject only to appropriate judicial scrutiny.
- The ICC must enjoy the maximum co-operation of all States, including non State Parties where possible.
- The Court should have inherent jurisdiction over the crimes of genocide, crimes against humanity and serious violations of the laws and principles applicable in armed conflict. In addition, crimes of aggression should also be included within the jurisdiction of the court if consensus can be so reached.
- The opt-in mechanism ought to apply in respect of treaty-based crimes.
- To emphasize that the Court should be provided with long-term secure funding as well as human resources necessary for its effective functioning.
- To encourage and fully and actively participate in the Rome Conference with a view to finalizing and adopting the Statute for the establishment of an effective Court at the end of the Conference and urge all states to contribute to the Trust Funds established for the assistance of least developed and developing countries to participate in the conference.

- To also encourage all SADC states to sign the statute once it is adopted and implement measures for its early ratification with a view to ensuring that the Court begins its work in due time (Jele, 1997; Maqungo, 2000).

The Dakar Declaration for the Establishment of the ICC was also adopted following a meeting of 25 African states in Dakar, Senegal in February 1998 (Cole, 2013). The common principles proposed by the SADC member states also appeared in the Dakar Declaration (du Plessis, 2008; 2010). The Dakar Declaration concluded that there was a need for an independent court that would prosecute perpetrators of crimes against humanity. Participants at the meeting affirmed their “commitment to the establishment of the international criminal court and underlined the importance that the accomplishment of this Court implies for Africa and the world community as a whole” (Dakar Declaration for the Establishment of the ICC in 1998). It also noted domestic legal systems failure to hold perpetrators of such crimes accountable and called for the establishment of an effective and independent international criminal court (Cole, 2013). Participating countries and NGOs present at the meeting were encouraged to attend and actively participate in the Diplomatic Conference in Rome.

At the Diplomatic Conference held in Rome in July 1998 for the adoption of the Rome Statute of the ICC, African states were present and actively represented in all the commissions (Monageng, 2014). African states were represented by their ministers of justice, ministers of foreign affairs and attorneys-general who were experts in international law and relations and were well informed on their national legal systems. African states needed to push the principles proposed at both the SADC and Dakar meetings; therefore it was necessary that they occupied strategic positions within the political structures in the conference (Maqungo, 2000). It was important SADC had a strong influence on the regional groups in order to achieve the objectives as set out in the Common Statements of the ministers of justice and attorneys-general (Maqungo, 2000). SADC also needed to influence

other African states to support the creation of an impartial court (Maqungo, 2000). They made immense contributions during debates and also chaired committees and coordinated various activities (du Plessis, 2008).

For instance, the Diplomatic Conference Drafting Committee was chaired by the Egyptian representative, Professor. M. Cherif Bassiouni. Professor Bassiouni played a significant role in the creation of the ICC. He was often referred to as the “the Godfather of international criminal law and war crimes expert” (Bassiouni, 2014). He also served on several United Nations commissions. He was the chair of the Commission of Inquiry on Libya, Compensation, and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, Vice-Chair of the General Assembly’s Preparatory Committee on the Establishment of an International Criminal Court and Vice-Chair of the General Assembly’s *Ad Hoc* Committee on the Establishment of an International Criminal Court (Bassiouni, 2014). He has written a number of books and articles on international criminal law and human rights. Some of his publications have been cited by the International Court of Justice, International Criminal Tribunal for Rwanda and the South African Supreme Court (Bassiouni, 2014).

South Africa, Ghana, Morocco and Cameroon were members (United Nations, 1998; Monageng, 2014). South Africa coordinated the formulation of Part 4 of the Rome Statute as a result they were frequently invited to the meetings of the Bureau of the conference (Maqungo, 2000; du Plessis, 2008). Lesotho representative, Mr. Phakiso Mochochoko was elected to be the vice-chairman of the Committee of the Whole that was responsible for coordinating the formulation of Part 9 of the Statue (United Nations, 1998; Maqungo, 2000; Du Plessis, 2010). Eight African delegates namely from Algeria, Burkina Faso, Egypt, Gabon, Kenya, Malawi, Nigeria and Tanzania were also elected among the thirty-one Vice-Chairpersons of the diplomatic conference (United Nations, 1998; Du Plessis, 2008;

Monageng 2014). Namibia was the coordinator of African states within the Non-Aligned Movement group (NAM) and Zambia and Cote d'Ivoire were members of the Credentials Committee at the conference (United Nations, 1998; Maqungo, 2000).

African states were well represented at all levels of the conference and could influence the negotiations. Forty-seven out of the hundred and sixty delegates that participated in the Conference were from Africa (United Nations, 2003). The strong influence SADC had led to the acceptance of the basic principles and the adoption of the Rome Statute (Maqungo, 2000). The majority of African delegates present voted in favour of adopting the establishment of an International Criminal Court (Maqungo, 2000; Cole, 2013). They believed the establishment of the Court would not only help put a stop to crimes against humanity but would help with strengthening national judicial systems (Monageng, 2014). The results of the vote to adopt the Rome Statute of the ICC was not officially recorded, however, one hundred and twenty states voted in favour, and seven voted against while twenty- one abstained (Bassiouni, 1999)

The SADC states further pushed their influence during the negotiation process by persuading other delegates to support the principles of consensus that led to the establishment of the Court. SADC delegates with other delegates supported the Court being a complementary jurisdiction rather than the primary jurisdiction with regards to crimes of genocide, war crimes, crimes against humanity and crimes of aggression so as to protect the sovereignty of states (Maqungo, 2000). Delegates supported the principle that affirmed the Court being complementary to national courts.

SADC delegates also worked to persuade other delegates to define what constituted an independent Court. Issues such as financing, the election of judges, the powers of the prosecutor, the relationship between the Court and the United Nations and the role of the

United Nations Security Council needed to be clearly defined in relation to the independence of the Court (Maqungo, 2000). In regards to financing the Court, SADC delegates did not agree with states that supported the option that the Court should be financed by the United Nations (Maqungo, 2000). SADC delegates suggested that the Court should not be subject to interference from the UN and therefore agreed to an option that was viable and protected the independence of the Court (Maqungo, 2000). This option stated that funding of the Court should come from the UN, the state parties and voluntary contributions. The option supported by SADC states is the one that appears in Article 115 and 116 of the ICC Statute (Maqungo, 2000).

With respect to the election of judges, SADC states supported the idea that judges must be elected by States Parties from nationals of the states that are party to the ICC statute and should serve a long period without an option of re-election in order to protect their independence (Maqungo, 2000). SADC's position is what is stated in Article 36 of the Statute on the election of judges. The issue of the powers of the prosecutor in relation to the independence of the Court was difficult to lobby due to the strong opposition from other groups. The hard lobbying of SADC and its influence on like-minded states and non-governmental organizations (NGOs) led to the decision to give power to the prosecutor to initiate investigations of his own accord (Maqungo, 2000).

With regards to the relationship between the Court and the United Nations, delegates had to vote on the option of what it meant to safeguard the independence of the Court. SADC's view which was that the ICC should be established through a treaty and brought into relationship with the UN was accepted (Maqungo, 2000). To date, the ICC is an independent organ established by treaty and brought into a relationship with the UN. SADC states also influenced the decision on the role of the UN Security Council. To make the Court

independent and free from external influence, SADC states wanted no role for the UN Security Council in the proceedings of the ICC (Maqungo, 2000).

There was strong opposition from states such as the United States who preferred the intrusion of the UN Security Council on cases. States had to come to a compromise position which is stated in the Article 16 of the Rome Statute of the ICC. The Security Council has the power to refer matters to the prosecutor's office for investigation and prosecution and grant the ICC prosecutor universal jurisdiction in such cases. While this in effect gives the ICC prosecutor power to investigate alleged crimes committed by nationals of non-State Party countries, it also allows the Security Council to take steps to prevent the ICC from exercising this jurisdiction (Rome Statute, 1998; Maqungo, 2000).

SADC states were of the view that any State that ratified the Statute of the ICC gave express consent to the Court to exercise its jurisdiction in its territory in accordance with the Statute (Maqungo, 2000). In view of this, SADC states strong influence on like-minded states and NGOs convinced the Bureau of the conference that the Court should have universal jurisdiction. SADC states also were of the view that the human rights of suspected persons or accused persons should be respected. They supported a life sentence rather than the death penalty for crimes within the jurisdiction of the ICC and were of the view that victims of war should receive reparation (Maqungo, 2000). They even proposed the Court establish a trust fund that would pay reparation to victims and a victim unit for the protection of victims and witnesses.

Finally, SADC states totally supported the views on State cooperation with the Court. Part 9 of the Rome Statute which was coordinated by Lesotho and Malawi who are also SADC members ensured this part of the Statute reflected the responsibility of all states to

cooperate fully with the ICC in investigation and prosecution of crimes within its jurisdictions (Maqungo, 2000; du Plessis, 2008).

The Organisation of Africa Unity (OAU), (now the African Union) also demonstrated its support for the adoption of the Rome Statute of the ICC. At a meeting on 27 February 1998, the council of ministers of the Organisation of African Unity (OAU), took note of the Dakar declaration and called on all OAU member states to support the creation of the ICC. This resolution was later adopted by the OAU summit of heads of state and government in Burkina Faso in June 1998 (du Plessis, 2008). In April 1999, at the Ministerial Conference on Human Rights in Africa, the OAU passed a resolution urging its members to consider ratifying the Rome Statute of the ICC (Mills, 2012). The OAU in 2000 at its 36th ordinary session of Assembly of Heads of State and Government condemned the perpetration of crimes against humanity and genocide and encouraged its members to cooperate with the Court in its aim to prosecute perpetrators of such crimes (Cole, 2013).

African representatives and delegates used their experiences, skill and knowledge to make meaningful declarations that led to the establishment of the Court. Their strong support and commitment to the creation of the Court continued even after the Diplomatic Conference when they led the way to sign the Rome Statute. Senegal was the first state to sign the Rome Statute on 18 July 1998. It was also the first to ratify the Rome Statute on 2 February 1999, making way for it to enter into force in July 2002 (Monageng, 2014; ASP, 2017). This paved the way for more African countries making Africa the highest regional representation to the Rome Statute with 34 state parties (Murithi, 2012; Cole, 2013; Monageng, 2014; ASP, 2017).

5.2 African Countries' Initial Support for the Rome Statute of the ICC

Other African countries have also demonstrated their support and commitment to the ICC by amending their domestic laws to incorporate the Rome Statute (Cole, 2013; Werle,

Fernandez & Vormbaum, 2014; Kemp, 2014). A strategy (The Windhoek Plan) for the implementation of the Rome Statute of the ICC was adopted by SADC states in 2001 “to give priority to the drafting of implementing legislation of the Rome Statute in order to effectively co-operate with the International Criminal Court and give effect to the principle of complementarity” (Kemp, 2014). As part of efforts to ensure SADC states signed and ratified the Rome Statute, capacity building programmes were organized in order to assist SADC members in the process of ratification and implementation of the Rome Statute. Also, efforts from non-governmental organizations were put in place to move African states towards ratification and eventual implementation of the Rome Statute of the ICC (Kemp, 2014).

South Africa is reported to be the first state in Africa to implement the Rome Statute’s (du Plessis, 2010; Kemp, 2014). South Africa signed and ratified the Rome Statute on 27 November 2000, thereby becoming the 23rd State Party (du Plessis, 2010). In order to give effect to its complementarity obligations under the Rome Statute, South Africa passed the Implementation of the Rome Statute of the International Criminal Court Act 27 2002 (‘ICC Act’). The ICC Act provides for the domestic criminalization of the most serious crimes of international concern and also provides for a comprehensive framework for co-operation between South Africa and the ICC (Kemp, 2014). It also includes arrest and surrender of individuals as well as general judicial assistance to the Court. The passing of the ICC Act was momentous: prior to the ICC Act, South Africa had no municipal legislation on the subject of war crimes or crimes against humanity, and no domestic prosecutions of international crimes had taken place in South Africa. It has moreover created a dedicated unit – the Priority Crimes Litigation Unit, staffed by experienced prosecutors – to tackle the crimes outlawed under the statute (du Plessis, 2010).

Mauritius also adopted an International Criminal Court Act in 2011 to implement the Rome Statute. Mauritius ratified the Rome Statute on 5 March 2002. The Mauritius ICC Act

provides for the incorporation of substantive international criminal law, the jurisdiction of national courts over the ICC crimes, as well as for co-operation between the Court and Mauritius (ICC ACT, 2011; Kemp, 2014). Like South Africa, the Mauritius ICC Act also provides for the arrest and surrender of persons wanted by the ICC.

Kenya adopted its ICC Act in 2008 to provide for the incorporation of substantive international criminal law as well as for cooperation between Kenya and the ICC and judicial and legal assistance (Kemp, 2014). Senegal also adopted an implementation Act that provides for the substantive jurisdiction over ICC crimes in its Criminal Code (Kemp, 2014). The Code of Criminal Procedure was amended in 2007 to provide co-operation with the ICC. In 2010, Uganda adopted the International Criminal Court Act to incorporate relevant parts of the Rome Statute into Ugandan Law (Kemp, 2014). It provides jurisdiction of the High Court to hear cases of genocide, crimes against humanity and war crimes. Burkina Faso, the Central African Republic and Comoros have also adopted domestic implementing legislation while Democratic Republic of Congo, Malawi and Lesotho have incorporated some or all of the Rome Statute crimes into their penal codes (Maunganidze & du Plessis, 2015).

The first International Criminal Court (ICC) review conference was held in May and June 2010 in Kampala, Uganda. Several African countries present at the conference made statements to reaffirm their support and commitment to the ICC (Keppler, 2011). Representatives from Tanzania, Botswana and Central African Republic made statements to reiterate their support for the Court and commitment to address to seek justice for victims of war crimes (ASP, 2017). Other African State Parties pledged to put in place strategies to ensure full implementation of the Rome Statute in their countries.

