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Evaluation of Challenges and Prospects of the Court's Involvement in Africa

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This document represents part of the author's study programme while at the Institute of Social Studies. The views stated therein are those of the author and not necessarily those of the Institute.

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List of Acronyms

ICC	International Criminal Court
ASP	Assembly of States Parties
PSC	Peace and Security Council
AU	African Union
AAU	Assembly of African Union
UNSC	United Nations Security Council
AFLA	African Legal Aid
CICC	Coalition for International Criminal Court
ICJ	International Court of Justice

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Abstract

The 4 March 2009 arrest warrant against the Sudanese President Omar Al-Bashir has changed the previous enthusiastic relationship between the ICC and its biggest bloc Africa. The AU passed non-cooperation decision following the measures the ICC took against the Sudanese and Kenyan Senior State officials. This paper intended to research this tense situation between the two. Immunity of sitting heads of state and the choice between prosecutorial and transitional justice are the basic point of controversy.

The universality of international law and legitimacy of international institutions are used as a theoretical lens.

Relevance to Development

Justice, Peace, and security are the integral parts of development studies. These elements are an integral part of my research as well. Poverty cannot be defeated in violent situations where people are without the protection of the law. There will not be any development in that situations, but only exploitations. My research looks to development from the perspective of international criminal justice.

Key words

International criminal court, Sovereignty, Immunity, Impunity, Complementarity, Universality, Legitimacy, Universal Jurisdiction, Prosecutorial Justice, Transitional Justice

CHAPTER 1: Introduction

The International Criminal Court (ICC) was established on 17 July 1998. Its Statute came into force on 1 July 2002 and as of then the first permanent international criminal court was a fact. Africa has played major roles in the processes of materializing the court through its strongly participation in drafting, discussions, negotiations and ratification of the Statute (Peter 2016: 15, Murithi 2013: 1).

However, the March 2009 order of the Pre-trial Chamber I against the Sudanese president Omar Hassan Al Bashir for the Darfur crisis has opened a contentious new phase (Clarke et al. 2016:1). The tense situation even escalated with the 2012 prosecution of Kenyan two senior politicians, Uhuru Kenyatta and William Ruto for human rights crisis followed the 2007 Presidential election (Knottnerus 2016: 152) . Their case became controversial after they won the 2013 Kenya election as a President and Vice-President respectively (Sadat and Cohen 2016: 101).

There are different positions regarding the role of the ICC in the African continent. Some identify it as a biased, Western-oriented, and neo-colonial instrument that engaged in investigating and prosecuting only Africans and setting aside other serious violations by actors from developed countries of the global North or (other) powerful countries (Plessis 2010: vii, Dicker 2015:3). Sheriff Baba Bojang, the Gambian Information Minister, said the following when Gambia withdrew of the ICC, “The ICC, despite being called International Criminal Court, is, in fact, an International Caucasian Court for the persecution and humiliation of people of color, especially Africans” (Reuters 2016, Published on October 26). Gambia reversed its prior decision to withdraw from the Court with the coming of a new government in 2017 (ICC website 2017, Press Release on 17 February).

At the other end of the spectrum of opinions, the Court, its affiliates and many other voices do not recognize the above claims and accusations. For one of them, the measures and positions that the AU and some African countries are taking against the ICC are “an innovative and secretive way” to let the perpetrators escape accountability of atrocities (Ankumah 2016, AFLA website).

Both sides have been trying to persuade each other based on different theoretical, legal, historical, and conceptual arguments. According to the AU and its affiliates, the Rome Statute does not give jurisdiction for the ICC to investigate and prosecute the situations in non-member states to the Statute. Thus, they require the UNSC to defer the cases it has referred to the ICC, and the ICC to quite its investigations and prosecutions initiated against president Al Bashir (AAU 2012: para. 6). Similarly, they claimed that the jurisdiction of the Court is complementary to the national judicial system and that thus the ICC has to leave the case of Kenya for Kenyan national mechanism (AAU 2011: para. 4). The AU believes and strongly pursues the idea that political negotiation is the best solution for post-conflict situations - like in Libya, Darfur, and Kenya - to address both impunity and reconciliation (ibid.: para. 6).

1.2 Organisation of the paper

The paper has seven chapters. Chapter one is an introduction. It introduces the subject, statement of the problem and objectives of the study. Chapter two is Methodology. Types of data, techniques of data gathering, and analyses are included. Chapter three incorporated review of major challenges. Chapter four is a theoretical discussion. The universality of international law and Legitimacy are discussed. Chapter five is an analytical discussion. Main controversies identified under three will be analyzed from the theoretical point of views. Chapter six is data presentation. The data gathered through interview will be

presented and analysed. The last chapter is the conclusion. Here, the major findings will be summarized.

1.3 Statement of the Problem

The enthusiastic relationship between the ICC and the Africa that was shown in establishing the Court, in ratifying the Statute, and in referring the first cases to the Court is now ruined due to two instances in the continent – the cases of Sudan and Kenya (Okoth 2017: 2).

Due to these two situations, the AU has passed several decisions that have influenced the relationship between the court and African States parties to the Court. The non-cooperation (AAU 2009c: para. 10), and proposal of collective withdrawal (AAU 2016: para. 10(iii)) were the two controversially known decision of the Assembly. This decision of non-compliance with the order of the court has completely prohibited the Court from executing its arrest warrant against President Omar Al-Bashir (CICC website no date). In this regard, President Al-Bashir said, “They wanted us to kneel before the International Criminal Court, but the ICC raised hands and admitted that it had failed” (Abdelaziz 2014, blog). Now, it seems as if the ICC needs to get the goodwill of the AU before getting into execution its mandate in the continent. Of course, this was one of the conditions raised by the Open-Ended Committee in its comprehensive withdrawal strategy of 2016 (Okoth 2017: 01).

In 2011, the Assembly requested the UNSC to defer the Kenyan cases in order to allow the national mechanism to deal with its own problems as per the Constitution of the Country (AAU 2011: para. 4). The Kenyan government also requested the same in order to activate the national system as per the complementarity principle (Du Plessis and Gevers 2011, blog). This is basically a question of jurisdiction – complementarity vs. primary jurisdiction.

Again, in 2012 the Assembly decided that the Rome Statute is not capable of removing an immunity of sitting head of non-member State, and claimed the UNSC to defer the cases against President Omar Al-Bashir (AAU 2012: para. 6). The immunity of sitting heads of state is the basic controversial issue in both cases. The ICC applies article 27 of the Statute for the Kenyan case, a state party, and the UNSC resolution 1593 for the Sudan case, non-member state.

Similarly, the AU's Peace and Security Council (PSC) rejected the arrest warrant against President Omar Al-Bashir on the basis of giving priority for peace and security in the country than prosecuting the perpetrators which might turn the situation into further (PSC 2008: para. 3). The Council argued that "justice search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace" (ibid.). The Council also endorsed the criticism of the AU that the Court focuses on the African leaders. Whereas the ICC claims the Court has the power to do so as per the UNSC resolution 1593 (UNSC 2005: Para. 2). This is another problem area where the international justice that ICC pursue and the quest for the transitional justice or domestic conflict solving mechanisms are conflicting (Olugbuo 2010:106, Dersso 2016: 65). The basic claim here is that the prosecution against President Al-Bashir does not serve both justice and victim in that specific period of time. So, they claimed the prosecutor should discontinue its case in such situations (Dersso 2016: 65).

Both Sudan and Kenya agree on the claim that the court focuses only on African leaders. All cases are from Africa. Due to this exclusive focus on Africa, some call this situation as ICC's 'Africanization' of investigation and prosecution (Dersso 2016: 71)

Generally, the question of conflict between the customary international law principle of immunity of sitting heads of state, the allegation of focus only

on African leaders, the choice between international (prosecutorial) justice and transitional justice are the basic controversial issues that need to be analyzed in this paper. So, it is demanding to take these two cases as the main sources of the conflict, and identify the major controversial issues involved therein, and then analyze them from the appropriate theoretical, legal, and conceptual perspectives. That will help to suggest the way forward to improve future relationship so that they can communally engage in fighting against impunity, as this is the ultimate goal of both the AU and the Court.

1.4 Objective of the Study

In one or the other way, the current controversial situation between the ICC and the so-called Africa links to the situations in the Republic of Sudan and Kenya. All the controversial claims and assertions have links to these two situations. So, it is demanding to zoom-in those basic controversial issues, and analyze them using appropriate theoretical, legal, and conceptual perspectives behind those controversies.

Accordingly, the main objective of the research will be to identify and analyze the main contentions between the ICC and Africa regarding the court's involvement in African cases. The specific objectives will be addressed are the following: -

- i. To explore the challenges attached to immunity of sitting heads of State;
- ii. To identify and examine the reasons behind the claim of bias against African leaders;
- iii. To explore justice perceptions and positions of the conflicting parties;

1.5 Significance of the Study

The research will contribute to development studies. It deals with issues of peace, justice, and security which are the basics of any development agenda. From the viewpoint of the international criminal justice system, it deals with controversial subjects of international law like universal jurisdiction, state sovereignty, immunity of sitting heads of state, and the like.

Generally, the study helps to understand the major conflicting interests between the ICC and relevant African actors. This, in turn, helps to develop policies and strategies to solve the problems as the ultimate goal of both parties is the same, fighting impunity. By doing this, we will be able to know where to invest and what to invest in the process of dealing with the issue at the hand.

1.6 Research questions

The main question that this research tries to answer is:

‘What are the contending positions between the ICC and the African actors regarding the Court’s involvement in the international crimes committed in African?’

By the ‘African actors’, I refer to those African countries and institutions which have a debate with the ICC like Sudan, Kenya, South Africa, AU, and PSC. So, this question tries to identify the main controversial issues raised in relation to the indictment of President Omar Al-Bashir, Uhuru Kenyatta, and Vic-President William Ruto.

In order to fully answer the main question, I pose four sub-questions. These are: -

1. How has the immunity of sitting heads of state treated in the relationship between the ICC and States Parties?

2. How are the African leaders treated by the ICC in the processes of cases selection?
3. How is justice perceived by the conflicting parties?

