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Africa and the International Criminal Court (ICC): Revisiting Bones of Contention
A Dissertation

Submitted to the Department of Politics and International Relations

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at the
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by

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In Fulfilment of the Requirements
for the Degree of
MASTER OF ARTS IN POLITICAL STUDIES

October 2019

Johannesburg, South Africa

Prof. Suzanne Graham
This affidavit conforms to the requirements of the JUSTICES OF THE PEACE AND COMMISSIONERS OF OATHS ACT 16 OF 1963 and the applicable Regulations published in the GG GNR 1258 of 21 July 1972; GN 903 of 10 July 1998; GN 109 of 2 February 2001 as amended.

ABSTRACT

This dissertation examines the usefulness of the International Criminal Court (ICC) through investigating three entities namely, the United Nations Security Council, the Prosecutor of the ICC and the State Parties, which are empowered to trigger situations under the Rome Statute. This dissertation concludes that, while this supranational entity has been set up as an independent court to investigate the most serious international crimes, including crimes against humanity, genocide and the crime of aggression, the effectiveness of the Court tends to depend to a significant extent on the entities that trigger the situation. By examining situations which were introduced and brought to the Court at the time of the entry into force of the Statute in 2002, this dissertation distinguishes the initiator who is most crucial to the effectiveness of this supranational body. The three situations are all in Africa namely, Sudan (Darfur), Kenya and the Democratic Republic of Congo. The situations are as unique as they are controversial form the point of view of jurisdiction. The examination of the rulings of the Court and the result of the situation will assist to ascertain the areas of competence of the Court in the processing of situations. Nevertheless, the collaboration between the States Parties to the Rome Statute and the Tribunal illustrates that some institutions tend to be more conducive in fostering the effectiveness of the Court. This implies that the greater the collaboration such as the arrest of the offenders, the provision of testimony and proof, the more efficient the Court becomes.
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# ACRONYMS AND ABBREVIATIONS

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<th>Acronym</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ACHPR</td>
<td>African Court on Human and Peoples’ Rights</td>
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<td>ACJ</td>
<td>African Court of Justice</td>
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<td>ACJHR</td>
<td>African Court of Justice and Human Rights</td>
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<td>ADS</td>
<td>Atrocities Documentation Survey</td>
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<td>ASP</td>
<td>Assembly of States Parties</td>
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<td>AU</td>
<td>African Union</td>
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<td>AUPD</td>
<td>African Union High-Level Panel on Darfur</td>
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<td>BH</td>
<td>Bosnia and Herzegovina</td>
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<td>CAR</td>
<td>Central African Republic</td>
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<td>CDF</td>
<td>Civic Defence Forces</td>
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<tr>
<td>CIPEV</td>
<td>Commission of Inquiry on Post-Election Violence</td>
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<tr>
<td>COMESA</td>
<td>Common Market for Eastern and Southern Africa</td>
</tr>
<tr>
<td>FPLC</td>
<td>Forces Patriotiques pour La Libération du Congo</td>
</tr>
<tr>
<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<td>GoS</td>
<td>Government of Sudan</td>
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<tr>
<td>HAC</td>
<td>Humanitarian Aid Commission</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICGLR</td>
<td>International Conference on the Great Lakes Region</td>
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<td>ICJ</td>
<td>International Commission of Jurists</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
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<tr>
<td>IGAD</td>
<td>Inter-Governmental Development Authority</td>
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<td>IMTN</td>
<td>International Military Tribunal at Nuremberg</td>
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<td>IMTFET</td>
<td>International Military Tribunal for the Far East in Tokyo</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>Acronym</td>
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<tr>
<td>JEM</td>
<td>Justice and Equality Movement</td>
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<tr>
<td>KNCHR</td>
<td>Kenya National Commission on Human Rights</td>
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<tr>
<td>LRA</td>
<td>Lord’s Resistance Army</td>
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<tr>
<td>MONUC</td>
<td>United Nations Organization Stabilization Mission in the Democratic Republic of the Congo</td>
</tr>
<tr>
<td>NIF</td>
<td>National Islamic Front</td>
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<td>NISS</td>
<td>National Intelligence and Security Service</td>
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<td>OAU</td>
<td>Organization of African Unity</td>
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<td>ODM</td>
<td>Orange Democratic Movement</td>
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<tr>
<td>OTP</td>
<td>Office of the Prosecutor</td>
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<tr>
<td>PEV</td>
<td>Post-Election Violence</td>
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<td>PNU</td>
<td>Party National Unity</td>
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<tr>
<td>PFLC</td>
<td>Patriotic Forces for the Liberation of Congo</td>
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<td>PRC</td>
<td>People’s Republic of China</td>
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<td>SALC</td>
<td>Southern African Litigation Center</td>
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<td>SCSL</td>
<td>Special Court of Sierra Leone</td>
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<td>SLM</td>
<td>Sudanese Liberation Movement</td>
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<tr>
<td>SOKIMO</td>
<td>Societe des Mines d’Or de Kilo-Moto</td>
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<tr>
<td>SPAF</td>
<td>Sudan People’s Armed Forces</td>
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<tr>
<td>SPF</td>
<td>Sudanese Police Force</td>
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<tr>
<td>SPLA</td>
<td>Sudanese People’s Liberation Army</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
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<td>UPC</td>
<td>Union des Patriots Congolais</td>
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<tr>
<td>US</td>
<td>United States</td>
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<tr>
<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>WWI</td>
<td>World War One</td>
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<td>WWII</td>
<td>World War Two</td>
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CHAPTER 1: INTRODUCTION, METHODOLOGY AND STRUCTURE

1.1 Introduction

The International Criminal Court (ICC) entered into force in 2002, pursuant to the principles established in the 1998 Rome Statute, with the jurisdiction “to prosecute individuals for the international crimes of genocide, crimes against humanity, war crimes”, and as of December 2017, the “crime of aggression” as there was the sense that this provision could restrain the unwarranted interventions of more powerful countries (The Rome Statute, 1998; The Guardian, 2017). The finalisation and endorsement of the Statute of a permanent ICC in Rome in July 1998 was a watershed moment in the application of the international rules regulating violent conflict and the leaders involved in such conflict (Sarooshi, 1999).

There are 122 States Parties to the Statute. It is to be noted that, to date, the 42 persons publicly indicted by the ICC are all from African states. Consequently, African dissatisfaction with the ICC has increased and can be summed up by Kuwonu (2017:28-29) who argues that there is a “perception that the ICC has disproportionately targeted Africans and does not respect the politics and sovereignty of African countries”. African States have raised concerns over this injustice and have considered a withdrawal of their support from the Court. Indeed in 2017, Burundi, Gambia and South Africa each announced their intention to exit from the Court. Burundi effectively withdrew in October 2017, the first State Party to do so. However, the Gambia and South Africa reversed their decisions, after the former experienced a change in executive leadership while the latter’s withdrawal was challenged through domestic jurisprudence due to the fact that the South African
government had not followed the requisite parliamentary procedure for withdrawing from the Statute (Bloomberg, 2019). Moreover, despite warnings by Kenya and Uganda to withdraw, they have not yet acted upon these threats. When Zambia consulted its public about leaving the ICC 93% of respondents elected to stay within the Court (The Guardian, 2017).

Debates in the literature tend to enquire as to whether “the ICC is targeting Africa inappropriately or are there sound reasons and justifications for why all of the situations currently under investigation or prosecution happen to be in Africa” (Clarke quoted in iccforum, 2013).

Clarke (in iccforum, 2013) circumvents this question and suggests that scholars reframe it. She argues that scholars should really be asking, why Africa in the first place? She does this by:

Bypassing the assumption that the ICC is “targeting Africa” and instead examines the structural inequalities that have made it so that Africa and not the United States, Joseph Kony and not George Bush, crimes against humanity and not pre-emptive intervention form the basis for the court’s action (Clarke quoted in iccforum, 2013).

The ICC is often characterised as a site where diplomacy and justice intersect and could be said to be “shaped as much by crude politics as by philosopher kings” (Mistry & Verduzco, 2012). Although the International Court of Justice, or World Court, was set up after World War II by the United Nations (UN) Charter, it dealt only with legal issues between states. The ICC, in contrast, would deal with individual responsibility and provide a mechanism where individuals would be held accountable and would no longer escape punishment. The establishment of an ICC would also act as a deterrent to future war criminals. The concept of a structure of international criminal justice found currency post-Cold War. This Tribunal emerged off the back of the International Criminal Tribunal for Rwanda (ICTR) (1994) and the International Criminal Tribunal for the Former Yugoslavia (1995). Such ad hoc international courts had certain geographical limitations and limitations in respect of time; limitations that could be remedied by a permanent tribunal (Peterson, 2008; Pict-Pcti, 2018).
Although two organisational antecedents to the ICC, the impromptu tribunal courts for Yugoslavia and Rwanda, were set up by the United Nations Security Council (UNSC) and function as auxiliary structures of the UNSC, the ICC is an autonomous agreement-based international entity. It is built up in association with the UN, and in view of the Rome Statute has particular linkages to the UNSC which emanate from Chapter VII of the UN Charter. The connection that links the Court and the UNSC is complicated, given the capacity of the latter to pass to the Court cases over which it would not ordinarily have a domain, including the capacity of the Council to suspend an enquiry and legal proceedings at the ICC. With its restricted authority, collaboration and assistance from other states is often what the court has to depend on, which can be improved upon through the involvement of the UNSC (Mistry & Verduzco, 2012).

The ICC’s legal authority is based on the acquiescence of states. For the ICC to exercise authority, the country in whose domain a crime was perpetrated or the country whose citizen perpetrated the crime must either be a signatory to the Statute or have consented to its legal authority. Additionally, the Rome Statute, particularly Article 13(b), empowers the Court to exert legal authority in situations in which the UNSC has made a referral to the Court when utilising its authority enumerated in Chapter VII of the UN Charter (Ibid). The position in which the Court finds itself makes the issue of its authority and legal acceptability as a juridical institution hinging on the rule of law especially profound. The intensely politicised environment within the UNSC also does not ameliorate the situation, including its decision-making processes, which do not augur well when juxtaposed with certain assumptions such as confidence, probability, and fairness which normally correspond with law and order in society (Mistry & Verduzco, 2012).

The Rome Statute confers upon the Security Council a special role of jurisdiction. Article 13(b) of the Statute confers on the Council, acting in accordance with Chapter VII of the Charter of the United Nations, the capacity to submit to the ICC situations in which offences under the legal authority of the court have been committed (Security Council Report, 2018). Article 16 of the Statute, in converse, enables the Council, by means of a resolution of Chapter VII, to suspend the inquiry or trial for one year for reasons relating to the preservation of international peace and security.
(Ibid). Probably the most compelling critique of the link between the ICC and the UNSC has to do with the capacity of the members of the UNSC, of which three (China, United States and The Russian Federation) of the five permanent members - often referred to as the P5, are not parties to the Rome Statute, to refer cases involving countries not parties to the Court. The US and Russia both signed up to the ICC but neither ratified it and later both withdrew their signatures in 2002 and 2016 respectively. This, it is contended, compromises the legal and moral acceptability of the ICC’s authority, if it is believed that its authority rests upon state consent. Additionally, there is debate over how non-signatories to the Statute, particularly within the permanent members of the Security Council, can legitimise their supposed pre-eminence by subjecting non-signatories to the Statute while refusing the Court’s authority over themselves. Consequently, Mistry & Verduzco (2012) argue that questions arise over whether or not, through Security Council referrals, the ICC assumes the character of a strategic device in the promotion of political objectives of the P5 countries. The Security Council’s role vis-à-vis the ICC and the complicated nature of enforcing its referrals have been extensively discussed between many members of the Council. The failure to refer certain situations in which large scale atrocities were allegedly committed was one of the areas of controversy. The Council has also been largely oblivious to the lack of cooperation between the States and the ICC on current referrals avoiding to take action on the 13 rulings of the court concerning the inability of the UN Member States to cooperate (Security Council Report, 2018).

Bearing this in mind, what is evident is that African “submissions to ICC jurisdiction exist within political and ‘structural’ inequalities in the global arena, meaning that the ICC’s involvement in Africa is not simply a question of the ICC’s targeting of Africa” (Clarke quoted in iccforum, 2013). In order to contribute to the debate on the fairness of the ICC, it may be prudent to dig deeper into the ICC’s make-up and re-assess, by way of examining the ICC’s relations with Africa through three cases studies namely, Darfur/Sudan, the Democratic Republic of Congo (DRC) and Kenya.. After all, as Clarke (quoted in iccforum, 2013) contends:

When law is delinked from the conditions of its making and the relations in which it is embedded, it has the potential of misrepresenting key issues as simply about
personal agency (i.e. the ICC targeting Africa) and not allowing us to understand the complexities of history that bring certain conditions into question.

Given the brief outline above of the reasons and the guiding principles for the establishment of the ICC; and some of its attendant challenges which inspire negative perceptions, this study is motivated by the primary research objective of this dissertation which is to:

- Revisit and disentangle the tensions between the ICC and Africa and propose some possible pathways towards solutions.

This will be achieved by examining the principles of universal jurisdiction and complementarity of the Rome Statute, as well as the question of protection for incumbent heads of state; examining the domestic enforcement of the ICC Statute in Africa; and monitoring the development of the conflict between African states, operating separately or within the scope of the African Union (AU), and the ICC.

Some of the sub-research questions which have assisted the researcher in gathering evidence include:

- What role does the UNSC play in forwarding or postponing cases under the ICC investigation?
- How does the peace versus justice dichotomy play a role?
- In what ways if at all, can the ICC prosecutor’s *propio motu* (on one's own initiative) power to initiate investigations in Africa be perceived as controversial?
- What is the function of national and conventional African courts, including the Malabo Protocol in the battle against brutal force (as opposed to making submissions to the ICC)? The track record of the Courts in Sudan, Kenya and the DRC, which have been specifically chosen for this study because of their relevance, will be reviewed.
- What are the challenges of the Court in the execution of its mission?

In order to undertake this task in a meaningful and substantive fashion, the study has examined the interplay of three parameters namely: the States Parties, the UNSC, and the Prosecutor of the ICC which the Rome Statute empowers to initiate cases.
This was done to firstly establish whether these entities help in ushering in a conducive environment for the universal acceptability of the court; and secondly, to establish the extent of the efficacy of these parameters in facilitating the objectives of the court namely, to help “put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, and thus to contribute to the prevention of such crimes” (icc-cpi.int, 2017).

The hypothesis of the dissertation is that, although the ICC was established as a politically autonomous body to investigate egregious international crimes such as genocide, war crimes and crimes against humanity, the success of the Court is highly dependent on the entities empowered by the Rome Statute to activate situations. While the initiating entities are: States Parties, the Prosecutor and the UNSC, there is a need for coordination between those entities if the efficacy of the Court is to be accomplished. A few cases, three in particular, referred to the Court since 1 July 2002 when the Rome Statute entered into force will be reviewed in this study in order to determine whether the hypothesis has been established.

1.2 Summary Literature Review

Any discussion on the establishment of the ICC ought necessarily to be prefaced by a brief reference to International Criminal Law, a body of law which forms the basis upon which much of what the ICC does, rests.

Newman (2005) opines that “International criminal law is a philosophically conflicted area and that these philosophical conflicts often seem to derive from international criminal law’s dual origins in international humanitarian law and criminal law - two disciplines with competing philosophies”. International criminal law, much the same as local criminal law, raises other philosophical anxieties, particularly those between the interests of victims and due process, restorative justice and criminal justice, and the possibly contending points of peace and justice but then in spite of these contentions, proponents of an international criminal legal framework regularly accept that peace and justice are not mutually exclusive (Corliss, 2013 and Tutu, 1999).
A substantial amount of scholarship on the development of International Criminal Law leading up to the formation of the ICC arguably starts with the Nuremburg Trials where the Allies put German (Nazi) bureaucrats through criminal trials for violations of international law which happened during World War II (WWII) (Ali, 2014).

In the Assessment of the Nuremberg International Military Tribunal (IMT) it is argued that the tribunal has often been accused of dispensing a ‘victor’s justice’, while the idea is not always obvious. It has many connected, yet varying claims, such as that the Trial itself was biased, that the judges were not fair towards the accused and that the relevant law was intended to ensure a sentence, and that equivalent acts were perpetrated by the charging countries but were not charged (Cryer, Friman, Robinson, and Wilmshurst, 2010; Cassese and Jones, 2002). However, the judges were convinced and resolute 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” (Cryer et al., 2010).

Rights and duties of States are typically under the purview of international law, while criminal law concerns itself with preclusions directed to persons, whose infringements are liable to correctional action by a State. The innovation of an international criminal law body that specifically enforces liability on individuals and penalises infringements through international processes is fairly recent (Cryer et al., 2010). The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) took place in Rome from June 15 to July 17, 1998. It included 160 states, 33 of which were African states 33 intergovernmental organizations and some 236 nongovernmental organizations (NGOs). Countries which ratified the rules of the conference were designated as States Parties and are included in the Assembly of States Parties. At the conclusion of the conference, the Rome Statute of the International Criminal Court was adopted by a non-recorded vote of 120 in favour, 7 against and 21 abstentions. The US proceeded to state publicly that it had voted against the statute, while France, the United Kingdom and the Russian Federation supported the statute (Arsanjani, 1999).

The ‘Peace versus Justice’ dichotomy is generally considered within the international criminal law community as very important when analysing international criminal
justice and associated politics thereof. The role played by the permanent ICC may be viewed as an impediment to peace processes, but it is also possible that it acts as an agent that promotes those processes (Krzan, 2016).

In his article, *International Criminal Court Facing the Peace vs. Justice Dilemma*, Krzan (2016) discusses the interrelationship between peace and justice and argues that the two may not necessarily be mutually exclusive. He goes on and cites the long-standing Latin principle of *Fiat justitia, et pereat mundus*, meaning “Let justice be done, and let the world perish” and notes that this is the ideal and between this extreme and the other one on the end of a spectrum lies a number of possible scenarios. He further suggests that a more nuanced approach is needed for adequately evaluating the impact of the ICC, and that in any case, there are different mechanisms enshrined in the Rome Statute, for accommodating the demands of peace and justice (Ibid).

Regarding another bone of contention, namely, the US’s ambivalence to the Statute, Scharf (2001) investigates the legitimacy of US’s contention against the ICC’s authority over the nationals of states not signatory to the Statute within a particular set of circumstances as well as rules underpinning international criminal jurisdiction. He demonstrates that the problem does not necessarily lie with the authority of the ICC over the citizens of states not signatory to the Statute, but with the legal contention of the US administration, which relies on weak arguments.

The US position on the “ICC is as simple as it is challenging for the international constitutional order”, according to Weller (2002), who argues that the US fears a scenario in which the ICC would move the final authority to try the policies approved by the US government to a distant territory beyond the control of US law-makers and bureaucrats. The argument goes on that, this may be done based on values that may or may not be in line with the US’s and this would be unacceptable since the latter carries more responsibilities for military operations whether within or outside of the UN framework and that this would make US politicians or officials prime targets of the tribunal (Ibid).
According to Schabas (2004:720) “the adoption of the Rome Statute of the International Criminal Court represents a single failure for American diplomacy as the world’s only superpower found itself outmanoeuvred by a constellation of small and medium powers, including some of its closest friends and allies”. In contrast, Africa’s integral role and enthusiasm for the establishment of the supranational body is well documented, as Jalloh (2012:204) aptly suggests, “Africa, as a continent, supported the idea of the ICC long before its birth, in fact, while the ICC concept was in gestation in the belly of the international community”. The author further mentions that Professor Tiya Maluwa, Legal Counsel to the Organization of African Unity (OAU) during the Rome talks, stated that the African continent had a special interest in the creation of the ICC because its population had suffered human rights atrocities for decades, such as slavery, colonial wars and other horrific acts of war and abuse that continue today notwithstanding the post-Colonial epoch. It is important to bear in mind that the treaty was adopted in Rome on 17 July 1998; became active on 1 July 2002 and is not retrospective.

However, following a number of questionable ICC indictments which were almost exclusively focussed on African leaders, these culminated in the controversial indictment of a sitting African head of state in President Omar al-Bashir and a perceived indifference by both the UNSC as well as the ICC. The AU Summit of Heads of State and Government on 03 July 2009, decided to direct African states to ignore ICC requests for cooperation with the court following the indictment of the Sudanese President. The decision was a watershed moment as it meant that African States Parties to the Rome Statute had to reconcile their AU member state obligations with those of the Rome Statute (Tladi, 2009). The decision of the AU thus presented a variety of important concerns about the future of international law from a theoretical and an organisational point of view. From a purely organisational point of view, the decision raised questions regarding the connection between the AU and the UN, the connection between the AU and its Member States against general international issues, and the connection between international bodies and their African Member States as regards decisions of the AU (Ibid). Abbas (2013:936) notes that for most observers, Africa's search for its own court to try international crimes was purely political in nature and started as a result of the AU/ICC disagreement on Al Bashir's arrest warrant. Although there is no doubt that
the Al Bashir case has intensified Africa's willingness to address international crimes, it is simplistic to say that this incident is the cornerstone of Africa's search for international criminal jurisdiction. Indeed, Africa initially demonstrated an intention to investigate international crimes in the 1970s during the debate on the African Charter on Human and Peoples' Rights. Even though the Committee of Experts charged with developing the Charter refused the recommendation to include a court of international criminal jurisdiction in its terms, examining the arguments for the initiative and its rejection will make it possible to better understand the historical context.

Elsewhere, in an article entitled: “Is the ICC Targeting Africa Inappropriately? A Moral, Legal, and Sociological Assessment”, deGuzman (2016:333) subjects the claim to a three dimensional scrutiny of moral, legal and sociological assessment and finds that the first two claims are not backed up by sufficient evidentiary basis, while the latter claim has some validity in terms of the perceptions of fairness of the Court. She argues that the ICC has only ever invoked its jurisdiction in one situation while all the other situations came to the Court via referrals by the states concerned and the UNSC. Additionally, the international body has opted not to investigate only two situations outside of the African continent, an insufficient basis to make allegations of selective prosecution of Africans. In its defence the Court also argues that it has used the gravity threshold in assessing the admissibility of situations. Another critique levelled at the Court has been that, it does not observe the doctrine of complementarity and therefore does not respect sovereignty of other countries as some crimes had already been under investigation by domestic jurisprudence of those countries involved – a claim that deGuzman also argues, is not backed up by empirical evidence. A key principle of the ICC treaty as Du Plessis, Maluwa, & O'Reilly (2013:7) observe, is that the tribunal can only undertake proceedings where the national courts are unable or genuinely unwilling to probe or prosecute in line with the doctrine of complementarity.

The strongest claim of inappropriateness according to deGuzman is the sociological one in as far as perceptions of fairness are concerned. In this regard, there is undeniable evidence that the ICC has suffered substantively when it comes to how its fairness is perceived by African audiences due to its disproportionate focus on the African continent. Again, it is not clear whether these perceptions are widely shared
between governments and populations, but one thing is certain, despite this fairness
deficit, African civil society appear to support the work of the ICC largely because it
is considered as a bulwark against human rights atrocities and ongoing impunity.