Furthermore, Africa is well represented at the Court and has a number of Africans occupy key positions. The current chief prosecutor of the ICC is an African, Fatou Bensouda

of Gambia. She assumed the post in 2012 after having served for eight years as the deputy prosecutor. Also, a number of Africans serve among the court's judges and administrative staff at the office of the prosecutor (du Plessis, Maluwa & O'Reilly, 2013; Werle, Fernandez & Vormbaum, 2014).

5.3 Continuous Support for the ICC in Africa after 2010

Botswana is reported to be one of the few countries in Africa that have vocally expressed their support for the Court since its establishment (Murithi, 2013). Botswana signed the Rome Statute of the ICC on 8 September 2000 and ratified it on 13 November 2008 (CICC, 2017; ASP, 2017). Botswana made news when it was the only country to take a stand against the African Union when the Union passed a resolution calling into question the conduct of the ICC and claiming that it had unfairly targeted African leaders (Kersten, 2013). Botswana was the sole voice opposing the AU resolution to terminate ICC cases in the region. The AU requested that the United Nations (UN) Security Council to defer cases against President Omar Al Bashir of Sudan and Senior State Officials of Kenya (African Union, 2013; Kersten, 2013). The failure of the UN Security Council to grant the AU's request led them to pass the resolution calling for the deferral of cases. Botswana stood alone amongst the other AU states by being the only state that voted against the resolution (Kersten, 2013). Botswana's ambassador to Kenya, John Moreti in a statement about his government's decision to stand against the AU stated that they believe the ICC plays an important role in the continent. He stated that millions of African citizens support the ICC and international criminal justice therefore, it was wrong for the AU to pass such resolution. He also stated that, there was no problem with the Court and that the AU's resolution was an unhelpful and a deleterious political move that would only antagonize the Court (Kersten, 2013). He added that the AU is playing politics with the judicial process that seeks to bring justice to the ordinary and powerless citizens.

Botswana again demonstrated its commitment to the ICC in October 2015 as one of the few African countries that backed the ICC at the United Nations General Assembly meeting. The representative from Botswana urged other states to respect and assist the ICC in its mission to end impunity for atrocities (CICC, 2015). He also stated that non-cooperation by some State Parties leads to continued impunity and escape from accountability for crimes committed against humanity (CICC, 2015).

Botswana demonstrated her unwavering support for the ICC when it voted against pulling out of the Court. This decision meant the risk of being isolated from the African Union (AU) and Southern African Development Community (SADC). Being isolated from both organizations could cost them politically or economically (Kersten, 2013). According to the Foreign Affairs Minister of Botswana, they do not mind being isolated or being the lone voice in Africa for the ICC (Ontebeitse, 2016). She also stated that the ICC needs to be protected by the AU and SADC instead of trying to destroy it. She further stated that the ICC was created by Africa and it was inappropriate to withdraw from it. Botswana believes that the ICC is an important institution that protects ordinary and powerless citizens from ruthless leaders (Ontebeitse, 2016). She advised that instead of African states pushing to withdraw from the ICC, they should find alternative ways to fix the Court. She suggested the AU and SADC states negotiate for an amendment to the Rome Statute of the ICC (Ontebeitse, 2016).

The news of the intended withdrawal by South Africa, Burundi and Gambia from the ICC in October 2016 received a lot of backlash from other State Parties including Botswana. State Parties and civil society groups that opposed to the withdrawal announcements released statements and undertook actions to reaffirm their continuous support to the ICC. Botswana was one of the countries that released a detailed statement on South Africa's initial intention to withdraw from the ICC in October 2016 (News24, 2016). The government of Botswana reaffirmed its membership to the Rome Statute and reiterated its support for a strong

international justice system through the ICC (Botswana Government, 2016; News24, 2016). They expressed their regrets on South Africa's intention to withdraw from the ICC. They believed that withdrawing from the ICC betrays the rights of the victims of atrocious crimes to justice and also undermines the progress made to date in the global efforts to fight impunity (Botswana Government, 2016). The Foreign Affairs minister of Botswana, Pelomoni Venson-Moitoi in a statement advised states intending to withdraw from the ICC to work towards fixing the Court instead of withdrawing (Cropley, 2016; Lansky, 2016). She suggested one way to fix the Court was to get the African Court on Human and Peoples' Rights to work alongside the ICC (Cropley, 2016). Botswana's firm support for the Court has received praise from the ICC officials, civil society groups, legal experts and some member states (Kersten, 2013; ICC, 2016). The current prosecutor, Fatou Bensouda in her remarks about Botswana's relationship with the Court praised Botswana for publicly maintaining its stance on matters being determined by the ICC. She commended Botswana for taking its responsibility under the Rome Statute very seriously (Kersten, 2013)

Other African governments also spoke out against ICC withdrawal and reaffirmed their support and commitment to the Court (CICC, 2016; Lansky, 2016). The Nigerian government was one of the countries that released statements to express its regrets about the intention of some countries to withdraw from the ICC. In the statement, acting spokesperson of the Ministry of Foreign Affairs, Jane Adams reaffirmed the country's support and commitment to the ICC (Vanguard, 2016). She stated that Nigeria had no intention of withdrawing its membership from the ICC. She added that Nigeria was poised to improving its work relations with the Court for efficient delivery of its mandate to serve humanity and equitable justice (Vanguard, 2016). Jane Adams also highlighted the importance of the Court as an institution that represents the hope and aspiration of millions of victims around the world (Vanguard, 2016). The ICC also represents an international mechanism for ensuring

justice for all. She mentioned that Nigeria underscores the ideals and objectives which inspired the creation of the Rome Statute of the ICC (Vanguard, 2016). These include fighting impunity and ensuring that perpetrators of crimes such as war crimes, genocide and crimes against humanity are brought to justice.

The Nigerian government also presented a strong statement to the United Nations General Assembly affirming its support and cooperation with the International Criminal Court (CICC, 2016; Lansky, 2016). The statement was presented on behalf of the government by Minister- Counsellor, Permanent Mission of Nigeria to the United Nations, Dr. Tiwatope Ade Elias- Fatile. He described Nigeria as a committed member of the Assembly of State Parties and also a current member of Bureau of State Parties. He reiterated Nigeria's continuous support and cooperation with the Court and its faithful commitment to the fundamental values of the Rome Statute and the ideals of the ICC. He concluded by reaffirming Nigeria's continued membership to the Assembly and its preparedness to work with Member States to address concerns that have been raised against the Court (Nigeria Report on the ICC, 2016).

Malawi reaffirmed its support for the International Criminal Court (ICC) by releasing a statement that it will not be pressured by its neighbours to leave the Court (Lansky, 2016). In an interview with a local newspaper, its Foreign Minister and Minister of International Cooperation stated that Malawi will stick with the ICC. He said Malawi has not made the decision to leave the ICC (Chauluka, 2016). He added that Malawi was not withdrawing from the Court despite the African Union's proposed mass withdrawal strategy. He clarified that the AU only suggested that African states leave the Court. But the decision to actually withdraw was the member states independent decision. He added that the withdrawal strategy was not an order but a proposal. Countries have their sovereign powers to make the decision (Chauluka, 2016).

Tanzania also presented a statement to the United Nations General Assembly affirming its continuous support and commitment to the Court (CICC, 2016; Lansky, 2016). The Permanent Representative of the United Republic of Tanzania to the United Nations, Mr. Tuvako Manongi stated that the establishment of the Court became an inspiration against impunity and injustice. The promise and hope are still relevant today, if not more urgent (Lansky, 2016; Tanzania Report of the ICC, 2016). Mr. Manongi in his remarks highlighted the importance of the Court and suggested some measures the Court needs to put in place to build confidence on how it functions as well as on how it interacts with its members. He also mentioned the need to cooperate with the Court to provide support for victims of serious atrocities and human rights violations (Tanzania Report on the ICC, 2016).

Zambia demonstrated its continued support to the ICC in a statement made by its Vice President Inonge Wina. She told Zambia's parliament that the country's membership to the ICC has not changed (Lansky, 2016; Lusaka Times, 2016). She also added that the relationship between Zambia and the Court since its establishment has not changed. Zambia signed the Rome Statute of the ICC on July 17, 1998, and ratified it on November 13, 2000 (ASP, 2017). Zambia continues to believe in the ideals and values of the Rome Statute of the ICC (Lusaka Times, 2016). Senegal in its statement to the United Nations General Assembly urged all States Parties to contribute all the assistance and cooperation necessary for the Court. They reiterated their support for the Court and described the decisions to withdraw as a betrayal to victims of injustice (CICC, 2016; Lansky, 2016). Sierra Leone government spokesman Ajibu Tejan Jalloh made local headlines for affirming that the country will not quit the ICC and that Sierra Leone is committed to peace and justice (Lansky, 2016). He also said that Sierra Leone respected international treaties, therefore, it would stay with the ICC (Bangura, 2016).

Other African countries have also demonstrated their support and the firm commitment to the International Criminal Court (ICC) in spite of the AU's decision for the collective withdrawal of African State Parties. In January 2017 at the 28th African Union summit, members were reported to have agreed on to mass withdrawal from the Rome Statute of the ICC (Keppler, 2017). At the summit, the AU adopted the ICC Withdrawal Strategy and called on member states to consider implementing its recommendations (African Union, 2017; Keppler, 2017). There was strong vocal opposition to the adoption from some member states present at the meeting. Nigeria, Cape Verde and Senegal entered a reservation to the decision adopted (Keppler, 2017). They argued that there are good reasons why Africa should remain with the Court. Liberia also entered a reservation to the paragraph that adopts the strategy (Keppler, 2017; African Union, 2017).

Nigeria was one of the member states that opposed the mass withdrawal strategy decision adopted by the AU. Nigerian Foreign Affairs minister, Geoffrey Oyeame who was present at the summit stated that Nigeria would not subscribe to the AU strategy for mass withdrawal (Vanguard, 2017; Momoh, 2017, 2017; The Guardian, 2017). He added that Nigeria believes the Court has an important role to play in holding leaders accountable (Vanguard, 2017). The spokesperson of the Nigerian Ministry of Foreign Affairs, Dr. Clement Aduku also in a statement stated that Nigeria's stand on the ICC has not changed even though the AU calls for withdrawal (Vanguard, 2017). He pledged Nigeria's continuous support and cooperation to the ICC to hold perpetrators of serious crimes. Burkina Faso, Ghana, Mali, Democratic Republic of Congo, Lesotho, Tunisia, Benin and Cote d'Ivoire also released statements to reaffirm their commitment the ICC (Keppler, 2017). They pledged to remain in the ICC and work with the institution to protect victims of serious crimes and atrocities (Human Rights Watch, 2017).

Some African countries have gone further by undertaking actions to affirm their support and cooperation with the International Criminal Court. During the 28th African Union (AU) Summit, the leadership of the AU passed a non-binding recommendation for mass withdrawal of African countries from the ICC (CICC, 2017). Member states were expected to give their positions respect the recommendation at the 29th AU summit in June/July 2017 (National Assembly of Zambia, 2017). The Government of Zambia decided to undertake a consultation meeting on whether it should withdraw. The Minister of Justice was authorized to initiate and spearhead a nationwide consultation process regarding Zambia's position on its membership to the ICC (National Assembly of Zambia, 2017). The consultation process began on March 27th, 2017 and ended May 31st, 2017. The process involved public hearings and voting in 30 districts in the 10 provinces of Zambia where the public was invited to make oral and written submissions on issues regarding the ICC. Over 90 percent of Zambians who took part in the consultation process voted to stay with the ICC (CICC, 2017).

Ghana has also demonstrated support and commitment to the International Criminal Court. Ghana signed the Rome Statute at the Rome Conference on July 17, 1998, and ratified it on December 20, 2000, becoming the second African country to do so (ASP, 2017). The Government of Ghana has established an institution, African Centre on International Criminal Justice (ACICJ) (Tarlue, 2017). The institution is expected to promote learning in matters relating to international criminal justice and also help address the perceived bias on the ICC towards the African continent (Tarlue, 2017). The institution is also expected to create awareness and educate Ghanaians about international criminal justice and the operations as well as objectives of the ICC (Tarlue, 2017). At the launch of the African Centre on International Criminal Justice, the Chief Justice of Ghana, Her Ladyship Sophia Akuffo tasked the ICC to work closely with African countries by fomenting local groups and constituents within countries to function as advocates and educators of persons on

international criminal justice in general and the work of the ICC in particular (Tarlue, 2017). She used the opportunity to reaffirm Ghana's support to the Rome Statute of the ICC. Chief Prosecutor of the ICC, Fatou Bensouda who was present at the occasion acknowledged Ghana's participation in the establishment of the ICC and also commended its continuous support to the development of international criminal justice (Hawkson, 2016; Tarlue, 2017). She pledged the Court's support towards the development of the ACICJ and urged other African countries especially the youth to make use of the centre.

Gambia announced its decision to rejoin the ICC in February 2017 after the current President, Adama Barrow won the December election. President Adama Barrow reversed his predecessor's decision to withdraw from the ICC (CICC, 2017). Moreover, in demonstrating commitment to international justice and human rights, the Government of Gambia announced it was setting up a Truth and Reconciliation Commission to offer reparations to victims of the former President's government, which is accused of torture and killing of perceived opponents (Bigg, 2017). The Gambian Justice minister, Abubacarr Tambadou stated that the government would study similar Truth and Reconciliation Commissions to prepare for the reparation process which would include public hearings expected to commence by the end of 2017 (Bigg, 2017). The President of the Assembly of State Parties, Sidiki Kaba welcomed Gambia's decision and stated that it was an important decision which signals a renewed commitment of the new leaders of the country to the ICC and to the shared values of the State Parties of prosecuting the most serious crimes (CICC, 2017). Members of the international community including the United Nations and the European Union applauded the decision and remained confident that States will continue to further support and strengthen the ICC (CICC, 2017).

In March 2017, South Africa rescinded its official notification to the UN Secretary General of its intention to withdraw from the Rome Statute (CICC, 2017). According to some

human rights experts, South Africa's decision to revoke its withdrawal from the ICC presents the country a fresh opportunity to support international justice and protect victims of atrocities (CICC, 2017). This action reaffirms South Africa's commitment to the International Criminal Court. The South Africa Cabinet has established a task team to determine a compliance roadmap to guide South Africa's relationship with the Court (CICC, 2017). This decision comes after a South Africa High Court ruled its initial decision to leave the ICC unconstitutional and irrational (CICC, 2017).