Chapter 2: Methodological Approach

Methodologically, I used a qualitative method of data analysis. I chose it because it is appropriate to my case in order to assess the understandings and perceptions of my interviewees depending on their own experiences and attitudes. The qualitative research:

Allows to examine people's experiences in detail, by using a specific set of research methods such as in-depth interviews, [...] allows to identify issues from the perspective of study participants, and understand the meanings and interpretations that they give to behaviour, events, or objects (Hennink et al. 2011: 9)

Qualitative research is a type of research which studies people in their own settings so that it becomes possible to know how people's experience and behavior is shaped by their environments and context of lives (ibid.). I found it a flexible and interpretative method that enables me to research and make sense of it from the viewpoint of my interviewees (ibid).

2.1 Selection of Source of Data

Primary and Secondary data are used in this research. The idea was to interview one state representative from the embassies of the respective countries found important for this research. The countries are from both states parties and non-states parties to the Rome Statute that actively participate in the debate.

The first group of countries is those have a tense relationship with the ICC. Sudan, Libya, Kenya, Uganda, and South Africa were selected as part of

this group. The justification is that, in one way or another, these countries have contributed to the current tense situation of the ICC in Africa.

The second group of countries is those that took steps to withdraw from the ICC membership. I wanted to know their main reason to leave the ICC and their next step in fighting impunity. Under this group, I had South Africa, Gambia, and Burundi. Gambia has already reversed its decision of leaving the Court. But still, I wanted to know their reason to go and to come.

The third group of countries was those known for their support for the ICC in Africa. Botswana and Cote d'Ivoire were selected. The fourth group constitutes only one country, Rwanda. I chose Rwanda for its active involvement in the issue while the country is not a party to the ICC. I wanted to find out Rwanda's justifications for becoming involved in the affairs of other countries and Rwanda's and other ideas for alternative justice system for international crimes committed in Africa.

Unfortunately, only South Africa, Kenya, and Uganda replied to my interview questions. Among these, Kenya backslid after knowing my research questions. So, in the end, only South Africa and Uganda were ready to talk to me. This, in turn, forced me to find out another way of addressing my objective.

Finally, I decided to take the Sudan and Kenyan controversial cases and explore the major controversies raised in those two cases. This time, the data I gathered from both primary and secondary sources are used to analyze those two cases.

Another selection concerned the NGOs working in this regard. Africa Legal Aid (AFLA), Coalition for the International Criminal Court (CICC), Africa Foundation for International Law (AFIL), Commission for

International Justice and Accountability (CIJA) and International Centre for Transnational Justice (ICTJ) were selected for this purpose. Except for the CICC, others were not responding. I went to their offices and tried to talk to them. AFLA agreed to my request but could not make it happen. The rest replied their organization has no direct involvement in the ICC system. Therefore, the interview in this regard was conducted only with the CICC.

Another selection was concerning prominent African intellectuals. Prof. Makau Mutua, Dr. Nourallah Elyas (Sudan), and Evelyn Ankumah were selected. They did not respond except Ankumah, the founder of AFLA. But she could not give a specific time for the interview either personally or through Skype. To compensate this, I tried to get some well-known intellect from Africa. Fortunately, Mr. Allan Ngari, Senior Researcher on Transnational Threats and International Crimes at the Institute for Security Studies, Pretoria, was proposed to me by Mr. Herman Bajwa of the CICC.

Here too, I could not get those people I assumed to get. So, this too forced me to choose another alternative. I just used online blogs like AFLA website which belongs to the NGO founded and directed by Evelyn Ankumah.

2.2 Sources of primary Data

As primary data, interviews, conventions, Legal Statutes, Agreements, Resolutions, press releases, Speeches, and Hansards are used.

I interviewed six peoples – each from the ICC, South African Embassy, Ugandan Ambassador, Judge from MICT, CICC, ISS. I interviewed all of them in person except one through Skype. What I understood was that they were not free to talk about the issue. They all choose diplomatic approaches in all their answers. They try to answer from the viewpoint of their country, not what they believe.

I recorded all the interviewees and transcribed it for my convenience to analyze them. Each of the interviews took more than 50 minutes.

I intensively used ICC and ICJ websites to get primary data. I found several important decisions that I used in my research.

2.3 Sources of Secondary Data

Different books, Journals, Articles, news, Research or working papers, etc were utilized as a secondary data source. I basically used three important books I found in the ISS library – The International Criminal Court and Africa, Africa and the ICC: Perceptions of Justice, and An Introduction to the International Criminal Court. They all are new books with recent information.

I used my data everywhere in my research where I found it necessary except interview results that I presented under chapter six.

CHAPTER 3: Review of Major Challenges and Counter Arguments

Introduction

Shortly after the materialization of the ICC through such amazing global participation, the Court started receiving strong oppositions from its biggest bloc which was triggered by the indictments of the Sudanese President Omar Al-Bashir and Kenyan President Uhuru Kenyatta and his Vice-President William Ruto (Okoth 2017: 02). The conflict involved many other African countries. But, not all African countries involved in the case (The guardian website 2016). Countries like Botswana, Cote d'Ivoire, Nigeria, Senegal, Tunisia, Burkina Faso, Cape Verde, and DRC are known for their strong support for the Court, and even sometimes opposing the measures of the AU (ibid.: 03).

Some argue that the real conflict is not between the ICC and African countries, rather between the ICC and the “African leaders who fight against the court to protect themselves from the court’s scrutiny” (The Guardian website 2016).

Therefore, this chapter is designed to identify those major controversial issues raised by the AU, Sudan, and Kenya and responses given by the ICC and its affiliates.

3.1. Challenges

3.1.1. The Republic of Sudan and the ICC

This was the case that first triggered the conflict between the ICC and Africa (Peter 2016: 16). The immediate triggering cause was the 4 March 2009 arrest warrant against President Omar Al-Bashir (ibid.: 17). The prosecutor requested the Court to issue an arrest warrant against him based on two crimes - Crimes against humanity which includes rape, murder, extermination, torture, and forcible transfer, and war crimes for intentionally attacking civilian

populations and individuals who did not take part in the hostilities and pillaging. And escalated with the second arrest warrant of 12 July 2010 (ibid.). He was suspected as a mastermind behind those human rights crisis in the region following the 2003 El Fasher Airpor attacked until 14 July 2008, when the ICC prosecutor produced its formal application to the Court seeking an arrest warrant against him (ICC website no data, Peter 2016: 15, Ocampo 2011: para. 8). He has become the first sitting head of state ever faced international criminal prosecution while remains in power (Du Plessis and Gevers 2009:3).

3.1.2 Facts: -

The Darfur case was referred on 31 March 2005 by the UNSC resolution 1593/2005 as per article 13(b) of the Statute following the report and the recommendation of the International Commission of Inquiry on Darfur which was established through the UN resolution 1564 in 2004, comprising 5 members - 3 from Africa, 1 Italian (Chairman), and 1 from Pakistan (Peter 2016:16).

This report disclosed the involvement of the government of Sudan in the Darfur crises. Accordingly, it was found that the government and the militia had committed crimes of rape and sexual violence, killings of civilians, destruction of villages, torture, forced disappearances, pillaging and forced displacement. The Commission found the government of Sudan liable for the crimes against humanity and that was targeted to destroy 3 black non-Arab African ethnic groups: Fur, Masalit, and Zaghawa (ibid.).

On 14 July 2008, the Prosecutor lodged its application to the Pre-Trial Chamber I (PTC-I) requesting arrest warrant against the President for the commission of genocide, crimes against humanity, and war crimes (Pre-Trial Chamber I 2009: para. 4).

3.1.3 Challenges followed the Indictment of the President

Even though several African Countries supported the step the UNSC took when referring the case to the ICC, many of them opposed the July 2008 indictment decision of the prosecutor as indicting sitting head of state is a political measure and that might have a detrimental effect on the promotion of peace and security in the region (Clarke et al. 2016: 15). The application of the Rome Statute, which is a treaty applicable among member states, is the center of the challenge as Sudan is not a party to the court (ibid.). However, the court refers to the UNSC referral Resolution 1593 of 2005 as the source of its power (UNSC 2005: Para. 2).

The Objection against the arrest warrant was even started before the March 2009 decision of the Court. The first of such objections came from the Sudan Workers Trade Unions Federation and the Sudan International Defence Group through their application of 11 January 2009 which raised four basic objections (Pre-Trial Chamber I 2009: para. 8). These objections were the following:

1. “Issuing such arrest warrants would have grave implications for the peacebuilding process in Sudan and that deference must be given to considerations of national interest and security”;
2. “That the interests of justice will not be served particularly in light of the Prosecutor’s conduct in bringing these applications”;
3. “That such warrants could entrench the negative perceptions of the ICC and thus contribute to a deterioration of the situation in Sudan”; and,

4. “That alternative means of transitional justice and resolution are being and will be pursued without the need for any consideration of involvement of the ICC at this stage”.

The Chamber rejected these claims and objections based on two reasons: first, the Chamber has no power to review the decisions of the Prosecutor, and second, it is not its duty to ascertain whether that measure would be detrimental to the interest of justice (*ibid.*: para. 15).

The second vital objection came from the AU’s Peace and Security Council (PSC). The Council requested the UNSC for deferring the request of the Prosecutor for the sake of mutually reinforcing the inter-linked subject of combating impunity though justice and promoting peace and reconciliation, and healing in Sudan (PSC 2008: para. 11).

Thirdly, the AU also immediately endorsed this communique of the PSC and urged the UNSC to exercise its power under the Statute and defer the request for an arrest warrant (AAU 2009a: para. 3). However, the then ICC Chief Prosecutor Luis Moreno-Ocampo was not convinced with the claims and insisted saying, “The execution of the arrest warrants will end the crimes in Darfur” (Ocampo 2011: para. 24).

There is a criticism against the decision of the Prosecutor deciding to pursue prosecution with complete negligence to the political situation and quests of reforms in Sudan and the region (Mbekiand Mamdani 2014, blog). Mbeki and Mamdani argued that it is this tendency of neglecting the reality and pursuing the Nuremberg model that is forcing some AU member states to advocate for withdrawal (*ibid.*).

The Nuremberg tribunal is also known for one-sided justice. It was established by the winners of the WWII and the judges were selected and

appointed from these countries. Because of this, the judgment rendered by this court is sometimes referred as “the winners’ justice” (Overy 2011, blog).

Mbeki and Mamdani argue that those support the Court are always criticizing the motive of African countries and their leaders rather than looking at the inadequacy of court trials to resolve mass violence which is political by nature than criminal violence. And they argued that prosecution will not solve the Sudan problem as the cause is politics that needs a political solution (Mbeki and Mamdani 2014, blog).