1.3 Analytical Framework

The analytical framework which has guided this study has been drawn from
international legal doctrine and institutionalism, a theory concerned with the deeper
and more resilient aspects of social structure. It considers the processes by which
structures, including schemes, rules, norms, and routines, become established as
authoritative guidelines for social behaviour. Within the context of international
relations, the concept of institution is contrasted with regime, defined by Krasner
(1982) as a set of explicit or implicit "principles, norms, rules, and decision-making
procedures around which actors' expectations converge in a given issue-area of
international relations". "Principles are beliefs of fact, causation, and rectitude.
Norms are standards of behaviour defined in terms of rights and obligations. Rules
are specific prescriptions or proscriptions for action. Decision-making procedures are
prevailing practices for making and implementing collective choice" (Ibid).

The above orientation finds resonance with other postulations such as Keohane and
Nye (1977) who see regimes as "sets of governing arrangements" that include
"networks of rules, norms, and procedures that regularize behaviour and control its
effects." For Haas (1980) regimes encompass mutually coherent set of procedures,
rules, and norms. Hedley Bull (1977), on the other hand looks at the significance of
rules and regimes within the international community as "general imperative
principles which require or authorize prescribed classes of persons or groups to
behave in prescribed ways." Bull further contends that institutions facilitate
"adherence to rules by formulating, communicating, administering, enforcing,
interpreting, legitimating, and adapting them" (Ibid).

1.4 Research Methodology
This dissertation is a qualitative study. The main research method of this qualitative study has been literature analysis and has relied on primary and secondary sources, examining three selected cases referred to the ICC since its inception. This study has used the case study method to serve as a supportive role in gathering evidence which has been useful in revisiting and disentangling the tensions between the ICC and Africa. The sub-questions outlined in the introduction section of this proposal have guided the study. The Sudan situation was a UNSC referral. On 31 March 2005, the UNSC passed Resolution 1593, which reported the Sudanese president to The Hague. Consequently, Sudan became subjected to the Rome Statute even though it was not a State party to the Treaty (AlZarouni, 2019). Omar al-Bashir had been the President of Sudan at a period when the conflict with the Sudanese People's Liberation Army (SPLA) was raging. In 2003, opposition black African militias launched an offensive on al-Bashir's regime in Darfur and, in order to quell the insurgency, the Sudanese president secured assistance from the Janjaweed, an Arab militia whose brutal tactics tormented residents, blocked humanitarian aid agencies from providing humanitarian supplies and ethnically cleansed more than two million refugees. In reaction, the UNSC decided to refer the Darfur situation to the ICC in 2005. The Sudan situation was a UNSC referral, but collaboration on the enforcement of President al-Bashir's arrest warrant was never difficult and this has become a precedent-setting case within the ICC, as the situation has generated a conflict between the Court and the AU. It is argued that while there is broad support for Resolution 1593 of the UNSC, which conferred authority to the Prosecutor in issuing al-Bashir's arrest warrant, the Chamber acknowledges the inherent discord with respect to Articles 27(2) and 98(1) of the Rome Statute.

The situation in Kenya was initiated by the Prosecutor Proprio Motu. In 2007, Kenya conducted its general election, overshadowed by bloodshed, in the form of sectarian conflict between the communities which decided to vote for Mwai Kibaki, leader of the National Unity Party (PNU) as well as civilians who voted for Raila Odinga of the Orange Democratic Movement. Following post-election violence (PEV) in 2007, which resulted in the loss life of more than 1,000 victims, which also included the sexual assault and dislocation of huge numbers of people, an autonomous panel known as the Waki Commission as well as a Special Tribunal were formed to examine the causes of these disruptions. As a State Party to the ICC in 2007
already, there had been an expectation that Kenya would meet with the provisions of the Rome Statute as massacres were perpetrated by the members of the two major parties that were contesting in 2007, however when Kenya neglected to turn over the guilty parties who committed the 2007 massacres, the Prosecutor exercised the powers enshrined in Article 15 of the ICC. A major bone of contention in this case was admissibility, as there were differences of interpretation in terms of who had the jurisdiction between the Court and the State over the situation.

The case of the DRC was appealed to the tribunal. In 2005, Thomas Lubanga Dyilo, a Congolese national was captured by the government and imprisoned by government authorities in Kinshasa before being moved to The Hague. At the ICC, Lubanga was tried and found guilty as a co-perpetrator for recruiting and conscripting under-age boys and using them to take part in conflicts from September 2002 to August 2003. As opposed to the Kenyan situation, the Court did not have to determine admissibility, as the matter was referred by the State and therefore did not need to issue an arrest warrant or subpoena to testify, even though the arrest warrant was eventually authorised by the Prosecutor as a mere formality by the Court. Enumerated above are three different instances of initiators referring cases to the ICC and as previously stated, the cases are both unique and unparalleled in the history of the Court.

As mentioned above, this dissertation has attempted to delve into the interplay of three parameters namely, the States Parties, the Security Council and the Prosecutor of the ICC that were empowered to commence cases by the Rome Statute. This was done in order to establish the extent of the efficacy of the principles in advancing the mission of the Court namely, to end impunity for the offenders of grave infringements to the international community, and thus to contribute to the prevention of such infringements.

Closely related to this aim is to establish whether in the course of the execution of this task, the Court is doing so in a manner that does not lend itself to both opportunistic influences by powerful states parties and also whether if that is the case, this does not contribute to perceptions of bias by other states parties. A combination of primary and secondary sources in the form of ICC case law, online
reports, books and journals have been reviewed to complete the preliminary literature review section in order to provide a conceptual framework of the evolution of International Criminal Law as a body of law which forms the basis upon which much of what the ICC does, rests.

1.5 Proposed Structure of Study

- This first chapter gives an overview and provides context for the research. The chapter articulates the aim of the research, provides a literature review section indicating key scholarly contributions related to this study, and describes the approach utilised to undertake the research and lays out the research outline.

- Chapter 2 has presented an analytical framework for the study and explores the Rome Statute and the applicable clauses authorizing the initiators of situations, namely, the UNSC, the ICC Prosecutor as well as States Parties.

- Chapters 3, 4 and 5 have reviewed three cases in detail which are Darfur/Sudan, Kenya and the DRC and their links to the ICC. The cases have been carefully selected because of their uniqueness. While different initiators refer cases, the cases are all unparalleled in the history of the Court.

- Chapter 6 has provided an overview of the findings and draw some conclusions.
CHAPTER 2: FRAMEWORK AND INTRODUCTION TO THE ICC

2.1 Introduction

This chapter will map the various stages in the evolution of the Rome Statute that brought about the ICC as well as discuss some of the salient aspects of international legal doctrine and institutionalism, a theory concerned with the deeper and more resilient aspects of social structure. As indicated in Chapter 1, within the context of international relations, the concept of institution is contrasted with regime, defined by Krasner (1982) as a set of explicit or implicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given issue-area of international relations. The chapter will conclude by exploring the grounds under which members on trial can be afforded immunity, state immunity, and sufficient reasons for member countries to justify withdrawal from the Statute.

The specific objectives of this chapter are to highlight the background information of the Rome Statute and to establish the analytical framework, which is international
legal doctrine and institutionalism which undergirds an institution such as the ICC. The other objective is to define what constitutes state immunity and also explain the reasons that may precipitate withdrawal by members from the Rome Statute and outline the reasons for state immunity and lastly, present the implications that withdrawal from the ICC can have on the international legal order in general.

2.2 The Rome Statute of the ICC

The Rome Statute of the ICC is the agreement that inaugurated the ICC (Benzing, 2003). The treaty was adopted in Rome on 17 July 1998 and became active on 1 July 2002. It should be mentioned from the outset that Member States of the African Union (AU) were integral in setting up the Rome Statute that established the ICC, with Senegal being the first country to ratify it (Apiko & Aggad, 2016). The global community commended the establishment of an autonomous and enduring international criminal court, with former UN Secretary General Kofi Annan remarking that “in the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision” (Annan, 1998).

The Rome Statute is said to be a treaty with a constitutional status as the clauses of the Statute have a constitutionalising effect on the entire body of international criminal law which, in itself, also encompasses the body of customary human rights law and customary international law (Cardona, 2013). The underpinning premise for this constitutional character is that the Charter of the UN is a type of ‘constitution’ for the global community that cannot be rejected by non-party states (Cardona, 2013). The Court was therefore formed as a critical component of the UN framework by means of the initiatives of the UN structures, such as the Rome Conference, however, there are also formidable dissenting voices as to the constitutional character of the Statute who argue that the Court is mostly a manifestation of emerging universal standards from different sources of international law, such as the UN as well as the Assembly of States Parties to the Court (Mendes 2010; (Apiko & Aggad, 2016)). At the moment, the ICC has been processing a total of 11 cases, with 9 being African countries, that is Sudan, the DRC, Uganda, the Central African Republic, Kenya, Libya, Côte d’Ivoire, Burundi and Mali.
2.2.1 The Jurisdiction of the ICC

The Statute empowers the ICC with legal authority to indict persons accused of flagrant transgressions that are disturbing to the global community namely: war crimes; genocide; crimes against humanity and the crime of aggression which was added later. Nevertheless, its jurisdiction over such transgressions is limited to crimes perpetrated after the coming into force of the Rome Statute on 1 July 2002 (Rome Statute, 1998: arts. 11(1), 126). Consensus on the interpretations of each of these offences is absolutely essential for identifying the spheres of authority of the ICC and to guide the proceedings and findings of the cases. The interpretations of genocide and what encompasses aggression have been remarkably troublesome, as seen in the case of Rwanda, where the international community was reluctant to categorise the 1994 slaughter as a 'genocide,' as the descriptor would necessitate intervention under international conventions (South African History online, 2015).

War Crimes:

According to the Rome Statute, war crimes can be any of the following violations of the Geneva Conventions of 12 August 1949 committed against any individual or property such as willful killing, torture or inhumane treatment, including biological experiments, willingly causing immense suffering or severe injury to the body or health as well as extensive destruction and appropriation of property, not warranted by military necessity (The Rome Statute, 1998: Article 8).

Genocide:

The Rome Statute describes the criminal act of genocide as comprising any of the following actions perpetrated with the intention of destroying, wholly or partially, a national ethnic, racial or religious group, murdering members of a group, serious physical or mental injuries to members of the group, as well as purposefully inflicting
on the group conditions of life calculated to cause its physical destruction wholly or partially (The Rome Statute, 1998: Article 6).

**Crimes against Humanity:**

Crimes against humanity are defined as “acts committed as part of a widespread or systematic attack directed against any civilian population” such as murder enslavement, forced removal or deportation, torture, any form of sexual violence, and the crime of apartheid which is defined as inhumane acts of a type similar to other crimes against humanity “committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime”. (The Rome Statute, 1998: Article 7).

**The Crime of Aggression:**

On 14 December 2017, the 16th meeting of the Assembly of States Parties to the Rome Statute (ASP) enacted Resolution ICC-ASP/16/Res.5 regarding "Activation of the jurisdiction of the Court over the crime of aggression". In effect, the ASP not only agreed to trigger the aggression-related legal authority of the ICC with effect from 17 July 2018. However, as has been observed by many of the representatives taking part in the negotiation process, the ‘narrow’ jurisdictional perspective now expressed in operative paragraph 2 of the afore-mentioned ASP resolution also essentially altered the earlier Kampala amendment, although without expressly doing so (The Rome Statute, 1998: Article 8; Zimmermann, 2018).

Although the ICC is ordinarily domiciled in The Hague, in the Netherlands, when required and deemed appropriate, it can sit anywhere. It operates as the court of last resort for the most egregious transgressions and will only move in when the country where the crime occurred is demonstrably “unable or unwilling to act itself” (Wand, 2017). Indeed, the Court operates as a complementary structure to other domestic courts, as per Article 1 of the Statute (Rosén and Gruner, 2007; Ferencz, 2008). The Court has authority over transgressions only if they are perpetrated in a particular geographic location of a state party or perpetrated by a citizen of a state party. The
only deviation here is that the ICC may also exercise authority over transgressions if its authority is permitted by the UNSC. Should an offender belong to a country that is not a State Party, the non-State Party may consent to the Court’s authority and transfer the culprit to the Court (Barnes, 2010). Under exceptional cases, the Tribunal may exercise authority with respect to a person who fails to fulfil some of these requirements, unless such instances include an arrangement involving the UN and the ICC (Barnes, 2010).

The ICC is autonomous of the UN; however, these organisations collaborate. Most importantly, the two bodies have a cooperation treaty (Relationship Agreement, 2004). In addition, the two institutions “recognize each other’s mandates and status and agree to cooperate and consult each other on matters of mutual interest” (Coalition for the ICC, 2005). Pursuant to Chapter VII of the Charter of the UN, the latter considers threats to stability and peace internationally and advises and determines the actions to be taken in response to those threats (U.N. Charter article. 39; Relationship Agreement, supra note 44, at article. 17(1)). In accordance with the Rome Statute and the Relationship Agreement, the UNSC may report an infringement of global security to the ICC in compliance with Chapter VII of the Charter of the UN (UN Charter art. 39, supra note 47). The UNSC may send the situation to the ICC even when it concerns a non-Member State citizen (Rome Statute, supra note 19, article. 13).

2.2.2 Signatories to the Rome Statute

There are currently about 122 States which have signed the document, while only 118 have ratified it. Signatories to the Statute include South Africa, Botswana, Georgia, Liberia, Nauru, Botswana, Slovenia Afghanistan, Zambia, France, and Australia. A few states have not ratified the Rome Statute, as indicated in Chapter 1, and these include India, China and the US. As per the ICC’s website, of the 122 countries that have signed the ICC, South Africa is one of 33 African states, and the eighth African country to ratify the Rome Statute. It is also the first African country to domesticate the Rome Statute into national legislation (Bizos, 2015). In addition to
other duties, the statute outlines the Court's functions, structure and jurisdiction (Rome Statute, 1998).

2.3 Constitution of the Court

The Court comprises of four divisions, namely: the Presidency; the Judicial Division; the Office of the Prosecutor (OTP), and the Registry (Rome Statute, 1998).

2.3.1 The Presidency

The Presidency is constituted by the President and two Vice-Presidents, with the first and second Vice-Presidents being elected by a majority of the Judges for a term not exceeding three years. The Presidency is responsible for ensuring the daily administration of the Court, including its external representation (Rome Statute, 1998: art 38).

2.3.2 The Judicial Division

The Judicial Division is constituted by judges (4 from the African group of states) who preside in proceedings before the Court and work in clusters known as Chambers. There are three chambers, namely the Pre-Trial, the Trial and the Appeals Chamber. Pre-trial judges preside over and make decisions on any matter that may arise prior to the commencement of the trial, usually including the issue of arrest warrants and the protection of the interests of victims and witnesses. The Trial Judges are responsible for presiding over the hearing of evidence and determine whether the suspected party is innocent or guilty. The judges determine the sentence for the crimes and any damages and reimbursement to be given to the plaintiffs. The Appeal judges are charged with reviewing judgements taken by the other judges and can either agree, disagree or amend the judgements and their decision is final (Rome Statute, 1998: Article 39).

2.3.3 Office of the Prosecutor (OTP)
The OTP is responsible for investigating and prosecuting offences under the Rome Statute. The prosecution must determine the facts of the situation and must collect all details even if it is in support of the accused person (Rome Statute, 1998: Article 42).

2.3.4 The Registry

The Registry undertakes all administrative tasks that are not of a judicial type. The Registry is managed by a Registrar who functions under the oversight of the President of the Court. The Registrar is elected by the Judges for a term of five years by a simple majority rule. The Registrar is also responsible for setting up a Victims and Witnesses Unit to provide security, counselling and other appropriate support services to victims and witnesses who appear before the Court (Rome Statute, 1998: Article 43)

2.4 Decision Making in the Court

The Assembly of State Parties (ASP) is the highest decision-making organ of the Court and each State party has one delegate to the ASP. Representatives are entitled to one vote and decisions are taken by consensus or by majority vote. Judges and prosecutors are designated by the ASP. The Registrar is, however, elected by the judges. The Court is composed of the Presidency, the Appeals Division, the Pre-Trial Division, the Office of the Prosecutor and the Registry. Eighteen judges are voted to the ASP for a nine-year period. These individuals must have solid personal and professional credentials in the field of international and criminal law. Financing for the Court is provided by assessed payments by State Parties, financing given by the UN and private contributions by states, international bodies, individuals and other entities. The preamble to the Rome Statute creating the Court lays out its purpose and goals (Mundis, 2003).
2.5 The Process of Referral of Cases to the Court

**Preliminary examination and investigation**

**Referral by State Party** (art. 14 RS)

- Prosecutor determines whether there is a reasonable basis to proceed (art. 15, 53(1) RS, Rule 40):
  - Jurisdiction over crime(s): Genocide, CAH, War Crimes
  - Admissibility: State inaction, unwillingness/inability
  - Interests of justice: gravity of crime, victim interests

**Referral by Security Council** (art. 13(b) RS)

**Communication from any source** (art. 15 RS)

- Pre-Trial Chamber authorization (art. 15 RS)

**INITIATE INVESTIGATION** (art. 52 RS)

Figure 1.1: Diagram indicating the three ways in which proceedings may appear before the ICC (Erlingsson, 2010).

There are three ways in which proceedings can be put before the ICC, as shown in Figure 1.1 above.

(i) **Self-Referral by State Parties**

The State Parties may request the OTP to investigate the crimes perpetrated in that country and for which the ICC has jurisdiction (The Rome Statute, Art 13). This is the procedure used when the DRC referred the case in that country to the Prosecutor in 2004 (Gaeta, 2004). This procedure is only available in State Parties to the Rome Statute. This method will be demonstrated in the case study of the DRC in Chapter 5.

(ii) **Referral by the UNSC**
The UNSC may submit a case to the Prosecutor for Inquiry (The Rome Statute, Art 13(b)). This approach is applicable when pursuing perpetrators of egregious offences in states that are not party to the Rome Statute. This *modus operandi* was utilised to refer the situation in Darfur, Sudan to be discussed in Chapter 3 (Boschiero, 2015).

iii) **The Prosecutor Acting Proprio Motu**

The OTP may on its own initiative, launch a provisional investigation *proprio motu* (on a case-by-case basis) upon receipt of relevant evidence requesting it to pursue certain proceedings in compliance with Article 15 (The Rome Statute, 1998). In this scenario, the Prosecutor must seek authorization from the pre-Trial Judges before the inquiry is carried out. The privilege of the Prosecutor to launch a preparatory inquiry must be based on evidence and factual information on the alleged offences and may originate from any source (Sjöström, 2014). There are certain safeguards which are meant to ensure that while the Prosecutor’s discretion is broad and unlimited, it should conform to the principles of independence, objectivity and impartiality. These can be found in Article 21 (3), 42, and 54 (1) of the Statute, respectively. The situation of Kenya in the ICC is an example of *proprio motu* and this will be explored in Chapter 4 of this study.

2.6 Background and setting out the framework for the study

There is no single and universally agreed upon definition of an institution in the institutional school of thought as Scott (1995) opines that “Institutions are social structures that have attained a high degree of resilience” and elsewhere, Scott (2004:408-14) describes institutional theory as:

> Attending to the deeper and more resilient aspects of social structure. It considers the processes by which structures, including schemas, rules, norms, and routines, become established as authoritative guidelines for social behaviour. It enquires into how these elements are created, diffused, adopted, and adapted over space and time; and how they fall into decline and disuse.
Institutions differ from regimes in the sense that the former are established organisations, while the latter denote a mode of governance or management and in this regard, Krasner (1982) sees regimes as sets of explicit or implicit “principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given issue-area of international relations”. The above orientation finds resonance with other postulations such as that of Keohane and Nye (1977) who see regimes as “sets of governing arrangements” that include networks of rules, norms, and procedures that regularize behaviour and control its effects. For Haas (1980) regimes encompass a mutually coherent set of procedures, rules, and norms while Bull (1977), on the other hand looks at the significance of rules and regimes within the international community as “general imperative principles which require or authorize prescribed classes of persons or groups to behave in prescribed ways.” Bull (1977) further contends that institutions facilitate “adherence to rules by formulating, communicating, administering, enforcing, interpreting, legitimating, and adapting them”.

Essentially, the basic tenets of international law, according to Schwabach, & Cockfield (2018), entail the promotion of “global peace and prosperity and international law and its accompanying institutions act as a balm to smooth over opposing interests that nations may have and that both international law and its institutional setting are evidently not ideologically neutral”. So, from the above postulations, it becomes evident that institutions and regimes share common characteristics and the ICC and by extension, the Rome Statute with its ‘coherent set of procedures, rules, and norms’ can usefully be viewed through this lens of institutionalism and regime theory.

2.6.1 Precursors to the ICC

Prior to the establishment of the ICC, four important tribunals demonstrated a clear necessity for a lasting solution in the form of an international court in service of the global community. Two tribunals namely: the International Military Tribunal at Nuremberg (1945-1946) and the International Military Tribunal for the Far East in Tokyo (1946-1948) were already in existence, having been established after World
War II (WWII) in order to prosecute former Nazi war criminals in Germany, and Japanese war criminals after WWII respectively. Shocking scenes of atrocities of the conflict prompted the setting up of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide. Genocide was described as a crime in international law in this Convention and it is also here that the International Law Commission (ILC) originally received authorisation to investigate prospects for establishing an international judicial body to be entrusted with prosecuting offenders pertaining to transgressions of genocide (Bucheister, 2012).

The ILC was then instituted by the United Nations General Assembly (UNGA) in 1947, to carry out the latter’s directive in line with article 13 (1) (a) of the Charter of the United Nations to “initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification” (ILC, 2018). When the ILC was undertaking research and gathering information, the Cold War, which had started after the WWII had disrupted and distracted the international community from creating an international court. The emergence of the bipolar international order which drew the US and the Soviet Union, as well as satellite countries and proxies of these power blocs, into an intense struggle for power and dominance had the effect of rendering institutions such as the UN almost moribund on a number of fronts. As a result, the ILC could not commence any discussions with UN member states. While the Cold War was coming to an end towards the late 1980s, the UNGA requested the ILC to “resume work on an international criminal court with jurisdiction to include drug trafficking.” Work started in earnest again, meanwhile, the UNSC formed the International Criminal Tribunal for Yugoslavia (ICTY) in 1993, and the International Criminal Tribunal for Rwanda in 1994, which further impacted the global community (Barria, 2005).

The fact that these courts were popular is undisputed, however, they proved to be very expensive to maintain. It is estimated that the ICTY had a budget of about $70 million, while the Rwanda court had a budget of about $40 million, annually. The UNGA was concerned about the high costs associated with running the tribunals and this gave further impetus to strive for a permanent international court to better manage and coordinate plans. The ILC eventually completed the drafting of the ICC statute which was forwarded to the General Assembly for further processing. An ad
hoc committee was convened in 1995 which formed a Preparatory Committee that was given the task of preparing a “widely acceptable consolidated draft text.” Between 1996 and 1998, this committee met six times to discuss a roadmap for the envisaged court (Damgaard, 2008).