5.4 Civil Society Groups' Efforts and Support for the ICC in Africa

Civil society groups in Africa such as the African Commission on Human and Peoples' Rights (ACHPR) and the Coalition for the International Criminal Court (CICC), which contains among its membership some 90 African NGOs that have worked to encourage governments to sign and ratify the Rome Statute (Cole, 2013; du Plessis, Maluwa & O'Reilly, 2013). The ACHPR has been committed to encouraging states to not only sign and ratify the Rome Statute but also to ensure that measures are taken to amend their domestic laws to include legislative wording from the Rome Statute (Cole, 2013). The civil society groups called on the African states to cooperate with the Court and surrender persons against whom warrants had been issued for the perpetration of crimes against humanity. They also assisted in the development of the Court's Rules of Procedure and Evidence (Cole, 2013). The great effort and involvement of African states and civil society groups led the way in signing the Rome Statute.

Human rights activists from across Africa have rejected attacks made by some African leaders on the Court (CICC, 2016). They have challenged attacks against the Court and called on African governments to support the Court. African activists have raised concern about African Union's hostile relationship with the Court. A video supported by 21

international and African non- governmental organizations featuring 12 African activists was released ahead of African Union summit in July 2016. These activists made statements on the importance of the Court and the need for African governments' support and cooperation. Stella Ndirangu of the International Commission of Jurists- Kenya stated that “the reasons why we supported the establishment of a permanent court as Africa have not changed. The only thing that has changed is that leaders are being held to account”. Another activist Chino Obiagwu of the Legal Defence and Assistance Project of Nigeria said “governments of the world must support the ICC to give justice to victims in Africa” (CICC, 2016; Human Rights Watch, 2016).

An activist from Sierra Leone emphasized the role of the Court to seek justice for victims of war crimes and atrocities in Africa. He described the hostile relationship between the leaders of the AU and ICC as a clash between a few powerful African leaders who want impunity for themselves and the vast majority of victims who want justice (CICC, 2016, Human Rights Watch, 2016; Keppler, 2016). Another activist from Zimbabwe also stated that it is inappropriate for African leaders to say the ICC is targeting Africans. She argued that 70 percent of the cases before the Court are self-referrals, where African governments have referred cases to the ICC. She also believed most of the cases before the Court are from Africa because Africans are making use of the Court they helped create (CICC, 2016; Human Rights Watch, 2016; Keppler, 2016).

The Elders is an independent group of global leaders who work together for peace and human rights. This group, which includes former UN Secretary-General, Kofi Annan, Archbishop Emeritus of Cape Town Desmond Tutu, and International women's and children's rights advocate Graca Madel, released a statement to condemn African countries criticising the operations of the Court. They called on countries considering withdrawal “to change course and instead fight for the much- needed reform from within as members” (Lansky,

2016; The Elders, 2016). Kofi Annan added that the Court should be seen as a source of hope for victims of atrocities whose domestic judicial systems have let them down. Therefore, the ICC needs support from countries as well as for them to propose reforms that will improve the credibility and effectiveness of the Court (The Elders, 2016).

The Coalition for the International Criminal Court (CICC) is the world's largest civil society partnership advancing international justice. It is made up of several non-governmental human rights organizations whose objectives include promoting civil society voices on international justice and to strengthen state support for and cooperation with the ICC (CICC, 2016). Coalition members include prominent international human rights and humanitarian organizations, as well as community and grassroots civil society groups working at the local, national and regional levels (CICC, 2016). African human rights activists and groups who work in partnership with the CICC to provide justice to victims of war crimes and atrocities are from countries such as Zambia, Sudan, South Africa, Ivory Coast, Mali, Zimbabwe, Kenya and Uganda (CICC, 2016). They strongly advocate all states become a party to the Rome Statute of the International Criminal Court, and that they work to ensure that the Court is fair, effective and independent and that it makes justice visible and accessible to all victims (CICC, 2016).

The Southern African Centre for the Constructive Resolution of Disputes (SACCORD) is a non-governmental organization in Zambia that deals with issues pertaining to peace, security and democracy in Zambia and the Southern African region (CICC, 2017). SACCORD is one of the national coalitions that work in partnership with the CICC to bring justice to victims of war crimes. SACCORD and other civil society organizations in Zambia played a crucial role in the consultation process. They realized the ordinary citizen did not have enough knowledge or information on the ICC for a consultation process to start asking them whether the country should remain or withdraw. They described the process as unfair to

the people of Zambia, therefore, it was important to sensitize and create awareness on radio and television. The efforts of the civil society groups influenced the results of the consultation process. SACCORD continues to work to ensure the government of Zambia does not withdraw from the ICC. The group organizes public meetings to protect the decision of Zambians to stay in the ICC. SACCORD serves as a pressure group that seeks to influence the Zambian government to stay committed to the ICC (CICC, 2017). The ICC consultation process and the efforts of SACCORD have been applauded and some civil society activists have suggested that Zambia could share its success with other African countries (CICC, 2017; Lusaka Times, 2017).

The Southern Africa Litigation Centre (SALC) is civil society group committed to protecting and promoting human rights through litigation in South Africa. It has demonstrated its commitment and support to the ICC in various ways. For instance, SALC was one of the civil society groups that challenged South Africa's failure to arrest and surrender President Al- Bashir in 2015 when he attended AU summit in the country despite treaty obligations and ICC requests (CICC, 2017). The group turned to the high court to stop Mr. Bashir from leaving South Africa (Bowcott, 2015; Bowcott & Grierson, 2015). The group filed an urgent application to overturn a government decision to grant immunity to all delegates attending the African Union (AU) summit. The high court in Pretoria issued an interim order preventing Al-Bashir from leaving South Africa until an urgent application to force authorities to arrest him was heard (Bowcott, 2015). President Al-Bashir left South Africa while the local high court was hearing arguments over an application that would have forced the South African government to arrest him (Bowcott, 2015). The Government of South Africa was criticised for allowing President Al-Bashir leave before the court ruling. According to a South African high court judge, the government failed to take steps to arrest

and detain Al-Bashir. The high court ruled that Al-Bashir should have been detained in South Africa (Bowcott, 2015).

SALC also challenged Government of South Africa's attempts to withdraw from the Rome Statute of the ICC (Lansky, 2016). The group released a strong statement to oppose South Africa's decision to withdraw from the ICC (Lansky, 2016; SALC, 2016). SALC fought hard to influence the government to reverse its decision to withdraw from the ICC and revoke the bill to repeal national laws outlawing genocide, crimes against humanity and war crimes (CICC, 2017). SALC made submissions to parliament in South Africa and recommended that either the Repeal Bill be scrapped or reviewed (CICC, 2017). SALC in conjunction with CICC and other South African civil society groups launched a campaign calling on South Africa to remain in the ICC and work to promote justice, human rights and the rule of law (CICC, 2017).

The International Commission of Jurists- Kenya (ICJ-Kenya) is an NGO that seeks to promote international justice initiatives by raising awareness on international criminal justice mechanisms focusing especially on the ICC (ICJ-Kenya, 2017). The ICJ also demonstrates its support to the ICC by monitoring ICC cases and operations as well as spreading awareness on the Rome Statute of the ICC (ICJ-Kenya, 2017). It challenges the AU's efforts to undermine the ICC and urges the AU to protect victims of atrocities instead of protecting leaders from accountability for mass atrocities before the Court (Human Rights Watch, 2016). The Africa Centre for International Law and Accountability (ACILA) in Ghana also operates to affirm its support to international justice and human rights. The ACILA focuses on international criminal justice and human rights research. It focuses on using findings from these researches to create public awareness and sensitize citizens on issues regarding international law and justice including the ICC (ACILA, 2017). The ACILA demonstrated its commitment to the ICC when it made a statement to the government to take steps to adopt the

ICC Bill (Graphic Online, 2017). The Bill will enable domestic courts to prosecute perpetrators of Rome Statute crimes as well as transfer cases that the domestic court is unable to prosecute to the ICC (CICC, 2017). ACILA also urged the government to continue supporting the ICC and put measures in place to educate Ghanaians on the importance of the ICC and its operations on the continent (Graphic Online, 2017).

Other non-government organizations across Africa that promote and support international justice for victims of serious crimes include Nigeria Coalition of the International Criminal Court, Malawi Centre for Human Rights and Rehabilitation, International Crime in Africa Program, Institute for Security Studies, Ghana Centre for Democratic Development, Foundation for Human Rights Initiative (Uganda), NamRights (Namibia), Centre for Accountability and Rule of Law – Sierra Leone, Mali Coalition of the ICC, African Center for Justice and Peace Studies (Uganda) and Human Rights Watch (Human Rights Watch, 2016). These organizations also serve as victims' advocates as well as pressure groups that challenge governments' decisions regarding their relationship with the ICC. Their jobs also include clarifying the misconceptions about the ICC and also highlight the need for governments support and cooperation.

Chapter 6

Africa's Growing Opposition and Movement towards Non-Cooperation with the ICC

This chapter examines the change in the relationship between the African states and the International Criminal Court. It starts with events leading to African states criticism and opposition to the ICC. It also explores African Union's objections to the operations of the ICC in Africa and the move towards withdrawal by some African states. It continues with individual African countries' opposition to the ICC and some ways by which they have demonstrated their opposition and non-cooperation to the Court. Finally, it explores the implications of the future of international criminal law and human rights on the continent.

6.1 African Union's Criticism and Opposition to the ICC

The once-promising relationship and cooperation between African countries and the International Criminal Court began to noticeably deteriorate after 2007. Since then the African Union and individual states have become highly critical of the Court and its operations in Africa (Werle, Fernandez & Vormbaum, 2014). The African Union which is made of almost all African states is opposed to the Court and has called on its members to implement a policy of non-cooperation with the Court (Mills, 2012; Murithi, 2013; African Union 2017). The African Union's objections to the operations of the ICC in Africa has caused some supporters of the Court to be concerned that it could lose the support of its largest regional block (Arieff et al, 2011). These objections and non-cooperation of African states among other challenges of the Court have left some experts unsure about the future of the Court.

The African Union (AU) became very critical of the ICC and questioned its credibility during the Kenya and Sudan cases. The relationship between the AU and ICC deteriorated following the issuance of an arrest warrant for Sudanese President Omar Al-

Bashir in March 2009 (Arieff et al, 2011; Keppler, 2011; du Plessis, Maluwa & O'Reilly, 2013). The UN Security Council referred the case of the violence in Darfur where about 200,000 people were killed and 2.3 million were displaced to the ICC and Omar Al-Bashir was to be arrested for war crimes, crimes against humanity and genocide (Mills, 2012). He is the first sitting head of state to be indicted by the Court making African leaders concerned that they could also be indicted (Mills, 2012).

The AU stated that the indictment of Omar Al-Bashir was unfair and requested a deferral of the case since it undermined ongoing peace efforts aimed at facilitating an early resolution of the conflict in Darfur (Mills, 2012; Murithi, 2013). At the 13th Ordinary session of the AU meeting of African State Parties to the Rome Statute of the ICC on 3 July 2009 in Addis Ababa, Ethiopia, the leadership of the AU called on members to withhold cooperation where the ICC has indicted heads of state (Keppler, 2011; Maunganidze & du Plessis, 2015). The leadership of the AU urged its member states not to cooperate in arresting President Omar Al-Bashir. The AU called on the UN Security Council to defer the ICC's investigations into President Al-Bashir for a period of 12 months by invoking Article 16 of the Rome Statute of the ICC (Murithi, 2013).

The President of Kenya, Uhuru Kenyatta and his Vice William Ruto, were also indicted by the ICC in 2011 following post-election violence in 2007-2008 (Werle, Fernandez & Vormbaum, 2014; Arieff et al, 2011). The African Union continued to criticize the Court following the Kenyan case. The ICC charged the President of Kenya, Uhuru Kenyatta and his deputy William Ruto for masterminding post-election violence in 2007-2008 in which about 1,200 people were killed, along with 3,000 rapes, 350,000 incidents of forceful removals, 3,561 incidents of grievous bodily injuries, 117,216 incidents of destruction of properties and 41,000 cases of destruction of houses (Materu, 2014). The prosecutor initiated investigations on his own free will (*proprio muto power of the*

prosecutor) since the domestic legal institutions failed to prosecute the alleged perpetrators (Materu, 2014). The AU requested that the Kenyan case should be handed back to the national legal system (Dersso, 2013; Batohi, 2014). The AU reiterated that the case against Kenyatta and his deputy be deferred until a time that they are no longer serving in their current capacities (Materu, 2014). The AU's request was dismissed and this caused them to call on their members not to cooperate with the Court (Materu, 2014). In January 2012, at the 18th Ordinary Session of Assembly of the AU heads of state and governments meeting in Addis Ababa Ethiopia, the AU reiterated its position not to cooperate with the ICC and stipulated that all AU states need to abide by their decision or invite sanctions from the union (Murithi, 2013). There was a call for the withdrawal of ICC support and non-cooperation with the Court as their request to defer both cases were not granted (Tladi, 2009; Mills, 2012).

Mainly, the AU wants sitting heads of states and other senior government officials to be granted immunity from prosecution by the Court. The leadership of the AU have also accused the Court of politicisation and misuse of indictment against African leaders (African Union 2013). They also want a number of issues relating to the ICC to be investigated (Mills, 2012). The major criticism against the ICC by the AU leadership is that the Court has been afro-focused (Cole, 2013) and thus making the Court seem biased. According to Jean Ping former president of African Union Commission, the ICC seems to exist solely for judging Africans. He argued that the ICC focusing only on Africa was undermining rather than assisting Africa's efforts to solve its problems (du Plessis, 2008). The AU argues that trying of sitting heads of states could undermine the sovereignty, peace, and stability of countries as well as the functioning of constitutional institutions (African Union, 2013). The leadership has therefore decided that no charges shall be commenced or continued before any International Court or Tribunal against any serving AU head of state or government or

anybody acting or entitled to act in such a capacity during their term of office. They also stated that any AU member state wishing to refer a case to the ICC may inform and seek the advice of the Union (African Union, 2013).