The court issued the second arrest warrant against the president on 12 July 2010. This woke up the African rulers to stand together against the indictment of sitting heads of state, may be to protect their tomorrow (Peter 2016: 17). The basic argument raised regarding the immunity was that the UNSC itself does not have a right to limit the customary international law that grants immunity (ECR2P 2016, website). This argument challenges the argument of the ICC which claims it has the power to do so because it is authorized by the UNSC through resolution 1593 (UNSC 2005: Para. 2).

3.2 The Republic of Kenya – Uhuru Kenyatta and William Ruto

The 2012 prosecution of Uhuru Kenyatta and William Ruto has brought many troubles in Africa (Knottnerus 2016: 152). The case got enormous attention by the AU after they were elected as President and Vice-President in the 2013 Presidential election of Kenya (Sadat and Cohen 2016: 101).

One of the challenging problems during this time was the absence of precedent to deal with these heads of state since no sitting head of state ever stand before the international criminal court (Peter 2016: 21). The investigation against these senior politicians was started as per the recommendation of the Inquiry Commission (CIPEV) (Peter 2016: 22). However, it is said to be the

first *Proprio motu* self-initiated investigation by the ICC prosecutor as per article 15 of the Rome Statute (ICC website no date). The fact it was said *Proprio motu* case is because there was no formal self-referral to the ICC as per article 14 of the Statute.

3.2.1 Facts: -

The government of Kenya established an International Commission called the Commission of Inquiry on Post-Election Violence (CIPEV), which comprised five members chaired by Hon. Mr. Justice Philip Waki, a judge of the Court of Appeal of Kenya, to investigate the 2007 – 2008 violence followed the Presidential election of 2007 (Peter 2016: 21). According to the report of the Commission, 1,200 people were reported dead, many injured and 500,000 displaced (Peter 2016:21).

The report of the Commission came up with three important recommendations: (1) Only perpetrators with greatest responsibility for commission of the crime especially crimes against humanity should be held accountable; (2) Special local court should be established to implement the recommendations, and (3) The case should be referred to the ICC if the government fail to establish the court (ibid.).

Therefore, it was this commission which identified the perpetrators, not the ICC (ibid.). Some refer to this situation as a quasi-self-referral since President Mwai Kibaki and Prime Minister Raila Odinga agreed to the recommendation and promised to prepare a bill for the establishment of the Special Tribunal to bring those most responsible (Mutua 2016: 53, Pre-Trial Chamber II 2009: para. 10).

The government of Kenya could not establish the proposed tribunal within the given one-year period. In February 2009, the Parliament rejected the bill presented to establish the tribunal (Hansen 2011: 4). This in turn divided

the opinions on what to be the next – taking the issue to The Hague or solving through local mechanism (Peter 2016: 22). Under two situations the Parliament of Kenya voted in favour of sending the case to the ICC (ibid.). Finally, in July 2009, Kofi Anna handed over the post with names of the perpetrators identified by the Waki Commission which included Uhuru Kenyatta and William Ruto (Hansen 2011: 4).

3.2.2 Challenges posed by the government of Kenya

In its 31 March 2009 application to the Chamber II, the government of Kenya expressly claimed that the ICC's trial of the Kenyan cases is against the sovereignty of the country, and requested the court to rule inadmissible and defer the case to the Kenyan national jurisdiction (Pre-Trial Chamber II 2011: para. 3). It was also criticized that it will be ultra-virus to exercise the primary jurisdiction over the Kenyan cases when the court is complementary to the national jurisdiction (ibid.: para. 6).

Kenya, in coordination with the AU, requests the UNSC to defer the Kenyan cases to the Kenyan judicial system leaving the ICC with the complementary jurisdiction (Arieff et al. 2011: 10). The main reason given for the request of the deferral was an issue of peace and security. But there was no an agreement on this issue. Some argued that the prosecution could stir up ethnic-violence, whereas others argue failure of prosecution will endanger future elections (ibid.). However, the UNSC rejected the referral request in November 2013 with majority vote

The Kenyan government believed that establishing Special Tribunal is not a solution. Rather preferred to establish a Truth, Justice, and Reconciliation Commission that was mandated to oversee the judicial reforms to enable the national justice system to be able to adjudicate the issue (ibid.: 11). Both Kibaki

and Odinga were on the side of national options (Kimball and Malalo 2009, blog).

Kenya, in cooperation with the AU, strived a lot for the amendment of the Rome Statute to end the Jurisdiction of the ICC that indicts sitting heads of state (Jalloh 2014: 43). Some argued that this is completely against the objective of the court and would make the Statute out of purpose (Mutua 2016: 55). Though this move failed, it was successful in persuading the ASP to adopt several amendments to the Rule of Procedure and Evidence of the Court which includes excusal of court attendance or trial, and attending through video technology like Skype (ibid.).

At the end, the Prosecutor withdrew its case against Kenyatta on 5 December 2014 due to the lack of sufficient evidence because the government was not cooperating (Mutua 2016: 55). Many argued that this was a severe blow specifically against the Court's legitimacy and credibility, and generally against the international justice system (DW website 2014b).

3.3. Counter Arguments by the ICC and Its Affiliates

The ICC and its proponents do not accept the claims and accusations made by the African actors. Desmond Tutu is one of them. For him, those claims from African leaders are the mere request to get a license to kill, maim and oppress their people (Peter 2016:1). Some others criticized the claims as they are designed to get recognition for atrocities so that the perpetrators will go free (Fombad and Nwauche 2012:100).

In most of the ICC supporters, the strong oppositions and accusations coming from the African actors were perceived as the proof of the strength and success of the court in fighting against the dictators and perpetrators. In this regard, Evelyn Ankumah, the Founding Executive Director of Africa Legal Aid (AFLA), argued that countries like Burundi, South Africa, and

Gambia would not decide to withdraw if the court was a lame duck, but because of their fear that it might bite them (Ankumah 2016, AFLA website).

According to some critics of this bloc, African leaders are a mixture of feudal monarchs, democratically elected leaders, and military rulers (Peter 2016: 01) who want to destroy the legitimacy of the court (Allison 2016, the Guardian), so that they can do what they want to do to their own people and rule for life (Peter 2016: 01). Still, some argue that these dictator leaders who were replaced into the shoes of the colonial rulers have been ruling their own people with an 'iron hand' and turned the continent into further human rights violation without any accountability except for their own wishes (Peter 2016: 01). For him, the ICC is established for the oppressed people of Africa to serve them as a shield from their dictators in the power and their counterparts in the forest (Ankumah 2016, AFLA website).

By looking at the human rights violation in different African countries, some conclude that it is not the ICC that targeted Africa, rather it is the situation in Africa that caused the ICC to pay more attention to Africa (Arieff et al. 2011:27). Ankumah makes it bold when she said "... the ICC is not the Problem [...], recognize the contribution it makes to our societies. The problem concerns structural flaws in our own African systems of government" (Ankumah 2016, AFLA website).

The current chief prosecutor Fatou Bensouda, Gambian, has argued that "the court is protecting Africans rather than targeting them" (ibid.). Kofi Annan, the former UN Security General, contended that:

In all of these cases, it is the culture of impunity, not African countries, which are the target. This is exactly the role of the ICC. It is a court of last resort (ibid.:28).

When answering the question of why only African? What about the leaders of the powerful countries? Ankumah argues that such position will not serve the justice. Rather “such reasoning implies that if one person cannot be held criminally accountable, no one should. It means giving up international criminal justice” (Ankumah 2016, AFLA website). Ban Ki-Moon, UN General Secretary, rejected this criticism of ‘selectivity’ as both unfair and inaccurate as most of the cases before the court are self-referral by those states see the court as a help, not a threat, while the Darfur was the UNSC’s referral and the only case the court initiated is the Kenyan case (Ban Ki-moon 2010, UN website). He also said, “There is a broader point, African society is cheering. To them, the Court is where we all should be, firmly on the side of the victims” (ibid.).

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Chapter 4: Theoretical Discussion

Introduction

Under this chapter, I will present two theories, Legitimacy and Universality, that help to analyze my research. The reason to choose these two theories link to the nature of the ICC and the crimes enshrined in the Rome State.

The fact that the ICC is a treaty-based international court tells us that its legitimacy depends on the perception or acceptance of each of its member states. All the cooperation and obedience to the court's order depends on the level of acceptance of the court in that specific country.

The crimes enshrined under the Statute are said to be the crimes against the international community as a whole, which is to mean those crimes are universal crimes. Depending on this claim, I am convinced that my research will sound better if how this universality is operating in the relationship between the two conflicting parties.

4.1 Legitimacy of International Institutions

For my discussion of legitimacy discussion, I appeal to Daniel Bodansky's concept of legitimacy in international law. I take legitimacy as one of my theoretic lenses to answer the basic questions of the international law jurisprudence like, what causes obedience? why subjects obey rules? what is the extent of their obedience? (Frank 1988: 706, Bodansky 2008: 310).

The need for international adjudication comes as a result of the contemporary system of international governance which is based on the international interdependence between states and state organs. The early twentieth century agreements between states embraced the necessity of

international cooperation to tackle international crimes either by extraditing or prosecuting the perpetrators of such crimes (Luban 2008: 4). This, in turn, necessitates the quest for the legitimate international court which can administer all those areas of legal affairs during that international interaction (Dersso 2016: 61, Richardson 2013: 81). The legitimacy confers on this court basically depends on its ability to administer this complex relationship (Shany 2014: 137). Different states give the different status of legitimacy for international courts depending on their own interest. The full-fledged and legitimate international courts are those courts “whose authority has been accepted by states, public opinion within the state, potential litigants, and other stakeholders” (ibid.).

Establishing what is legitimacy is not an easy task. As Bodansky argues, “It is difficult to establish that something is legitimate, but it is much easier to show that it is illegitimate” because factors of illegality are much agreed upon, like bias, Violations of fundamental human rights, and so forth (Bodansky 2008: 315).

According to Bodansky, there are three reasons for obedience: Rationality, Compulsion, and Deference (Bodansky 2008: 310). In my case, the question is which one of this theory may apply to the relationship between the ICC and the state parties to the Statute, especially the Africans subject to this research.

As per the Rationality theory, a subject may legitimize an authority and submit to its rules because he or she is rationally persuaded that that is correct, ‘based on whatever standard of correctness he or she chooses to apply’ (Bodansky 2008: 310). For instance, someone might be convinced with the arguments made by the other person and subdue to that argument even though there is nothing threatening or compelling to do so.