Four main areas of concern occupied the discussions for the establishment of the ICC. The first related to the UNSC and what role it might play. The second concern was how much independence the prosecutor would be afforded. A third area focused on by which method the State Parties would accept the new Court’s jurisdiction. Finally the preconditions that needed to be met in order for the Court to exercise that jurisdiction had to be considered (Bucheister, 2012). Some countries especially the US had misgivings as it pertained to the considerable power given to the Court. Even though the Court is an autonomous body, independent from the UN, the UNSC can obstruct investigations and prosecutions by adopting resolutions supported by at least nine UNSC members, as long as no permanent member of the UNSC votes against the obstruction of a resolution. If a permanent member of the UNSC does not support the resolution, but does not wish to vote against it either, they may abstain from the vote, therefore not affecting the outcome. This delay that the UNSC can enact by passing a resolution is for a period of 12 months that can be renewed annually, and is considered a frivolous and delaying strategy. The ability of the UNSC to obstruct cases renders the autonomy of the ICC rather questionable (Bucheister, 2012).

Eventually, the Statute was concluded on 17 July 1998 as mentioned earlier in this chapter, establishing the ICC and setting out the parameters of the Court. It commenced operations on 01 July 2002, and the four-year hiatus between the conclusion of the Statute and the operationalization of the ICC is attributable to deferrals in its ratification by some States. Before it could be operational, at least 60 states had to ratify the Statute, which was only possible on 11 April 2002. Between April and July 2002, an advance team comprising five persons was assembled to initiate the Court and the following year, the Assembly of States Parties elected judges, prosecutors, and a registrar. These persons included Phakiso Mochochoko (Lesotho), Marc Dubuisson (Belgium), Sam Muller (The Netherlands), Morten Bergsmo (Norway) and Salim A Nakhjavani (South Africa). The States also announced an inaugural budget for the ICC of about €53 million euros for the year 2004. By 2011, the budget had almost doubled to over €103 million (Knoops, 2008).
The Court is restricted in the types of cases it may prosecute including where it may exercise jurisdiction. The Court prosecutes “cases against people accused of genocide, crimes against humanity, war crimes, or crimes of aggression” (Bucheister, 2012). The scope of authority tends to be rather complex in some situations, however, it may only exercise authority in the signatories to the Statute. Importantly, the ICC may not prosecute cases for transgressions committed before the ratification of the Statute by a State. The Assembly of States Parties meets annually and establishes policies for the administration of the Court and drafts a programme of action. At these meetings, the States Parties: assess progress of the work streams set up by the States and including all other matters pertinent to the ICC; go through new activities, and pass the ICC’s annual budget (Pedretti, 2014).

2.6.2 State Immunity

As stated previously, one of the objectives of this chapter is to define what constitutes state immunity and in order to explain state immunity effectively, one has to explain the concept of jurisdiction and state clearly whether the ICC has the scope of authority to issue warrants, including petitioning the international community for the transfer of heads of state. Jurisdiction typically refers to the exercise of authority covering a particular territory or specific individuals. In the legal sense, jurisdiction may reference a specific locality which carries a fixed legal authority.

Universal jurisdiction allows any nation to prosecute offenders for certain crimes even when the prosecuting nation lacks a traditional nexus with either the crime, the alleged offender, or the victim (Randall, 1987).

Nonetheless, the Tribunal might encounter difficulties in the pursuit of its jurisdiction when dealing with the penal responsibility of those individuals who benefit from specific immunities of prosecution (Pedretti, 2014).

The concept of immunity as it relates to prosecution, is a long-standing doctrine firmly entrenched within international law that can be invoked by an accused person to escape legal action for criminal transgressions. Not to be unexpected, definitions and descriptions of the doctrine abound, with Tomuschat (2014) putting it thus:
“State immunity is a rule firmly anchored in customary international law”, while some states like the US “argue that the rule pertains essentially to international comity and does not constitute truly binding law” (Caplan, 2003).

Immunities are generally of two kinds namely; *ratione materiae* and *ratione personae*, and the focus is usually on the second type, which stems from customary international law and grants immunity to individuals who hold a specific office from the civil, criminal, and administrative jurisdiction. These immunities being usually described as ‘personal immunity’ are only active for the duration of the official’s term in office, and the predominant justification for such immunities is ensuring unhindered conduct of official duties and, as such, they are granted to those state officials who represent the state at the international level (Akande & Shah, 2011).

State Immunity is a cornerstone of international law, and shields states from prosecution or suit for the violation of the domestic laws of another state. State Immunity is often invoked by other states to protest that a particular court or tribunal is not legally authorized to try it, or to halt a judgment against any of its assets. This principle makes it difficult for another party to impose legal punitive actions against a state. It is therefore normal practice for state immunity to always be considered whenever states or their entities engage in any transaction. A good understanding of what state immunity entails is always important in order to mitigate the risks that often accompany matters of this nature. This would help give direction on those matters and then consider steps that can be taken to help minimize any risk when contracting with a state or state entity (QC & Webb, 2013).

State, or sovereign immunity as it is often referred to, has since then become a principle of international law that has eventually become part of the national law of many states and derives from the theory of the sovereign equality of states, as a consequence of which one state has no right to judge the actions of another by the standards of its national law. In general, there are two approaches: the absolute doctrine and the restrictive doctrine (Derains & Schwartz, 2005).

According to the absolute doctrine which was initially the first and only approach, notably, still in use in China and Hong Kong, any proceedings against foreign states are inadmissible unless the state expressly agrees to waive immunity.
The increasing involvement of states in world trade activities led to the development of a more restrictive approach to state immunity, where a distinction is drawn between acts of a sovereign nature and acts of a commercial nature. Under the restrictive approach, immunity is only available in respect of acts resulting from the exercise of a sovereign power (Ibid).

According to Derains & Schwartz (2005), although the restrictive approach is now widely adopted,

“State immunity continues to be an unsettled area of international law and the scope of recognised exceptions varies from state to state. Therefore, in order to analyse the level of risk in dealing with a particular state or state entity, it is important to understand which laws will apply in determining whether the state is entitled to claim immunity”.

Regardless of the justification, considerable support from state practice to assert that individuals are accountable for crimes of international law irrespective of their official position can be inferred from a historical presentation of the statutes and practice of international tribunals. Various excerpts from the Nuremberg judgments underline the fact that no plea of immunity is available in case of crimes of international law. This principle was also notably endorsed by an Israeli Supreme Court in its judgment against Nazi war criminal Adolf Eichmann and by the ICTY in Furudzija, which “held that the individuals are personally responsible for acts of torture, whatever their official position, even if they are heads of state or government ministers, is ‘indisputably declaratory of customary law’” (Bianchi, 1999).

On the contrary, the International Court of Justice (a UN institution) has indicated that there is “no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies” (ICJ: Case Concerning US Diplomatic and Consular Staff in Tehran, 1980). Following the establishment of the ICC, the problem of jurisdiction over immunity *ratione personae* has endured, which begs the question as to whether the ICC indisputably possesses the criminal jurisdiction to issue warrants and to petition the international community for handing over of heads of state? Another bone of contention is the notion of what to do about those heads of states which are non-signatories to the Rome Statute, but which are linked with alleged related crimes.
Immunities are deemed to be essential devices for ensuring a system of cordial relations, international collaboration and harmony, which explains the reluctance of states to recognize a general exception to immunity *ratione personae* that would permit other states to prosecute their highest-ranking officials. Nevertheless, a number of countries supported an establishment of an ICC with authority over grave transgressions, and to relinquish even their head of state immunities to the Court. In line with the Rome Statute, states parties are under obligation to cooperate, under Article 86, without reservation, under Article 120, with the court, and to surrender individuals, under Article 89 (Cryer et al, 2010).

The insignificance of official capacity with regards to trial is highlighted in Article 27 where it is made clear that no reliance on immunity is to be entertained (Refer to Appendix). In this particular instance, Article 27 of the Rome Statute makes provision that official capacity shall under no circumstances constitute an exemption for an individual from criminal responsibility nor in and of itself constitute grounds for the reduction of a sentence. Article 27 similarly makes a provision that immunities or special procedural rules shall not impede the ICC from exercising its jurisdiction over an individual (Reyes, 2003). This provision is a direct outcome of the evolution of international law as before the Rome Statute was established, a number of international treaties already embraced this principle of the irrelevance of official capacity with respect to certain crimes (most of those crimes are now also included in the Rome Statute). Article 7 of the Nuremberg Charter made provision that “the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment” (Nuremberg Charter, 1945).

Additionally, Article 4 of Law 10 of the Allied Control Council made provision that “The official position of any person whether Head of State or as responsible official in a Government Department, does not free him from responsibility for a crime or entitle him for mitigation of punishment” (Allied Control Council, 1945). Lastly, Article IV of the Genocide Convention made provision for the insignificance of official capacity and that states should domesticate this provision within their own laws (Convention on the Prevention and Punishment of the Crime of Genocide, 1948).
It is also instructive to note, as Marecha (2012: 27) observes, that as it relates to heads of state, the doctrine of immunity has undergone a transformation from the pre-World War I (WW I) period to suit the changing exigencies of the time such as “the creation of international organizations like the League of Nations and the establishment by the preliminary Peace Conference in 1919 of a commission to look into issues of war crimes and the birth of the Red Cross and Red Crescent Commission impacted on international law, especially on issues pertaining to humanitarian law and human rights law”.

When state parties accepted that heads of state may enjoy immunities under international law but not before ICC’s prosecution, it meant that concomitant domestication legislation was necessary in order to ratify the Rome Statute (Cryer, et al, 2010). Additionally, in support of this view, Article 29 does not provide for the application of statute of limitations, the relevant language used is that “The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations” (The Rome Statute, 1998).

However, another provision on immunities in the ICC Statute makes the situation somewhat difficult. Article 98.1 clarifies a path to surrender. Additionally, under Article 98, the duty to arrest is subject to a state’s responsibility to observe personal immunity under customary international law, thus if the ICC requests a state party to hand over an individual entitled to immunity protection by a third state, then the requested state could find itself in a position where its obligations are on a collision course in that it has to decide to either contravene the Rome Statute or to contravene the responsibility to honour immunities of a state non-party to ICC Statute (Cryer et al., 2010). In these circumstances, the ICC’s implementation of jurisdiction over a non-signatory head of state may be set on a collision course vis-a-vis a state’s political interest. When this action, usually motivated by economic considerations takes place between a state party and a non-party, the likelihood for diplomatic relations between the two states to be prioritized will trump the obligation to accede to an ICC request. The precise language used in Article 98.1-2 which deals with Cooperation with respect to waiver of immunity and consent to surrender is:
The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. Secondly, the court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender (The Rome Statute, 1998).

The ICC’s much contested universal jurisdiction comes under the spotlight when the scenario painted above is viewed from a practical perspective and the question will focus on how the ICC exercises its jurisdiction over immunity *ratione personae* in real case scenarios? A further enquiry will focus on the role played by politics in Omar Al Bashir’s case. As of now, the ICC case against President Omar Al Bashir of Sudan brings to the fore the real prospect that an international tribunal has never arrested and prosecuted an incumbent head of state before. The argument for the justification of immunities under international law and other relevant issues will be presented in Chapter 3.

2.7 Withdrawal from the ICC and reasons thereof

The connection between Africa and the ICC can be traced back to the negotiations of the ICC Statute in 1998 when several African states featured prominently in its establishment with Senegal being the first state to join the court, with 33 other African states following soon after. Wand (2017: 401) suggests that this relationship has, however, become fraught with challenges which continue to the present day, and saw in 2016, three African states namely; South Africa, Gambia and Burundi, initiating withdrawal proceedings from the Court.

Article 127 (i) and (ii) of the statute outlines a path to withdrawal and states that:

State Parties may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation
to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective (Rome Statute, 1998).

Although almost all the states affirm their commitment to the ICC, some have, however, expressed an interest to withdraw over the years. The US chose to ‘unsign’ the Statute following concerns that the court would become untameable. It viewed the court as one that would gain so much power that it would not be able to have its prosecutorial powers checked. The US wanted the ICC to be controlled by the UNSC which would determine the issues and cases that would be prosecuted by the court (Brown, 2012). However, the Rome Conference decided to have a limited UNSC role and an independent prosecutor as this was critical to ensure the Court was non-biased. These “safeguards” forced the US and other nations to vote against the ICC (Brown, 2012).

It is also notable that the US failed to ratify the Rome Statute due to other reasons including the fact that the ICC did not embrace the idea of a jury. The court also allows what the US called “hearsay evidence”. The court also fails to offer speedy trials to different victims. The ICC “also does not give victims the required rights to public trial and reasonable bail” (Schiff, 2008). The decision to join the ICC is also considered unconstitutional in the country.

In recent times, several African states have also voiced concerns about the powers and even possibly perceived attributed to the ICC. These will be elaborated on, in Chapter 3 of this study. Suffice it to say that the Rome Statute was crafted in a manner that ensured sufficient checks and balances and as such, should be the court of last resort. A key feature in the treaty is that of complementarity, which empowers States Parties with the jurisdiction to try crimes outlined in the Statute. As previously stated, it operates as the court of last resort for the most egregious transgressions and will only move in when the country where the crime occurred is demonstrably unable or unwilling to act itself. Indeed, the Court operates as a complementary structure to other domestic courts, as stated in Article 1 of the Rome Statute (Rosén and Gruner, 2007; Ferencz, 2008). States Parties are obliged to
domesticate the Statute by means of amending relevant existing domestic laws which will in turn align and strengthen domestic judicial systems while enhancing the international legal order. In this regard, it should be pointed out that a regional accountability layer such as that envisaged under the Malabo Protocol could be added, which would strengthen the often stated objective of acquiring "African solutions to African problems" in the case of Africa.

2.7.1 Implications of withdrawal from ICC

Proponents of the ICC argue that states that intend to withdraw from the Court risk sending conflicting signals about their commitment to fighting impunity and may potentially damage the promotion of a human rights agenda. It is also argued that the repercussions of the withdrawal tend to have dire consequences on the most vulnerable in society, especially on the victims from those states who would have lost the recourse to the ICC, against perpetrators violating international law (Pensky, 2008).

It is instructive that some 130 African civil society organizations and international organizations wrote to AU Heads of State, urging their governments to affirm support for the ICC and the court’s treaty, the Rome Statute, at an extraordinary AU Summit on 11-12 October 2013. In the letter they pointed out that:

A key criticism raised by some African leaders is that the court is targeting Africa. While the ICC’s cases are entirely from Africa, the majority came before the court as a result of requests by the states where the crimes were committed especially in Uganda, Democratic Republic of Congo, Central African Republic, Côte d’Ivoire and Mali. Libya and Darfur, Sudan were referred by the United Nations Security Council, with the support of its African members. Kenya is the only situation where the Office of the Prosecutor of ICC acted on its own initiative, but only with the approval of an ICC Pre-Trial Chamber after Kenya failed to take action to ensure justice domestically (AU-ICC Group Letter, 2013).

The conglomeration of organisations further pointed out that:

The international justice currently operates unevenly across the globe. In some situations, powerful governments are able to shield their citizens and the citizens of their allies from the ICC’s authority by not joining the ICC or using their veto power at the Security Council to block referrals of situations to the court (Ibid).
Observers worry that a large-scale withdrawal from the ICC would only serve to reduce the scope of justice on states that do so, and that states should instead, clamour for consistency and fairness in the application of international justice, including guarding against inconsistencies at the UNSC. Bizos (2015) sums up the essence of these concerns when he argues that:

Any decision to leave the ICC must be driven by more than loyalties to individuals or partisan interests. I am certainly mindful of the criticisms and frustrations with the ICC many of which are well-founded, some of which I consider misplaced.

Despite what appears to be the marginalization of Africa by the ICC, African states have been at the forefront of the establishment of an effective and functioning ICC, and as stated previously, a majority of AU members are now ICC States Parties and a number of African governments have engaged the ICC and requested its assistance to carry out investigations and prosecutions. Additionally, Africans constitute a big part of the ICC’s officials and even serve at the highest levels including as judges at the Court (Jannink, 2013). The current ICC Prosecutor Fatou Bensouda is also an African from the Gambia, thus Africa’s representation at the helm of the supranational body cannot be in any doubt.

2.8 Conclusion

This chapter has tracked the various stages concerning the evolution of the Rome Statute that led to the establishment of the ICC. It has also explored some important aspects of international legal doctrine and institutionalism such as the absolute doctrine and also had an in-depth examination of immunities which are bifurcated into *ratione materiae* and *ratione personae*. It also explored the grounds under which those on trial can be afforded immunity, state immunity, as well as sufficient reasons for member countries to justify withdrawal from the Statute. Finally, the chapter examined some of the perceptions of bias attributed to the Court due to the manner in which it has seemingly focused exclusively on indicting African leaders, thus leading to calls for African countries to shun or challenge its universal jurisdiction. The refusal by some permanent members (P5) of the UNSC such as the United States, the People's Republic of China (PRC) as well as the Russian Federation, to
ratify the Rome Statute, as well as the UNSC’s referral and deferral powers, further add to accusations of bias.

At a politically symbolic level, nevertheless, it is suggested that it is better to have an incomplete international tribunal, as it would serve as a deterrent to impunity rather than having none at all, and that a massive withdrawal from the Court would hinder efforts to bring those accused of crimes against humanity to justice. At the administrative level, there is evidence that African international public servants are a key part of the operation of the Court and should therefore claim ownership of the body rather than feel alienated.

The next chapter will focus on the Darfur/Sudan case study.
CHAPTER 3: CASE STUDY OF DARFUR/SUDAN

3.1 Introduction

The Sudan crisis was reported to the UNSC, thereby rendering it a UNSC referral. On 31 March 2005, the UNSC adopted Resolution 1593, referring President al-Bashir to the ICC. As a consequence of the referral, Sudan was to be subjected to the Rome Statute even though it was a non-State Party to the Treaty (Al Zarouni, 2019). The Sudanese President had been in power at a period when the conflict with the Sudanese People’s Liberation Army (SPLA) was ongoing. In 2003, militant black African tribes mounted an assault against the government in Darfur and in order to counter the insurgency the Sudanese President sought help from an Arab militia known as Janjaweed, whose violent techniques massacred villagers barred foreign aid agencies from providing humanitarian aid and dislocated more than two million civilians (Flint and de Waal 2008; Barnes, 2011). Reacting to this catastrophe, the UNSC resolved to refer the Darfur situation to the ICC in 2005 (Tangaho and Hermina, 2008).

Even though the Sudan situation was a UNSC referral, collaboration between the UN system and the OTP with regards to the execution of the indictment of al-Bashir has not been difficult and this has become a precedence setting case within the ICC due to the tension that the indictment caused between the Court and the AU. It is argued that while there is broad support for Resolution 1593 of the UNSC which granted the Prosecutor the authority to enforce a warrant of arrest against al-Bashir, the Chamber has nonetheless acknowledged an inherent discord regarding Articles 27(2) and 98(1) of the Rome Statute (Dyani-Mhango, 2013).

3.2 The Sudan and the International Criminal Court

As has already been mentioned, the Rome Statute had been conceptualised to offer an enduring system for bringing to justice those liable for the most severe transgressions, such as war crimes; genocide; crimes against humanity and crimes
of aggression. The Treaty, which is widely accepted internationally, was delicately and painstakingly drafted so as to ensure that the Court would carefully scrutinize these wrongdoings, and carry out its tasks, independently, professionally and without fear or favour (Sarooshi, 1999).

The ICC as an arena of interest within public affairs is often a site of political and legal contestation, transcending boundaries of sovereign states. After the Rome Statute was signed in 1998 and the ICC inaugurated in 2002, an international legal instrument had now been established (Matthew, 2012). The signatories of the Rome Statute had a strong sense of confidence that universal justice could greatly benefit by the creation of an international order mandated to try those found guilty of the most egregious crimes. Africa, through the AU, naturally agreed with the above and gave tacit and open approval for the creation of the Court (as referred to briefly in Chapter 2).

There were two major reasons for the African continent’s overwhelming support for the setting up of the Court, which were mainly the Rwandese genocide as well as the determination by African states to prevent the destabilisation of smaller states by larger ones.

There was also an urgent need in Africa to squarely confront impunity and the mass violation of human rights, as well as prevent militarily, politically and economically stronger countries from invading weaker ones. In terms of the latter, the inclusion of crimes of aggression the planning, preparation, initiation or execution of an act of using armed force by a state against the sovereignty, territorial integrity or political independence of another state, was especially attractive to African countries (ICC, 2012).

At last count there were 43 African signatories to the Rome State. However, 31 of these have not ratified the Statute (UN Treaty Collection, 2019).

Notwithstanding the African continent’s considerable support in creating the ICC, the former’s relationship with the international body has been somewhat frosty over the past few years. The AU, as well as other African regional bodies have slated the ICC for ‘selective prosecution’ of African leaders and individuals (Cole, 2013). The critics point to the fact that all the individuals currently facing a myriad of charges before the
ICC are African. The AU and other quarters argue that the court is targeting Africans (Cole, 2013: 670). This criticism has been used by the AU as a clarion call for the non-compliance and defiance of the international body by African States and this is the defense that formed the basis of al-Bashir's ambivalence towards the indictment, as will be shown in the next section.

3.3 Omar Hassan Ahmad al-Bashir and the Sudan Conflict

The rise of al-Bashir to power in Sudan was through a coup d'état in 1989, following which he was appointed the chairman of the Revolutionary Command Council for National Salvation, which ruled the country. In 1991, al-Bashir and "Al Turabi, an influential politician and member of the National Islamic Front (NIF), had Islamised the state and adopted Islamic Shariah law in 1991. In October 1993, the Revolutionary Council was dissolved and al-Bashir was handpicked President of Sudan. In 2002, al-Bashir was elected President of Sudan, and the conflict with the Sudanese People's Liberation Army (SPLA) steadily increased (Chingono, 2014).

Since independence in 1956, Sudan's political landscape has been unstable. The country has experienced several conflicts which are mainly due to its history. The conflicts in the country were characterized by cultural differences; religious intolerance; competing over natural resources; racial differences and also competing over control of the state and its apparatuses. The protracted conflict in the country had a detrimental effect on peace security as well as human development, with the Darfur territory being the most impacted. Consequently, the growing level of insecurity in Sudan put both the country and al-Bashir in the crosshairs of the International Community with the UN, equating the magnitude of human suffering to a shocking human rights violation, designating the Khartoum government the main culprit (Caas, 2007).

3.3.1 Conflict as Genocide

In April 2003, there was fighting in Darfur when, El-Fasher airport, an installation of the Government of Sudan (GoS) was suddenly invaded by the Sudanese Liberation Movement (SLM) and the Justice and Equality Movement (JEM) (Flint and de Waal,
Responding to the outbreak of fighting, the Sudan People's Armed Forces supported by the Janjaweed, the National Intelligence and Security Service, the Sudanese Police Force and the Humanitarian Aid Commission spearheaded reprisal attacks against the SLM/A, the JEM, and other militia groups which opposed the government of President al-Bashir (Barnes, 2011).