Other criticisms include Africa becoming a laboratory to test the new international law (BBC News, 2008 cited du Plessis, 2008). The AU accused the Court and European Union states of abusing the principle of universal jurisdiction (Mills, 2012). The leadership of the AU have also accused the former ICC prosecutor, Luis Moreno Ocampo for making egregiously unacceptable, rude and condescending comments against President Al-Bashir (Keppler, 2011). The Court has also been described as a neo-imperialist tool that illegitimately targets African leaders. The AU has challenged the ICC process and its operation in Africa and described it as flawed. According to the AU, the absence of cases outside of Africa at the Court has raised suspicion about the credibility of the Court. The Ethiopian Prime Minister Hailemariam Desalegn, who was the Chairperson at the 21st AU Summit of African heads of state and government in May 2013, described the ICC process in Africa as some kind of race-hunting rather than fight against impunity (Dersso, 2013). He also described the ICC is a hegemonic tool of western powers which is targeting or discriminating against Africans (Dersso, 2013; Maunganidze & du Plessis, 2015).

6.2 African Countries Opposition and Non-Cooperation to the ICC

Strong opposition -- from individual countries, political leaders, civil society, the media and academics -- to the Court have left a lot of people questioning the credibility and effectiveness of the Court (du Plessis, 2008). An anti-ICC campaign which is being led by Omar Al-Bashir, President of Sudan and Kenya's president Uhuru Kenyatta and his deputy William Ruto has requested that African states withdraw from the ICC (CICC, 2016). Some African states have argued that the cases are not being pursued on the basis of the universal

demands of justice but according to the political expediency of pursuing cases that will not cause the Court and its main financial supporters any concerns (Murithi, 2013).

Although Sudan is not party to the Rome Statute, the ICC has jurisdiction over war crimes committed in its territory. As mentioned earlier, the case against Sudan president Omar Al-Bashir was referred to the ICC in 2005 by the United Nations Security Council because the Sudanese courts were unable and unwilling to prosecute and try the alleged offenders of human rights (du Plessis, 2008). The ICC issued arrest warrants for senior Sudanese government officials including President Al-Bashir as well as high-ranking opposition rebels (CICC, 2017). However, the Sudanese government has failed to cooperate with the Court in investigating and punishing persons responsible for gross human rights violations. President Al-Bashir is reported to have sworn never to hand any Sudanese national to any foreign court (Agence France- Presse cited in du Plessis, 2008). There have been a number of public demonstrations in Khartoum objecting to the referral and describing the Court as an American court (du Plessis, 2008). Angry protestors in Khartoum and Darfur demonstrated to show their support for Al-Bashir and “cried for the death” of former Prosecutor Luis Moreno-Ocampo (Sudan Tribune, 2008). The Sudanese government also warned that any citizen found cooperating with the Court would be dealt with (Rice, 2009). Some government officials stated that, the arrest warrant against President Al-Bashir was politically motivated. They also accused the Court of seeking to undermine the country's stability and independence (Rice, 2009). The information minister is reported to have stated Sudan would not recognize or cooperate with the "white man's court" (Rice, 2009).

Other African countries have also shown their non-cooperation to the Court and have criticised its operation. They have done so by explicitly declaring their support for the anti-ICC campaign being led by Kenya and Sudan or by failing to execute arrest warrants for persons wanted by the ICC who visited their countries. As ICC States Parties, it is their

obligation to cooperate with the ICC under the Rome Statute which includes arresting ICC warrant subjects when they come into their country (Kemp, 2014). Article 86 of the Rome Statute of the ICC states “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court” (Rome Statute of the ICC, 1998). Article 89 of the Rome Statute specifically requires State Parties to arrest and surrender persons to the Court (Rome Statute of the ICC, 1998).

In July 2010, Chad failed to arrest Sudan President Omar Al-Bashir when he attended a summit of the Community of Sahel-Saharan States held in Chad (Al-Jazeera, 2010; Keppler, 2011). Chad ratified the Rome Statute of the ICC on January 1, 2007, to be a State Party of the International Criminal Court (ICC, 2017). As a full member of the ICC, it was obliged to cooperate with the Court by arresting President Omar Al-Bashir during his visit. However, before President Al-Bashir’s arrival, Ahmat Mahamat Bachir, Chad's interior and security minister stated: "We are not obliged to arrest Omar Hassan Al-Bashir" (Al-Jazeera, 2010). He added that Omar Al-Bashir is a sitting president, therefore, Chad would not arrest or detain him. President Al-Bashir’s visit to Chad was his first visit abroad after the genocide warrant against him was issued and also his first visit to a full member state of the ICC (Ngarmbassa, 2010). Chad's failure to arrest President Al-Bashir seems to be in compliance with the African Union's call for non-cooperation with the arrest warrant against Omar Al-Bashir. Another reason could be efforts to improve and normalize ties between the two nations after 5 years of proxy war which involved rebel groups of both countries (Keppler, 2011). Chad supported Darfur rebels who were against President Al-Bashir while Sudan supported Chadian rebels who were against President Deby. In February 2010, the 2 neighbouring countries agreed to end their support for the rebel groups. They were in the

process of fixing their troubled relationship at the time President Al-Bashir visited Chad for a summit (Al-Jazeera, 2010; Ngarmbassa, 2010).

In August 2010, President Omar Al-Bashir visited Kenya to attend celebrations for Kenya's new constitution without being arrested (Keppler, 2011). Kenya had ratified the Rome Statute of the ICC on 15 March 2005 and implemented legislation (ICC Act of 2008) that entailed an obligation to cooperate with the ICC which includes arresting known fugitives (Maunganidze & du Plessis, 2015). Therefore, Kenya's failure to arrest Omar Al-Bashir was contrary to its binding international treaty obligations under the Rome Statute (Keppler, 2011). Kenya's action of hosting and failing to arrest Al-Bashir resulted in the Court's first-ever decision on non-cooperation (Maunganidze & du Plessis, 2015). Some Kenyan government officials justified Al-Bashir's visit and defended their failure to arrest him by citing special reasons. Richard Onyoka, Kenya's deputy foreign minister stated that arresting Al-Bashir may adversely affect ongoing peace process in Sudan (Rice, 2010). He added that Kenya had a strategic interest in Sudan and an important role in the negotiation process. Sudan was preparing for a referendum in 2011 in which the south may secede.

A 2005 peace agreement established a power-sharing government aimed at ending four decades of on and off war between the north and south (The Guardian, 2010). Negotiations had barely started and there were intense anxiety and tension over stability in the region thus Kenya's obligation as a neighbour and mediator in the peace agreement were crucial (The Guardian, 2010; Keppler, 2011). Kenya engaged in peace talks with the leadership of Sudan's power-sharing government to ensure peace was sustained. Other Kenyan ministers in their statements at the ceremony stated that Kenya places national and regional interest ahead of international obligations (Rice, 2010; The Guardian, 2010). They added that Kenya is committed to cooperating with the ICC but that commitment was superseded by an African Union decision not to arrest and extradite Al-Bashir (Rice, 2010).

In 2013, Kenya's parliament voted to withdraw from the International Criminal Court (Al-Jazeera, 2013). The decision to pull out of the ICC was taken after the Court indicted President Kenyatta and his deputy for alleged human rights violations and crimes. The motion to suspend any links, cooperation and assistance with the Court was approved by the National Assembly that is dominated by the alliance of President Kenyatta and his deputy, Ruto (Al-Jazeera, 2013). On the other hand, opposition members of parliament who were against the resolution thought it was a wrong move. Minority leader, Francis Nyanze stated that "We'll be seen as a pariah state, we'll be seen as people who are reactionary and who want to have their way." (Al-Jazeera, 2013).

South Africa is reported to have played very important roles before and during the negotiation process to adopt the Rome Statute of the ICC (Monageng, 2014). It ratified the Rome Statute of the ICC on 27 November 2000 and later implemented the ICC Act in 2002. South Africa is noted to be committed to the principles of the Rome Statute through its efforts to train and equip its prosecutors and investigators who specialize in work related to international crime and justice system, the Rome Statute and the ICC Act (Maunganidze & du Plessis, 2015). However, the South African government failed to arrest ICC fugitive, President Al-Bashir when he travelled to Johannesburg, South Africa for the 25th Summit of the African Union in June 2015. South Africa failed to arrest Al-Bashir despite calls from the ICC and local and international human rights groups to do so.

Prior to the meeting, the President of the Assembly of States to the Rome Statute of the ICC, H.E. Mr. Sidiki Kaba called on South Africa to see Al-Bashir's possible visit as an opportunity to ensure the execution of the arrest warrants against Al-Bashir (ICC, 2015). The former United Nations general secretary, Ban Ki-Moon, the leadership of the European Union and the United States also called on South Africa to detain Al-Bashir during the summit (Bowcott, 2015). South Africa's failure to issue an order against Al-Bashir was met

with disappointment and regret. South Africa's crucial role and participation in establishing the court as well as its reputation for promoting justice for human rights violations has been tarnished. The ICC, countries which support the court, civil society groups as well as victims of injustice in Sudan were hopeful South Africa was going to arrest Al-Bashir. However, South African government officials justified their failure to arrest President Al-Bashir and criticised the ICC for unfairly focusing its indictments on African leaders and said the Court was no longer useful for the purpose for which it was intended (Bowcott, 2015).

Other State Parties to the ICC that demonstrated their non-compliance to ICC decision by welcoming President Al-Bashir includes Djibouti, Malawi, Uganda and Nigeria. Djibouti welcomed President Al-Bashir on its territory in May 2011 and 2016. He was invited to attend the inauguration ceremony of President Ismail Omar Guelleh on both occasions. Djibouti is one of the Arab League states that signed the Rome Statute (Reuters, 2011). It ratified the Rome Statute of the ICC on 5 November 2007 (ICC, 2017). By welcoming Al-Bashir and failing to arrest him, Djibouti has violated its obligations to cooperate with the Court (Reuters, 2011). The ICC called on the UN Security Council to take measures against Djibouti for failing to arrest Al-Bashir.

Malawi failed to arrest President Al-Bashir when he attended the heads of state summit of the Common Market for Eastern and Southern Africa (COMESA) in October 2011 (BBC, 2011). Malawi ratified the Rome Statute of the ICC 19 September 2002 (ICC, 2017). The President of Malawi at the time, Bingu wa Mutharika was one of the African leaders who criticised the Court in a statement in which he said it was not Malawi's "business" to arrest Al-Bashir (BBC, 2011). Prior, the European Union and some human rights groups had called on Malawi to cooperate with the Court and arrest Al-Bashir should he attend the summit (BBC, 2011). Malawi's failure to arrest Al-Bashir prompted the ICC to write to Malawi demanding answers.

Uganda has also been accused of failing to cooperate with direct requests to arrest and surrender the Sudanese president while on their territory in May 2016 (CICC, 2016). Uganda became a State Party to the ICC on 14 June 2002 (ICC, 2017). Al-Bashir visited Uganda to attend the inauguration ceremony of President Yoweri Museveni. Amid calls from the ICC, human rights organizations and some State Parties of the Court to either arrest or bar Al-Bashir from visiting their territory, the government of Uganda went ahead to invite and failed to arrest him (CICC, 2016). President Museveni during his inauguration was reported to have described the Court as being made up of "a bunch of useless people". This statement caused Western leaders present to walkout at the ceremony (Gaffey, 2016). According to the Ugandan President, the ICC is responsible for "blackmailing" African states and is composed of "a bunch of useless people" (Kersten, 2017). He is also reported to have described the ICC as a "shallow" and "biased" court that mishandles complex African issues in his statement at the 68th United Nations General Assembly held in September 2013 (Materu, 2014). Nigeria is also reported to have failed to arrest Al-Bashir when he attended an African Union summit on HIV/AIDS (Al-Jazeera, 2013). Nigeria ratified the Rome Statute of the ICC on 27 September 2001(CICC, 2017). The Nigerian government defended welcoming Al-Bashir by stating that, he came because of the summit and not at Nigeria's invitation (Al-Jazeera, 2013).

Some African leaders have challenged the moral integrity of the ICC. The self-exclusion from the ICC by powerful countries such as China, Russia and the United States of America raised objections about the efficacy of the Court. Their failure to support the Court and subject themselves to its criminal jurisdiction questions the credibility of the ICC (Murithi, 2014). Some African countries have raised concerns about how the original noble intentions of the ICC have become subverted by the political expediency of great- power interests (Murithi, 2014). The nearly exclusive focus on Africa cases is seen by some African

states as selective justice by the ICC Prosecutor (Murithi, 2014). They also see it as injustice and “judicial politics” towards Africa because other countries are not being prosecuted for similar war crimes (Murithi, 2013; 2014). Some African countries perceive the ICC to be keen in prosecuting cases on the continent only where the states are weak compared to the diplomatic, economic and financially stable ones such as United States, United Kingdom, Russia and China (Murithi, 2014). The Court is also accused of not pursuing cases on the basis of the universal demands of justice but according to the political expedient of choosing cases that will not cause the Court and its main financial supporters any concerns (Murithi, 2014).

The President of Kenya, Uhuru Kenyatta, in this speech at the 2013 AU emergency summit, criticised the ICC of being reduced into a painfully farcical pantomime, a travesty that adds insult to the injury of victims (York, 2013). He further added that the Court stopped being a home of justice the day it became a toy to declining imperial powers (York, 2013). The President of Rwanda, Paul Kagame has also criticised the Court of only dealing with African countries and has argued that Rwanda cannot be part of this colonialism, slavery and imperialism (Fritz, 2008 cited in du Plessis, 2008). Other critics have alleged that the ICC is a creation of Western powers (Pheku, 2008 cited in du Plessis, 2008). Renowned African scholar, Mahmood Mamdani has criticised the ICC of being part of some new international humanitarian order in which there is the worrying emphasis on the big powers as enforcers of justice internationally (Mamdani, 2008 cited in du Plessis, 2008). He concluded that the ICC is rapidly turning into a Western Court to try African crimes against humanity (Mamdani, 2008 cited in du Plessis, 2008). He also alleged the interference of the United States in the cases referred to the Court. According to Mamdani, the ICC is targeting governments that are United States adversaries and ignoring cases the United States does not oppose such as Uganda and Rwanda (du Plessis, 2008). In a debate on Al-Jazeera Network, Professor

Mamdani argued that the indictment of sitting heads of states threatens the sovereignty of the countries. He also mentioned that African countries signed the Rome Statute of the ICC because it promised them rule of law. However, African states are being taken for a ride since the rule of law promised during the establishment of the Court does not apply to powerful states such as the United States (Al-Jazeera, 2016).