The second type of obedience emanates from the use of pressure or compulsion. Here, someone may abide by the rules and procedures not because he or she believes that that is right, but because of the fears of adverse consequence of not complying accordingly.

Still, as the third way of obedience, someone may abide by the orders, not because of the fear or rationally thinks that it is right, but rather because he or she “accepts the decision-making process as legitimate” (Bodansky 2008: 310). For instance, the processes followed, being transparent, and participatory may compel him or her to abide by. If there is such type of institution, people need to defer to its order even though they are not convinced by the decision. Here, the driving force is not fear or compulsion, but justification (Bodansky 2008: 311).

Some argue that the basic element of legitimacy in the relationship between the states and the international institutions is self-interest. It is stated as follows:

One of the reasons why states might agree to subject themselves to the authority of an international institution is that they think that such institutions are in their self-interest (Bodansky 2008: 312).

The self-interest in such type of subjection is a principal defining reason for the existence of the subjection. And, in such situation, self-interest and legitimacy cannot be separated, they work in tandem (Bodansky 2008: 312).

But, Bodansky argues that the fact that we need some international institution does not mean that we confer legitimacy for all such type of institutions (Bodansky 2008: 312). For instance, there might be an absolute demanding interest to establish an international institution that investigates and

prosecutes the cruelest international crimes at the international level. According to this argument, however, we do not have to necessarily give legitimacy to the ICC merely because it works what we are interested in.

In relation to the specific case under the study, Africans have shown their deeper interest and commitment to have an international criminal court that will take-over their biggest security problems in the continent. However, still, they may not give legitimacy to the ICC, for whatever reason. They might rationally think that the court is biased, or something else. Therefore, even if a 'self-interest' criterion is fulfilled, still they may not work in tandem.

This makes the concept of legitimacy very complex. Therefore, we need to deeply understand what legitimacy means and how it works. We can approach it from two perspectives: philosophical or Political, and Sociological theory – also called normative legitimacy, and social legitimacy (Bodansky 2008: 313).

The philosophical perspective tries to explicate legitimacy from its normative characteristics. Thus, it asks, "What gives some institution or individuals the right to rule? Why they have to the right to do what they do? (Bodansky 2008: 313).

From the Social dimension, we ask, "what do the relevant actors think about legitimacy? On what basis do they think that an institution or person has the right to rule? (Bodansky 2008: 313). In contrast to the normative one, this is factual, i.e., we can empirically study the social dimension of legitimacy by interviewing individuals or from the views of state (Bodansky 2008: 313). The kind of interviews I had in relation to the ICC will ascertain the sociological perception of the interviewees about the court's role while involving in African cases. That means, how they legitimize the court based on their observations.

Normative legitimacy measures legitimacy based on procedural requirements using the list of sophisticated standards like transparency, and accountability, which are ideal in nature because the states or individuals do not apply those standards to measure legitimacy (Bodansky 2008: 314). On the other hand, social legitimacy argues that the legitimacy is “grounded in the social reality, in the actual views of the relevant actors” (Bodansky 2008: 314). For instance, based on the above explanations, when we talk about the legitimacy of the ICC, we are talking about its acceptance by its state parties, not about some sophisticated system the ICC depends on to work. For example, the complex building it owns, the number of qualified employees, and so forth. The ICC needs these all, but not for legitimacy.

People look at actual outputs of the institution, not the complex procedures it has. Therefore, “to the extent that an institution or decision-maker is producing good results (output), we tend to defer to its decisions” (Bodansky 2008: 315).

Saying legitimacy depends on the views of the actors, we conclude that each actor, which are collectively the bases of the legitimacy, defines legitimacy from its own angle. Therefore, “the bases of social legitimacy may not be universal” (Bodansky 2008: 314). The government actor understands legitimacy from that perspective. So, for him or her legitimacy might be about sovereignty, consent, immunity, and so forth. But, for the actor from the civil society, legitimacy may mean the protection of human rights, equal participation, and the like. It also differs depending on the cultural differences between the actors (Bodansky 2008: 314).

Legitimacy cannot be created at once, it takes time to develop because it takes time to develop a body of experience to evaluate whether an institution is producing good results. Deference to an

institution develops gradually as the institution proves itself worthy of support (Bodansky 2008: 315).

4.2 Universality of International Law

The universalist theory argues that some rights are universal norms and applicable everywhere (Steiner et al. 2008: 517). This commonality is because all human being “belongs to common species and share in common a set of basic capabilities and needs” (Parekh 2005: 284). That is to mean all human beings are equally dignified (ibid.: 519). It also insists that the principles under the international human rights documents have been accepted as universally acknowledged standards of achievement which later on has become international morality since the half of 20th century, especially through ratification of treaties (AIV 2008: 10).

It advocates that the universalization of international law is desirable and urgent to “to establish a public order on a global scale, a common legal order for mankind as a whole” (Simma 2009: 267). It promotes the proliferation of international law, establishing a hierarchy of norms, the introduction of the international criminal law, the existence of institutions and procedures that enforce these common interests of a human being at the international level for the emergence of the international community (ibid.: 268).

On the other hand, there is cultural relativist school of thought which stands at the opposite end of the specular to the universalist view of the universality of international law. It argues that there is no universal norm because all cultures are context specific (Steiner et al. 2008: 517- 518). The argument is that there no moral principle that can be applicable to all cultures, and therefore, human rights is not universal, but culturally dependent (GPF no date). The principles in the UDHR are challenged as a product of the Western political history (ibid.). Universalism is also criticized as a movement to extend the Western culture to the rest of the world (ibid.). It argues that:

“There are no transcendent or transcultural ideas of right can be found or agreed on, and hence that no culture or state is justified in attempting to impose on other cultures or states what must be understood to be ideas associated particularly with it’ (Steiner et al. 2008: 518).

So, it insists that the claim of universality is merely the “arrogance and cultural imperialism of the West” and the move to the universalization of norms is nothing than the effort to destroy cultural diversity and to bring global cultural homogenization (ibid.).

From the criminal perspective, the universalist views that the establishment of the ICTY, ICTR, ICC, and other international institutions are the illustrations of the existence of international norm and its application at the through international institutions at the international level (GPF, no date). However, the cultural relativists always advocate for the “traditional or local approaches to justice as that will contribute more to post-conflict reconciliation” (ibid.).

CHAPTER: 5 ANALYTICAL DISCUSSIONS

Introduction

Both the AU and the ICC are meant to have common agenda – fighting against impunity (Murithi 2013: 2). Their respective constitutive legislations verify this fact (AU 2000: Art. 4(o), Rome Statute 1998: Preamble para. 5). However, they are always in conflict since the ICC started indicting the African sitting heads of state, especially Omar Al-Bashir, Uhuru Kenyatta and William Ruto. So, it is very important to know how they understand justice and tries to address impunity. Similarly, they both claim to be a beacon of justice. However, they cannot agree on what amounts to justice. The ICC is striving to attain justice by prosecuting the perpetrators, while the AU and its supporters choose the Transitional or local mechanisms to achieve justice, peace, and security (Olugbuo 2010: 106). For the ICC prosecution will bring lasting peace, whereas prosecution is a threat to peace and security for African actors (Dersso 2016: 65).

What matters in all these differences is the way both parties treat that same concept from their own historical, theoretical, and cultural perspectives. For the purpose of my analysis, I divided the overall controversies raised in the cases of Sudan and Kenya into two – Pursuit of Justice, and Immunity of Sitting Heads of State. These are the basis of all other debates that have been taking between the ICC and Africa.

5.1 The Immunity Debate: Immunity of Sitting of Heads of State

There has been a debate over whether certain senior state officials, like heads of state or government, should enjoy immunity from foreign criminal jurisdiction for international crimes committed while in office. The debate engages two branches of international law – the law of state and diplomatic immunities and international criminal law (Akande 2004: 407). On the one hand, there is a well-established law that confers immunity to the state and its

officials, to prevent undue intervention by foreign states. On the other hand, there are international law principles that strive for the protection of the values and principles of human rights which believe immunity endangers such effort (ibid.).

In principle, any state is entitled to exercise jurisdiction over anyone belongs to that territory. The exception is when that person enjoys immunity from foreign jurisdiction (Kolodkin 2008: para. 56). Roman Kolodkin, special rapporteur of the International Law Commission (ILC) on the subject of al immunity of state officials from foreign criminal jurisdiction, defined immunity as “the privilege of exemption from, or suspension of, or non-amenability to, the exercise of jurisdiction by the competent authorities of a territorial State”, or “non-existence of power or non-amenability to the jurisdiction of the national authorities of territorial state” (Kolodkin 2008: para. 57). It is, “a plea relating to the adjudicative and enforcement jurisdiction of national courts which bars the national courts of one state from adjudicating the disputes of another state” (Fox et al. 2013: 1).

The immunity of state officials is of two types – Functional Immunity (Immunity *ratione materiae*) and Personal Immunity (Immunity *ratione personae*).

5.1.1 Functional Immunity (Immunity *ratione materiae*)

It is a type of immunity that is enjoyed by anyone acted on behalf of them with respect to his or her official capacity (Akandeand Shah 2011: 825). It is conduct-based immunity because it is attached to the official acts regardless of the status of the actor or whether he or she is still in the office or left (ibid.).

There are two basic defining purposes of functional immunity. The first is that functional immunity constitutes substantive defense (ibid.: 826). That means, the individual acted on the behalf of the state on the bases of his

official capacity is not liable for that act because the act imputes to the state (ibid.). In this sense, “immunity *ratione materiae* is a mechanism for diverting responsibility to the state” (ibid.). The second purpose for granting function immunity is to prevent the third (hosting) country from interfering in the international issues of sovereign (sending) country by bringing proceedings against the representative of the sovereign country (ibid.: 827).

Now, the question is whether functional immunity can be invoked for the violation of international crimes, like those crimes under the Rome Statute. There is no conclusive answer or position on this question. Those opposing the application of functional immunity for violation of international crimes have developed three argumentative approaches. The approaches are discussed below: -

The first approach argues that officials cannot claim functional immunity for violation of serious international crimes since such acts do not amount to a state function (Advisory Committee on Issues of Public International Law 2011: 17). Akande and Shah explained this argument as follows:

State immunity applies only in respect of sovereign acts and international crimes, particularly those contrary to *jus cogens* norms, can never be regarded as sovereign acts ... acts which amount to international crimes may never be regarded as official acts. When a state engages in acts which are contrary to *jus cogens* norms it impliedly waives any rights to immunity as the state has stepped out of the sphere of sovereignty (Akande and Shah 2011: 828).