Previously, in the 1990s, the Janjaweed also attacked settlements along the Chad-Sudan frontier near Darfur. The inability of the GoS to prevent this led to more complaints by Darfur pastoralists. When hostilities exploded in 2003, the government guided the Janjaweed in a counter-insurgency operation against the militant organizations mentioned above (BBC, 2004).

It has been speculated that as far back as 1945, approximately 22 million civilians have died in almost 50 politicides and acts of terror around the world (Harff, 2003). These are deliberate large-scale massacres which are usually organised and orchestrated by insiders in state power, where such operatives have vested political interests in reducing or eradicating such populations on ethnic or religious grounds which are considered to represent a perceived political danger (Krain, 1997).

The enormous impact of large-scale political massacres with regard to human life requires a thorough examination of prevention strategies including identifying the enabling processes that facilitate the perpetration of these atrocities, as this would form a path towards a better appreciation of the phenomena (Yanagizawa-Drott, 2014). Empirical evidence demonstrates that, when the official policy of the government includes repression of certain sections of society, the possibility of a violent confrontation turning to politicide is considerably greater (Harff, 2003). Nevertheless, there is an unanswered issue as to whether, and if so, how, manipulation that expressly incites hatred towards a group in society could, in effect, actively stimulate violence against that community. In one example, ruling elites in charge of autocratic regimes have frequently exploited mainstream media within their personal influence to promote public endorsement and involvement in violent acts towards certain communities (Lee, 1945; Lasswell, 1971). Joseph Goebbels, who
was Adolf Hitler’s Minister of Propaganda, declared the radio “the most powerful weapon of mass control everywhere” (Welch, 1993).

Genocide is now extensively debated by media organizations and legal professionals, however, it is often overlooked, dismissed or under-theorised by social scientists (Hagan & Rymond-Richmond, 2008). Nevertheless, genocide narratives follow basic sociological structures. Such narratives often stress dehumanisation centred on a racial group, ethnic background, faith and nationality. This practice is frequently portrayed as being systemically steered, orchestrated by organised groups and resulting in the extermination of a community (Hagan & Rymond-Richmond, 2008). In the case of Sudan, the government pursued a systemic framing mechanism which dehumanised its targets (the black Africans in Darfur) and ultimately exploded in genocide. Even though the facts are situation-specific, they follow similar iterations and comparisons of many other genocides. The role of the government in triggering ethnic dehumanisation contributing to genocide is central to the crucial collective framing theory as suggested by Hagan & Rymond-Richmond (2008). By means of racist framing, the Sudanese government organised neighbourhood Arabic Janjaweed militias to kill and destroy as mentioned above in this chapter. This crucial ‘collective framing theory’ suggests that such ethnic targeting was a social construct meant to induce the population in order to victimise the ‘other’ on grounds of resource competition (Chirot & Edwards, 2003). It is therefore in this context that the conflict and genocide in Darfur should be located.

3.3.2 The Atrocities Documentation Survey

In June 2004, the US authorities notified Sudan that their Darfurian operations had been under surveillance, although “the photos were not hard evidence until verified by the evidence of the witness statements on the field” (AAAS, 2004). During that year, assistants to the former US Secretary of State Colin Powell persuaded him to support genocide allegations by means of empirical evidence obtained through a survey. The State Department subsequently allowed the Atrocities Documentation Survey (ADS) to question 1,136 Darfur refugees based in Chad (Hagan & Rymond-Richmond, 2008).
The ADS was premised on a multi-stage cluster data set of 1,136 Darfur displaced people in 20 detention facilities and villages east of Chad (Howard, 2006). The UN structured its detention centres through alphabet grids, each district being led by a sheikh. The ADS staff defined and surveyed all segments of the detention centres in relation to their scale and ethnic background. Researchers also systematically surveyed ‘households’ and people inside them for questioning. Since detention centres and communities were structured around sheikhs, their social demography mirrored the community cluster from which displaced people escaped. With the geospatial software of the State Department, cartographers and translators, interviewers were able to pinpoint 90% of the original settlements (Hagan & Rymond-Richmond, 2008).

The ADS field atlas was utilised to locate participants in 22 original settlements (refer to Figure 3.1 below) with 15 or more survey respondents each, including 932 out of 1,136 survey respondents. The team (Hagan & Rymond-Richmond) adjusted the circles on the Map in the quartiles of people who witnessed receiving racist epithets. The sampling was structured to provide a proportionate account of the refugee population from the surrounding areas of Darfur. The State Department’s analysis suggested that the survey “captured the full extent of the Darfuri refugee camps in Chad” (Howard, 2006). The ADS data obtained distinctively and systematically assessed victimisation when the assaults took place. Following the start of the conflict approximately 18 months before, refugees were questioned how, when, as well as why they fled Darfur and whether, they knew when, or how they, their relatives, or neighbouring villagers had been injured. The study merged the closed-ended style of medical assessments with the semi-structured style of legal eyewitness accounts (Respini-Irwin 2005). They also validated and augmented ADS information by analysing and encoding the detailed accounts captured in the interactions (Hagan & Rymond-Richmond, 2008; Parker 2005).

The information includes ages, sex and group identity of displaced people, distinct and mixed regime and Janjaweed militias targeting communities, modes of violence, their specific targets identified, the concentration of settlement nodes, rebel activity
measures (augmented with a media research measure) and records of racist epithets mentioned earlier (Howard, 2006).

Figure 3.1: Settlement Map of Racial Epithets: Atrocities Documentation Survey, Darfur Refugees in Chad, Summer 2004 (Howard, 2006).

3.3.3. Additional Evidence linking GoS with Janjaweed Militia

Human Rights Watch reports that “We are the government!” was the constant refrain by members of Darfur’s Masalit community who were known to be the Janjaweed “at
checkpoints, in the streets, in the course of robberies or cattle rustling, whenever civilians attempted to defend themselves and their property” (HRW, 2004).

In a Human Rights Watch interview, Adam, a 32 year old farmer who was banished from the village of Gokar near Geneina, said Omda Saef, leader of Janjaweed in Geneina, informed local tribesmen: “This place is for Arabs, not Africans. If you have a problem, don’t go to the police” which are mostly Masalit or other Africans, and thus likely to give a sympathetic ear to their concerns. “Come to the Janjaweed. The Janjaweed is the government, the Janjaweed is Omar Bashir” (Ibid). In another interview conducted by the HRW, Abdullah, a 49 year old headman of Terbeba village had this to say: “Why do I say the Janjaweed and the government are the same thing? They come together, they fight together and they leave together!” (HRW, 2004).

On 24 April 2004, Sudanese Foreign Minister Mustafa Osman Ismail acknowledged a common purpose with the Janjaweed but suggested that their struggle was a just one. He said that “The government may have turned a blind eye toward the militias … this is true, because those militias are targeting the rebellion” (Associated Press, 2004). During a public speech to the civilians of Kulbus on 31 December 2003, President al-Bashir said that his administration’s mission was to crush the SLA insurrection and that ‘horsemen’ would be among the weaponry that he used, supporting the military (Associated Press, 2003). Conflict in various parts of Sudan continued and this had an adverse effect on the state of human security, human rights and development. The most affected areas in Sudan included Darfur, the Blue Nile and South Kordofan. In these three areas there were reported cases of government-sponsored repression against the rebel movements.

The international outcry about the egregious crimes in Sudan led to growing calls for the ICC to prosecute President al-Bashir. As a direct response to the counterinsurgency, the UNSC voted to send the situation in Darfur to The Hague in 2005 even though the Sudanese president conceded to a truce with the SPLA in 2005, the ICC Prosecutor filed for an indictment against several officials for human rights violations, war crimes and genocide in Darfur (Tangaho & Hermina, 2008).
The Prosecutor issued an arrest warrant for al-Bashir in 2008, but the Sudanese Government refused the attempt by the Prosecutor. The Prosecutor issued an arrest warrant again in 2009 for human rights abuses and atrocities. Another warrant was issued in 2010 and this time genocide was also listed among the allegations. (Chingono, 2014).

This move was viewed by most African countries, including South Africa as a selective victimization of sitting African heads of state by the ICC. Consequently, this narrative received support from the AU. (Barnes, 2010). The persistence of political instability ultimately led to the signing of a Comprehensive Peace Agreement in 2005, which provided for, among others, the establishment of the Government of National Unity. It also created an opportunity for the holding of a referendum in 2011 to decide on whether the country should remain as a unitary state or the south should secede as a sovereign state, and called for active steps in resolution of conflict in the Darfur region (Barnes, 2010). Although the referendum was a success, there were concerns that the indictment would impede progress and that Sudan would be less likely to cooperate and abide by the CPA (Barnes, 2010).

3.4 The Response of the African Union

The indictment of al-Bashir was condemned as a Western affront against an African, since the ICC had only probed cases in Africa up to that point. At the time, the AU Chairman Jean Ping is reported to have said “it seems Africa has become a laboratory to test the new international law” (BBC, 2008). In terms of international law, heads of state, such as al-Bashir, are entitled to an array of privileges, which would include immunity from criminal jurisdiction. This strictly implies that a serving Head of State may not be brought before a trial to account for their supposed offenses. Moreover, even when they resign from public office, they keep enjoying indemnity from prosecution for formal deeds conducted while in office, a privilege referred to as “functional immunity, or immunity ratione materiae as referred to earlier in this study (AlZarouni, 2019). However, some scholars are of the opinion that protection for a head of state should not be extended for serious offences (Murithi, 2013).
The AU also expressed some misgivings over the capacity of the ICC in handling the Darfur situation as it could not undertake a comprehensive “prosecution in order to truly bring justice to the region” (AU-PSC, 2009). The ICC was perceived to be rather sluggish and tended to go after individuals separately and was overly focused on international implications of its prosecutions (AU-PSC, 2009). Thus, “the ICC will not prosecute every responsible individual and may prosecute some that should not be prosecuted and many of those criminally responsible will go unpunished” (AU-PSC, 2009). Furthermore, the AU suggested a strengthening of Sudan’s existing legal system (AU-PSC, 2009). It urged Sudan to consider the rich legal tapestry in the region including common law, customary and Islamic laws in order to bring justice, reconciliation and healing to the region.

Consequently, on 21 July 2008, the AUPSC proposed that the UNSC hold the prosecution of President al-Bashir in abeyance for a year pursuant to Article 16 of the Rome Statute. In summary, Article 16 provides that, no inquiry or trial can be officially started or continued for a year when the UNSC has duly approached the Court. The AU was concerned that a trial of the serving Sudanese President in the prevailing environment of the time would negatively impact the prospects for peace (du Plessis; Jalloh & Akande, 2011). The AU’s UN observer, Tete Antonio, said at the time that “The processes under way in the Sudan are too critical to the future of the country and the stability of the region and the continent as a whole to be allowed to fail” (Mail & Guardian, 2010). Needless to say, the Security Council ignored the request, and Prosecutor Luis Gabriel Moreno-Ocampo proceeded with the indictment (Barness, 2011). As a reflection of the global power undercurrents at play within the UN system; du Plessis, Jalloh & Akande (2011:5-50) put it thus:

From the perspective of many African leaders, the ICC’s involvement in Sudan has come to reflect their central concern about the UN – the skewed nature of power distribution within the UNSC and global politics. Because of the Council’s legitimacy deficit, many African and other developing countries see its work as a cynical exercise of authority by great powers, in particular, the five permanent members.

Disappointed and worried by the failure of the UNSC to act, the AU issued an injunction to all member states regarding the indictment of President al-Bashir in July 2009 (ICC don. Assembly/AU/13(X111), July 8, 2009). The AU regretted “that the
request for deferral was ignored and asked the UN Security Council to reconsider its decision. The AU thus decided that, pursuant to Article 98 of the Rome Statute, AU member states would not cooperate with the arrest and surrender of President Al-Bashir” (Tladi, 2009). Pursuant to Article 98 (1) of the Statute:

States Parties can refuse the cooperation requests of the ICC on arresting and surrendering a person citizen of a third State, if the Court with this request is asking the State Party to act inconsistently with international law. In this case, referring to Art. 98 (1), international law is affording to this person State or diplomatic immunity, thus the State Party cannot continue with further actions in fulfilling the cooperation request, unless the Court can first obtain the cooperation of the third state for the waiver of the immunity (Sadushaj et.al, 2017).

The relationship between Articles 16 and 98 is that the former deals with deferrals while the latter deals with non-cooperation. In simple terms, the AU sought a deferral in the case of al-Bashir, but when this did not yield the desired outcomes, the AU exhorted its member state, the Sudan not to cooperate with the ICC, citing Article 98.

3.5 President Omar Al-Bashir’s indictment

In July 2008, the Prosecutor submitted an indictment against President al-Bashir on allegations of human rights violations, genocide and atrocities committed in Darfur, an indictment which represented the first prosecution by the ICC of an incumbent Head of State. As expected, the indictment stimulated a lot of reaction from many quarters, with human rights groups commending the decision as a courageous and important move in the right direction (Geis & Mundt, 2009). The Khartoum Regime unsurprisingly condemned the indictment as smacking of neocolonialism and a conspiracy sponsored by the West, while officials who were busy negotiating peace feared that the indictment ran the risk of scuppering the Darfur peace process including the fragile CPA that brought the 20 year north-south conflict to an end. Both the timing and nature of al Bashir’s indictment galvanized ongoing discussions over the peace versus justice dichotomy in conditions of armed conflict across the globe (Geis & Mundt, 2009). Observers found it curious as to whether this would “be a historic victory for human rights... or a tragedy, a clash between the needs for justice and for peace, which will send Sudan into a vortex of turmoil and bloodshed” (de Waal, 2008).
Analysts and other keen observers noted that any positive spin-offs that would have emanated from the indictment would have been lost due to the possibility of Sudan’s non-cooperation with the peace process, as the differences in opinion within the international community had sharpened since Moreno-Ocampo announced the indictment in July 2008 (Flint & De Waal 2008; Daly, 2007). Most importantly, African states and members of the Arab League rallied around the Sudanese President in denouncing the charges, and much of Sudan’s political class, even al-Bashir’s opponents, felt that he had been unfairly charged (Geis & Mundt, 2009).

3.6 Discord between Customary International Law and Articles of the Rome Statute

While incumbent heads of state and government have hitherto enjoyed indemnity from prosecution in the national courts of other states under international law, recent thinking as well as scholarship within customary international law points to changing dynamics. These new approaches are clearly manifested “in Article 28 of the Rome Statute establishing the ICC which proclaims that neither the immunity of a head of state nor the official position of a suspected international criminal will bar the Court from exercising its jurisdiction” (Marecha & Chigora, 2011). Article 28 of the Rome Statute tends to be in the opposite direction to the conventional legal principle of immunity that states that the head of state is inviolable, meaning, but not restricted to, indemnity from civil and criminal jurisdiction from detention or indictment by a foreign state. Thus, the indictment of a sitting head of state would be a watershed moment in history which set a new precedent and would lead to questions as to whether the Chamber was wrong in indicting an incumbent head of state. In characterising this seemingly contradictory discourse within the Rome Statute, Dr Antoine Kesia-Mbe MINDUA, an ICC Judge says:

The Rome Statute suffers from what I call “schizophrenia disease” characterized here by mutually contradictory or inconsistent elements, attitudes, requirements, etc. While the Rome Statute supposes that the ICC, as a multilateral treaty-based body, is a consent-based institution, at the same time it seems to be subject to injunctions of a superior, which is the UNSC, whose resolutions adopted under Chapter VII are binding on all UN member States, even non-Parties to the Rome Statute, like a Government ruling a nation (Mindua, 2016).
Dyani-Mhango (2013: 106 - 120) goes so far as to argue that “there is a clear tension between articles 27(2) and 98(1) of the Rome Statute when it comes to state parties' cooperation with the ICC in cases of arrest and surrender of accused persons who happen to be entitled to personal immunities”. Dyani-Mhango further wonders as to whether States Parties to the Rome Statute are obliged “to arrest and surrender a head of state not party to the Rome Statute when such a head of state has immunities under international law? Does this mean that states party to the Rome Statute are to ignore their obligations under the Rome Statute vis-à-vis international law obligations on personal immunities of the incumbent heads of state, and vice versa”? (Dyani-Mhango (2013).

Indeed, many perspectives abound on this vexing issue as elsewhere it is argued that with respect to the ‘tension’ in the Rome Statute between Article 27 and Article 98, the ICC Statute provides a special exemption from the international order of personal immunities for prosecutions of international crimes, but only between States Parties to the Statute and that the exemption of persons is not valid (Swanepoel, 2015). Nonetheless, it is not horizontally operational and therefore, for instance, it would be unconstitutional for any State, specifically the Member State of the ICC, to issue a warrant of arrest for an individual pursued for crimes committed by the ICC if that person is a resident of a non-ICC Member State (Swanepoel, 2015).

The Rome Statute describes the mandate of the ICC as dealing with crimes against humanity, atrocities, genocide and war crimes. Whereas many scholars concur that the Sudan violence constituted crimes of immense gravity, there have been opposing schools of thought arguing for and against the prosecution of al-Bashir, while there was an on-going peace process – the much-debated peace versus justice dichotomy. In the view of the ICC intervention, it is argued that the court has assumed a victor’s justice approach that could be detrimental to any reconciliation process. The proponents of this claim argue that this form of justice further divides society by framing some as violators and others as victims. They lament that a victor’s approach of justice fails to deal with the underlying structural nature of conflict for it is preoccupied with trials and prosecutions (Mani, 2005).
3.7 The principle of the Pre-Trial Chamber regarding the arrest warrant of President al-Bashir of Sudan

This subsection will deal with the proceedings at the Pre-Trial Chamber pertaining to the arrest warrant of al-Bashir. This will immediately be followed by analyses of specific countries which found themselves at loggerheads with the ICC due to their failure to apprehend and surrender al-Bashir while in their territories, in line with UNSC Resolution 1593.

The Pre-Trial Chamber hears motions and appeals against the orders of the Co-Investigating Judges while the case is still under inquiry. Bullock (2013:197-209) explains that the Chamber clearly held that the historically inviolable doctrine of immunity of sitting heads of state was not applicable any longer before a global tribunal or the Court. On 31 March 2005 the UNSC adopted a landmark resolution (1593), referring the situation in Darfur to the ICC and:

Urged all States and concerned regional and other international organizations to cooperate fully with the Court. On March 4, 2009 the Pre-Trial Chamber published its Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir (hereafter the March 4 2009 Decision) in which it asserted the ICC’s jurisdiction over Omar Al Bashir despite his position as the current head of a state not party to the Rome Statute. This conclusion was based on the fact that one of the central aims of the Rome Statute is to end impunity for the perpetrators of the most serious international crimes. Furthermore, the Pre-Trial Chamber stated that Article 27(1) and (2) provides that the Rome Statute applies to all people equally regardless of their position, and capacity as a Head of State did not exempt a person from criminal responsibility. The Pre-trial Chamber stated that customary international law rules establishing the immunity of serving heads of state did not bar the Court from exercising its jurisdiction. The Chamber determined that because the Security Council had referred the matter to the ICC, it had also intended that any prosecution would take place within the framework of the Rome Statute (Bullock, 2013).

In the next sub-section dealing with the reasoning advanced by Malawi in failing to apprehend and turn over al-Bashir to The Hague, it is shown how the provisions of the Statute appear to be in conflict with customary international law as it relates to immunities accorded to incumbent heads of states.

Back to the decision of the Pre-Trial Chamber, several analysts argued that somehow the reasoning that the Chamber presented in that judgment was at least to
some extent faulty, even though the result had to be accepted. For example, Akande (2011) pointed out that the consequence of the ruling is not only to make redundant the traditional international law on immunities granted to incumbent heads of state but also Article 98 of the Rome Statute itself. More specifically, the logic of the Chamber overlooks the reality that the Rome Statute is a legal structure, only enforceable to the signatories (Dörr & Schmalenbach, 2011).

Akande (2004) believes that the criminal responsibility of a country that is not a State Party cannot derive purely from the foreign dimension of a tribunal or court demanding the detention of the Head of State of a non-State party. It could, however, be expected to occur if the UNSC referred the case to the ICC for inquiry and trial. As a UN member state, Sudan, the state concerned, automatically granted the UNSC the authority to carry out whatever measure that is considered appropriate (in line with the rights bestowed on it by Chapter VII of the UN Charter) to preserve global peace and stability, such as the referral of a case to a supranational court or tribunal.

Akande (2004) maintains that the State is under a duty to evaluate if an individual's waiver of immunity forbids the receiving State from collaborating with the Tribunal on the application to hand over or detain the person. After analysing the obvious discrepancy in Article 98(1) and (2) and Article 27 of the Rome Statute, the author argues that privileges of countries that are not state parties remain unaffected since they are not party to the Treaty. Most specifically he contends that the purpose of Article 98 is to free the receiving state out of its duty to relinquish an accused if the duties of international treaties provide for the protection of a non-state party. It was also the similar approach taken by the AU in the case of President al-Bashir.

3.7.1 An Analysis of The Republic of Malawi’s stance vs the ruling of the Chamber on President al-Bashir

In 2011, Malawi, the AU and the ICC became embroiled in a controversy surrounding the implementation of the Tribunal’s indictments issued in respect of Sudanese President Omar Hassan Ahmed al-Bashir. During Bingu wa Mutharika’s
presidency in 2011, Malawi vehemently refused to accede to the ICC’s ruling which implored States Parties to adhere to UNSC’s Resolution 1591 which enjoined states to carry out indictments by deciding in this instance, to permit the Sudanese President to attend a Common Market for Eastern and Southern Africa (COMESA) meeting held in Malawi between the 14th and 15th October 2011. This action was a categorical rejection of the Statute of the ICC. “It went against the UNSC which urged countries to collaborate in Resolution 1593 of 2005. Was Malawi justified in its decision to go against the ICC’s Warrants of Arrest? The AU and Malawi felt that this position was justifiable while ICC felt that it was not” (Kayange, 2013).

The Malawi Decision essentially identified two arguments, namely:

i. Al-Bashir as a sitting Head of State is not subject to the Rome Statute and has thus enjoyed immunity from investigation and prosecution by Malawi in keeping with existing international conventions and in conformity with the Malawi Immunities and Privileges Act (Iverson, 2012), and

ii. The Republic of Malawi, as an AU member, has agreed to completely associate itself with the stance taken by the AU on the prosecution of sitting heads of state and government in states not party to the Rome Statute (Iverson, 2012).

The ICC rejected both of the arguments above. The first argument was dismissed with due regard to:

International Law Article 23 of the Vienna Convention of the Law of Treaties (23rd May 1969) which prohibits the use of domestic jurisprudence as a justification of a country’s failure to honour its treaty obligations. The ICC went on and asserted with examples that international law does not give any immunity to a head of state who has committed crimes against humanity in view of his position (ICC, No. 02/05-01/09, 12 December 2011).