6.3 Current State of Opposition and Non-cooperation in Africa

Opposition to the ICC has probably never been as tense and strained as it is today (Monageng, 2014). The criticisms and attacks against the Court have intensified. The highlight of the opposition and non-cooperation to the Court came when some countries announced their decision to withdraw from the Rome Statute of the ICC. The African Union still reiterates its position not to cooperate with the ICC (Murithi, 2013; 2014). The leadership of the AU have accused the Court of exclusively targeting Africans. Others have said the Court is a conspiracy against Africa. There are eleven situations now under investigation with the ICC and ten are from African states (ICC, 2017). At the African Union summit held in January 2016 at Addis Ababa, Ethiopia, Kenya proposed African states withdraw from the ICC (Human Rights Watch, 2016). Some members of the AU are alleged to have backed the Kenyan proposal to withdraw from the ICC in protest at perceived unfair targeting of the continent (Human Rights Watch, 2016).

The President of Chad, Idriss Deby, who was elected AU chairman at the summit criticised the Court for focusing its efforts on African leaders (Human Rights Watch, 2016). He said “elsewhere in the world, many things happen, many flagrant violations of human rights, but nobody cares” (Human Rights Watch, 2016). The President of Kenya in a statement during the summit also said: “we refuse to be carried along in a vehicle that has strayed off course to the detriment of our sovereignty, security as dignity as Africans”

(Human Rights Watch, 2016). A statement by Ethiopia's foreign minister, Tedros Adhanom, speaking for the AU at the 2015 annual meeting of countries that have signed the Statute, said that the ICC was no longer a court for all (Human Rights Watch, 2016). The Ethiopian Prime Minister, HaileMariam Desalegn, also called on African countries to withdraw from the ICC because it was serving the interest of Western nations who ironically refused to join the Court (Geeska Africa Online, 2015).

In November 2015, Namibia's cabinet approved a recommendation plan by the ruling Swapo party to withdraw from the ICC (Immanuel, 2015; The Herald, 2015). Namibia signed and ratified the Rome Statute of the ICC on 25 June 2002, which means the country has committed itself to cooperating with the ICC to fight impunity worldwide (Immanuel, 2015; ICC, 2017). The President of Namibia, Hage Geingob, who is noted to be one of the main critics of the Court urged other African countries to withdraw. President Geingob in a speech delivered at the AU Summit stated that African countries should withdraw from the Court because it has become an abomination and failed to serve its mandate (Immanuel, 2015; The Herald, 2015; Chatora, 2015). He added that the ICC should stay out of the domestic affairs of Kenya and other African countries. He stated that "no institution or country can dictate to Africans, who and by whom they should be governed" (Immanuel, 2015). However, a date for the withdrawal has not been decided on yet because some technical issues needed to be sorted out first (Immanuel, 2015).

In October 2016, South Africa had announced its intention to withdraw from the ICC because its membership conflicted with diplomatic immunity laws (Brock, 2016). South Africa had also been accused of non-compliance with the ICC because it failed to arrest Sudan President Omar al- Bashir when he visited South Africa in 2015 (Brock, 2016). South Africa officially presented their withdrawal documents to the United Nations on October 19, 2016, making them the first country to officially announce its withdrawal from the Rome

Statute of the ICC (Brock, 2016). Many South Africans, academics and civil society groups were disappointed by the decision of South Africa to withdraw from the Court (CICC, 2016). Many civil society groups nationally and internationally condemned the decision because of the crucial role South Africa played in the creation of the Court and its support for criminal justice in Africa (CICC, 2016). The move was described by some African activists as demeaning of South Africans and the legacy of former President Nelson Mandela who supported all mechanisms of international criminal justice thus the ICC (CICC, 2016).

Gambia also announced its intention to withdraw from the ICC. The Gambian information minister announced in October 2016 that it intended to withdraw from the ICC (CICC, 2016; Reuters, 2016). He stated the Court had been used for the persecution of Africans and especially their leaders while ignoring crimes committed by the West (Al-Jazeera, 2016). The perceived anti-Africa bias of the Court was mentioned as a reason for considering leaving the Court (CICC, 2016). They accused the Court of failing to indict people in the West who have been accused of committing war crimes (Al-Jazeera, 2016). Gambia signed the Rome Statute of the ICC on 28 June 2002 (ICC, 2017). Gambia's intention was announced when it was experiencing political unrest caused by protest from the opposition party. The opposition party was protesting for an electoral reform ahead of the presidential elections in December 2016. The then President, Yahya Jammeh had ruled since 1994 after a successful coup d'état (Al-Jazeera, 2016; Human Rights Watch, 2016). The opposition party leaders and their supporters took to the street to protest against President Jammeh's decision to run. Protestors were brutalized and arrested by the police which led to the death of a prominent opposition activist (Al-Jazeera, 2016). Several civil society groups and governments have criticised the move by Gambia to withdraw from the Court. Civil society pointed out that the Court is far from only focused on Africa and questioned rationale provided by the withdrawing African governments (CICC, 2016). Some African State Parties

also expressed their regret to Gambia's intention to withdraw from the Court. The decision was also described as a personal blow to current Prosecutor Fatou Bensouda, who is Gambian (Al-Jazeera, 2016).

Burundi also announced its intention to withdraw from the Court. 94 out of 110 parliamentarians in its National Assembly voted in favour of leaving the Rome Statute of the ICC (CICC, 2016). They commenced the necessary procedures that would lead to their withdrawal from the Rome Statute of the ICC in October 2017 (CICC, 2016). On October 27, 2017, Burundi became the first state party to officially withdraw from the Rome Statute of the ICC (Al-Jazeera, 2017). Burundi's move to withdraw from the Court comes after the ICC prosecutor opened a preliminary examination in April 2016 into the situation in Burundi to determine whether reports of grave international crimes since April 2015 warrant the opening of a full investigation (CICC, 2016). The Government of Burundi perceives the Court as an instrument that powerful countries use to punish African leaders who do not comply with the West (Human Rights Watch, 2016). Burundi ratified the Rome Statute of the ICC on 21 September 2004 (ICC, 2017). The current situation in Burundi is as a result of political crisis after President Nkuruziza won a third term as president which many have called unconstitutional. This has led to violent street protest between supporters of the president and the opposition, forced disappearance, assassination, rape and torture leaving hundreds dead and 200,000 people homeless and having to flee the country (CICC, 2016).

Burundi's vote to withdraw from the ICC has been criticised by civil society groups as a threat to efforts to bring justice, peace, stability and rule of law in the midst of serious violent and political crisis (CICC, 2016). They have also urged Burundian lawmakers to reconsider voting to leave the ICC since it is a terrible setback in efforts to hold perpetrators of serious crimes accountable (CICC, 2016). United Nations officials stated that violence in the country is in danger of escalating into atrocity crimes and raised fears of an ethnic conflict

reminiscent of the 1994 Rwandan genocide (CICC, 2016). Other human rights activists stated that the decision to withdraw demonstrates Burundi's disregard for human rights and the rule of law (Human Rights Watch, 2016). It is perceived as the government's efforts to shield those responsible for grave human rights violations from being held accountable (Al-Jazeera, 2017).

In summary, the non-cooperation demonstrated by the leadership of the AU and some African countries highlights non-commitment and indifference towards ensuring justice through the ICC (Braithwaite, 2015). Even though South Africa and Gambia revoked their decision to withdraw and the push by the anti-ICC campaigners has not yet found favour by majority of the AU member states, their intention to withdraw threatens the Court's efforts to promote and protect human rights in Africa and ensure justice for victims of grave human rights violations (Braithwaite, 2015). The ICC has identified the opposition and non-cooperation from some African States in recent time as a great challenge. The Court does not have a police force to enforce to arrest, therefore, it relies heavily on State Parties to cooperate by arresting and detaining ICC fugitives (du Plessis, 2008). Opposition and non-operation to the ICC are described as a serious stab especially to the numerous victims of heinous atrocities on the continent.

Chapter 7

Discussion and Analysis of Findings

This chapter presents the theoretical reflections of research findings and a discussion on the different perceptions African countries have of the ICC. Generally, this chapter attempts to answer the key research questions formulated to guide this study. It employs the post-colonial approach to critically examine the operations of the Court and the potential reasons why the AU and some countries oppose it. It employs a post-colonial perspective to highlight the major challenges and limitations of the ICC. The chapter concludes by highlighting the importance of the Court as well as potential reasons why the countries that support it do so.

7.1 Potential Reasons for Opposition and Non-Cooperation to the ICC

This chapter explores the important tenets of the critical post-colonial perspective that help explain the competing perceptions African countries have of the ICC in its quest to protect human rights in the continent. The current study also situates itself in criminological scholarship that breaks away from Western criminological ideas that fail to take into account African peculiarities. It exposes the biases of international human rights ideas towards the West and role international human rights institutions such as the ICC play to promote imperialist and neo-colonial ideas. The study also challenges the role African leaders and state officials play in violating human rights of ordinary citizens and their growing opposition to efforts to protect human rights.

The post-colonial perspective helps to us to better understand the different views Western and non-Western societies have of human rights. As mentioned earlier, the Western notion of human rights emphasizes individualism while the African notion emphasizes collectiveness. Every culture has different views and understanding of peace, justice, human

rights, and political authority. African societies value communalism; African societies put more emphasis on the community rather than the individual (Ake, 1987; Ouko, 2011). The African idea of humanism does not alienate the individual by seeing him or her as a separate entity having an existence more or less independent of society. The individual does not stand in contradistinction to society but as part of it. Neither should he or she be considered as alienated from and at war with society (Nahum, 1982 cited in Ouko, 2011). Rights of individuals in African societies are often subsumed in the rights of the community (Alie, 2012). Individuals enjoy their rights within the framework of their group (Mwenda, 2000 cited in Alie, 2012). Africans have a strong sense of belonging to their families, clan, ethnic groups and society as a whole. Therefore, it is argued that the Western notions of rights cannot be applied to African societies.

The post-colonial theory has also criticized western human rights scholarship for failing to acknowledge that Africans had notions of human rights before coming into contact with the West (Agozino, 2017). Western scholarship suggests human rights notions were extraneous to pre-colonial Africa. They argue that human rights are gifts of the West to the rest of the world (Chukwumah, n.d.; Agozino, 2017). However, some African scholars have shown that pre-colonial African society had legal structures and political systems that respected and protected human rights (Asante, 1969 cited in Chukwumah, n.d; Alie, 2012; Agozino, 2017). African notions of human rights are also concerned with asserting and protecting human dignity. Human rights in indigenous Africa were sustained by the concept of natural justice, religious doctrine and the principle of accountability to ancestral spirits (Asante, 1969 cited Chukwumah, n.d).

The post-colonial perspective argues that Western institutions continue to promote imperialist ideas. The Court is seen as a tool of neo-colonialism directed towards countries of the Third World. Western values and ideas are perceived to influence and shape the

principles of international criminal justice and law. International criminal justice institutions such as the ICC have been criticized for failing to incorporate the non-Western perception and understanding of peace, democracy, justice and human rights. The formal justice system inherited from the colonial era is largely criticized for been unable to exercise its jurisdiction universally. The failure of the national courts and the ICC to seek justice for victims of human rights violations is partly due to the fact that the ideas of these institutions are inapplicable to all cultures. The accountability mechanisms of international human rights institutions are criticized for being deeply rooted in Western notions of justice which emphasize retribution as compared to restoration. Western justice systems have largely been shaped by the retributive paradigm and have accordingly influenced decisions to prosecute perpetrators of major war crimes and human rights abuses (Harvey, 2006 cited Alie, 2012).

The African perceptive on justice places emphasis on repairing relationships instead of punishing perpetrators of wrong (Bennett, 2012; Alie, 2012). The ideas of justice amongst African societies focus on peace negotiations and reconciliation instead of punishment (Bennett, 2012; Cole, 2013). The value of traditional African style of justice is a preservation of peace and social order (Gluckman, 1967 cited Bennett, 2012). In the African context, justice, peace and reconciliation are inseparable. Post-colonial writers have argued that retributive justice is not always suitable for post-war situations in African societies for several reasons. Prosecution of active players of ongoing or recently ended conflicts by the ICC may result in prolonging or reigniting further conflicts (Cole, 2013). It also has the potential of further polarizing the community instead of healing it (Alie, 2012). The African justice system seeks to rehabilitate both the injured party and the wrongdoer. It believes in justice that heals rather than prosecuting wrongdoers. Victims, perpetrators and survivors often continue to live in the same community; therefore this continued coexistence may be marked by residual fears, animosities and tensions (Alie, 2012).

Justice in the African context does not perceive rules to be essential for achieving a satisfactory settlement through mediation or negotiation (Bennett, 2012). Justice is not considered to be the rational and impartial application of abstract rules. Justice is seen as a process of persuasion with emphasis on the spirit of give and take (Bennett, 2012). The aim of the ICC to prosecute perpetrators of heinous crimes is largely not shared by the African view on justice. The Court's focus on prosecution limits the support and cooperation it receives in Africa and also prevents other ways of dealing with political violence to be employed (Dersso, 2013). Firstly, African domestic legal systems failure or unwillingness to prosecute perpetrators of war crimes, genocide, the crime of aggression and crimes against humanity can be attributed to the fact that, the African notion of justice seeks to foster peace and repair relationships rather than prosecute. The African Union uses this point as a base to critique the Court for undermining the peace process (Cole, 2013). The AU alleges that indicting sitting heads of states and senior government officials scuttles the prospects of peace negotiations. The AU argues that peace and stability should be the foremost priority of international criminal justice institutions instead of prosecution.