According to this approach, atrocities against human rights do not qualify a sovereign act. In such cases, domestic courts can deny sovereign immunity since such acts do not amount to a sovereign act (Belsky et al. 1989: 377). This means that a state loses its sovereign immunity when it harms an individual in

abuse of norms of jus cogens (ibid.: 367). Jus cogens norms are defined as rules from which states may not derogate. They are norms and values that require absolute protection for the benefit of the global community (ibid.: 387).

The Amsterdam Court of Appeal also decided as, “The commission of very serious crimes of this kind cannot, after all, be regarded as one of the official duties of a head of state “ (Advisory Committee on Issues of Public International Law 2011: 17).

The second approach assumes that international crimes amount to a violation of peremptory norms of international law (jus cogens) (Advisory Committee on Issues of Public International Law 2011: 18). Vienna Convention defines Jus cogens (Peremptory norm) as follows:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. [...] a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character (UN 1969a: Art. 53).

The argument is that since peremptory norms are hierarchically superior to international law, they must prevail over rules of international law which confers immunity. This argument was raised by Siderman against the Republic of Argentina for the crime of torture. He argued as follows:

The principles of jus cogens norms enjoy the highest status within international law, and thus prevail over and invalidate [...] other rules of international law in conflict with them [...] since sovereign immunity itself is a principle of international law, it is trumped by jus cogens. In short, [...] when a state violates jus cogens, the cloak of

immunity provided by international law falls away, leaving the state amenable to suit (Akande and Shah 2011: 833).

Akande and Shah rejected this argument based on the following reasons. First, even though some crimes such as war crimes, crimes against humanity, genocide, aggression, and torture are recognized as peremptory norms, “it is by no means established that all rules prohibiting international crimes are prohibitions that rise to the level of jus cogens” (Akande and Shah 2011: 833).

Second, since the main purpose of state immunity is to prevent adjudication in a foreign domestic court, the rules concerning state immunity do not necessarily contradict with norms of jus cogens (Akande and Shah 2011: 834). For the granting of immunity not to be in conflict with the norms of jus cogens, two criteria need to be fulfilled. First, there has to be an obligation on the third state to domestically prosecute those violations, and second, that obligation on the third state has to be a jus cogens norm itself (Akande and Shah 2011: 834).

The third approach asserts that functional immunity could not be invoked because the perpetrator is individually responsible, regardless of his/her status, for committing an international crime (Advisory Committee on Issues of Public International Law 2011: 19). The violation of international law is committed by individual persons even if they use government resources or policies. This act cannot be imputed to the government to claim functional immunity for such acts (ibid.).

5.1.2 Personal Immunity (Immunity Ratione Personae)

The second type of immunity is Personal immunity. The International law accords such immunity on some state officials based on their official status which lasts if they are in office tenure (Akande and Shah 2011: 818). This type of immunity is not limited to official activities, but also to private acts

(Advisory Committee on Issues of Public International Law 2011: 11). Hence, it is called absolute immunity (Akande and Shah 2011: 818). The reasons for such absolute immunity are to ensure a smooth relationship between states in their international relations, to secure effective communication between the states, to eliminate any potential harassments, and to enable the persons to function and move freely when representing the interests of their country (ibid.: 818). In this regard, the International Court of Justice (ICJ), in its decision in the case of *Djibouti v. France*, said the following:

A Head of State enjoys in particular full immunity from criminal jurisdiction and inviolability which protects him or her against any act of authority of another State which would hinder him or her in the performance of his or her duties (ICJ 2008: para. 170).

Similarly, in the arrest warrant case of *DRC v. Belgium*, the ICJ decided that:

The functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another state which would hinder him or her in the performance of his or her duties (The Arrest Warrant Case 2002: para. 54).

The expression 'full immunity' is the same with 'absolute immunity' or 'personal immunity' (Advisory Committee on Issues of Public International Law 2011: 11). The customary international law accords absolute immunity to the head of state because he is assumed as the personification of his state (ibid.).

The ICJ decision of the Arrest Warrant case put an exception when the sitting heads of state may not enjoy immunity. The decision states:

Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances (The Arrest Warrant Case 2002: Para. 61).

These certain circumstances are: first is when that official does not enjoy such immunity under his own country, second, when the state they represent waives that immunity, third if the official ceases to hold the office, and the fourth, which is very important in this case, is when the state official is indicted by international criminal tribunals, like the ICC (*ibid.*). In relation to this, the conclusion reached by the Dutch Advisory Committee on International Law (CAVV) regarding the applicability of immunity in the Netherlands is interesting. It states as follows:

The CAVV, therefore, concludes that the existing immunity rules under international law are applicable in case of national proceedings not based on a request of the ICC (Advisory Committee on Issues of Public International Law 2011: 25).

This conclusion differentiates between the national jurisdiction from that of ICC. Therefore, it concluded that the Courts of the Netherlands cannot by themselves try a foreign official in the Netherlands. However, if the country is ordered by the ICC, being the state party to the Court, then the country can arrest and surrender as per the order of the Court.

5.2 Prosecutorial vs Transitional Justice Debate

This is the second main debate between the ICC and African actors. Under this sub-topic, I will raise two inter-dependent debates: Prosecutorial justice and Transitional Justice.

There are different perceptions and theorizations concerning the role of international law in promoting justice, peace, and security. Some argue (internationalist and cosmopolitan) that “international law has the potential of limiting or even abolishing war by constraining the actions of states” whereas, others claim (realist or instrumentalist) that “the peace regulated by the international law is merely political, reflecting a situation in which powerful countries see themselves better served by peace than war: as soon as this situation changes, international law will change with it and war return” (Liden and Syse 2015:22).

According to the latter view, international law is the liberal peace instrument, “the weapon of the stronger”, through which sovereign states are forced to accept some particular world order in the name of international peace and security where they could have benefited from another kind of order at their disposal (Liden and Syse 2015:22-23).

However, there is an opposition to this assertion from those who believe that justice and peace are not mutually exclusive to each other. They argue that justice, peace, and security need to co-exist comprehensively (Dersso 2016: 61).

The task to choose between these two intermingling concepts is not an easy job. One of the most discontents and oppositions of the African actors against the ICC alleges that the court’s pursuit for prosecutorial justice is at the expense of sustainable peace in the continent (Dersso 2016: 65). For these actors, peace and security are claimed to be a priority choice in war or transitional situations than rushing to prosecute the perpetrators. The primary interest of the society in such situations is to be rescued from the danger of the war and to make their future safe and perpetual. They primarily justify their opposition against the ICC’s intervention in such unstable situations as that may result in further destabilization and worsening the situation rather than

satisfying the interests of the victims, the country, and the continent as a whole (Dersso 2016: 65).

They strongly claim that the pursuit of justice should not be in a way jeopardizes peace and security. On this point, the decision made by the African Peace and Security Council (PSC) on 21 July 2008 regarding the ICC's arrest warrant application of 14 July 2008 against Omar Al Bashir is very important. The commission expressed its strong conviction that "... the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace" (AU Peace and Security Council 2008: Para.3).

This claim does not reject prosecutorial justice, rather demands prioritization and selecting proper time before interfering in such fragile situations. On this account, the AU chairman Jakaya Kikwete, Tanzanian President, justified the AU's opposition against the arrest of Omar Al Bashir saying: -

Justice has to be done. Justice must be seen to be done. What the AU is simply saying is that what is critical, what is the priority, is peace. That is priority number one now. We should do the first thing first (Heavens 2008, blog).

It is on this account that some scholars argue that it is not possible to easily dismiss the AU's concern of a careful execution of the arrest warrants against Al Bashir. Otherwise, it could further instable Sudan and neighboring countries (Ero 2010:14). The AU High-Level Panel on Darfur held the same position. It concluded that African Union will not take his hands out from the Darfur situation as that could impair the whole continent (AU's Peace and Security Council 2009:80, Para.292). It also expressed its primary focus in war situations is to restore peace, security, and reconciliation (Dersso 2016:65).

Some research concluded that, even though the ICC was established as an independent and impartial international justice instrument, both the timing and nature of its indictments issued so far suggest that its involvement in the circumstances of ongoing conflict is influenced by broader external factors (Geis and Mundt 2009:13).

This problem associates with the debate as to whether enforcing justice and peace is possible at the same time. Some argue that peace and justice are inseparable, and none of them is mutually exclusive. For instance, Kofi Annan argued that “justice, and peace ... are not mutually exclusive objectives, but rather mutually reinforcing imperatives” (Olugbuo 2010:111, Dersso 2016:61). At this point, the speech of Mr. Ban Ki Moon, UN Secretary-General, delivered at the conference of Kampala, Uganda, on 31 May 2010, worth mentioning here. He said,

Perhaps the most contentions challenge you to face is the balance between peace and justice. Yet frankly, I see it as a false choice [...] Between war and peace must first come something else: reconciliation, forgiveness, a mending of the social fabric. These are the hand-maidens of peace and justice. We have no choice but to pursue both, hand in hand (Ban Ki-moon 2010: Conference Press Release, Kampala).

On the other hand, for Geis and Mundt, this assertion is not practical in the ongoing war situations. They argued that since there is an inherent tension between peace and justice, getting full cooperation from someone going to be persecuted is not convincing (Geis and Mundt 2009:13). That means, it is not possible to simultaneously enforce justice and peace at the same time in such complex war situations. Therefore, the choice of the court in how to intervene in such situations is very important. The strict pursuit of prosecutorial justice may risk the peaceful settlement of the conflict and elongate the crisis. In this regard, Thabo Mbeki and Mahmood Mamdani contended that “in a context of

civil war, ‘to call simply for victims’ justice, as the ICC does, is to risk a continuation of civil war’” (Dersso 2016:66). They further argued that,

There are a time and a place for courts, as in Germany after Nazism, but it is not in the midst of conflict or a non-functioning political system. Courts are ill-suited to inaugurating a new political order after civil wars; they can only come into the picture after such a new order is already in place (Mbekiand Mamdani 2014).

According to them, in civil wars, no one is purely innocent or guilty. Thus, no need of permanently assigning as perpetrators or victims. Rather, “there must be a political process where all citizens – yesterday’s victims, perpetrators, and bystanders – may face one another as today’s survivors” (Mbekiand Mamdani 2014). They advocate for political solutions than judicial solutions in such circumstances.