The Chamber further bolstered its argument that it had become a “principle of international law that immunity of either former or current heads of state cannot be invoked to oppose a prosecution by the international court, whether or not the states were party to the Rome Statute” (Chingono, 2014).
3.7.2 An Analysis of the Response of Nigeria to the Chamber’s Ruling on President al-Bashir

At the beginning of July 2013, Sudanese President Omar al-Bashir was invited to attend the African Union HIV / AIDS Summit convened in Nigeria, in utter rejection of the ICC’s arrest warrant. In a press release, the ICC’S Spokesperson and Head of Public Affairs Unit, Fadi El Abdallah, wrote that: “on 15 July 2013, the Pre-Trial Chamber II of the ICC requested the Federal Republic of Nigeria to immediately arrest Sudanese President Omar Al Bashir, on a visit to Nigeria and to surrender him to the ICC” (Weldehaimanot, 2011). The Chamber noted that Nigeria had been a State Party to the Rome Statute since 2001 and had a duty to enforce the directives of the Tribunal. The Chamber also observed that the Darfur situation was sent to the ICC by UNSC Resolution 1593 and that, pursuant to Article 87(7) of the Rome Statute, under which a State Party refuses to comply with a call for cooperation by the Tribunal in contravention of the stipulations of this Statute, the Court may make a finding to that effect and take the matter to the ASP or the UNSC. (Weldehaimanot, 2011).

Ignoring the ruling of the Pre-Trial Chamber, Nigeria disregarded the ruling of the ICC and hosted al-Bashir with all the pomp and ceremony customarily reserved for heads of state. Nigeria further scoffed at “the outcry from human rights activists to arrest al-Bashir and stated that it was merely acting in line with the AU’s position which rejected al-Bashir’s arrest arguing that such an action will only serve to hamper peace efforts in Sudan” (Chingono, 2014). Interestingly, Nigeria had also advanced the argument that al-Bashir was not an official guest of the government, but that of the AU.

3.7.3 An Analysis of the Response of South Africa to Pre-Trial Chamber’s Ruling on President al-Bashir

When the AU Meeting of Heads of State and Government was convened in South Africa in June 2015, President Omar al-Bashir was in attendance, in spite of the fact
that he was likely going to be detained subject to Resolution 1593, and also due to the fact that South Africa was a signatory to the Rome Statute. When his aircraft landed in South Africa, The Southern African Litigation Center (SALC) contacted the South African judiciary and requested that the Sudanese President be arrested and prevented from departing South Africa. On 15 June 2015, the High Court of North Gauteng, composed of Judge Dunstan Mlambo, Deputy Judge Aubrey Ledwaba and Judge Hans Fabricius, approved an order for the detention of President Omar al-Bashir of Sudan. Subsequently, the South African State announced that President al-Bashir had been allowed to leave the jurisdiction of South Africa in direct violation of an urgent order imposed by the High Court on Sunday 14 June (Politicsweb, 2015). The interim order had directed the State “to take all necessary steps to prevent the Sudanese President from leaving South Africa until the Court handed down a final order” (SALC, 2015).

Judge Hans Fabricius heard part of the matter on Sunday 14 June 2015 and ordered that:

President Omar Al-Bashir of Sudan is prohibited from leaving the Republic of South Africa until the final order is made in this application and the respondents (the government of South Africa) is directed to take all necessary steps to prevent him from doing so. The eighth respondent, the Director-General of Home Affairs is ordered to effect service of this order on the official in charge of each and every point of entry into, and exit from, the Republic; and once he has done so to provide the applicant with proof of such service, identifying the name of the person on whom the order was served at each point of entry and exit (SCA Judgement, 2016).

Despite this ruling, the Sudanese Presidential aircraft left from the Waterkloof Air Force Base on Monday 14 June at 12:00 noon, with President al-Bashir in it. It is clear that South Africa refused to detain al-Bashir prior to his exit on 14 June 2015. As a result, proceedings under Article 87(7) and Regulation 109 of the Rome Statute were brought before the International Criminal Court and the matter was eventually heard on 7 April 2017 (Swanepoel, 2018).

The Pre-Trial Chamber II of the ICC issued a verdict on the inability of the Republic of South Africa to adhere to the application of the Court under Article 87(7) of the Rome Statute for the detention and transfer of Sudanese President Omar Hassan Ahmad Al-Bashir (Prosecutor v Omar Hassan Ahmad Al-Bashir ICC-02/05-01/09-
302) (hereinafter Al-Bashir). Article 87 referred to above addresses applications for collaboration between the ICC and the Member States. Article 87(7) effectively provides that, when a State Party does not comply with the request of the Court, the Court may render a finding to that effect and present the case either to the Assembly of States Parties or, where the situation was originally referred to the Court by the UNSC, to that body (Swanepoel, 2018).

In this regard, al-Bashir’s judgement in The Hague was predated by domestic jurisprudence in the North Gauteng High Court (South Africa Litigation Centre vs Minister of Justice and Constitutional Development 2015 5 SA 1 (GP) and the Supreme Court of Appeal (Minister of Justice and Constitutional Development vs Southern Africa Litigation Centre 2016 3 SA 317 (SCA Judgement, 2016). Swanepoel (2015) observes that the judgment of the North Gauteng High Court in the case of South Africa / Bashir must be commended for affirming South Africa’s global commitments and its own obligation to the rule of law.

Indeed, the decision not only contributed to the much-needed legal assurance of the Member States’ commitments to the ICC, but also to the clarification of the legal position of Chapter VII referrals to the Court by the UNSC, including the consequences which may follow for States Parties—not only for their responsibilities with regard to the tribunal, but also for non-state parties. This latter component complemented, in particular, the jurisprudence of South Africa, which had not yet clearly established or addressed the interpretation of the law of the UNSC referrals to the ICC.

Following the decisions of local jurisprudence in South Africa, which made it abundantly clear that the government was under an obligation to detain and turn over the Sudanese President, the Tribunal later stated that the government appeared to endorse the requirement since it was no longer challenging the matter (Mail & Guardian, 2017). ICC Judge Tarfusser later remarked that “It therefore appears that the government of South Africa has accepted its obligation to cooperate with the ICC under its domestic legal framework, and so, because there is no longer any doubt about South Africa’s obligations, referral of its failure to comply
with those obligations to the likes of the UN Security Council would be of no consequence” (De Wet, 2015).

3.7.4 An analysis of the Response of Chad and Kenya with respect to President Al Bashir's Indictment: The Problem of ICC's ineffective Enforcement Mechanisms

The aim of this subsection is to illustrate what some observers have called the vulnerabilities of the ICC, which is basically the lack of effective enforcement mechanisms. This will be accomplished by examining two more States Parties which failed to apprehend the fugitive President al-Bashir in flagrant contravention to their treaty obligations with the ICC when the Sudanese strongman was in their territories. These two countries are Chad and Kenya. The first point to be made is that, as mentioned elsewhere, the ICC implements its indictments strictly via the assistance of its Member States (AUPD, 2009). Neumayer (2009: 660) aptly puts it this way that the ICC can only be as effective as its enforcement capability and depends on States Parties to provide critical support at all levels of the prosecutions, in general for the detention and deportation of accused persons. The unwillingness of Chad to apprehend the Sudanese President, therefore, highlights the absence of an effective enforcement regime with regards to the ICC (Milly, 2015). The secure flying and courtesies which Chad extended to President al-Bashir demonstrate the powerlessness of the Tribunal when States Parties fail to cooperate with it (Barnes, 2011).

When President al-Bashir visited Chad on 21 July 2010, he was received with a warm reception by Idriss Deby, President of Chad, which was interpreted by some observers as a triumph over the troubled past of the two countries (Hamilton, 2010; Clarke, 2010; Oluoch, 2010). However, for the ICC, these events were a worrisome development as Chad was a signatory to the Rome Statute and therefore a State Party to the ICC whereas Sudan was not (Moreno-Ocampo, 2010). The incident was significant as it marked the first occasion that President al-Bashir faced possible arrest by visiting a Member State following his indictment by the ICC in 2009 (Hamilton, 2010). The Tribunal's indictment order against President al-Bashir
was also significant in that it was the first time that the ICC charged a sitting head of state. Pursuant to the Tribunal's governing statute, the Rome Statute of the ICC, every Member State has a responsibility to comply with all ICC arrest requests. Due to the fact that Chad is a full member, there was an obligation on its part to detain President al-Bashir (Prosecutor v. Al Bashir, 2009; Clarke, 2010).

While in Chadian territory, al-Bashir addressed a gathering of representatives of the Sahel-Saharan Community and went on to stay for three days. Throughout that period, the EU, as well as groups such as Amnesty International and Human Rights Watch applied pressure on Chad to detain President al-Bashir. However, Chad resisted the pressure. Furthermore, the AU raised concerns that the indictment request could trigger infighting in the continent and urged the UNSC to delay the indictment (Clarke, 2010; Soares, 2010). As stated above, the AU’s reservations and pleas for a deferment of 12 months in line with Article 16 of the Rome Statute fell on deaf ears at the UNSC and Moreno-Ocampo proceeded with prosecution instead.

The AU subsequently invoked Article 98 of the Rome Statute, according to which Member States of the AU would not comply with the detention and handing over of President al-Bashir to the ICC (AUPSC, 2009). It must be understood that bilateral relations between the two countries had been negatively affected by the Darfurian conflict, and that the visit signalled a long-awaited rapprochement between the two countries and the AU was thus pleased with the developments (Barnes, 2011). Later, on 28 August 2010, the Sudanese president flew to Kenya which is also an ICC State Party (Borger, 2010). President al-Bashir had been in Kenya on invitation by the government for the signing ceremony in celebration of a new constitution (Clarke, 2010). Again, the defiant head of state was allowed to depart the Kenyan territory a free person as the authorities argued that Kenya could not afford to detain al-Bashir as that would have been disruptive to the Sudanese negotiations that were underway (Barnes, 2011). Although this was not necessary, the AU ordered all Member States not to take part in the detention and trial of the Sudanese head of state and Kenya, being a full AU member state, was under obligation to observe the injunction (Borger, 2010).
In response to the hostility of its State Parties, the ICC made a statement concerning the Sudanese leader's trip to neighbouring Chad. It stated that President al-Bashir had entered Chad between 21 through 23 July 2010 but that the criminal charges against him had not yet been issued (Barnes, 2011). The ICC concluded that pursuant to the Rome Statute, the Chadian State had an obligation to detain President al-Bashir and, as it did not fulfil that obligation, the ICC decided to alert the UNSC and the ASP in order to “take any action they consider appropriate” (Barnes, 2011). Immediately afterwards, the ICC released a similar statement concerning President al-Bashir's travel to Kenya. Much like in the Chad judgment, the Tribunal emphasised the legal obligation of Kenya to detain the Sudanese President and resolved to transfer the issue on to the UNSC and the ASP. The AU reacted to the decisions of the ICC concerning Kenya and Chad and communicated its own concerns (AU Press Release, 2010). The continental body recalled that it tried to cooperate with the Rome Statute by proposing a postponement of the trial. However, since Chad and Kenya are neighbours to Sudan, those states must do their utmost to bring about peace and stability and help the regime and elected leaders, including President al-Bashir. An AU media release made the argument that the Tribunal had put the AU in an invidious position which appeared to promote its own agenda with little regard to the possibly disastrous consequences towards African states (AU Press Release, 2010). Sometime during September 2010, the Kenyan president declared an IGAD (Intergovernmental Authority on Development) special conference to address the Sudan situation which was to be convened in Kenya and announced that the Sudanese head of state could be expected to participate.

Upon learning of this possibility for President al-Bashir’s return to Kenya, the ICC on 25 October 2010, demanded that the host country notify it of “any problem that would impede or prevent the arrest and surrender” of President al-Bashir if he returned to the country again (Prosecutor v. Al Bashir, 2010). Kenya's Attorney General immediately responded to the ICC, stating that the summit would not be held in Kenya any longer and that President al-Bashir would therefore not be visiting Kenya (East African, 2010). At this point, it would appear that some Member States seemed to be deftly circumventing the controversy of being obliged to detain the Sudanese
president by publicly cautioning him that he would be detained if he intended to
attend.

The common approach that the Member States adopted was to send the invitation to
him and then persuade him not to attend (Barigaba, 2010; Malwal, 2010). The
prosecutor thought that this was a good thing since it tended to leave President Al
Bashir increasingly aloof (Barigaba, 2010; Malwal, 2010). Nevertheless, Moreno-
Ocampo’s encouragement notwithstanding, President al-Bashir travelled to two ICC
State Parties in 2011, first to Djibouti for a presidential inauguration ceremony on 8
May 2011, and subsequently to Chad or President Deby’s inauguration on 07 August
of the same year (Prosecutor v. Al Bashir, 2011). The ICC released a resolution to
the UNSC and the ASP to the Rome Statute concerning the participation of
President al-Bashir in Djibouti and requested that they take every step they consider
necessary (Prosecutor v. Al Bashir, 2011). The ICC released a supplementary
decision on 18 August 2011, inviting comments on the second visit of President al-
Bashir to Chad. Specifically, the ICC requested Chad to answer to the accusation
that it had permitted President al-Bashir to twice enter its territory without capturing

3.8 The Principle of Complementarity between the Rome Statute and National
Criminal Jurisdictions

States have authority and are specifically obliged to prosecute, convict and deter
massacres, crimes against humanity, war crimes and acts of aggression, and the
ICC will only intervene if national judicial systems collapse and it can be shown that
the State is either reluctant or unable to pursue the offenders (Wand, 2017). The
doctrine of complementarity is formulated by the Court in compliance with Articles 17
and 53, which set out the requirements for a particular case to be prosecutable in the
ICC. Article 1 of the Rome Statute stipulates that the authority of the ICC “shall be
complementary to national criminal jurisdictions” (Rome Statute, art 1). Article 17(1), then, outlines the four circumstances wherein the Court may
acquiesce to domestic jurisprudence, except for the following:
Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
(d) The case is not of sufficient gravity to justify further action by the Court (Rome Statute, art. 17(1)).

There is a general convergence of opinions among scholars within international criminal law that a complaint is admissible under Article 17 if the Court decides that the State having authority over it does not furnish the accused with due process (Heller, 2006).

Considering the fact that complementarity is determined on the facts of each issue, the assumption that the ICC exercises authority in a given situation must not prohibit territorial or other capable States from investigating and prosecuting the crimes under the control of the Court at the same time. In these situations, both the ICC and the States should support each other to ensure that all crimes in a given situation are resolved (Parliamentarians for Global Action, 2019).

3.9 Could the Statute be incompatible with AU prescripts?

Whereas the Chamber agreed that there was a fundamental disconnect in both Articles 27(2) and 98(1) of the Rome Statute, it nevertheless contended that it was not sufficient for Malawi or the AU to depend on Article 98(1) to defend its defiance to the Court. The Chamber found that contemporary international law on rights and privileges had ceased to apply whenever a supranational tribunal ordered the detention and extradition of the Head of State for international crimes, and that Article 98(1) did not apply in that case (Marecha & Chigora, 2011).

It must be noted that while a number of experts and scholars do not object to the detention order of al-Bashir, as it is considered lawful, they do not agree with the demand to the State Parties to detain and hand him over and contend that it violates...
Article 98(1) of the Rome Statute (Chingono, 2014). There is an ambiguity with regard to the interpretation of Article 27(1) which states that the Statute does not permit protection to incumbent Heads of State or state officials, however, pursuant to Article 98, the Sudanese President is accorded protection as the incumbent Head of State and thus cannot be charged. Even though Article 27(1) of the Rome Statute provides that heads of state may not enjoy legal protection, it still does not clarify whether such a clause extends just to Member States. It is perplexing that the Rome Statute states that there is no protection to sitting Heads of State, but that diplomatic immunity may also be granted according to Article 98(1). In addition, Article 98(2) stipulates that Member States do not have to comply with the provisions of the ICC when they have previous agreements. As Malawi and Nigeria are both members of the AU, they have a pact with the AU. Malawi and Nigeria may claim that, since the stance of the AU conflicts with that of the ICC, they do not have to cooperate with the ICC’s demands.

Some scholars have pointedly wondered whether the Chamber shares the general argument that protection no longer applies before an international criminal court would also extend to former presidents Obama and Bush for their roles in conflicts in various parts around the world. They believe that, given the power distribution within the Security Council that could never be the case. It is then suggested that this is permitted due to the prevailing power distribution within the UNSC. These insights may help to explain why the Africans have taken a distrustful stance towards the Tribunal (Chingono, 2014). Whereas the decision of the Chamber made it clear that the AU and its Member States had to cooperate unquestionably with UNSC resolutions, the AU’s reservations about the prosecution of al-Bashir seemed to be gaining traction.

Several opponents claimed that the reasoning used by the Chamber in its judgment was somewhat flawed. Some critics claim that the result of the resolution of the Chamber had the effect of rendering the application of customary international law to the immunities of the incumbent Heads of State unenforceable. For instance, although Bullock (2013:201) states that it is problematic that “the Chamber ignores the fact that the Rome Statute is a treaty instrument binding only on the signatories”, the author realises that “as a member of the United Nations, Sudan has
also given the Security Council permission to take any action it considers appropriate to maintain international peace and security, including the referral of a situation to an international court or tribunal”. Similarly, Akande (2004:396) also believes that, by “relying on the ICJ’s *opinion juris* in the arrest warrant cases and the judges’ *obiter dicta*, immunity may not exist before international criminal courts or tribunals. Such courts have jurisdiction established by the Chamber as a general principle”.

### 3.10 Conclusion

In view of the multitude of issues that have been discussed in this study it is concluded that the Tribunal was conceptualized as a court of last resort, which would intervene when national legal systems malfunction, and it can be shown that the State is either reluctant or unable to subject offenders to the criminal justice system. Although the Statute acknowledges that such serious crimes endanger the stability, safety and well-being of the international community, it is either vague or not clear as to how the Court can respond to the need for the promotion of ‘peace’ in the broader sense, besides ensuring that the guilty parties are prosecuted. Throughout Africa, the Court seems to have concentrated on the application of its judicial authority without due regard to how the public perceives its actions as leading to the consolidation of peace.

It is also concluded that the vastly different ideological orientations in Africa, polarization, mistrust and strife arising from long periods of western influence, including colonialism accounted for a considerable part the AU’s intransigence which in turn influenced the latter’s policy of non-cooperation with the ICC. Thus, international intervention, represented by the ICC, which imposed a process of judicial accountability onto a government that was not ready for it, thwarted the peace process already initiated by the AU. The sensitive politics concerning the ‘Peace vs Justice’ dichotomy is widely regarded by international criminal law as crucial in the post-conflict reconstruction and development discourse. If improperly applied the role played by the Court can impede peace and reconciliation efforts, but it may also act as an enabling agency in the promotion of transitional justice.
Also, the future status of the Malabo Protocol on the establishment of the African Court of Justice and Human Rights continues to remain uncertain. Notwithstanding expectations that a regional accountability layer could be added and could strengthen the often stated objective of acquiring "African solutions to African problems", a maxim which according to Ani (2016:7) harks back to the Pan African ideals of the early 1900s as espoused by eminent personalities like Marcus Mosiah Garvey, but which gained new currency with the Thabo Mbeki driven African Renaissance movement of the late 1990s. The protocol is also often chastised for conferring immunity to incumbent Heads of State and Government. The AU envisages an option to the ICC, which is to expand and enhance the authority of the African Court on Human and Peoples’ Rights (ACHPR) to address international criminal acts perpetrated in Africa. The Malabo Protocol, which will have to be adopted by 15 Member States, will give legal jurisdiction to the current ACHPR, which is planned to be integrated with the African Court of Justice (ACJ) to set up the African Court of Justice and Human Rights (ACJHR).

By the same token, it must also be registered that, through collaboration with a constellation of activist groups across the continent, including the President of the Assembly of States, governments, non-governmental organisations as well as intergovernmental bodies, the ICC was able to disrupt al-Bashir’s free movement in the continent as catalogued by Elise Kepler (2015) writing for the South African newspaper, the Daily Maverick. Kepler writes that in 2009, South Africa invited al-Bashir to attend the inauguration of President Zuma and South African organisations protested sharply about enabling him to come into the country without being detained. When the South African state struggled to explain its stance on its duty to detain al-Bashir, activist groups requested legal recourse. South African authorities eventually made a clear statement that al-Bashir was at risk of being arrested if he entered the country. Al-Bashir abandoned the trip.

In August 2010, the Sudanese President travelled to Kenya to attend a ceremony for the new constitution of Kenya. Activist groups vigorously opposed the trip, and once it was mentioned that al-Bashir could return to the Inter-Governmental Development Authority (IGAD) conference, Kenyans and other African organisations appealed to Kenyan authorities and the press to voice their disapproval. Kenyan organisations
also launched legal proceedings in order to enforce a warrant in the Kenyan judiciary (Reuters, 2010). The IGAD conference was subsequently moved to Ethiopia, which is not a member of the ICC (Sudan Tribune, 2010). That year, al-Bashir accepted an invitation to participate in a meeting of the International Conference on the Great Lakes Region (ICGLR) in Zambia, with a Zambian official initially indicating that al-Bashir would not be apprehended there. However, there was an appeal from Zambian activists and other African and international organisations, together with a request from the ICC to detain him. In the end, al-Bashir decided to cancel his trip (SUNA, 2010).

Al-Bashir was also requested to participate in the celebration of the 50th anniversary of freedom for the Central African Republic that same year, and the Sudanese press stated that al-Bashir planned to participate. Central African protesters objected, ICC judges called for his extradition, and the travel was cancelled on the day before the journey, partially due to lobbying from France (The Daily Maverick, 2015).

In October 2011, Malawi received al-Bashir to a regional trade conference, widely opposed by activists. Once Malawi was set to stage the AU summit in July 2012, Malawi NGOs partnered with African organisations within Malawi and international organisations to condemn the event. The parties then supported President Joyce Banda’s move to decline to invite al-Bashir to the meeting, and the AU switched the conference to Addis Ababa (The Daily Maverick, 2015).

Al-Bashir undertook an unplanned visit to Nigeria in July 2013. Nigerian organisations latched on the subject and domestic and international press widely commented on the activities of the Nigerian Coalition which urged the ICC to condemn the mission. The Nigerian coalition also filed a petition with domestic courts insisting on the arrest of al-Bashir. As the criticism of the visit increased, al-Bashir hurriedly left the country less than 24 hours since his arrival without making his planned appearance at the AU meeting (The Daily Maverick, 2015).

On 25 February 2014, Al-Bashir visited the DRC at short notice to join an AU conference. Congolese organisations promptly called for his detention, which was extensively reported in Congolese media, and eight Congolese organisations filed a
legal statement to the Congolese Prosecutor demanding the arrest of al-Bashir. On February 27, before the conference ended al-Bashir departed - under pressure from Congolese protesters, a number of government sources confirmed this, although other official sources disputed it (The Daily Maverick, 2015).