The AU's request to defer the case against Al-Bashir and some African countries failure to arrest him was based on this argument (Cole, 2013). The AU perceives Al-Bashir to be an active player in the peace process in Darfur, therefore, prosecuting him will rather heighten the conflict and human rights violations in Sudan. The Government of Kenya also cited this as a reason for failing to arrest Al-Bashir when he visited their territory. The Government of Kenya stated that arresting Al-Bashir would have serious consequences on the ongoing peace and negotiation talks between the north and south Sudan (The Guardian, 2010). The AU also alleges that laying of charges against sitting President of Kenya, Uhuru Kenyatta and his deputy William Ruto threatens the Kenyan peace process (Cole, 2013). The AU reiterates that prosecuting the Kenyan leaders constitutes a threat to the peace and

reconciliation process that was started after the 2007 post-electoral violence (Cole, 2013). Other critics of the operation of the ICC in the continent also assert that the Court's quest to prosecute Al-Bashir is ill-timed and undermines the peace process in Sudan (Cole, 2013). Al-Bashir is noted to be playing a crucial role in the peace process; therefore, prosecuting him would prolong matters. The Court has been accused of narrowing its interest in justice at the expense of peace and security (Cole, 2013).

Due to past experience with Western domination, imposition and the negative impact of colonialism, the leadership of the African Union and African countries do not take kindly the attempt of Western institutions dictating to the continent (Cole, 2013). The AU also seeks to protect the political and economic interest of the continent as well as promote and defend issues of common interest to countries of the continent. In this regard, the AU's growing opposition and non-cooperation with the Court perhaps is a way to prevent the West from using international law to dominate and control its affairs (Angie & Chimni, 2003). The AU and the critics of the Court question its credibility. The Court has been described as a fraudulent institution to control poor African states. The AU perceives international involvement in Africa as a way to manipulate and impose foreign policies and ideas that seek to exploit instead of help solve its problems (Anghie & Chimni, 2003).

Increasingly, some African governments have become very critical of the Court and accuse it of exclusively focusing on African countries (Cole, 2013; Murithi, 2013). African strong opposition is perceived as a way to prevent unwanted intrusion and attempts to promote neo-colonial ideas. The Court has also been criticized to be largely influenced by the powerful countries. African governments assert that the strong influence of these countries on the Court is translated into the prosecution process. The selective application of international human rights norms to African states or nations that are not considered as allies to these powerful countries has deepened suspicions and criticisms of international human rights

institutions such as the ICC (du Plessis, 2008; Wiredu, 2015). The Court is depicted as a weapon that is used by powerful countries against weaker ones or longstanding opponents (Chazal, 2017). The Court is accused of targeting adversaries of the United States (Mamdani, 2008 cited in Cole, 2013). For instance, the United States is seen as one of the powerful members of the UN Security Council even though it is not a State Party to the Rome Statute to the ICC. The government of the United States is seen to actively oppose the operations of the ICC and has put in place efforts to protect its officials and citizens from prosecution by the Court. One of such efforts was when the US formulated a Bilateral Immunity Agreement; that prohibits the surrender to the ICC of current and past government officials, military personnel and nationals (CICC, 2011). The US is being accused of using this agreement to manipulate and bully States that support the Court and also depend on them economically (CICC, 2011). States that have failed to sign the agreement have had large economic penalties imposed on them by the US.

Some African leaders have also based their criticism of the ICC on human rights debate that argues for a human rights perspective that considers African values and traditions. The communalist and individualist debates of human rights have been used by some African leaders as a reason to violate human rights of their citizens as well as oppose the ICC. These arguments have been challenged by some writers for being rhetorical instruments for human rights abuses (Wiredu, 2015). African leaders who wish to violate other people's human rights make these claims to deflect criticisms of their oppressive conduct (Wiredu, 2015). It is understandable that human rights ideas need to appreciate and consider the differences of other cultures and traditions especially African cultures. However, it is unacceptable for African leaders and other violators of human rights to use it as a basis to criticize international mechanisms to protect human rights. The primary purpose of human rights is to protect persons individually or in a group from the state (Ouko, 2011). For this reason, every

society needs human rights ideas regardless of its own cultures. The notion that the so-called Western individualist human rights are not relevant to the African culture has been challenged by some scholars. It is argued that the African perspective of human rights which emphasizes communal values fails to recognize that groups or communities do not exist without individuals in them (Ouko, 2011).

The critical post-colonial perspective is further used in this study to expose political motives that inform the opposition and criticisms of the ICC by some African leaders. The postcolonial perspective does not only accuse Western societies of the woes of their colonies (Agozino, 2014, 2017). It challenges attempts of some African leaders to politicize efforts to promote and protect human rights at both the local and global level. Some African leaders are perceived to be “playing politics with human dignity” (Wiredu, 2015). They seek to criticize human rights institutions that state how they should treat their citizens as well as dismiss efforts of human rights activists within their own countries and describe them as puppets of Western imperialism (Wiredu, 2015).

In reality, African leaders who are against the ICC are using the Court as a political weapon against their opponents. Self-referrals are useful tools to get the ICC to target a state’s adversaries and the Court is used by some of these African leaders to settle scores against political opponents (Materu, 2014). This perception is believed to have motivated Kenyan politicians to support the creation of the Court (Materu, 2014). Before they were elected, President Uhuru Kenyatta and William Ruto led Kenyan support for the Court and urged it to intervene after the election violence in 2007 (Materu, 2014). They urged the ICC to identify the suspects and commence investigations immediately. Apparently, they hoped to use the Court to indirectly settle scores against their political opponent, Raila Odinga and his allies. However, Kenyatta and Ruto were named among the suspects and investigations for their involvement with the political violence began. Kenyatta and Ruto immediately changed

their perception about the ICC and have since been two of the vocal critics of the Court pushing for mass withdrawal by African State parties (Materu, 2014).

Other African leaders who are perceived to use the Court against their opponents include President of Uganda, Yoweri Museveni. Initially, he supported the Court and invited it to prosecute leaders of the Lord's Resistance Army (LRA), a ruthless rebel group that was formed in Uganda two decades ago and operates by kidnapping children and forcing them to fight (Roth, 2014). In 2003, Uganda became the first country to have made a self-referral to the ICC (Materu, 2014). It referred violence in Northern Uganda to the ICC and hoped the Court targeted individuals who were the government's adversaries (Kersten, 2017). However, his stance has changed since the Court started indicting sitting heads of states in other countries (Materu, 2014). Similarly, the President of the Ivory Coast, Alassane Ouattara, seemed content when his rival, former President Laurent Gbagbo, was sent to The Hague to face charges of crimes against humanity (Roth, 2014). Now President Ouattara does not support the Court's operations with the fear that the ICC might pursue atrocities committed by the forces that supported him during the civil war that broke out after contested elections in 2010 (Roth, 2014).

In August 2012, opposition groups from Rwanda and the DRC asked the ICC to investigate Paul Kagame for alleged war crimes in eastern Congo (Lamony, 2013). Rwanda never signed the Rome Statute of the ICC but remains one of the strongest critics of the Court's activities. In reality, President Kagame's own actions and criticisms of the ICC have also been perceived to be motivated by political interests (Lamony, 2013). Many have argued that the real reason Rwanda does not want to sign the Rome Statute and is critical of the Court is so its military commanders and political leaders would not be held accountable for their involvement in supporting rebel groups in Democratic Republic of Congo (Lamony, 2013; Roth, 2014). Even though Rwanda is a not a member State of the ICC, their

involvement in war crimes and atrocities in Congo could be prosecuted at the Court because Congo is a State member. The ICC has jurisdiction over crimes committed on territories of State members (Roth, 2014; ICC, 2017).

As stated earlier, the main reason why the leadership of the African Union and some African leaders have become critical of the ICC is the indictment of sitting heads of state (Cole, 2013). It is not surprising that most of the critics are heads of state and senior government officials from countries with long history of violence and human right abuses. Prominent among the anti-ICC campaigners is President Paul Kagame of Rwanda. He describes the Court as a fraudulent institution that was established to pursue imperialist, colonialist and racist ideas (Kezio-Musoke, 2008 cited Cole, 2013). President Kagame said that Rwanda “cannot support an ICC that condemns crimes committed by some and not others or imposes itself on democratic processes or the will of sovereign people” (Lamony, 2013). Rwandan Foreign Minister Louise Mushikiwabo also called the ICC “a political court”• and said that Rwanda has never believed in its jurisdiction (Lamony, 2013). However, contrary to President Kagame’s negative statements about the international justice system and the ICC in particular, he has in the past demonstrated his commitment to international justice by calling for the establishment of the International Criminal Tribunal for Rwanda (ICTR) (Cole, 2013). Kagame’s government cooperated with the ICTR since it mainly indicted his opponents for several atrocities committed during the genocide in Rwanda (Lamony, 2013). According to the Human Rights Watch world report (2017), the political space in the country remains limited with Kagame’s ruling Rwandan Patriotic Front (RPF) having over 90 percent support from the majority of Rwandan citizens. Political opponents who attempt to challenge the policies and actions of the ruling government are subjected to unlawful arrest and harassment, preventing them from functioning effectively (Human Rights Watch, 2017).

President Kagame is one of the longest-serving African leaders, ruling Rwanda for almost two decades (Roth, 2014). In December 2015, Rwandans voted in favour of a constitutional amendment that allowed him to run for a third term in 2017 and two additional five years terms after (Human Rights Watch, 2017). This means President Kagame would be able to run a third seven-year term in 2017 and also allow him to run 2 more five-year terms in 2024 and 2029, opening the possibility of extending his rule until 2034 (Human Rights Watch, 2017). Opposition to the referendum from political opponents, the media and civil society groups was limited since the referendum took place in a context that restricted the rights and freedoms of the citizens. Civil society in Rwanda is weak due to many years of government intimidation and interference (Human Rights Watch, 2017). Rwanda is noted for its high numbers human rights violations and abuses and the Government is perceived as the main abuser of citizens' rights and freedoms. There are frequent reports of unlawful detentions, illegal arrests and brutality toward ordinary citizens, journalists and political opponents who challenge or criticise the government (Human Rights Watch, 2017).

Kenya's criticism of the ICC is also perceived to be politically motivated. In recent years, Kenya is reported to be one of the African countries with increasing cases of human rights abuses due to political violence. Authorities have been accused of failing to protect the human rights of citizens by investigating abuses across the country and undermining basic rights to free expression and association (Human Rights Watch, 2017). The operations of human rights advocates and journalists continue to be limited and they continue to face obstacles and harassment for challenging the government. The Kenyan police and military have been accused of brutality, unlawful arrest and disappearance of individuals linked to opposition groups (Human Rights Watch, 2017). Even though the Government of Kenya wanted to prosecute its case at the Court locally, it has not made any progress to address these crimes. The government continues to ignore the plight of thousands of women and men who

were abused and raped during the post-election violence in 2007-2008 (Human Rights Watch, 2017).

Kenya continues to experience violence after its recent presidential election which took place in August 2017 (Al-Jazeera, 2017). Tensions were high throughout the country during periods prior to the election. This period was characterized by the enforced disappearance of mainly opposition supporters, desperate political manoeuvres and interference, volatile political debates and campaign rallies. The high point of the tension was the brutal murder of Mr. Chris Msando, who was the IT boss at the Independent Electoral and Boundaries Commission (IEBC) and in charge of the computerized voting system (Kelley, 2017; BBC, 2017). There were also reports of verbal as well physical attacks and intimidation of election officials (Al-Jazeera, 2017). The Electoral Commissioner, Roselyn Akombe is reported to have resigned and left the country. She stated that staff were threatened and accused the IEBC of being partisan and part of the political crisis facing the country (Al-Jazeera, 2017). The main opposition candidate, Raila Odinga contested the election results which declared incumbent President Kenyatta the winner. He challenged the outcome of the elections and stated that the process was not free and fair (Al-Jazeera, 2017). He argued that the electronic counting and tallying system was hacked thus the electoral process was manipulated and lacked integrity (Hourel, 2017; Al-Jazeera, 2017). Fresh violence erupted in Kenya after the Supreme Court annulled the election results due to electoral irregularities and illegalities (Al-Jazeera, 2017). The Supreme Court ruled that a presidential election rerun was to be held in October 2017. This news surprised many Kenyans and was applauded by both local and international community. It was seen as an opportunity for Kenya to deepen its democracy and rule of law (Al-Jazeera, 2017). The opposition celebrated the decision by the Supreme Court since it reaffirmed their allegations. They also expressed their dissatisfaction with the foreign election observers who accepted Kenyatta's victory (Busari, 2017; Okello,

2017). On the other hand, Kenyatta initially accepted the Supreme Court's decision but later attacked the judiciary. He is reported to have said he will "fix" the Supreme Court if re-elected and called the Chief Justice and other judges' crooks (Okello, 2017; Houreld, 2017).

However, about two weeks to the rescheduled election date, opposition candidate Raila Odinga announced his intention to withdraw from the rerun because he anticipated it would not be free and fair (Al-Jazeera, 2017). He demanded that the head of the electoral commission needed to be replaced and a different company print the ballot papers. Kenyan parliament passed a new law a day after Odinga announced his intention, which said if a candidate withdraws; the other automatically wins the presidency (Al-Jazeera, 2017). The news of Odinga's withdrawal and the new law has angered opposition supporters who have taken to the streets to protest. Kenya is witnessing daily protests which have led to the death of several people mainly opposition supporters. Raila Odinga called for massive protests on October 26, the day of the election rerun. He is reported to have announced at a rally of his supporters massive demonstrations were going to take place in the whole country (Al-Jazeera, 2017). The opposition has criticised the new law that was passed by parliament which is dominated by Kenyatta's ruling Jubilee party (Al-Jazeera, 2017).