Best examples they present here are the case of South African’s Convention for a Democratic South Africa (Codesa) and the Rwandan genocide cases. They became successful because the ICC was not there in those days. They just followed what they agreed upon to be necessary to save their future by forgiving their past. In both cases, national negotiations and reconciliations were the major tools to bring all citizens near the table to discuss and bring common solution by giving amnesty to perpetrators. They did this because they believed, “if you threaten to put your opponents in the dock, they will have no incentive to engage in reform” (Mbekiand Mamdani 2014). For them, the model the ICC has been pursuing does not work to bring justice and lasting peace in the civil war situations. That is because “mass violence is more a political than a criminal matter. Unlike criminal violence, political violence has a constituency and is driven by issues, not just perpetrators” (Mbekiand Mamdani 2014). Therefore, they argue,

Rather than criminalize or demonize the other side, as was tempting, they sat down to talk. The process was punctuated with many a bloody confrontation, [...], but the eventual outcome decriminalized the alleged perpetrators and incorporated them into the new political order. Yesterday's mortal enemies became mere adversaries (Mbeki and Mamdani 2014).

5.3 Jurisdiction of the ICC – Complementarity

The concept of complementarity first appeared in the Draft Statute of the International Criminal Court of 1994 which was prepared by the ILC (International Law Commission) (ILC 1994: Preamble para. 3 and Art. 35).

The idea to confer primary jurisdiction to the international criminal court was rejected because the states refused it because they believed that endangers their sovereignty (Solera 2002: 146).

Complementarity is not only a right but an obligation as well. It vests primary responsibility on the member states to fully implement and follow the principles of the Rome Statute in order to fight impunity. This could be complemented by the speech of Mr. Christian Wenaweser, The President of the ASP when he said the following:

‘The state parties have the primary responsibility and competence to ensure that there was no impunity for the most serious crimes under international law and that the ICC merely has a complementary role in cases where national proceedings were not effective’ (ICC website 2011).

According to Article 1 of the Rome Statute, the Court's jurisdiction is a complementary to national criminal court. Then, Article 17 sets substantive criteria for admissibility of a case before the court. Four Criteria are set out under sub-article 1. These criteria will be assessed

under the general principle laid down under Sub-article 2 – due process international law. In general, the admissibility test consists two main parts. The first part considers whether the case has been or is being investigated or prosecuted (CMN website 2016). This further needs to assess whether the case has been or is being investigated is the same with the one before the ICC and assesses whether there is unwillingness or inability in the side of the country having a jurisdiction (ibid.).

The second criterion of the admissibility test is about the gravity threshold which examines the seriousness of the crime (ibid.). According to the decision of the Appeal Chamber of the ICC, the terms ‘unwillingness’ and ‘inability’ refers that there is formal investigation or prosecution by the government, whereas ‘inaction’, the term not clearly used in the article, indicates no investigation or prosecution is started (ibid.).

Article 17 (1)(a) deals with the situation when the state is unwilling or genuinely unable to carry out the ongoing investigation or prosecution, whereas 17 (1)(b) is a situation under which a state carried out its investigation but decided not to prosecute the perpetrator for any reason. These two circumstances would activate the complementary jurisdiction of the court. In this regard, the decision of the Appeals Chamber of on the admissibility challenge raise in Mr. Germain Katanga is very important. It says the following:

In considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a)

and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute (ICC 2009: Para. 78).

To determine unwillingness, the court needs to prove the existence of one of the three criteria set out under Art. 17 (2) (a-c). The first criterion for the court to exercise complementary jurisdiction is when the court reasonably find that the decision made by the government was intended to shield the perpetrator to escape accountability (ibid.: Art. 17(2)(a)). The second criterion is an unjust delay to start investigation or prosecution (ibid.: Art. 17(2)(b)). The third concerns the issue of independence and impartiality of the court (ibid.: 17(2)(c)). And the fourth criterion assesses the gravity threshold of the case.

The inability criterion of a state is measured from its overall capacity to effectively entertain the case. Here, the first thing to be examined is a total collapse or unavailability of national judicial system that can investigate and prosecute the case; second inability to access the perpetrator, or to collect evidence and testimony, or any other ground hinders to carry out the proceeding need to be examined to exercise complementary jurisdiction (CMN website 2016).

This criterion of incapacity or inability is criticized for working in favor of developed countries while jeopardizing the poor countries those do not comparatively have developed the system. Louise Arbour, a former Prosecutor of the ICTY and ICTR, argued that:

The regime would work in favor of rich, developed countries and against poor countries. Although the Court's Prosecutor might easily

make the claim that a justice system in an underdeveloped country was ineffective and therefore unable to proceed, essentially for reasons of poverty, the difficulties involved in challenging a State with a sophisticated and functional justice system would be virtually insurmountable (Schabas 2017: 178).

William Schabas argues that what was intended by the complementarity principle and what actually happened are quite different. He said, “what is created is a relationship between international justice and national justice in which the two systems functions in opposition and to some extent with hostility vis-à-vis each other” (Schabas 2017: 171).

Chapter 6: Data Presentation and analysis

Introduction:

This chapter presents and analyses the data collected through the primary and secondary data gathering techniques. All the interviews were conducted in The Hague, Netherlands. Among the six selective interviews, one was held through skype. The interviewees were purposely selected from different stakeholders - from the ICC, African embassies, international NGOs work on advocating the ICC, and prominent African intellectuals familiar with my issue.

As per my objectives, I will present the data under three themes intended to answer the question embedded in each objective. The themes are Bias against African leaders; Immunity for Sitting Heads of State; and Prosecution vs Transitional Justice.

Table 1. 1: Details of Interviewees

	Interviewee	interview		
1	Mr. Andre Stemmet	21 August 2017	Legal Counsellor of the South African Embassy at The Hague and Deputy Permanent Representative to the ICC	Embassy of South Africa, The Hague
2	Herman Bajwa	12 Sept. 2017	Advocacy Officer of the Coalition for the International Criminal Court (CICC) comprised of 2,500 NGOs	CICC Office, The Hague
3	Mirjam Blaak	18 Sept. 2017	Ugandan Ambassador at the Brussels and Permanent Representative to the ICC	Hilton, The Hague
4	Justice <u>Salomy Bossa</u>	18 Sept. 2017	<u>Judge:-</u> 1. Supreme Court of Uganda; 2. African Court of Human Rights and peoples' Rights; 3. ICTR; 4. MICT	Hilton, The Hague
5	Shamiso Mbizvo	20 Sept. 2017	International Cooperation Advisor of the OTP	Office, ICC, The Hague
6	Allan Ngari	10 Oct. 2017	Senior Researcher on Transnational Threats and International Crime at the Institute of Security Studies (ISS), Pretoria	Skype

Source: Researchers construct.

6.1 Bias against African Leaders

This theme of analysis is designed to examine what data say about the bias against African leaders during the selection of cases by the ICC prosecutor. Here, I used primary and secondary data sources. As a primary source, I used Interview and two documents of the OTP: Case Selection Policy and Preliminary Examination Policy. As a secondary data source, I used interviews conducted on the former and present Chief Prosecutors of the ICC – Luis Ocampo and Fatou Bensouda, respectively.

As been discussed earlier, there are several debates on the issue of bias of the Prosecutor while choosing cases to proceed. Those criticise the Court for this issue call the Court as a Neo-Colonial instrument of the West, or Caucasian Court that works to dominate Africans (Plessis 2010: vii, Dicker 2015:3, Reuters 2016, Published on October 26). The history of the Court also shows all suspects their cases are presented to the Court are only Africans (ICC website 2017). Many critics use this fact as the evidence to prove the biasedness of the prosecutor and the application of double standards for cases from Africa and from the developed countries, which are alleged to be the financial sources of the court (Plessis 2010: vii, Dicker 2015: 3).

As the Policy Paper on Preliminary Examinations of the OTP says, the Prosecutor is independent, impartial, and objective in all its case selection and investigation processes (OTP 2013: Art. 3 (25)). According to this policy document, they seriously consider the criteria set out under the Statute, i.e. jurisdiction, admissibility, and the interest of justice, and use ‘reasonable basis’ standard of proof to proceed with any cases triggered through the referral, acceptance of jurisdiction or *Proprio motu* (ibid.: para. 5).

According to the Case Selection Policy Paper of the OTP, the following is the basis for the selection of cases. It says:

The Office will select cases for investigation and prosecution in light of the gravity of the crimes, the degree of responsibility of the alleged perpetrators and the potential charges (OTP 2016: Art. 5 (34)).

The gravity criterion looks at the seriousness of the crime from the perspective of the international community as per article 17(1)(d) of the Statute (ibid.: 35 and 36). Regarding specific elements of the gravity criterion, it says the following:

The scale of the crimes may be assessed in light of, *inter alia*, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, and their geographic or temporal spread (high intensity of the crimes over a brief period or low intensity of crimes over an extended period) (ibid.: 38).

Under the second criterion of the degree of the responsibility of the perpetrator, the prosecutor, in principle, look at those most responsible perpetrators found at the top of the pyramid. As an exception, the prosecutor may prosecute lower-level-perpetrator only if his or her act is found to be grave or notorious (ibid.: 42). This last criterion seems as if the prosecutor hunts people at the higher positions. However, the document clarifies what is meant by 'the most responsible' when it says:

The notion of the most responsible does not necessarily equate with the *de jure* hierarchical status of an individual within a structure but will be assessed on a case-by-case basis depending on the evidence. [...] the extent of responsibility of any identified alleged perpetrator(s) will be assessed on the basis of, *inter alia*, the nature of the unlawful behaviour; the degree of their participation and intent; the existence of any motive

involving discrimination; and any abuse of power or official capacity (ibid.: 43).

There is also the ICJ decision on this issue of degree of responsibility. In the case of Prosecutor v. Jean-Pierre Bemba, the court decided as follows:

The Chamber considers [...] the responsibility of superiors by virtue of the powers of control they exercise over their subordinates. [...] The fundamental responsibilities which such superiors assume, and the potential for irreparable harm from a failure to properly fulfill those responsibilities, has long been recognized as subject to regulation by criminal law (ICC 2016: para. 172).

Regarding the third criterion, the potential charges, the prosecutor gives particular consideration to crimes culturally under-prosecuted such as crimes against children or most affect children, rape, crimes targeted to destroy cultural, religious, historical and other protected objects, crimes targeted humanitarian workers and peacekeeping workers (ibid.: 46).