Chad is the only ICC State Party which has embraced the Sudanese President multiple times, in direct contravention of the court orders and without any sign it intended to re-evaluate this stance. Because Chad shares a border with Sudan and has a lengthy and politically charged relationship with its regime, it may not be surprising. These instances catalogued above serve to demonstrate that even without the absence of enforcement mechanisms, the Tribunal can still be effective albeit with the assistance and collaboration of other stakeholders who are unified in fighting impunity (The Daily Maverick, 2015).

However, there is still consensus among experts and scholars that the response of the ICC to the Sudan situation was ill-conceived as it did not appreciate the political consequences of its decisions. It is observed that, in attacking only the ruling elites of the state, it exacerbated assumptions that such allegations were not legitimate rules and laws, but tools of coercion orchestrated at the behest of certain Western political capitals with an agenda. While it is very challenging to ensure impactful enforcement of law in the midst of an escalating conflict, the value of establishing trade-offs between temporary deterrence and long-lasting preventive mechanisms cannot be overemphasized. In the context of the continuing doubts of the AU about the ICC’s intervention against the former Sudanese president and the subsequent deadlock, there is growing concern within the international criminal justice establishment in Africa and elsewhere about the Court’s ability to fulfil its mission under the referral and in other contexts.

For the ICC to have a truly universal jurisdiction, its integrity and credibility must be beyond reproach, as this is the only way in which the international community can defer authority to it. The ICC has gradually developed and morphed into an arena where politics and international legal instruments intersect, necessitating robust engagements between these two issue areas. This chapter’s case study has also served as a poignant reminder of how imperfect certain international legal
instruments such as the Rome Statute are, when viewed through the telescope of the complicated case such as that of Darfur. Whereas the Statute proclaims that the purpose of the ICC is to bring an end to exemption from punishment, it also insists that States Parties “refrain from the threat or use of force against the territorial integrity or political independence of any State or intervene in armed conflict or internal affairs of any State”.

The Statute is unclear in terms of immunity and tends to leave its Member States with very little assurance and a range of options on how to circumvent it. Apart from the fact that Member States often have limited understanding of whether to collaborate, the Statute, however, is conspicuously silent on the ramifications for States Parties that are in clear violation of the Rome Statute. The Statute simply states that the matter will be reported to the UNSC, but there is no concrete clarification in this regard. Even if the offending states felt they had a responsibility to ensure compliance with the demands of the ICC, the absence of guidelines from the Rome Statute led them to conclude that there would be no repercussions for the violation. If presented with a choice of declining to detain al-Bashir without any clear consequences for detaining him, and be confronted with the likelihood of more regional instability and resentment in Sudan, the alternative seems self-evident.

However, unlike the UNSC, which has enforcement mechanisms, the ICC relies solely on States Parties to enforce its judgments or send cases to the UNSC. Lastly, the ICC, like a variety of other tribunals, does not function in a legal vacuum, but rather at the nexus of customary international law and diplomacy, which, if not properly navigated and managed, may result in an unpredictable outcome with international ramifications, as the indictment of al-Bashir has illustrated.

The next chapter will focus on this dissertation’s second case study, the Prosecutor proprio motu initiated Kenyan situation.
CHAPTER 4: CASE STUDY OF THE REPUBLIC OF KENYA

4.1 Introduction

The situation in Kenya was a Prosecutor *proprio motu* initiated case (on one’s own initiative). The Prosecutor is empowered to launch an inquiry *proprio motu* pursuant to Article 15(1) of the Rome Statute (Rome Statute, 1998). This particular case differs from the Sudan Case as that was a UNSC referral. It also differs from the Thomas Lubanga Dyilo case, to be explored in Chapter 5, which was a state referral.

In 2007, Kenya conducted its general election, which was overshadowed by bloodshed, in the form of ethno-tribal conflict between the communities which supported Mwai Kibaki of the National Unity Party (PNU) and those who supported Raila Odinga of the Orange Democratic Movement (Harneit-Sievers & Peters, 2007). Following post-election violence (PEV) in 2007, which claimed the lives of more than 1,000 people, along with the sexual assault and dislocation of hundreds of thousands of people, an autonomous commission of Inquiry known as the Waki Commission and a Special Tribunal were set up to examine the causes of
these disturbances (Harneit-Sievers & Peters, 2007). As a State party to the ICC in 2007, it was hoped that Kenya would comply with the criteria of the Rome Statute when atrocities were committed by the supporters of the two major parties that were contesting in 2007, but when the Kenyan state failed to hand over the guilty parties who committed the 2007 atrocities, the Prosecutor used the powers enshrined in Article 15 of the ICC and sent the Kenyan situation to the Pre-Trial Chamber II asking for a permission to launch an inquiry. The major bone of contention in this case was admissibility as there were differences of interpretation between the State and the Court on who possesses jurisdiction over the situation.

4.2 The General Election of 2007 – A Background

It is necessary to provide a brief background to the political situation in Kenya in order to put the conflict in proper context. Fierce ethnic disputes have been the hallmark of Kenyan national politics ever since the emergence of mixed-party polls in 1991 (ICG, 2012). Although they never attained the same level of violence and structural complexity as they appear to have done in 2007 to 2008, fierce fighting frequently accompanied the country’s general elections during the 1990s.

Multi-ethnic conflict during the 1990s is better understood as government-sponsored violence, orchestrated and supported by leaders of the governing Kenyan African National Union (KANU), who had tried to intimidate and destabilise resistance fighters from the territory where they have not been deemed ‘native’ (Klopp, 2001). Due to the close relationship of both the perpetrators of aggression and the governing KANU organisation, it is not surprising that in the 1990s, the multiple Commissions of Inquiry into Post-Electoral Violence (PEV) scarcely resulted in criminal trials. Mostly, such panels were nothing more than manoeuvres of the governing regime to divert attention from political pressure for responsibility (ICG, 2012). The 2002 polls were considered to be free and fair compared with previous elections, mainly because the two rival contenders, Mwai Kibaki and Uhuru Kenyatta shared the same tribal background, Kikuyu. Brown & Sriram (2012:246) suggest that such an uncommon configuration contributed to the misalignment of Kenya’s key tribal communities with particular political sides and therefore considerably reduced
the potential for voter abuse. Nevertheless, a short historical assessment indicates that the comparatively democratic 2002 election can be seen as an unprecedented phenomenon in Kenya’s lengthy record of ‘electoral despotism’ (Klopp, 2001).

The leadership contest towards the December 2007 national election was mainly smooth but nonetheless full of stories of rivalry among Kenyan tribal communities (ICG, 2012). In comparison to the previous election, the 2007 polls brought about a contestation among Kenya’s most prominent ethnic enclaves. President Kibaki’s Party of National Unity (PNU) derived its support mainly from the Kikuyu, Kisii, Embu and Meru groups, while the rival Orange Democratic Movement (ODM), led by Raila Odinga received most of its electoral endorsement from Kalenjin, Luhya and Luo (ICG, 2008). On 30 December 2007, the Electoral Commission proclaimed Kibaki victorious, amid proof of ballot tampering and flawed electoral processes (ICG, 2008). Needless to say, the ODM rejected the outcomes and declared Odinga victorious. In the light of this electoral turmoil, disagreements among PNU and ODM followers erupted and public disorder ensued in major areas of Kenya. Across a span of approximately two months, at least 1,300 persons were killed and many more severely wounded. The slaughter, “perpetrated by participants on both ends of the political and tribal cleavages, including arson, rape, torture and murder” resulted in more than 1,000 people dead and displaced over 600,000 (Boell 2012).

4.3 The Commission of Inquiry on Post-Election Violence (CIPEV)

The 2007-2008 post-election violence and its impact included several serious human rights violations, as demonstrated by studies from many national, foreign and non-governmental entities, such as the Commission of Inquiry into Post-Election Violence presided by Justice Philip Waki, commonly referred to as the Waki Commission (Waki Commission, 2008); national human rights legal agency, Kenya National Commission on Human Rights (KNCHR, 2008); global officials, in particular, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston (2009) and prominent global non-governmental human rights organisations.
The reports, specifically those generated by the Waki Commission and the KNCHR, which collected and catalogued horrific stories of atrocities during the post-conflict recession, highlighted abuse of power as one of the major triggers of inter-ethnic and intra-ethnic conflict. The Waki Commission noted that leaders, political elites and the press, all added to the cultivation of hostilities in the run-up to the elections by using ‘inciteful utterances’ and the “incitement to and the organisation of violence” (Waki Commission, 2008).

The Waki Commission was set up as a quasi-judicial body entrusted with investigating the relevant evidence leading to the PEV:

> to investigate acts of commission or omission by state security agencies in the course of the PEV, and to recommend measures of a legal, political or administrative nature that would lead to the criminal prosecution of those responsible (Songa, 2018).

CIPEV submitted its findings to President Kibaki and Prime Minister Odinga on 15 October 2008 and produced sweeping suggestions for extensive changes in the security establishment and disaster management and humanitarian aid measures. The findings also produced suggestions on how those found guilty should be held responsible. The CIPEV document called for further criminal prosecution of individuals considered to have been the instigators of the PEV as a way to end impunity. The recommended mechanism for this was the Special Tribunal to “seek accountability for those most responsible for offences, especially offences against humanity, related to the 2007 Kenyan General Election” (Waki Commission, 2008).

The CIPEV also forwarded a copy of the report to the African Union Panel of Eminent African Personalities, together with a sealed envelope bearing the details of the persons considered to shoulder the biggest liability for the PEV, as well as the information obtained against them. Along with this request was a further suggestion that the envelope be submitted to the Chief Prosecutor of the ICC should the Special Tribunal not be established (Songa, 2018).
4.3.1 The Jurisdiction of the ICC on the Kenya Situation and the Triggering of an Investigation *proprio motu*

As illustrated by Figure 1.1 in Chapter 1 of this study, the ICC can only exercise jurisdiction over such crimes in one of three ways: When a State Party refers the crimes to the Court (State Party Referral); when the UN Security Council refers the crimes to the Court (UN Security Council Referral), and lastly, when the ICC Prosecutor initiates a preliminary examination into the crimes (*Propio Motu* Investigation). The above-mentioned instances of the exercise of jurisdiction are known as triggers.

The Kenyan situation was a Prosecutor *proprio motu* (on one’s own initiative) initiated case. The Prosecutor is empowered to initiate an investigation *proprio motu* according to Article 15(1) of the Rome Statute. According to Cryer et al. (2010:163), for the ICC to exercise its jurisdiction, a situation must first be triggered.

4.3.2 The Government of the Republic of Kenya's reaction to the Commission of Inquiry on Post-Election Violence

As mentioned in the foregoing section, Kenya conducted its general election in 2007, which was overshadowed by conflict in the form of tribal disputes between the Mwai Kibaki groups of the PNU and those who supported Raila Odinga of the ODM. At this point, it should be noted that the Kenyan government had acquired a somewhat dubious reputation of vacillating when it came to implementing measures aimed at ensuring accountability as regards the PEV. To illustrate this point, whereas Kenya ratified the Rome Statute in March 2005 and legislated it domestically via the International Crimes Act, which entered into force in January 2009, the Parliament was twice unable to adopt a law establishing the Special Tribunal in accordance with the recommendations of the CIPEV (Jalloh, 2011).

It is argued that the dithering had less to do with fears by the lawmakers about the efficacy of a local judicial process over an international one (Hansen, 2011) and more to do with the protection of political allies. It was reasoned that the ICC
process had better prospects of giving the perpetrators of PEV much needed reprieve as it was considered to be distant as opposed to the domestic Special Tribunal which presented a real and present danger (Annan, 2008).

4.3.3 The Prosecutor's reaction to the situation in Kenya

As luck would have it, the ICC process materialised even quicker than had been expected when the former Secretary-General of the UN, Kofi Annan (Chair of the Committee of Eminent African Personalities) forwarded the CIPEV sealed envelope to the Chief Prosecutor of the ICC, Moreno-Ocampo, who immediately applied Article 15(3) of the Rome Statute to begin proceedings under the principle of the *proprio motu*. The basis of this was the information obtained from the CIPEV dossier. The ICC promptly allowed inquiries into the Kenyan situation to begin in March 2010 and by December 2010, Moreno-Ocampo had identified six persons as allegedly culpable for the perpetration of crimes against humanity during the PEV. Nicknamed the ‘Ocampo Six’, they were: Henry Kiprono Kosgey, who at the time was chairman of the ODM; William Samoei Ruto, who at the time was a senior member of the ODM and cabinet minister in the grand coalition government; Joshua Arap Sang, who at the time was head of operations and host of a breakfast show at the Kass FM radio station (the popular Kalenjin vernacular station); Uhuru Kenyatta who at the time was the head of KANU and a Deputy Prime Minister in the grand coalition government; Francis Muthaura who at the time was the head of the Public Service and Secretary to the Cabinet, and Mohammed Hussein Ali who at the time was the Commissioner of Police (Songa, 2018).

4.3.4 The Principle of Complementarity, Gravity and the Prosecutor’s Initiative

As previously stated, towards the end of November 2009 the Prosecutor sought permission from Pre Trial Chamber II to open an investigation into crimes alleged to have been committed inside the jurisdiction of the tribunal in 2007- 2008 which could involve human rights violations. This was the first attempt to launch an investigation *proprio motu* (on its own) given the reluctance of the Kenyan State to launch inquiries or trials or to set up a tribunal as proposed by the Waki Commission.
(Abraham, 2010). In this application, the Prosecutor focused not only on the facts presented by the Waki Commission but also on widely accessible documents from a number of Kenyan and foreign agencies (ICC-01/09-3 26-11-2009 1/42 EO PT). The prosecution of the Kenyan case gives a new perspective into the understanding by the Prosecutor and the Judges of two main, yet little-defined, clauses of the Rome Statute namely, complementarity and gravity (Abraham, 2010). The principles of complementarity and gravity should be discussed together, since each of them constitutes a cornerstone of admissibility. Pursuant to Article 53(1) (b) of the Rome Statute, the application of the Rome Statute. In launching a case, the prosecutor must take into account whether or not a pending case is allowable in Article 17, whose provisions include complementarity and gravity.

Both issues are also theoretically interconnected since, in cases where domestic prosecutions are underway, the ICC may have to investigate carefully whether a similar activity by the same entity is being investigated by a national authority before determining whether or not to take action. In fact, there is a likelihood that a domestic legal authority might decide to pursue more severe offences as opposed to the ICC, certainly, this was the argument on the indictment of Thomas Lubanga Dyilo, explored in Chapter 5 of this study, in certain circles (Schabas, 2009; Stahn, 2010). Germain Katanga's defence clearly brought this up, arguing that complementarity and gravity should be intertwined, so that admissibility should not be restricted to one or the other, but should be applied across all levels, both national and international levels (Sácouto & Cleary, 2010). Although this was not a point that the judges considered compelling, it brought focus to the possible convergence of the two concepts.

The concept of complementarity, as codified in the Rome Statute, outlines the pre-eminence of domestic courts to try the accused unless the State is “unwilling or unable” to act, presuming that the criminal activity is of “sufficient gravity” for the ICC to act immediately (Imoedema, 2014). It further outlines the connection between both the ICC and domestic authorities and sets out the mechanism by which the admissibility of cases before the ICC may be decided (Chingono, 2014). The doctrine of complementarity is therefore clearly important to any judgment on the admissibility of a putative situation. It could be considered as a key element in a fine
equilibrium between the expansion of the jurisdiction of international criminal law and the retention of state sovereignty, allowing for the pre-eminence of domestic authority (Leonard, 2005; Pichon, 2008).

At the point at which an indictment is ordered, the prosecution may not yet have established particular perpetrators or accusations. Nevertheless, the judges should recognize the admissibility of putative cases in line with Article 53(1) (b) and, in fact, acknowledge the complementarity as well as the gravity of putative cases. In order to do so, they apply the guidelines set out in Article 17(1) of the Rome Statute, while they refer to the admissibility of individual cases rather than to future cases in general. As would have been seen, the Pre-Trial Chamber addressed possible cases while evaluating the application to launch an investigation for Kenya, using the complementarity requirements of Article 17(1) (Sriram & Brown, 2012).

The Kenyan situation provided an opportunity to examine the evolving complementarity principles used by the Office of the Prosecutor and the Courts. This is of special importance as Kenya was the first state to pursue an inquiry through the application of the powers of the Prosecutor's own initiative, in contrast to previous situations of state referral. Pursuant to Article 15 of the Statute, the Prosecutor may launch inquiries on offences within the purview of the Tribunal, instead of waiting for approval by the State or the UNSC. Where territories actually requested the assistance of the court and either proclaimed themselves unable or unwilling to prosecute particular cases, it was theoretically far easier to determine that they were indeed unable to do so (Kleffner, 2009; Bitti & El Zeidy, 2010).

Nonetheless, in situations where a government considers itself competent in terms of prosecuting national cases but takes very limited measures to investigate cases and does not initiate proceedings against accused high-level criminals thus engaging in stalling tactics, complementarity must be carefully measured. The Statute does not explicitly set out the timetable for action, but instead makes reference, in Article 17(2) (b), to an unwarranted pause in deliberations which is incompatible with the expectation of putting the person in question to due process. Neither does it include any specific guidelines for determining the lack of willingness or reluctance to prosecute cases or for evaluating whether fake trials or delaying tactics are being
created, but rather makes reference, in Article 17(2) (a, c) to court cases pursued to insulate an individual from criminal proceedings, or where the court hearings are undertaken in a way that is incompatible with the objective of the proceedings. In Kenya, the postponements and final inability to create a hybrid court happened under the close supervision of the Prosecutor's Office, with notices given and dates set (Sriram & Brown, 2012).

As mentioned above, the Kenyan Government had repeatedly deferred intervention, which had, in effect, delayed the demand of the ICC prosecutor for a full investigation. This would mean that complementarity is often not necessarily determined at the stage the case is being discussed, but rather that the prosecutor must give time for States to begin investigations rather than making an instant judgment on the unwillingness or inability of a State to proceed. This also implies, however, that the breathing room offered to national platforms is not unlimited. The politicking persisted almost a year before Moreno-Ocampo formally ordered an inquiry. The somewhat unforeseen guarantee of internal policy changes and proceedings at an undefined time in the future was not strong enough to avert a possible application for inquiry (Sriram & Brown, 2012).

4.3.5 Unwillingness and Inability to Act on the Part of the Kenyan State

The main objective of the Rome Statute's drafters was that the tribunal would complement instead of replacing domestic jurisprudence (Rome Statute, supra note 5, pmbl; art. 17(1)). According to international law, the State is solely responsible for examining, trying and penalising the crimes against humanity happening under its jurisdiction (Rome Statute, supra note 5, pmbl; art. 17(1)). In the absence of these interventions, the national government is required to transfer the offenders of such crimes to states prepared to try them, thus the dictum aut dedere, aut judicare (either extradite or prosecute) (Bassiouni & Wise, 1995). Ultimately, the participation of the ICC is required only if a State Party to the Rome Statute is unable and unwilling to investigate and penalise international crimes.
‘Inability’ takes place when a state’s judicial system is inaccessible or has been partly or significantly damaged by conflict to such an extent that the State cannot be reasonably expected to perform its legal obligation to investigate and charge (Rome Statute, supra note 5, art. 17(1)(a)). ‘Unwillingness’, on the other hand foresees a circumstance in which prosecutions against the suspect have begun at the state level but are being pursued or have been handled in such a way as to imply that the offender is being protected from due process (Rome Statute, supra note 5, art. 17(2)(a)). The direct or indirect reluctance of the State to proceed, although not explicitly stated in the Rome Statute, could be interpreted as a sign of a lack of willingness.

In the case of Kenya, domestic jurisprudence was unable to resolve the voting controversy due to the fact that the official opposition, ODM, declined to submit the claim of voting fraud and systematic election rigging to arbitration. ODM rejected the whole Kenyan judicial system as not a servant, of equity, but of blatant political agendas, and thus unable to administer justice, especially in the case at hand (Hull, 2008). In a press statement, Prof. Philip Alston, U.N. Special Rapporteur on Extrajudicial, Arbitrary, or Summary Executions opined that the integrity of the Kenyan judicial system had been the topic of a great deal of interest (Alston, 2009). The ailments were acknowledged, even in the CIPEV document, which indicates that the effort to establish a special commission had been an attempt to rid it of corruption, inefficiency and lack of independence of the Kenyan judiciary. Having acknowledged that its own judicial system had been unable to deliver redress to survivors of post-electoral abuse, it was then left for Kenya to act and enforce CIPEV’s advice by establishing a special commission. The inability to establish the tribunal, notwithstanding determined attempts by the President and Prime Minister, and, most notably, a Member of Parliament, revealed Kenya’s reluctance to punish and left the situation in Kenya suitable for action by the ICC (Ngirachu & Rugenep, 2009; HRW, 2009). Although the Kenyan judicial system has not formally failed, it is unable to resolve criminal problems resulting from post-electoral strife thoroughly and comprehensively.

Nevertheless, this stance is disputed by those who see the Kenyan judicial system as competent - with some reform, of delivering justice to the survivors of voting
abuse (Kagwanja, 2008). The advocates of this opinion take the view that the degree to which the whole legal system is still functioning suggests that the state has the potential to settle the matter if afforded the necessary space and assistance and that the criterion for the intervention of the ICC, which is the breakdown of the domestic criminal justice system, has not arisen. Some, however, believe that the internationalisation of the Kenyan situation and other conflicts in Africa will not inspire confidence for the fragile stability that generally persists in many other countries, as the fading flames of ethnic tensions could be revived once these issues are dealt with at the international arena (Mamdani, 2009). When determining the lack of willingness on the part of a State to undertake a meaningful inquiry and trial, the ICC may, amongst other factors, examine the essence of the prosecutions at the domestic level to decide whether such investigations are real or superficial mechanisms intended to protect persons involved from criminal liability (Rome Statute, supra note 5, art. 17(2) (a)).

As it pertains to Kenya, no concrete action has been undertaken, apart from the creation of the CIPEV itself, the guidelines of which need to be pursued, at least with respect to the formation of a specific tribunal (Republic v. Stephen Kiprotich Leting et. al., (2009). Through the promulgation of the International Crimes Act in 2008, the state of Kenya can contend, as opposed to the involvement of the ICC, that it has widened its criminal legislation to cover the acts of genocide perpetrated throughout the post-electoral era, and that its domestic courts are therefore ready to prosecute the human rights violators (The International Crimes Act, 2008). It could request space and technical assistance from the ICC to see this clear intent to fruition, nonetheless, to undertake such a course of action, there would be a plethora of public sentiment to contend with, which is already in support of external proceedings, in particular by the ICC.

4.4 The Concept of Gravity

The baseline of gravity, a component of the admissibility test alluded to in Article 53(1) and set out in Article 17(1)(d), is not specified in the Statute, therefore the situation in Kenya tends to shed some light on it. Much like with complementarity, the
other main criterion for the admissibility of a prosecution, the determination at the point of the application for the opening of an inquiry does not apply to the specific cases raised. The Rome Statute merely refers to the “perpetrators of the most serious crimes of interest to the international community as a whole”. While this was not a point that the judges considered compelling, it drew attention to the possible overlap of the two concepts (Rome Statute, preamble, art. 5). Sriram & Brown (2012) suggest that the court should instead, recognize not specific cases, but the kinds of cases that are likely to arise in the scope of the situation if the offences are not of enough gravity, the proceedings would not be admissible, but the Rome Statute does not define the meaning of enough. There has been very little academic debate and even less juridical analysis of the nature of gravity, until recently. It is therefore important to define what gravity entails, since it can establish the admissibility of a situation, but it is also vague in the broad sense of the Rome Statute. Since all the offences within the remit of the court are severe by nature, the claim that significant crimes have been committed cannot be adequate.