Sudan has witnessed several civil wars since its independence in 1956. Between 1955-1976 and 1983-2005, Sudan witnessed conflicts between the colonially modernized Arab north and the underdeveloped Christian and Animist south which brought widespread civilian suffering (Peace Insight, 2017). In 1989, a coup brought Omar Al-Bashir and his National Islamic Front (NIF) to power and he has ruled since then. Al-Bashir is one of the longest heads of state in Africa, ruling for about 28 years (Burke, 2016). Under his rule, repression in the south increased as the war against South Sudanese rebels became a holy war (Peace Insight, 2017). Intensive conflicts continue in Sudan despite several peace agreements that have been signed. These conflicts have resulted in widespread human rights abuses

targeting mainly civilians. Sudan continues to experience wars and human rights abuses to date. They have also killed civilians, raped women and girls and destroyed hundreds of villages. Government authorities are also accused of undermining efforts to protect by preventing foreign missions and the UN peacekeeping missions (Human Rights Watch, 2017).

In May 2016, there was a report of attacks on school children in Heiban where six were killed and several others injured. Government forces burned crops, looted food, and displaced people from farming areas (Human Rights Watch, 2017). Government forces have been accused of repressing civil society groups and independent media; unlawful arrest and detention of human rights activists, students and other protesters (Human Rights Watch, 2017). The National Intelligence and Security Service (NISS) of Sudan are known for its abusive tactics, including torture against real or perceived political opponents; detained activists, students, lawyers, doctors, community leaders and those perceived to be critical of the government (Human Rights Watch, 2017). Women are flogged in Sudan for alleged indecency or immoral behaviours. Some female activists who protest these laws and ill-treatment are detained and sexually abused by national security officers (Human Rights Watch, 2017). Others who write or speak out about the conflict and abuse are abducted and detained at unknown locations for months. Government authorities have restricted the efforts of local civil society organizations and blocked their participation in international events. Media is also restricted. Journalists are arrested and tortured for reporting on protests and criticising the government. Local media houses who publish about the human rights abuses by national security officials have their newspapers confiscated and banned from publishing (Human Rights Watch, 2016; Human Rights Watch, 2017).

Uganda is another state with long history of political violence and has a weak democratic system. President Museveni formed the National Resistance Movement in 1982

and took charge of the country in 1986. He has ruled Uganda for over three decades, making him the longest-serving leader in East Africa (Our Africa, n.d; Burke, 2016). Uganda is noted to have experienced violence after its 2001, 2006 and 2011 elections (Human Rights Watch, 2016). President Museveni was re-elected to rule Uganda in February 2016 amid controversies and protests mainly from the opposition. The main opposition party alleged that the election results were rigged and the process was not transparent, free and fair (Al-Jazeera, 2016). Deliberate delays and irregularities were reported in political strongholds of the opposition. Dr. Kizza Besigye, the main opposition candidate was detained at his home for trying to challenge the election results (Human Rights Watch, 2017). The police and military forces are perceived as the main violators of human rights in the country. They have been accused of using unnecessary force and violence to disperse peaceful protests and gatherings, which has resulted in the death of protesters and bystanders. The police force was also accused of raiding and closing down of opposition party offices as well as arresting and beating party officials (Human Rights Watch, 2017). Freedom of expression and the operations of the media are limited in Uganda. The police have arrested and beaten journalists for criticising the government. The government is alleged to have directed telecommunication companies to block access to social media and internet during the 2016 elections (Human Rights Watch, 2017). Lastly, civil society organization groups and human rights activists are unable to operate freely and effectively due to government legislation that has been put in place. These legislations are perceived to undermine their efforts promote human rights and protect ordinary citizens from human rights abuses.

Other African anti-ICC supporters include Ethiopia and Zimbabwe who have never signed or ratified the Rome Statute of the ICC. Both countries have a history of impunity for serious crimes and atrocities. Ethiopia has gone through a number of destructive civil wars some as a result of ethnic and political difference (Tsegaye, 2012). The result of these

conflicts has been the gross violation of human rights and there is fear of these conflicts reoccurring in some parts of the country. Ethiopian security personnel are accused of frequent torture and abuse of political detainees held in secret detention centres (Human Rights Watch, 2017). They are reported to have sexually abused protestors as well as having killed more than 400 protestors in the Oromia region in November 2015 (Human Rights Watch, 2017). The government controls the media and regularly employing strategies that restrict independent media. There have been reports of harassment and abuse of journalists and media houses that criticize the government. The government is also accused of blocking access to internet, social media and radio and television signals during a state of emergency in 2016. This action prevented people from sharing information locally and internationally as well as mobilizing during protests (Human Rights Watch, 2017).

Zimbabwe has witnessed violence and political unrest over the last two decades as a result of tension between the two main political parties (Our Africa, n.d). President of Zimbabwe, Robert Mugabe was elected into power in 1980 after the country's independence (Burke, 2016; Winter, 2017). It is noted that political violence and abuses in Zimbabwe are mainly perpetrated by supporters of Mugabe to ensure that he stays in power at all cost (The Zimbabwean, 2017). During 2016, the government of President Robert Mugabe intensified repression against thousands of people who peacefully protested human rights violations and the deteriorating economic situation (Human Rights Watch, 2017). Human rights defenders, civil society activists, journalists, and government opponents were harassed, threatened or faced arbitrary arrest by police while there was widespread impunity for these abuses. Some civil society activists were arrested and charged with false violence protest. Mugabe is known to be a key enabler of political violence and abuse against his opponents. He is accused of instigating the 2008 political violence that resulted in the deaths of over 200 opposition activists (The Zimbabwean, 2017). The now removed President Mugabe, as African Union

chairman in 2015, stated that the ICC was unwelcomed in Africa (Al-Jazeera, 2015). Mugabe said Africa is not the headquarters of the ICC; therefore the Court should not operate in the continent (Al-Jazeera, 2015).

Burundi, one of ICC's main critics and the only country to actually withdraw from the Rome Statute is perceived to violate human rights of its citizens. As mentioned earlier, the case against Burundi resulted from protests and violence after President Nkurunziza announced his intention to run for a third term in 2015 (Human Rights Watch, 2017). Members of the ruling party, government security forces, particularly the national intelligence service have been accused of killing and torturing scores of opposition political party members and other perceived opponents since the start of the crisis (Human Rights Watch, 2017). There have also been reports of unchecked abuses which include rape, torture, enforced disappearance, unlawful detention and execution (Human Rights Watch, 2017). The military and police in Burundi have been accused of killing a large number of residents in the capital, Bujumbura. More than 325,000 Burundians have fled the country since 2015 to neighbouring countries for fear of their lives (Human Rights Watch, 2017). Civil society groups and media in Burundi are repeatedly under threat from the government. Most leading civil society activists and independent journalists remain in exile after several government threats and arrest warrants against them. In October 2016, the Interior Minister banned 10 civil society organizations that had spoken out against government abuses while some radio stations have also been suspended (Human Rights Watch, 2017). The Burundian justice system is perceived to be deeply manipulated by the ruling party officials. There is little or no effort to hold persons responsible for gross human rights violations accountable. Reports by commissions put in place to investigate human rights violations were biased and manipulated by the ruling party granting impunity to accused persons (Human Rights Watch, 2017).

In summary, African leaders support the Court as long as their names do not appear on the Court's wanted list. They are quick to refer cases that involve their political opponents (Cole, 2013; Materu, 2014). Some African governments supported the Court until it started investigating sitting heads of state (Cole, 2013; Materu, 2014). The current opposition and resentment of some African leaders towards the Court are also perceived as fear of possible indictment. The ICC is seen as a threat not only by the leaders who have been indicted but by their colleagues who judging from the way they govern their countries and the gross human rights violations committed in their countries, see themselves as targets of the Court (Materu, 2014). Perhaps, had African leaders anticipated that the Court would indict sitting heads of state and not grant them immunity, they would not have been enthusiastic towards its establishment (Cole, 2013). Secondly, the vociferous critics of the Court are widely seen to be awful leaders who have been implicated in mass atrocities (Kersten, 2017). They are leaders of countries where gross human rights violations are committed and little or no effort is put in place to punish perpetrators of abuses

7.2 Importance of the ICC

As mentioned earlier, the post-colonial perspective challenges the manipulative actions of African leaders who oppose the Court. Proponents of the Court reject the criticisms and describe such opposition as flawed. They have accused the leadership of the AU and other major critics of the ICC of narrowly focusing on perpetrators instead of victims (Materu, 2014). The voices of victims are often lost in the debates about head of state immunity. In this regard, it is important to highlight the benefits of the Court to the victims of human rights violations

As stated earlier, the main role of the Court is to bring justice to victims of gross human rights abuses by ensuring that the perpetrators are held accountable. The Court also

seeks to help promote peace and security by deterring potential perpetrators. It also assists domestic judicial systems to investigate and prosecute violators of human rights, serving as last resort when states are unable or unwilling to prosecute (ICC, 2017). The ICC is seen as a tool for justice in Africa where persons responsible for gross human rights violations would otherwise escape punishment (du Plessis, 2008). Some authors have argued that African countries supported the establishment of the Court because its aims align with their own role to protect human rights of citizens. It is for this same reason that the African Union, SADC and other African civil society groups played crucial roles during the negotiation of the Rome Statute (Maqungo, 2000; Monageng, 2014).

Africa's strong support and active participation in the creation of the Court was perhaps because of the mass human rights violations and atrocities most African countries had suffered in the past (Jalloh, 2012; Monageng, 2014). The realities of the Rwandan genocide, the Civil War in Sierra Leone, the Apartheid struggle in South Africa as well as other post-colonial ethnic and religious conflicts experienced by the majority of African countries during the 1950s till the early 1990s. These struggles convinced governments of the need to support an international court that sought to bring an end to these atrocities (Murithi, 2014; Mbaku, 2014; Monageng, 2014).

Moreover, the non-existence of strong and credible legal institutions to hold perpetrators of crimes accountable had previously resulted in a culture of impunity (Mochochoko, 2005:249 cited in Jallow & Bensouda, 2008; Jalloh, 2012). Perpetrators went unpunished because domestic legal systems were unable to try them. These gross human rights abusers are the same people with the power to prosecute as well as protect victims. The majority of African countries do not have strong judicial systems capable of dispensing credible justice. Therefore, they supported the idea to create a permanent, impartial, effective and independent Court that would more effectively prosecute perpetrators of crimes against

humanity (Mochochoko, 2005:249 cited in Jallow & Bensouda, 2008). Also, the majority of African judicial systems lack legislation that fully incorporates genocide, crimes against humanity, and war crimes into domestic law, making international criminal justice institutions such as the ICC, the most reliable solutions to providing justice and protecting human rights of victims (Werle & Jessberger, 2014; Braimah, 2015).

The creation of the Court for African countries also meant a stop to the unwarranted interventions by powerful states in their domestic affairs (Murithi, 2013; Mbaku, 2014). African countries perceived the establishment of the Court as providing a safe haven from politically and economically strong countries from preying on them (Mbaku, 2014). The Court's mandate to prosecute perpetrators of crimes of aggression which included "the planning, preparation, initiation or execution of an act of using armed force by a state against the sovereignty, territorial integrity or politically independence of another state" was one of the reasons African states were supportive of the creation of the Court (Mbaku, 2014).

Another benefit of the ICC is its potential to prevent and deter future conflicts (Vinjamuri & Snyder, 2008 p. 472; Monageng, 2014). "The fulcrum of the case for criminal punishment is that it is the most effective insurance against future repression" (Orentlicher, 1991 cited Larsen & Smandych, 2008, p.472). International courts such as the ICC also prevent future crimes and conflicts by breaking the future cycle of violence (Vinjamuri & Snyder, 2008 p. 472). War crime trials also serve as an education in the rule of law to the people of new democracies, authoritarian regimes and failed states (Vinjamuri & Snyder, 2008 p. 473). Public trials inspire societies that are re-examining their basic values to affirm the fundamental principles of respect for the rule of law and for the inherent dignity of individuals (Orentlicher, 1991 cited Larsen & Smandych, 2008). It enables people to witness the prosecution of offenders of war crimes and also have knowledge about how the ICC

operates. Public trials may influence people's confidence in international criminal justice systems (Vinjamuri & Snyder, 2008).

In conclusion, even though some African countries are hostile towards to the Court, others continue to demonstrate support for the Court for different reasons. They argue that there is the need to have institutions that enforce international law especially international humanitarian and human rights law. Punishing perpetrators of war crimes, crimes against humanity and genocide is a way to honour and redeem the suffering of the individual victim (Vinjamuri & Snyder, 2008 p. 472). Table 5 below provides a summary of the countries that have been identified and discussed to either support or be against the Court.

Table 5: List of countries and their positions on the ICC

Countries that support the Court	Countries against the Court
Botswana	Sudan
Ghana	Kenya
Nigeria	Uganda
Zambia	Burundi
Tanzania	Rwanda
Malawi	Ethiopia
Senegal	Zimbabwe
South Africa	Namibia
Gambia	Chad
	Djibouti

7.3 Limitations and Challenges of the ICC

After fifteen years, the International Criminal Court continues to face challenges despite its benefits mentioned above. The ICC is still not perfect in its functions and operation. This section highlights the challenges identified by the Court itself and how it limits its operation.

A major challenge identified is the cooperation of states and the enforcement of its orders through national authorities (Ambach, 2015). As mentioned earlier, the Court does not have its own means to enforce arrest and detention of suspects (Kaul, 2007; du Plessis, 2008; Ambach, 2015; ICC, 2017). The ICC lacks executive powers, police force, armed forces to enforce its decisions (Kaul, 2007). It is fully dependent on States Parties to execute arrest warrants and assist in investigations. Some arrest warrants issued have not been successful and deliberate efforts by states to manipulate the investigation process limits the Court from operating effectively (ICC, 2017).

The Court has identified the difficulty of carrying out investigations and collecting evidence. Since it investigates situations in regions and states that are far away from The Hague, it is sometimes difficult to access these places (Kaul, 2007; Mutyaba, 2013). Due to the conflicts and political instability experienced in these regions, they are dangerous and unsafe for investigators and court officials. For instance, four staff members of the Court were arrested and detained after they had undertaken a mission to investigate Saif-Al-Islam Qaddafi in Libya (Mutyaba, 2013).