I got a variety of replies to this question. My interviewee from the South African Embassy, Mr. Andre Stemmet, said the following: -

I personally think the bias debate is an unfortunate debate. Almost all cases in the court are in fact from Africa. But that is because they were referred by the Africans themselves. The court does not have a say in the cases referred by the SC. So, we cannot blame the court on that ground. So, I do not really see any bias in the court.

Similarly, Mirjam Blaak said:

The prosecutor did not select most of those cases, just referrals, either by the states themselves or the UNSC. So, those arguments are not holding so much, because it was not the prosecutor who made those decisions to target Africa (Blaak 2017, Interview).

Both the interviewees hold the same position, i.e., the Court is not biased. They referred to two sources for the present cases at the ICC – Self-referral and UNSC referral. Then the next question must be, ‘what is the role of the ICC in those two types of referrals?’ The interviewees answered, ‘no role’, the Prosecutor has no say over that situations. If so, at least in these two situations, it is not possible to criticize the Court as biased.

However, Mirjam Blaak told me her reasonable suspicion that some major contributors of the court may exert on the decision-making process of the prosecutor basically through the budgetary mechanism. She said:

Some major contributing states like, France, Canada, Germany, Britain, and Japan have more influence than others. That is why you always see their judges on the court. Cases can be influenced by giving budget the prosecutor needs, depending on whether they want that case to be started or not. In some cases when the prosecutor wants to inter to a case, like in the case of Cote d’Ivoire, they just say no, there is no money (Blaak 2017, interview).

From its face-value, the of the position of the interviewee seems contradictory with her previous position. Nevertheless, this one views the external pressure on the prosecutor that has nothing to do with the bias of the prosecutor. As she explained that pressure is basically through budgeting. That

means it does not necessarily affect the international independence, impartiality, and objectivity criterion set out in those policy documents.

The response from Justice Salomy Bossa to some extent agrees with the above assertion and she took somehow different look when she said:

The problem is that the politics creep into everything that is done at the international level. We had opted to avoid selective prosecutions in the ICC. But because some states have stronger voices, we continued selective prosecutions. Whereas in non-state parties, especially the UNSC selectively refers the case to the ICC. Prosecutions are selective in a sense they select one group and leave the other. For instance, they prosecuted Gbagbo and left the other side. So, politics is alive here. This is the legacy of the Nuremberg Tribunal where only the defeated were prosecuted (Bossa 2017, interview).

This argument of pursuing only one side justice is what Richard Overy calls “The Winners’ Justice” (Overy 2011, blog). Here the interview raised vital point where the biases ought to be challenged. The role of the politics is an essential part of her conclusion. On this point, Mirjam Blaak also told me the political oppositions took place after Uganda referred the case to the ICC. Several government officials felt that the referral was the wrong decision of the Ugandan Attorney General where the case was purely political that should not be referred to an external body. And she said,

Every case before the court can be said a political case, there is a government involvement in one or other way. The court is now having the challenge to remove the politics and look at the judicial aspect. Every case referral is political. But the court should not be interfered once referred (Blaak 2017, interview).

This raises the legitimacy problem. These political external challenges from the referring countries and from the UNSC can highly affect the legitimacy of the Court.

My interviewee from the ICC, Ms. Shamiso Mbizvo, answered my question from the view point of her Office, OTP. According to her, independence, impartiality, and objectivity are the guiding principles of the OTP on which the prosecutor does not have the discretion to obey or not, but only to obey. She stated as follows:

These principles of independence, impartiality and objectivity are the critical guiding principles for the OTP. They come from the Rome Statute. They are not discretionary principles. We are mandated to always be independent, impartial and objective. The Prosecutor cannot say ‘under my discretion I will investigate that country or this country’ and then just do so. Rather she must present evidence to a panel of independent judges to say, ‘I believe these evidences support the legal criteria for me to open an investigation’.

According to Ms. Shamiso, both the Prosecutor and the Judges are independent of any external pressures. She said:

The ICC is absolutely independent. The Rome statute has introduced two systems – the ASP and the Court which are completely independent of each other. The ASP is a political body or the legislator of the Statute and it does not have a say in any case. Whereas, the Court is the judicial body and works independently from the ASP or any other bodies (Shamiso 2017, Interview).

As she told, the OTP has many checklists and criteria to objectively select cases for preliminary investigation or to request authorization from the Court to start full-fledged investigations, and finally to open charge or to quite the

investigation. The preliminary investigation is first conducted by a team of legal professionals in the OTP. They submit their findings with recommendations to the Executive Committee of the OTP which is chaired by Chief Prosecutor. Finally, this committee decides over the case, not just a prosecutor alone (Shamiso 2017, interview). This position is what we have seen above in the policy documents.

Mr. Herman Bajwa fully agrees with Ms. Shamiso's assertion. He answered my question as follows:

The ICC has a Prosecutorial Policy which gives some sort of mechanism of accountability and criteria need to be satisfied to select what kind of cases should be given priority that serves the expectation of victims. The policy takes the interest of justice into consideration. It looks at what is important to the victims and affected communities and what they need to be prosecuted (Herman 2017, interview).

The former Chief Prosecutor of the ICC, Luis Moreno-Campo, said the following in responding to the question of targeting Africa and weak countries:

I am just investigating crimes committed in the states parties' territory. If you mention to me one country in my states parties that I'm not investigating, then you can tell me something. The rest of the world is a UN Security Council decision and then you can say there are still double standards. I would not say there are no more double standards in the world. I would say, do you believe it's not true, what we are saying about Libyan crimes? Is it not true what we say about the crimes committed by Thomas Lubanga, Joseph Kony, Jean-Pierre Bemba or President Bashir? (NewAfrican website 2012).

Fatou Bensouda also said the following on the same question of bias:

I have my strong views about the saying that the ICC is targeting Africa or African leaders. I don't agree with that. I think the ICC is working for Africa and for African victims. And I don't think any of us can deny that the atrocities that are happening in Africa are crimes and therefore within the jurisdiction of the ICC (NewAfrican website 2012).

She continued saying:

Every time people say the ICC is targeting Africa, it saddens me, especially as an African woman, and knowing that most of these conflicts are happening on the continent of Africa. All the victims in our cases are Africans. Why don't we look at the positive side? Why don't we look at the fact that African leaders are taking the lead in international criminal justice? (ibid.).

These two people are the center of the claim. All the bias claims are against them. They both argued from the viewpoint of the substance of the crime. They are arguing that since the suspects from Africa have been prosecuted for the violation of the crimes alleged to be overlooked in other countries such Syria, then it does not make difference if the prosecutor decides to pursue any of the cases. Because all are equal crimes under the Statute.

I think this is the main point if the divergence of perception. For instance, Mirjam Blaak said that,

what brings this issue of bias is the question why the ICC is not going to other parts of the world, like in the situation of Iraq, and Palestine which are states parties as well (Blaak 2017, interview).

I think they stand on opposite sides to each other. The interviewee is evaluating the biases from the point of equal treatments and asking why others

do not prosecute, whereas the prosecutors answer that both are crimes, and there would not be a bias if any of them is brought to justice.

Bensouda argued that the Court is doing justice for Africa, and there is no bias. She also claimed the fact that all cases before the Court can show the commitment of Africa to the international justice. This is the same with the position of Ankumah when she said,

The ICC does for Africa what it was set in place to do: work on criminal justice for the benefit of victims and potential victims. What I can say, as one who has observed the court from its inception is that accused persons do in principle get a fair trial. The ICC does contribute to justice (Ankumah 2016: AFLA website).

6.2. Immunity for Sitting Heads of State

On this issue of immunity of sitting heads of state, one of my interviewees replied me as follows:

It is indisputable under international law that peremptory norms are binding on all states. So, the crimes of international concern trump any kind of diplomatic arrangement, treaties agreements, or immunity. If you implement the Rome Statute into your national law, that will trump and repeal any previous arrangements concerning immunity. There is no law that grant immunity for genocide. So, the debate might be which crimes come under the peremptory norm. If you signed the Rome Statute, then you already agreed (Herman 2017, interview).

He claimed crimes under the Rome Statute are parts of peremptory norms. Classifying some crime as the peremptory norm is not an easy task. Literature show that crimes such as war crimes, crimes against humanity, genocide, aggression, and torture are recognized as peremptory norms

(Akande and Shah 2011: 833). But still, there is an issue of universality factor. No one can underline that this and that crime are peremptory.

Another interviewee replied as follows:

For me, it is clear that there is no immunity for Rome Statute crimes. For me, this is actually the purpose of the Rome Statute. What is new about the ICC is that it is a statute that codifies this principle that there is no longer immunity for sitting heads of state. You will be accountable regardless of your official statute (Shamiso 2017, interview).

This argument goes with article 27 (2) of the Rome Statute Which states as follows:

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

This sub-article proves that the Rome Statute does not accept all forms of immunity, whether functional or personal or that accorded by customary international law (Lind 2016, website). Article 27 is a treaty by which states parties agreed to waive the immunity accorded as per international law (Customary international law) or national (Schabas 2010: 450).

My interviewee from South Africa replied as follows:

The tension is between Customary International Law and the Rome Statute. The Rome Statute lifted immunity under the customary international law, but only for member states. Non-member states still enjoy immunity (Andre 2017, interview).

This position is the most controversial for the case between President Omar Al-Bashir and the ICC. Since Sudan is not a state party, the Rome Statute cannot remove the immunity accorded to the sitting heads of state by the customary international law (Lind 2016, website). The Vienna Convention also says, “A treaty does not create either obligations or rights for a third State without its consent” (UN 1969b: Art. 34). As the decision of PTC-I of 4 March 2009 between the Prosecutor and Omar Al-Bashir ascertains, the immunity of Omar Al-Bashir is lifted as per resolution 1593 of the UNSC (Prosecutor v. Omar Al-Bashir 2009: para. 40).

However, the decision made by the same Chamber concerning the same parties to the suit on 12 December 2011 completely revokes any immunity claim for violation of international crimes regardless of being states parties or not. It reads as follows:

Therefore, the Chamber finds that the principle in international law is that immunity of either former or sitting Heads of State cannot be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States not parties to the Statute whenever the Court may exercise jurisdiction [...] (Prosecutor v. Omar Al-Bashir 2011: para. 36).

In relation to article 27 of the Rome Statute, another controversial article is article 98 of the Statute. This article prioritizes obligations under the Statute with that of international obligation. It provides that states are not obliged to obey the ICC order if that order contradicts with another obligation under the international law. This article is found to be in contrary to article 27 (Lind 2016, website). The contradiction is that article 27 puts no obstacle on the jurisdiction of the Court. However, article 98 puts obstacle. According to the latter, member states cannot arrest and surrender a suspect if that would

contradict with the international obligation that country owes to the other (Rome Statute 1998: Art. 27 and 98).