In order to restrict a potentially wide category of suspects who would be liable for prosecution by the ICC, the prosecutor implemented a policy of prosecuting “those who bear the greatest responsibility” for offences within the purview of the ICC as the most liable for offenses perpetrated in any particular situation under investigation. Probably the first judicial specification of the gravity criteria was set out in a ruling of the Pre-Trial Chamber I in February 2006 on the situation in the DRC. To be able to meet the criterion of gravity, the Chamber decided that the following three questions had to be addressed in the affirmative:

Is the conduct which is the object of a case systematic or large-scale (due consideration should also be given to the social alarm caused to the international community by the relevant type of conduct)? - Considering the position of the relevant person in the State entity, organization or armed group to which he belongs, can it be considered that such person falls within the category of most senior leaders of the situation under investigation?; and - Does the relevant person fall within the category of most senior leaders suspected of being most responsible, considering (1) the role played by the relevant person through acts or omissions when the State entities, organizations or armed groups to which he belongs commit systematic or large-scale crimes within the jurisdiction of the Court, and (2) the role played by such State entities, organizations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation? (Prosecutor v. Thomas Lubanga Dyilo, 2006)
Subsequently, the OTP tried to establish more specific guidelines for determining gravity. The OTP Guidelines laid out four parameters: the severity of the offences (though establishing a numerical limit would be difficult, the frequency would be taken into account), the essence of the offences, the way in which they are perpetrated and their effects on families of the victims (Pre-Trial Chamber II, Decision, paras. 56-59 and 62).

4.4.1 The Interpretation of the Principle of Gravity in Kenya

The severity of the atrocities in Kenya, with more than 1100 civilians murdered, and hundreds of thousands homeless, may not have been of enough gravity in a limited interpretation of the term (Nmamu, 2009). Nevertheless, according to the OTP’s conceptualisation of gravity, the killings in Kenya could be sufficient for the purposes of gravity. Nevertheless, when the Pre-Trial Chamber II Judges, charged with examining the application of the Prosecutor for the launching of the trial, asked for more details on the alleged offences and prolonged the time limit for the judgment on the request, it was again suggested that there were questions regarding the gravity of the case (ICC-CPI-20100219-PR497). In response, the Prosecutor tried to highlight the nature of the perpetration of the offences, especially the manner in which they were carried out. The Prosecutor claimed that prominent party leaders of the PNU, (President Kibaki’s party) and ODM, (Prime Minister Odinga’s party) “planned, promoted and/or funded assaults against the civilian population” in support of a political agenda. The prosecutor further presented the judges with a summary of what he found to be the most significant criminal cases, and a list of 20 identities of those who seem to bear the most blame for those offences (ICC-OTP-20100303).

When authorizing the launch of the inquiry, the Pre-Trial Chamber had to weigh the seriousness of the alleged offences. Firstly, it concluded that it did not need to decide, at such an early stage, the seriousness of any particular specific case, but instead the probable collection of cases, given the circumstances (Sriram & Brown, 2012). Furthermore, applying the guidelines set out by the Prosecutor, it viewed
prospective offences to be of sufficient gravity, saying that “it is not the number of victims that matter, but rather the existence of some aggravating or qualitative factors attached to the commission of crimes that make it grave” (Sriram & Brown, 2012). The judges assessed both the numerical nature of the offences and also their subjective nature (Sriram & Brown, 2012). They measured the magnitude of the alleged offences including the spatial and temporal intensity, the essence of the crimes, the way in which they were perpetrated, and the severity of the criminal acts and the harm done to the victims (Sriram & Brown, 2012).

Its analysis of the way in which the offences were perpetrated is especially significant, as it rejected the idea that any aggression was simply a kneejerk reaction to the declared election outcome and resulting reprisal brutality, but instead understood the coordinated character of much of the brutality, such as the crimes perpetrated by the policemen. There was a dissenting opinion, with one of the three judges disagreeing with the decision, but on separate reasons, claiming that human rights abuses must be the product of a clear policy of the government or official entity and that this has not been evident (dissenting opinion of Hans-Peter Kaul, supra note 2, paras. 4 and 22-27). The dissenting view openly acknowledged that violations seemed to have taken place but conceded that they would not fit within the authority of the tribunal, the subject-matter of the trial. The judge did not make any conclusions with respect to gravity.

4.4.2 The Impact of Gravity on the accused in Kenya

Not unexpectedly, the indictment of the Kenyan personalities had a ripple effect on Kenya’s body politic and would soon have far-reaching ramifications in as far as how the alleged perpetrators viewed the ICC, starting with William Ruto, who had previously been positively disposed to the ICC and who was now staunchly against it as an accused (Daily Nation, 2009). In addition, the Members of Parliament who had earlier granted tacit approval to the ICC, instead of the Special Tribunal, revoked their support for the ICC and proceeded to table a parliamentary motion trying to extract Kenya from the Rome Statute (Daily Nation, 2010).
Although President Kibaki and Prime Minister Odinga had both endorsed the Special Tribunal, the latter became an ardent supporter of the ICC option following the announcement of the names of the suspects. Political interests and self-preservation appeared to be central to the adjustment of political positions by Uhuru Kenyatta, William Ruto and Raila Odinga as the focus now shifted towards a post-Kibaki dispensation (Daily Nation, 2012). The political positions of the Grand Coalition Government towards the ICC were certainly influenced by political considerations with an eye fixed towards a post-Kibaki Presidency. This was also demonstrated by Hansen (2011) that the Government actions aimed at ending the involvement of the ICC in Kenya would include attempts to rescind cases involving Kenya under Article 16 of the Rome Statute and then an application challenging the admissibility of the cases on the basis of claims that domestic investigations had commenced (Songa, 2018).

The result of all of this was a further politicisation of the ICC intervention and the ever-changing political configurations ultimately morphed into a Kenyatta-Ruto alliance that relentlessly pushed for a victimhood discourse against both the ICC as well as Kibaki and Odinga (Murithi, 2015; Hansen, 2013).

The Kenyatta-Ruto alliance eventuated into the Jubilee Alliance that would win the March 2013 Presidential Election with Kenyatta and Ruto being President and Deputy President respectively (EISA Kenya, 2013).

From here onwards, the duo would embark on a series of political and diplomatic offensives aimed at characterising the ICC at the state level as a threat to the sovereignty of the country when it comes to peace and security (Aide Memoire, 2013). The multipronged aggressive campaign included a push to have the cases rescinded through diplomatic and procedural measures such as seeking a deferral from the UN Security Council, an African Union resolution on withdrawal of the case and immunity from prosecution for heads of state and a series of legal challenges at the domestic level to stop the ICC prosecutor from accessing documentary evidence or enforce an arrest warrant with respect to an individual accused of tampering with witnesses (Songa, 2018).
At the same time, it questioned the admissibility of the situations and the authority of the Court, in direct contrast to its tactics to abolish or delay the jurisdiction of the court.

The cumulative effect of this entire campaign was that the case against Uhuru Kenyatta was eventually abandoned on 13 March 2015, whilst the charges against William Ruto and Joshua Sang were withdrawn following a ruling of the Trial Chamber on 5 April 2016 (International Justice Monitor, 2019).

4.5 Conclusion

The ICC’s indictment of the perpetrators of PEV that inflicted Kenya between 2007 and 2008 has energized an ongoing discussion on the potential trade-offs between accountability and stability in post-conflict situations, on the one hand, and the need to assess and balance the peace versus justice dichotomy that has always been manifested in post-conflict discourses. Turning to the procedure of initiating an investigation, an assessment of the Prosecutor’s initiation of an investigation proprio motu shows that there are still many grey areas. When the Prosecutor opens a preliminary investigation, the factors outlined in Article 53(1) give guidance as to whether a reasonable basis exists to proceed with an investigation contemplated in Article 15(3). The issue of prosecutorial discretion also comes into the fore and becomes very important in establishing a threshold of initiation.

A further explanation for the need for prosecutorial discretion in the ICC is that the Prosecutor retains the authority to activate the authority of the ICC. As mentioned previously, authority is always activated in response to a case. In brief, the magnitude, scale and difficulty of the case, together with the resource constraints of the ICC, render it essential for the prosecutors to exercise discretion. It is therefore not a matter of whether the Prosecuting authority should be capable of exercising power. Instead, the issue is how the Prosecutor should or will use their authority pursuant to Articles 17(1) (d) and 53(1) (c) of the ICC. Regardless of whether the Prosecutor confirms that there are legitimate grounds for proceeding with the investigation or not, they must be able to demonstrate how they arrived at that conclusion. Put differently, it ought to be evident how they exerted the discretion of
the prosecution. To reiterate, the Prosecutor also examines the considerations set out in Article 53(1) (a)-(c) of the ICC to decide whether there is a rational justification for continuing with the inquiry. It is the legal duty of the Prosecutor to request authorisation for the launch of an inquiry when it has been determined that the conditions have been satisfied. In addition, the Prosecutor may not exercise authority through Article 15(3) of the ICC until the conditions set out in Article 53(1) (a)-(c) of the ICC have been satisfied. Consequently, the prosecution's power under Articles 17(1) (d) and 53(1) (c) of the ICC is required in order to deal with the question of choice. The considerations set out in Section 53(1) (a)-(c) of the ICC reflect legal requirements, but the extent of the prosecution's power remains an open question. Thus, it is important to also be mindful of this ambiguity whenever an effort is undertaken to address the issue at the beginning. Nevertheless, the recognition of this ambiguity therefore ensures that the Prosecution and the Judges of the tribunal will be able to clarify the extent of the prosecution’s power in the future.

Generally speaking, the analysis of the opening of the inquiry by the Prosecutor’s Office proprio motu shows that there are still several issues which require answers. Once the Prosecutor launches a provisional inquiry, the criteria set out in Article 53(1)(a)-(c) of the ICC dictate whether there is a reasonable justification for continuing with the inquiry according to Article 15(3) of the ICC, or not. There are a number of things that have been answered. The authority and admissibility of Article 53(1) (a)-(b) of the ICC shall be determined in regards to possible proceedings within the scope of the situation. Therefore, the evaluation is not attributed directly to the case as such. In addition, the proposed reading of Article 15(3) of the ICC implies that the Prosecutor has a legal obligation to launch an inquiry once the conditions set out in Article 53(1)(a)-(c) of the ICC have been met. Due to the fact that the admissibility determination is rendered in regard to future proceedings, Section 53(1) (b) of the ICC does not help open for a relative gravity test, which implies that the relative seriousness of conditions is measured and decides whether there is a rational justification for the inquiry to be carried out. The statutory obligation to launch an investigation cannot be isolated from the reality that the ICC should work within the constraints of its financial resources.
The question of choice does not fall away if the Prosecutor is not in a position to carry out two or more inquiries simultaneously. Accordingly, the Prosecutor may only deal with this issue during the initial investigation. Due to the fact that the variables referred to in Article 53(1)(a)-(c) of the ICC are the only variables to be considered by the Prosecutor so as to determine whether there is a rational justification for proceeding with the inquiry, the broad discretion of the Prosecutor is a critical component to deal with the problem of selection.

As far as the prosecution’s discretion is concerned, the key issue is not whether the prosecutor is simply capable of exercising discretion but also how the Prosecutor may carry out best judgment. Consequently, a summary of the launching of such an inquiry *proprio motu* by the Prosecutor's Office must also contain a study of how the Prosecutor applies authority. This is due to the fact that it is not sufficient to determine which considerations the Prosecutor should weigh in order to establish that there is a rational justification for dealing with the inquiry since the perception of gravity as well as the interests of society are not completely clear. The Prosecutor may not make a ruling under Article 15(3) of the ICC if the conditions set out in Article 53(1) (a)-(c) of the ICC were satisfied. Nevertheless, both the gravity of Article 17(1) (d) of the ICC and the considerations of justice of Article 53(1) (c) of the ICC require an interpretation and are subject to wide discretion by the prosecutor. The prosecutor can then be able to demonstrate that s/he applies the authority of the prosecution as s/he enforces the law. The Office of the Prosecutor has released a number of policy documents that, to a certain degree, explain how the Prosecutor handles the preparatory analysis as well as how the Prosecutor understands the considerations in Article 53(1) (a)-(c) of the ICC. In addition, the PTC has explained to some degree how the conditions set out in Section 53(1) (a)-(c) of the ICC must be viewed. The discretion of the Prosecutor is broad in accordance with Articles 17(1) (d) and 53(1) (c) of the ICC however it is not unrestricted. The ambiguity that still persists when it comes to the application of discretion by the Prosecutor shows that the ICC will have to revisit this area in the future.

The next chapter will be a case study focussing on the ICC’s prosecution of Thomas Lubanga Dyilo, a national of the DRC whose case was a State Referral.
CHAPTER 5: CASE STUDY OF THE DEMOCRATIC REPUBLIC OF CONGO

5.1 Introduction
The previous chapter examined a Prosecutor *proprio motu* initiated case involving the Republic of Kenya, one of the three instances in which a situation is referred to the ICC for prosecution. This was preceded by another instance, a UNSC Referral which examined the processes that were involved in referring the situation of former Sudanese President al-Bashir by the UNSC to the ICC.

The situation of the DRC was a national jurisdiction referral. On 28 August 2006, Fatou Bensouda, Deputy Prosecutor of the ICC, lodged evidence and accusations arguing that Thomas Lubanga Dyilo, a Congolese national intentionally captured child soldiers and financed military training facilities and the weapons that were used by children. The evidence incorporated the confessions of six child combatants (Boustany, 2006).

From 1998 to 2002, following President Laurent Kabila’s seizure of authority, overthrowing President Mobutu Sese Seko, hostilities boiled into the open in the DRC, affecting several African countries bordering the country. As of 2002, there had also been a domestic element to this crisis, comprising militias that battled both with the government authorities and each other. This ‘conflict within a conflict’ happened in the eastern province of Ituri (Bekou, 2008).

5.2 A brief background of Thomas Lubanga Dyilo

According to TRIAL International, a watchdog agency that monitors and opposes impunity for crimes against humanity and represents survivors in their pursuit of freedom and fairness, Thomas Lubanga Dyilo was born in 1960 in Djiba, Ituri district of the DRC (TRIAL International, 2016). After completion of his studies at the University of Kisangani, where he received a psychology degree, Lubanga held the office of administrator at the University of Cepromad from 1990 to 1994.

It is widely believed that Dyilo had been the leader of the Union des Patriots Congolais (UPC) since its inception in 2000 and the Commander-in-Chief of its armed wing, the Forces Patriotiques pour La Libération du Congo (FPLC). Between 2002 and 2003, the FPLC was involved in conflict in the Ituri region of the DRC.
During the hostilities, the UPC / FPLC is claimed to have undertaken countless acts of genocide, such as the extensive recruitment of minors to its forces (Barker & Happold, 2007).

Well before the formation of the FPLC, it was claimed that the UPC forcibly recruited children under 15 years of age and conscripted them primarily at its Sota base. After the formation of the FPLC, this method became more comprehensive. The youths are said to have been pressured to engage in fighting, in particular by being bodyguards of senior militia leaders in the FPLC. As Head of the UPC and Commander-in-Chief of the FPLC, Thomas Lubanga is said to have been conscious of and supported such activities, particularly between September 2002 and 13 August 2003, during the hostilities in Ituri (Trial International, 2016). Lubanga's Defense Team denied any culpability by Dyilo and proceeded to invite 19 witnesses to the court to support this claim. They claimed that Lubanga was just a UPC leader and he had no position in the FLPC. Although he acknowledged that there were a few child soldiers in the FLPC, Lubanga vehemently denied engaging in the conscription and enlistment of the child soldiers. In fact, he reiterated that he had participated actively in the process of demobilisation of child soldiers.

The UPC was also blamed for the slaughter of civilians in Ituri, particularly in the Bunia region, the central town in the Eastern Province district in 2002. Between 2002 and 2003, more than 800 people were reported to have been murdered by the UPC in the mining town of Mongbwalu and the surrounding communities. Mining in the town is largely artisanal, although Anglo Ashanti as well as the government owned Societe des Mines d'Or de Kilo-Moto (SOKIMO) have concessions. Innocent people of Lendu descent were said to have been particularly attacked. Ituri, a region wealthy in raw materials, was the site of brutal clashes among various rebel armies that led to mass killings and the ethnic cleansing of tribal communities (Trial International, 2016).
5.3 Determining the Jurisdiction of the ICC on the DRC Situation

Confronted by sustained violence in the restive region of the Eastern DRC, President Joseph Kabila's Administration, being a State Party to the Rome Statute decided to refer the case to the ICC in 2004, citing Article 14 of the Rome Statute (Kurth, 2013). Article 14 of the Rome Statute provides that:

A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes (Rome Statute, 1998).

The Prosecutor, therefore, had to undertake inquiries to establish as to whether one or more particular individuals were to be prosecuted with offences falling within the purview of the ICC. For their part, the Congolese government was required to collaborate with the Court (Trial International, 2016).

Lubanga was detained in March 2005 and moved a year later to the Dutch jail facility in The Hague, which was set aside for the ICC. At the ICC, Lubanga was tried and convicted for the recruitment and conscription of minors and forcing them to engage in armed conflict between 2002 and 2003 (Osuji, 2010).

The ruling of the Pre-Trial Chamber (PTC) I in the Lubanga trial was announced at the conclusion of the confirmation hearing conducted at the ICC from 9 to 28 November 2006, following two adjournments. These delays were owing to challenges in finding appropriate safeguards for both survivors and testifiers and the resultant impediments in the declaration process. It is important to remember that, in relation to the prosecution and the accused, four affected persons whose identities were kept concealed, participated in the trials and the confirmation hearing through legal representation (Miraglia, 2008).
5.3.1 Determining Admissibility in the DRC Situation – Setting out the legal framework

Article 17 of the ICC Statute deals with circumstances where a case is inadmissible at the ICC. Article 17(1)(a) states that a complaint may not be admissible before the Court in cases where a territory with jurisdiction is actively investigating a matter unless it has been determined that the State “is unwilling or unable to genuinely carry out the investigation or prosecution” (Rome Statute of the International Criminal Court, Art. 17(1)(a)).

Once interpreted in combination with (1) (b) it is evident that, for a State to comply with this provision, the case must be under prosecution (Rome Statute) or has been prosecuted. Jurisdiction can only be given to the ICC if it is determined that the determination not to try a person is extracted “from the unwillingness or inability of the State to prosecute” (Rome Statute, Art. 17(1) (a)). It ensures that, where there are no indications of a domestic prosecution, the matter will be legally valid before the Tribunal. Moreover, as soon as the domestic inquiry is determined to be credible, there is no impact attached on the results of the investigation.

On 10 February 2006, the PTC I published an arrest warrant in respect of Thomas Lubanga (Prosecutor vs Thomas Lubanga Dyilo, 2006). When arriving at this ruling on the Prosecutor’s submission for the arrest warrant, PTC I noted that two concerns had to be assessed when deciding admissibility: first, whether there were any domestic inquiries and legal proceedings relating to the situation at present that could affect the jurisdiction of the ICC; and secondly, whether the threshold of gravity contemplated in the ICC is satisfied (Prosecutor vs Thomas Lubanga Dyilo, 2006). This assessment is crucial because it helps to clarify the requirements used to establish which situations are satisfactorily severe and the kind of offenders for the ICC to pursue. It is also the first ruling of the tribunal concerning another important component of the Rome Statute namely, complementarity as per the preamble of the Rome Statute which provides that the ICC shall be “complementary to national criminal jurisdictions” (Rome Statute, 1998).
5.3.2 Complementarity

The main rationale for embracing the complementarity principle was to accommodate the need for state sovereignty with the formation of a universal institution by providing states with the first right to try crimes. The purpose of complementarity is to promote domestic investigations for massacres, genocide and international crimes. The doctrine of complementarity determines questions of admissibility and authority between the ICC and domestic jurisprudence. Article 86 of the Statute of the ICC imposes an overall burden on the States Parties to comply with the Statute. Without the collaboration of the States Parties, the Tribunal would stop functioning. The opening paragraph to the ICC Statute stresses that the ICC “shall be complementary to national criminal jurisdictions” (Rome Statute, 1998). Accordingly, the concept of complementarity guarantees that the ICC is a ‘last resort’ tribunal for worldwide violations and also that exclusive authority and consideration is granted to national courts at all times (Cryer, 2010). The doctrine is indeed rational since in many other cases, it will be more productive and also less time-consuming to prosecute an international crime before a domestic judiciary.

The PTC I first deliberated as to whether the territories with sovereignty over the Lubanga situation were weak, reticent or reluctant to act in relation to the Lubanga situation. This was especially important given that Thomas Lubanga was in detention in Kinshasa at that point of the ruling and was being prosecuted by the Congolese judicial system. In assessing admissibility, PTC I noted “it is a conditio sine qua non for a case arising from the investigation of a situation to be inadmissible that national proceedings involve both the person concerned and the conduct which is the subject of the case before the Court” (Prosecutor vs Thomas Lubanga Dyilo, 2006). Noting that the arrest warrants released by the government of the DRC against Lubanga did not contain any mention of his supposed culpability with regards to offences committed in the prosecution's submission, PTC I ruled that the DRC could not be deemed to be operating in regards to a particular situation before the tribunal (Prosecutor vs Thomas Lubanga Dyilo, 2006).
5.3.3 Gravity

The question as to whether the recommendation by the Prosecution to concentrate on “persons most responsible” ought to be a legally enforceable yardstick in the view of the Court's gravity threshold under Article 17(1) (d) as suggested by PTC I in the Lubanga case, was dealt with to some extent by a variety of scholars and may even be a topic for further clarification by other Chambers of the Court (PTC I: 43–64). As reported in its Three-Year Report, the Office of the Prosecutor earlier identified Thomas Lubanga for prosecution in relation to a wide range of misconduct, in keeping with its strategy of introducing “focused cases with the goal of reflecting the whole spectrum of crime” (Three Year Report (OTP), 8, 12). As the article noted, the practical factors pertaining to the likely imminent release of Lubanga, who at the time was under detention by the local courts in relation to another incident, prompted the Prosecutor to proceed with the aspect of the case, which had been determined without a shadow of a doubt, and finally to terminate similar inquiries into certain conducts.