The ICC also faces financial challenges. Currently, the Court is mainly funded by the European Union, the Netherland government and other State Parties (Mutyaba, 2013). The increase in the number of cases and situations under investigations at the Court requires the need to increase its annual budget. The long Court proceedings and delays contribute to the

high cost of operations (Mutya, 2013). The Court needs to recruit more staff to conduct investigations and other administrative duties. The Court also needs funds in order to undertake outreach and awareness campaigns and compensate victims. Funding is vital for the smooth functioning of the ICC and also aids it to achieve its goals (Kaul, 2007).

Chapter 8

Conclusion

This final chapter presents an overview of the current study. It begins with a review of theoretical reflections and research findings. It continues by assessing the future of the relationship between the ICC and African countries and suggesting possible solutions to repair or strengthen the current relationship. It ends with a discussion of the limitations of the study as well as suggestions for future research.

8.1 Review of Theoretical Reflections and Major Research Findings

This study explored the competing perceptions of African countries on the ICC and its operations in the continent. It examined the perceptions of the African Union, individual countries and civil society. The study attempted to clarify the somewhat misleading perspective that the Court has no support in Africa. It did this by an analysis of the ICC African discourses. This thesis was situated in research that sought to engage criminology with human rights discourse. It highlighted the criticism of criminology's failure to explicitly engage human rights issues. In this, it drew insights from post-colonial theory analyze the different perceptions of the Court.

Major findings of the research reveal that two disparate views animate the ICC-African debate: that is, arguments supporting the efforts of the Court to protect human rights on the continent and those against the Court's operations. The study found that African countries actively participated in the creation of the Rome Statute of the ICC (Cole, 2013; Murithi, 2013; Monageng, 2014). They supported the idea to establish the Court and put in efforts. Organizations such as SADC held conferences and workshops to create awareness and agree on a common goal for the Court (du Plessis, 2008, 2010; Jallow & Bensouda, 2008; Cole, 2013; Monageng, 2014). The Southern African Development Community (SADC) and

the Dakar Declaration for the Establishment of the ICC agreed on common principles they wanted in the Rome Statute of the ICC. These principles guided their negotiations at the Diplomatic Conference in Rome (Maqungo, 2000; Cole, 2013; Monageng, 2014).

The African Union initially supported the Court and called on its members to support and cooperate with it by signing and ratifying the Rome Statute as well as cooperate with the Court to protect human rights (Cole, 2013). Even though the current relationship between the ICC and Africa seems frail countries such as Botswana, Ghana, and Zambia continue to put in effort to demonstrate their commitment to the Court. They have done so by either establishing institutions to create awareness of the mandate of the Court, or implementing the Rome Statute into their domestic court system, while also challenging and criticizing efforts to undermine the efforts of the Court to promote and protect human rights of victims. These countries were shown to have countered the African Unions' proposal for a mass withdrawal by member states (CICC, 2016; Tarlue, 2017). Civil society organizations locally and internationally are noted to support the operations of the Court in Africa and have demonstrated this by cooperating and putting in other measures to protect human rights. Civil society groups in Zambia and South Africa also act as pressure groups that criticise the government and its decisions regarding protection of human rights of citizens (CICC, 2016).

On the other side of the ICC and Africa debate is the opposition and non-cooperation of some African countries and the African Union. The once-promising relationship began to deteriorate when the Court indicted sitting presidents of Kenya and Sudan (Mills, 2012; Murithi, 2013). There is strong opposition from countries such as Sudan, Kenya, Uganda, Burundi, Rwanda and Zimbabwe. These countries have demonstrated their non-cooperation either by never signing the Rome Statute, threatening to withdraw from the Rome Statute or actually withdrawing. Leaders of these countries have been identified as the major critics of the Court.

In light of the discussions above, the study revealed that the "widely accepted" perception that Africa is against the ICC is misleading. The study also found that the non-cooperation and arguments against the Court, particularly by the African Union, does not necessarily represent the common views of all African states. They are not the views or perceptions of individual African countries, civil society or citizens (Materu, 2014). It demonstrated that the ICC remains a relevant institution for Africans, especially victims of serious human rights violations (Materu, 2014). From victims' perspectives, the AU's position on the ICC does not reflect their interests. Victims and other supporters of the Court have criticised the AU for failing to show any sensitivity to concerns of victims unlike it does to those being pursued by the Court (Dersso, 2013). The discussions also revealed that there are varying opinions about the Court within countries. People who are or likely to be targeted by the Court are against it. These people include the leadership of the African Union, leaders of some African states as well as senior government officials. They have demonstrated their position by failing to cooperate with the Court and also through their explicit and hostile utterances against the Court. The main critics of the ICC are noted to be the ruling political class in these countries (Materu, 2014) and they are accused of being the major violators of human rights and have the tendency to manipulate the domestic justice system of their countries. They are also leaders of countries with long history of ethnic and political violence (Cole, 2013; Materu, 2014).

8.2 Future of the ICC and Africa Relationship

Amid, current tensions and controversies, the future of the ICC in Africa remains unclear. Some criminal justice experts assert that future of the Court is in jeopardy due to the continuous effort of the African Union and some African states to make the Court's presence in the continent irrelevant (du Plessis, 2008; Murithi, 2013). They have referred to international organizations like the League of Nations that ceased to exist because its

members ignored its mandate (Murithi, 2013). The criticisms and non-cooperation by the African Union according to some experts are likely to cause the ICC a similar fate.

8.3 Possible Strategies for Repairing the ICC and Africa Relationship

For these reasons mentioned above, there is the urgent need to repair the relationship between the ICC and Africa states. As noted earlier, the importance of the Court in Africa or vice versa cannot be underestimated (du Plessis, 2008). The AU and the ICC share similar mandates to end impunity and ensure accountability for gross human rights violations and atrocities in the continent (du Plessis, 2008; Murithi, 2014). Both organizations have demonstrated they are determined to promote and protect human rights and to ensure good governance and the rule of law (du Plessis, 2008). Therefore, it is apparent for both organizations to tread side by side in order to implement their mandates.

Firstly, the African Union should put aside their interests and side with the Court's interventions to promote and protect human rights. The AU needs to move away from its exclusively political approach towards embracing international jurisprudence (Murithi, 2014). The ICC also has to acknowledge and be aware that, it is operating in an international political setting which consists of different approaches and solutions to addressing impunity and ensuring accountability (Murithi, 2014). The ICC should be willing to adjust its mandate to prosecute to enable political solutions which place emphasis on peacemaking and reconciliation to run their course (Murithi, 2014). The former Prosecutor of the Court, Luis Ocampo has been criticised for focusing too much on prosecution and asserting that the Court has no political powers influencing its operations (Murithi, 2013). He argued that the ICC operated strictly within a framework that is free from any political influences (Dersso, 2013).

Another possible strategy to adopt to repair the ICC and Africa relationship is to establish an Africa Criminal Court or expand the mandate and jurisdiction of the existing

African Human Rights Court to prosecute genocide and war crimes (Cole, 2013). The AU Commission in 2010 began the process to amend the Protocol on the Statute of the African Court (Maunganidze & du Plessis, 2015). In 2014, the AU Assembly adopted the Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights at the AU Summit and its now opened for ratification (Maunganidze & du Plessis, 2015). Some experts have advised that expanding the jurisdiction of the African Court to prosecute international crimes would contribute to efforts to end impunity in the continent (Deya, 2012 cited in Maunganidze & du Plessis, 2015). It is believed that this initiative has the potential to strengthen the relationship between both courts. The ICC as the main institution that promotes and protects human rights internationally can support or complement the African Court and States by providing technical assistance and resources through the office of the ICC registrar (Cole, 2013). Expanding the jurisdiction of the African Court also means crimes would be prosecuted domestically. This settles the debate about the ICC serving justice that is “foreign” to the African culture. Perhaps, African leaders would trust and cooperate with a justice system that serves and represents African ideologies (Cole, 2013).

Secondly, the ICC should improve its collaboration and outreach, particularly with African civil society. This could be done through meetings and workshops across the continent (Murithi, 2013; 2014). The Court also needs to adopt a more welcoming and accommodative approach to AU representatives when they come to The Hague (Murithi, 2013; 2014). The Chief Prosecutor needs to appoint a senior political advisor to act as a liaison with political organizations such as the AU. The Court also needs to establish and strengthen the liaison office at the AU headquarters in Addis Ababa. Also, the Chief Prosecutor needs to issue a series of policy papers on sequencing the administration of justice

to enable the promotion of peace building particularly in countries that are still affected by war (Murithi, 2013).

On the part of the African Union, it needs to partner with the Court to address human rights violations in the continent. The African Union can engage in dialogues with the Court and take advantage of having a majority of their members being State Parties to the Rome Statute to communicate its views and grievances (Murithi, 2013; 2014). African countries played a crucial role in drafting and negotiating the Rome Statute, therefore it is possible to dialogue with the Court to make changes. The AU should also engage civil society in regards to formulation and analysis of policy, victim support, documentation, creating awareness, advocacy and lobbying on issues pertaining to international criminal justice (Murithi, 2013; 2014). The AU should give civil society and external legal experts and academics opportunity to comment and make suggestions during summits on decisions regarding their relationship with the Court (Maunganidze & du Plessis, 2015).

Thirdly, individual African States need to raise accurate public and official awareness of the work of the ICC in the continent. There is also the need for enhanced political support for the work of the ICC and for international criminal justice in general (du Plessis, 2008). African governments should put in place initiatives that would raise awareness about the operations and benefits of the Court in order to debunk the myths and misleading perceptions about the Court. Ordinary citizens should be educated on the objectives and mandate of the ICC to clarify the perception that international criminal justice institutions such as the Court are Western ideas that were imposed on Africa and are irrelevant to them (du Plessis, 2008).

African countries should liaise with the Court to assist them to strengthen their domestic justice systems. The ICC serves as a last resort when domestic systems are unable or unwilling to prosecute cases (du Plessis, 2008; ICC, 2016). The Court is in a

complementary relationship with national courts. However, national courts in most African countries are often weak and inadequate to prosecute international crimes. They are also limited by resource and skills to establish criminal justice systems to address war crimes, genocide and crime against humanity (du Plessis, 2008). The efforts of the leadership of the AU and countries that oppose the ICC should be directed at strengthening their national judicial systems to be able to effectively prosecute gross human rights violations and crimes to avoid interference from the Court (Cole, 2013; Batohi, 2014).

The United Nations Security Council has been identified as an integral part of the existing tension between the African Union and the Court. Some experts have suggested that the UN Security Council should reorient its stance in relation to its referral power and communicate formally with the African Union and the individual African States before exercising its authority (Murithi, 2013). Failing to communicate with the AU or countries to ensure clarity and understanding would only aggravate the tension that exists and continues to portray international criminal justice systems bias (Murithi, 2013).

8.4 Limitations of the Study

The research conducted for this study relied on secondary sources for information about the views and perceptions of the ICC in Africa. This information could not be verified from original sources and therefore the findings could be compromised to some extent. News on the Court and African countries reported in the media may not necessarily accurately represent what is happening in reality. Thus the study could have benefited from employing research approaches that allowed for the collection of first-hand information from ordinary citizens, victims of human rights violations, international criminal justice experts and other stakeholders.

8.5 Suggestions for Future Research

The current research merely scratches the surface of the complex relationship between the International Criminal Court and Africa. Even though the focus of the current study is quite broad, it is admittedly not entirely encompassing or complete. There are a range of theoretical and practical issues that need to be explored in more detail for a better and broader understanding of the perceptions of the Court in Africa. Future research should employ different qualitative research approaches such as interviews in order to obtain more primary or first-hand data on perceptions in Africa regarding the operation of the ICC. This type of study could be broadened to take into account the perceptions of ordinary citizens, African civil society groups, leadership of the African Union, leaders of African countries and criminal justice experts and scholars of African descent.

Additionally, future research could be widened even more broadly to examine all African countries and their relationship with the Court, from tracing their involvement in creating the Rome Statute to their current stance on the operation of the ICC. Through a larger research project like this, researchers could analyze the perception of all African countries in order to get a more encompassing and balanced understanding of how the Court is perceived across the continent. Also, future research should probe further into the mandate of the Court and the principles underlying its operations. For example, having a clear and more in depth understanding of the Rome Statute and the other complicated legal principles and terms associated with the ICC can further help researchers provide a more balanced analysis of the operations of the Court in Africa. This type of research may also help expose further limitations of the ICC and the international criminal justice system in general as well as guide solutions and policies that could be suggested for improving relations between the ICC and African countries.

8.6 Concluding Remarks

Providing justice for victims in Africa is relevant because it is seen as a continent that has reported a number of gross human rights violations and atrocities. Often perpetrators of these atrocities go unpunished or unaccountable. The ICC represents justice for victims of grave crimes and has constantly put in efforts since its establishment to effectively and efficiently address these violations. Genocide, war crimes, crimes against humanity and crimes of aggression have had devastating consequences on the continent. Africa has suffered severely due to these atrocities that have led to the death of millions of people, children being orphaned, raping of innocent women and girls, and the outbreak of epidemics to mention a few.

Therefore, it is important to support institutions like the ICC that seek justice for victims and have the mandate to hold perpetrators accountable. African governments, the African Union and civil society have a vital role to enable the Court to accomplish its objectives. The ICC requires the support and commitment of the international community in order to bring justice to victims. The responsibility of providing justice should not be left to the ICC. Instead, it takes the efforts of the international community which includes the African Union, African member states of the ICC, civil society groups and human rights institutions across the world to put an end to impunity.

However, the fact that only Africans are being investigated at the ICC is bound to raise criticisms and problems (Cole, 2013). The refusal of countries to place themselves under the jurisdiction of the ICC and the failure of the Court to pursue justice in other parts of the world seem to suggest that, the Court is selective in the administration of international justice (Murithi, 2013). The success of the Court lies in its effort to demonstrate its commitment to addressing the perception that it holds a double standard (Dersso, 2013). The

International Criminal Court needs to address the genuine concerns raised by critics in order to fulfil its mandate of protecting universal human rights. The African Union and the anti-ICC leaders should also put aside their excuse that the actions of the ICC are politically motivated and work together with the Court to put an end to wars, genocide, human rights violations and crimes against humanity.

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