In selecting alleged persons for trial, the Rome Statute merely mentions ‘perpetrators’ of “the most serious crimes of concern to the international community as a whole” (Rome Statute, 1998). The range of likely offenders becomes wide and therefore in order to restrict this otherwise wide group of culprits who would meet the requirements for prosecution by the tribunal, the Prosecutor has instituted a policy of targeting “those who bear the greatest responsibility” for atrocities within the purview of the ICC (OTP, 2006). PTC I concluded that the gravity prerequisite contemplated in Article 17(1)(d) “is intended to ensure that the Court initiates cases only against the most senior leaders suspected of being the most responsible for crimes within the jurisdiction of the Court allegedly committed in any given situation under investigation.” (Prosecutor vs Thomas Lubanga Dyilo, 2006). So as to satisfy the gravity threshold, PTC I ruled that three issues had to be satisfactorily addressed namely:

Is the conduct which is the object of a case systematic or large-scale (due consideration should also be given to the social alarm caused to the international community by the relevant type of conduct)? - Considering the position of the relevant person in the State entity, organization or armed group to which he belongs, can it be considered that such person falls within the category of most senior leaders of the situation under investigation?; and - Does the relevant person fall within the
category of most senior leaders suspected of being most responsible, considering (1) the role played by the relevant person through acts or omissions when the State entities, organizations or armed groups to which he belongs commit systematic or large-scale crimes within the jurisdiction of the Court, and (2) the role played by such State entities, organizations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation? (Prosecutor vs Thomas Lubanga Dyilo, 2006).

In fulfilling the three criteria as regards the Lubanga situation, PTC I concluded that the gravity threshold had been satisfied pursuant to Article 17(1) (d). Early rulings of the Pre-Trial Chambers of the ICC provided the framework for the application of the Rome Statute. While these decisions were not yet final and could be subject to appeal, they provided good insights into the functioning of the Tribunal. As the very first court decisions on many new issues in international criminal law, such as victim participation, they illustrated how the Rome Statute was applied in practice by the Court (HRW, 2007).

5.3.4 Participation of Victims in Proceedings

The involvement of victims in the trials of the ICC is broadly described as a substantial institutional milestone of the ICC regime, both by scholars and legal practitioners alike. In addition, the ICC Statute represents a major shift from the simple understanding of the concept of victims’ interests in respect of compensation (Stahn, Olásolo & Gibson, 2006). The participation of victims in ICC prosecutions represents, first of all, the universal appreciation of the value of survivors’ access to due process, as illustrated in the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (UN doc. E/CN.4/2000/62, 2000).

At a pragmatic level, the involvement of witnesses in ICC deliberations may be interpreted as an appreciation of the value of the input of persons who possess first-hand knowledge of the perpetuation of the alleged crimes and who can provide a personal perspective on the events depicted during the hearings. On an ethical dimension, the involvement of victims would guarantee that the Court and the global community in general, are fully aware of the trauma endured by victims. Ultimately,
the presence of victims may allow the Court to make a difference in the healing of society more broadly (Simpson, 2005).

5.3.5 Principles governing the participation of victims in the Pre-trial Phase

The Court and the Rules of Procedure laid down three procedures for the participation of victims in the pre-trial phase: submission of ‘representations’ and ‘observation’ according to Article 15(3) and (19); involvement according to Article 53(3) and (61); and ‘seeking the views of victims by the Chamber according to Rule 93. This diverse structure clearly indicates that various kinds of victims can participate in the various phases of the ICC pre-trial hearings, however, victim participation methods are still open to a wide spectrum of technical and legal complexities (Timm, 2001). Nonetheless, two observations can be mentioned generally. Firstly, all three systems are unique from one another. Victim ‘participation’ under the framework laid down in Rule 89 - 91 is distinct from the framework under which victim participation was conducted during trials under Part 2 of the Statute. Participatory privileges dealt with in Part 2 of the Statute tend to be granted to victims irrespective of the formal application made pursuant to Rule 89. In addition, the protections afforded to victims pursuant to Part 2 tend to apply regardless of the obligation for individual designation pursuant to Article 68(3) (Bergsmo & Pejic, 2008).

Moreover, the three different systems provide for the participation of victims at a preliminary stage, in some situations prior to the naming of a perpetrator or even prior to the launch of a case inquiry. Article 15(3) including Rules 50(1) and (3), 92(2) and 107(5) provide for the participation of victims prior to the actual launch of an inquiry. Article 19 requires victims to be heard at a phase where a ‘case’ has been placed before the Tribunal. Article 61 calls for the involvement of witnesses at the phase at which the allegations were verified. Lastly, Article 68(3) does not lay down a timeline in which victims can engage in the trials.

5.3.6 Participation of Victims under Part 2 of the ICC Statute
Section 2 of the Statute provides a few simple rules on the protection of victims prior to the actual beginning of the proceedings and incorporates special provisions on the involvement of victims in the jurisdiction and admissibility hearings. The choice of the architects of the Statute to include victims at this point was based on various rationales. In the scope of Article 15(3), the participation of victims is a rational consequence of the participation of victims in proprio motu inquiries in broadly (Bergsmo & Pejic, 2008).

Proprio motu hearings through Article 15 are normally prompted by the evidence provided by the victims (Rome Statute, Art. 15(1) and (2). It is only reasonable that they are permitted to make statements. Additionally, the participation of victims in the course of securing authorisation from the Pre-Trial Chamber for an inquiry was based on the premise that victims are expected to be fully aware of the full implications of the offences that have occurred related to the situation at hand (Stahn, Olásolo & Gibson, 2006). Victims would certainly be ideally placed to explain the alleged nature of offences and might be capable of giving a far more personal view on the circumstances described by the Prosecution. Clearly, such viewpoints are of great significance to the Court in trying to make a fundamental judgment as to whether proceedings should be triggered. The presence of victims at this point further helps to strengthen the objectiveness of the trial by presenting a perspective other than that of the Prosecutor in the Pre-Trial Chamber (Stahn, Olásolo & Gibson, 2006).

The key role played by victims in the wider context of this discourse has been extensively noted, particularly by the United Nations Office for Drug Control and Crime Prevention, which observed in its Handbook on Justice for Victims that “the victim is generally in the best position to provide information on various aspects of the incident to the investigating authorities, the prosecutor and the court with information on various aspects of the incident” (UNODCCP, 1999). In the scope of Article 19(3), objections to the authority or legality of a case are likely to emerge through States which usually possess the requisite funds to support such a complaint. The statements of the victims would include information directly from the state concerned. The participation of victims in Articles 15(3) through 19(3) of the
Rules of Procedure could often be viewed as a logical consequence to the larger pattern of criminal trials which generally gives victims access to justice.

The particular rule on the participation of victims in Section 2 of the Statute clearly suggests that Rule 89 - 91 may extend only in a separate way in those prosecutions. Rule 92(1), which differentiates between involvement under Part 2 and involvement through Rule 89, states that “the rule on notification to victims and their legal representatives shall apply to all proceedings before the Court except in the proceedings referred to in Part 2” (Bitti & Friman, 2001). Practically speaking, this approach often makes sense. With regards to Articles 15 and 19, the Statute offers specific details about the point at which victims can participate as well as the manner in which they would participate. In other instances, though, the nature and duration of the participation of victims should be decided by the appropriate Chamber (Rule 91(2)).

5.3.6.1 Article 15 (3)

The authorisation of an inquiry pursuant to Article 15(3) establishes the first time whereby victims are explicitly permitted by the Statute to participate in the proceedings of the ICC. In particular Article 15(3) states that “victims may make representations to the Pre-Trial Chamber in accordance with the Rules of Procedure and Evidence” where the Prosecutor has submitted a request for approval to initiate an inquiry. Rationally, at this point, where no prosecution has been launched yet, situations (in contrast to cases) constitute the subject-matter of the prosecutions.

5.3.6.2 Participation of Victims under Article 15 (3)

Rule 50 regulates the process alluded to in Article 15(3) of authorisation by the Pre-Trial Committee. Rule 50(1) demands that, where the Prosecutor wishes to obtain authorisation from the Pre-Trial Chamber to begin an inquiry, they must notify the victims identified to them or to the Victims and Witnesses Division. Rule 50(1) also imposes a comprehensive reporting requirement on the Prosecutor and could eventually entail the identification of a large number of victims (Holmes & Lee, 2001).
The wide criteria for the alerting of victims illustrates the idea that a substantial number of victims have possibly been and should have been impacted by the offences perpetrated in the situations under review and should, therefore, reserve the right to make statements on the key question of whether inquiries should be launched. The significance of informing victims at the time of the beginning of an inquiry has also been noted in domestic judicial systems. In addition, the identification of victims at this juncture of the trial had been one of the proposals found in the Council of Europe's Recommendation No. R (85)11. R (85)11 (European Committee on Crime Problems, & Council of Europe Directorate of Legal Affairs, 1985). After notice by the Prosecutor, victims may “make representations in writing” to the Pre-Trial Chamber according to Rule 50(3), regardless of whether they have already provided correspondence to the Prosecutor or not. The Pre-Trial Chamber may then seek some additional details from each of the victims who may have submitted representations and, “if it finds it necessary, hold a hearing” according to Rule 50(4).

5.4 The Thomas Lubanga Dyilo Trial and the Participation of Victims

Pursuant to the rules outlined above, an appeal by three victims to take part in the prosecution of Thomas Lubanga Dyilo was permitted by the ICC on 31 July 2006. The Court came to a determination that there was enough justification to believe that Thomas Lubanga Dyilo committed acts of crime against the three applicants and thus demanded all official documentation pertaining to the hearings to be handed over to the victims’ legal team (Trial International, 2016). In stark contrast to the ad hoc tribunals such as the International Criminal Tribunals for Rwanda and the former Yugoslavia or the Special Court for Sierra Leone, the ICC, by so doing, provided victims with the right to be heard as sovereign individuals in the international judicial process and this is considered as an unprecedented progressive step within this area of international justice.

The trial of Thomas Lubanga Dyilo enabled survivors of crimes against humanity, for the very first time, to describe their own opinions and feelings to the Tribunal in which their special circumstances are concerned. In addition, the appeal ruling of 3
March 2015 is the first ruling where the ICC described in detail the required minimum elements deemed necessary by the reparation order and laid down the general tenets regulating reparation payments for survivors of crimes against humanity (Trial International, 2016).

5.5 Conclusion

As opposed to the *propio motu* situation in Kenya, the Court did not have to determine admissibility, as the case was referred by the State, and therefore did not need to issue an arrest warrant or summons to appear, even though the arrest warrant was ultimately issued by the Prosecutor as a matter of record by the Court. Nevertheless, the Prosecutor was still confronted with the challenge of balancing the criteria set out in Articles 61 and 66. Article 61 of the Rome Statute directs the Chamber to establish irrefutable proof to demonstrate a strong basis for believing that an individual has perpetrated an offence and has been brought to trial.

Article 66 directs the Prosecutor to demonstrate that the suspect executed atrocities over and above a shadow of a doubt and Article 64 directs the Trial Chamber to provide for the presentation of documentation or details not earlier communicated before the start of the court so as to allow appropriate readiness for the court.

While the ICC eventually managed to try Lubanga, who would become its first individual to be found guilty, the Prosecution nevertheless also experienced difficulties in meeting several of the criteria outlined in the Rome Statute. For instance, Trial Chamber 1 called for the acquittal of Lubanga Dyilo in July 2008 following the Chamber’s assertion that the Prosecutor had neglected to comply with the provisions of Article 54(3) (e) which deals with the issue of non-declaration of exonerative information. According to Baylis (2014: 625), the Pre-Trial Chamber I claimed that more than 200 articles providing exculpatory material which was also expected to be used by the prosecution were not published. The ICC Trial Chamber requested a stay of prosecution after it established that the Prosecutor had exceeded his powers under Article 53(3) (e) (Djurdja, 2008). Even though the
Prosecutor claimed that the records had been acquired on the basis of secrecy, hence the refusal to reveal them, the Trial Chamber maintained that the Prosecutor was obliged to comply with Article 67 of the Statute of the ICC. Whereas Article 67(2) of the Statute of the ICC compels the Prosecutor to reveal to the defense any crucial evidence which has a tendency to demonstrate the innocence of the indicted or to reduce the guilt of the accused, Article 54(3)(e) allows that, unless it is indicated in words, the records kept by the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUC) would be considered to be given in compliance with or even subject to the regulations laid down in Article 54(3)(e) of the Statute of the ICC (Ambos, 2012).

Since the discovery of the exculpatory evidence is at the core of the accused’s right to due process, the absence of such transparency by the Prosecutor can lead to the conclusion that the balance of justice has been tipped against Lubanga because the defence team was incapable of negating the greater resources of the prosecution. Although these challenges were later ironed out, paving a way for the eventual successful prosecution and conviction of Thomas Lubanga Dyilo in The Hague for the enlistment and conscription of child soldiers in his army, the errors point to an emerging regime that is codified in solid international jurisprudence that will continue to improve as the imperfections are addressed in due course.

The next chapter will conclude the study and will offer areas for future exploration.
CHAPTER 6: CONCLUSION AND RECOMMENDATIONS FOR FURTHER STUDIES

6.1 Introduction

This study set out to revisit and disentangle the tensions between the ICC and Africa. It did so by examining the principles of universal jurisdiction and complementarity of the Rome Statute, as well as the question of protection for incumbent heads of state; examining the domestic enforcement of the ICC Statute in Africa; and monitoring the development of the conflict between African states, operating separately or within the scope of the African Union (AU), and the ICC.

Some of the sub-research questions that assisted the researcher in this study were:
- What role does the UNSC play in forwarding or postponing cases under the ICC investigation?
- How does the peace versus justice dichotomy play a role?
- In what ways if at all, can the ICC prosecutor’s *propio motu* (on one's own initiative) power to initiate investigations in Africa be perceived as controversial?
- What is the function of national and conventional African courts in the battle against brutal force (as opposed to making submissions to the ICC)? The track record of the Courts in Sudan, Kenya and the DRC, which have been specifically chosen for this study because of their relevance, have been reviewed.
- What are the challenges of the Court in the execution of its mission?

6.2 Key findings

As Schabas (2004) observes, like with any new organisation, the ICC will inevitably suffer some kind of youthful vulnerability and uncertainty as it grows and matures. With the world's eyes focused on this international legal breakthrough, and the
conspicuous absence of endorsement from the US, there was much to lose or gain from the Court's initial trials. Some of the advocates of the Court are therefore genuinely concerned with its legitimacy. The universally accepted cornerstone of the integrity of the Court has to be its autonomy and neutrality, as shown by the robust discussion about the Prosecutor's Office which occurred during the Rome Conference, when the ICC's founding document, the Rome Statute, was passed.

The architects of the Rome Statute exercised great precaution to insulate the Prosecutor from unwanted external political influence. Nevertheless, they also took into account national sovereignty, a careful consideration that culminated in a concession of complementarity giving preference to domestic judicial systems over the ICC in situations where they both have jurisdiction. The interaction of the prosecuting authority and complementarity is made difficult by the nature of the ICC as an ex ante tribunal. The Court operates in circumstances of continuing disputes where it must negotiate with States trying to address highly polarised situations. As such, a neutral and unbiased ICC Prosecutor, should cautiously use their authority in a delicate political environment, in such a way that their actions may not jeopardise the expected outcomes.

This issue has generated considerable discussion and reflection on how the ICC should navigate active conflict when it comes to the twin issues of peace and justice and rehabilitative or retaliatory justice. One side of the argument, that had been favoured by Prosecutor Moreno-Ocampo, went on to argue that international law as well as the Statute of the ICC compel the Prosecutor to press ahead with the trial and that there could be no peace before justice. Another side maintains that reconciliation is much more crucial and that there would be no peace unless the ICC stands back. The Court's integrity seems to be in question as all parties weigh under what conditions the ICC can give way and whether to do so would compromise its authority.

The first chapter of this dissertation dealt with the introduction of the study and how the study would be structured, including the methodology as well as the framework of analysis. Chapter two tracked the various stages in the evolution of the Rome Statute that led to the establishment of the ICC. It also explored some important
aspects of the study's framework of international legal doctrine and institutionalism such as the absolute doctrine which also had an in-depth examination of immunities which are bifurcated into *ratione materiae* and *ratione personae*. It also explored the grounds under which those on trial can be afforded immunity; State immunity, as well as sufficient reasons for member countries to justify withdrawal from the Statute. Finally, the chapter examined some of the perceptions of bias attributed to the Court due to the manner in which it has seemingly focused exclusively on prosecuting Africans, thus leading to calls for African countries to boycott or challenge its universal jurisdiction.

The refusal by some of the permanent members (P5) of the UNSC such as the People's Republic of China (PRC), the Russian Federation and the US to ratify the Rome Statute, and also the referral and deferral powers of the UNSC, further add to the accusations of bias. Yet at a politically symbolic level, it is, however, argued that it is better to have an imperfect international tribunal as that would serve as a deterrence to impunity as opposed to having none at all, and also that a massive withdrawal from the Court would impede efforts aimed towards bringing those accused of crimes against humanity to book. At an administrative level, there is ample evidence that African international public servants form a core part of the functioning of the Court and should therefore also claim ownership of the institution, rather than marginalization. As stated in Chapters 1 and 2, an analytical framework to guide this study was drawn from international legal doctrine and institutionalism, which is a theory concerned with the deeper and more resilient aspects of social structure.

This dissertation has endeavoured to explore the success of the International Criminal Court. The hypothesis of the dissertation is that, although the ICC was established as a politically autonomous body to investigate egregious international crimes such as genocide, war crimes and crimes against humanity, the success of the Court is highly dependent on the entities empowered by the Rome Statute to activate situations. While the initiating entities are: States Parties, the Prosecutor and the UNSC, there is a need for coordination between those entities if the efficacy of the Court is to be accomplished. A few cases, three in particular, referred to the Court since 1 July 2002 when the Rome Statute entered into force have been
reviewed in this study in order to determine whether the hypothesis has been established.

Since the cases presented within the study were classified into a single basket comprising general cases and in-depth case studies, the findings of each case have served to demonstrate who the initiating party is. The findings of each case often indicate whether or not the Court is successful. There were three carefully chosen cases which were referred to the Court by each initiating entity, namely; a UNSC Referral in the case of the Sudan, a Prosecutor *proprio motu* initiated case in the case of Kenya, as well as a State Referral in the case of Thomas Lubanga Dyilo of the DRC. The following criteria were used to assess the success of the Court: (i) whether the Court was able to apprehend the offender and subject them to the ICC processes; (ii) whether the Court was able to gather the necessary evidence for prosecution; and (iii) whether sufficient access to witnesses to testify before the Court or to give evidence for trial had been obtained. The success of the Court is rated highest when all the three elements referred to above are successfully met, and rated low where only two elements were fulfilled, and success is rated lowest where one or none of the criteria was fulfilled.

### 6.2.1 The UNSC Referral – The Sudan

As a UNSC referral, President al Bashir's situation reached a deadlock. Although the UNSC pursued all the correct protocols to prosecute President al-Bashir, Sudan failed to collaborate with the UNSC, and the AU also rejected calls to abide by the terms of the Chamber. The dissertation has therefore established that no conviction has been secured and that no records were made available to demonstrate that strong evidence had been obtained by the Court for prosecution or that there was reasonable access to witnesses to testify before the Court.

### 6.2.2 The Prosecutor *proprio motu* initiated case – Kenya

Following a multi-pronged onslaught by President Uhuru Kenyatta's government to have his case withdrawn, it was eventually abandoned on 13 March 2015. Although
the prosecution followed proper protocols leading to the confirmation of Kenyatta's charges, the Court eventually failed to secure a conviction. Although the Waki Commission identified the 2007 post-election violence suspects, a large number of witnesses have since died or have stopped participating in the proceedings and the offenders have not been charged or brought to justice.

6.2.3 State Party Referral – The DRC

The situation in the DRC was a state referral. The situation in the DRC is a perfect example of the success of the ICC. Once the Government of the DRC submitted the situation in the Ituri region to the ICC, the Prosecutor issued an arrest warrant which was duly authorised by the Chamber and the DRC authorities detained and presented Lubanga to the ICC. Thomas Lubanga Dyilo was sentenced to 14 years in prison in The Hague on 14 March 2012 for enrolment and conscription of children below 15 years of age in his militia, the FPLC.

6.3 Possible areas for future exploration

The purpose of this dissertation was to revisit the tensions between the ICC and Africa and, as a side aim, to examine the usefulness of the International Criminal Court. What the dissertation has shown is that the success of the Court depends on the party that initiates the situations. The situation in the DRC is a prime example of a conviction emanating from a state referral which has shown that the success of the Court is achievable when there is a strong level of collaboration among the signatories to the Rome Statute.

With regards to the Sudan UNSC Referral, there is broad consensus among experts and scholars that the response of the ICC to the Sudan situation was inadequate as it did not take into account the political consequences of its decisions. For the ICC to have a truly universal reach, its integrity and credibility must be beyond reproach, as this is the only way in which the international community can defer authority to it. The inconsistences and paradoxes illustrated in this case study, such as the incompatibility between some of the articles of the statute with customary
international law on immunities point to a need to continuously revisit the founding architecture of the Rome Statute and in a meaningful, if nuanced way, address the remaining and glaring bones of contention.

With regards to the Prosecutor proprio motu initiated cases, the ambiguity that still remains in relation to the application of discretion by the Prosecutor shows that the ICC will have to revisit this area in the future.

Regarding the DRC State Referral, the ICC’s record is arguably the best in this score, and despite the errors such as when the Prosecutor had failed to comply with the provisions of Article 54(3) (e) which deals with the issue of non-declaration of exonerative information, the successful conviction and sentencing of one of the most feared warlords, Thomas Lubanga Dyilo points to an emerging regime that is codified in solid international jurisprudence that will continue to improve as the imperfections are addressed going forward.

As it evolves, the ICC will have to do a lot more in placating perceptions that it is unfairly targeting Africa, its most enthusiastic supporter since its inception. The partnership between Africa and the ICC seems to be dealing with some big obstacles at the moment. Nevertheless, owing to the dynamism of international relations, this partnership will keep developing. In this respect, some preliminary findings may be made, considering that the relationship is still in its early development.

To begin with, it seems obvious that the troubled continent has some serious and valid concerns about how external trials could integrate into its wider goals of peace-building and post conflict reconstruction and development. With respect to the situation in Sudan, which has caused tremendous debate, the AU affirmed that it was not adverse to prosecution, but that it was worried about its timing, and in this unique area, a degree of tension is perhaps to be anticipated and unavoidable. Yet Africa’s fear of the timing of trials versus its peace-making efforts must not be easily ignored by the ICC, other institutions of the Court, and by the entire international community. The explanation for this is that its impact on further loss of human life and violations of human rights can stretch far beyond the legal humanitarian, political
and economic spheres. Yet, as the region involved, there is little to suggest why Africa should not have a stronger voice in deciding its own issues. Nevertheless, such decisions must be taken in a sense in which African States acknowledge responsibility for making sure that justice is served in specific circumstances where it could otherwise be sacrificed in order to advance the ambitions of ruling elites. This, too, is unsustainable and impermissible, as victims of criminal acts in Africa deserve some due process for those who have perpetrated criminal activities against them.
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Article 27

Irrelevance of official capacity

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

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

7. Article 98

Cooperation with respect to waiver of immunity and consent to surrender
1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.