The response of Mirjam Blaak is the same with this assertion. She said that:

This is the main problem we have with the ICC. Always there is a problem if the Court tries to indict a sitting head of state. I don't agree with the assertion that immunity removes accountability. They will be subjected to accountability after they leave their power. What we say is if you suddenly start arresting a head of state, it could result in great instability in the country. There is no precedence on the prosecution of sitting head of state. Vienna Convention on diplomatic immunity is also there. So, it is better to wait until he leaves the power (Blaak 2017, interview).

Some argue that this kind of argument is not convincing. If the leaders know that they are going to be accountable, they may use their power as a shield to escape accountability (Peter 2016:06).

Justice Salomy Bossa held a different position from Mirjam Blaak. According to Bossa:

The very purpose of the ICC is to fight impunity. When you fight impunity, you have to first fight the big fishes who are really behind the atrocities. If you give immunity to those big fishes, then you lose everything (Bossa 2017, interview).

Amb. Mirjam Blaak does not agree with what Justice Bossa argued. She argued:

The constitution of many countries in the world grants immunity for sitting head state. The is the customary international law, it is not what African leads brought. Heads of state are immunized in many countries (Blaak 2017, interview).

Mr. Allan Ngari answered me the following:

According to the Rome Statute, article 27(2) official capacity is no bar to bring the case to the court. Whether you are a head of state or ordinary citizen, if you commit the ICC crimes then the ICC will have jurisdiction over you. Under international law, we know that there is a customary international law that accords immunity for heads of state. This is clear from the ICJ decision on DRC vs Belgium on what exactly customary international law is. However, the same court has equally said that there could be different interpretations for the international tribunals (Allan 2017, Interview).

This argument agrees with the 2002 decision of the ICJ concerning the arrest warrant between the DRC v. Belgium where the Court decided immunity claim may not work for the commission of international crimes (The Arrest Warrant Case 2002: para. 61).

6.3 Prosecutorial V. Transitional Justice

“Since the ICC became operational in 2002, we have witnessed an unprecedented integration between peace and security and international justice,” said the ICC Chief Prosecutor Fatou Bensouda (Bensouda 2013, blog).

She continued saying:

Yet despite this, we consistently hear voices questioning whether perpetrators of crimes against humanity, war crimes, and genocide should always be prosecuted. This question has long been asked:

Peace or Justice? Shall we strive for peace at all costs, sacrificing justice on the way, or shall we soldier on in the pursuit of justice to end impunity? (ibid.).

The question she asked is the question I also asked to my interviewees. This question basically questions the universality of these concepts. How they are perceived in different societies at different places.

My interviewee Ms. Shamiso replied me that there are two ways to look at the debate between peace and justice. The first way is:

To realize that the court is not the Superman of the world, i.e., the court is not there to solve every problem of the world. It is created just to prosecute three crimes, crimes against humanity, war crimes, and genocide and if it is activated the crime of aggression. So, bring peace is not the mandate of the court. If you bring accountability in the world through the prosecution of these crimes, then we hope that will have a deterrent effect to make militias and policemen to think twice before taking any action. We hope this will end up in peace. But this is a benefit, the actual goal is to prosecute these crimes (Shamiso 2017, interview).

She continued with her second way to look at this problem:

Secondly, I don't believe justice and peace are opponents. Because you have to also think that are you talking about peace at short term or in the long term. In my assessment from my colleagues, the reason we are here is that for the sake of the world in the long term we have to build more justice. Because if we make sure the people are accountable for what they do, there will be less international crimes in the future (Shamiso 2017, interview).

She argued the justice the ICC stands for is a true justice the dreams for lasting peace. She stated that:

So, for me, it's not true that justice is an enemy of peace. But rather I believe true peace requires justice. Thus, without justice as the foundation, the peace is not real. Because when you have a community that has been victimized, and then they see the people victimized them flourishing with no accountability, is that real peace? Or will you have another cycle when they have the opportunity of reprisals? Especially in circumstances where no one is accountable, then you will have a cycle of violence. So, I don't think that peace and justice are incompatible. I think justice is a prerequisite for lasting peace. But, we need to work it together (Shamiso 2017, interview).

Bensouda agrees with this view of Shamiso when she said: -

Past negotiations have done just that: sacrificed justice for peace. Yet history has taught us that the peace achieved by ignoring justice has mostly been short-lived, and the cycle of violence has continued unabated (Bensouda 2013, blog).

Ms. Shamiso's first view is contrary to what the AU and its PSC urge for. As PSC boldly indicated in its decision, "[...] the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace" (AU Peace and Security Council 2008: Para.3). As the Chairperson of the AU Yakaya Kikwete, Tanzanian President said peace is the priority in the conflict areas (Heavens 2008, blog). Several AU's decision also shows that the AU and its supporters interest in the Court is to engage in both issues, both as the mandate of the Court and giving priority for peace and security. This does not mean to escape accountability, rather to consider the

timing factor that the investigation and prosecution not to devastate peace and security of the region (Jalloh 2014: 48).

Prosecutor Fatou Bensouda also described this issue almost similarly. She said, “The ICC is an independent and judicial institution, it cannot take into consideration the interest of peace, which is the mandate of other institutions, such as the UNSC” (Bensouda 2013, blog). She believes justice has a preventive role in peace and positively influence it, “by setting a clear line of accountability” (ibid.).

For Mr. Allan, the problem lies in understanding transitional justice. He said the following:

There has been a misunderstanding as to what transitional justice is. Transitional justice encompasses a retributive model, restorative model, and it includes issues related to truth commissions, it includes issues related to reparations, it definitely includes guarantees of non-recurrence of violence, it includes looking at institutions within a post-conflict States to try and address the past effectively. Transitional justice means to look at all these mechanisms that are mentioned together, holistically. They're meant to be complementary, they're not meant to be in competition (Allan 2017, interview).

He continued explaining the flaws of prosecutorial justice model as follows:

Unfortunately, the **prosecutorial justice model** takes retributive as the most important. You cannot choose one over the other. So, where one model has been preferred over another, fortunately, that community finds itself in the same place that it was before (Allan 2017, interview).

This position of Mr. Allan was also expressed by Bensouda. She argued that:

The debate about peace versus justice or peace over justice is a patently false choice. Peace and justice are two sides of the same coin. The Road to peace should be seen as running via justice, and thus peace and justice can be pursued simultaneously (Bensouda 2013, blog).

Both Mr. Allan and Bensouda agree that both justice and peace are not separable. However, the position of Bensouda contradicts with her previous statement where she said the ICC does not have mandate to look at the peace element.

Ambassador Mirjam Blaak gave me the following response:

As an African, I always support the idea to solve African problems with African solutions. We don't have to go to international criminal court to solve our problems. I think Africans look to certain situations very different from Europeans. We have many good values which are lost in the West. We can use these values. Why are other values of Europe better than ours? Why should we be persuaded to their values? We need to protect ours, we need to protect our identity. So, we need to continue our traditions and values. We don't necessarily always look to the Americans and Western countries as there is better which is not truth (Blaak 2017, interview).

Mirjam Blaak argues for the national mechanism and she calls that 'African good value'. But this argument is not persuasive. Because it is in Africa where major human rights crisis have been taking place. It is true that the Africa has a variety of good cultures and values. These cultures and values need to evaluate from the perspective of justice – to prevent crimes, redress victims, and its contribution to perpetual peace. Fatou Bensouda has a question for such type of position: "Why peace had proven elusive in a country

such as Uganda long before the arrest warrants against the leaders of Lord's Resistance Army were issued?" (Bensouda 2013, blog).

Chapter 7: Conclusion

In my paper, I have tried to identify and analyze main controversies between the ICC and the African. I selected the cases of Sudan and Kenya as they are the main sources of the controversies. Accordingly, I have used primary and secondary data sources to answer my research question, 'What are the contending positions between the ICC and the African actors regarding the Court's involvement in the international crimes committed in African?'.

I used two umbrella theories, the universality of international law and legitimacy of international institutions, and concepts. From the universality perspective, I found several differences of perception of concepts supposed to be similarly understood. This difference attached to the understanding and perception is the main reason for the parties to fall into conflict.

From the legitimacy theory, I have seen that there is a legitimacy problem due to the third-party interferences in the works of the court. The African actors tend to legitimize the domestic mechanism of solving conflicts. They are very skeptical about the universal justice system. Therefore, they are very protective in their relationship with international institutions.

Immunity of sitting heads of state and the choice of peace versus justice are the two basic controversies between the two parties.

Literature and judicial decisions show that, in general, there is no immunity for international crimes included under the Rome Statute. The Court

exercises jurisdiction irrespective of any status. The immunity of sitting heads of state of the non-state party is still controversial. The Statute has incorporated two contradicting provisions, article 27 and 98. According to Vienna Convention, states do not benefit or obliged to a treaty they did not consent. In our case, even though Sudan is not a party to the Statute, the Court has been exercising jurisdiction based on the resolution of the UNSC. However, the Court passed a decision that international Courts are not bound by the immunity principle since this principle is meant to govern the relationship between states, not between states and international Courts.

African actors opted for transitional justice than prosecutorial justice in fragile situations. Supporters of the international justice criticize the transitional justice as it does not yield lasting peace. The international justice advocates argue that lasting and future peace and security must be given priority than short-term peace talks and negotiations. But both peace and justice are important. It is not possible to see one from the other.

The ICC uses complementary jurisdiction. It steps into the case when the national judicial system fails to take measures to investigate and prosecute international crimes or unable to do so. Always, the primary jurisdiction belongs to a national justice mechanism. This is a deliberate arrangement to respect the sovereignty of states. Therefore, the national justice system in Africa need to be strengthened to exercise its jurisdiction.

The better choice for both parties in the conflict is to take a chair and talk about their common goals. The destination of both the AU and ICC is the same - fighting impunity. To fight together, it needs to plan together. To plan together, it needs to think together. Unfortunately, the current reality is different.

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Appendix

Appendix 1. 1

Questionnaire

INTERVIEW GUIDE

1. How do you evaluate the role of the ICC in bringing peace and security in the continent?

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2. What do you think is the main controversy between them?

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3. How do you evaluate the case selection method of the prosecutor?

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4. How do you understand the position of Africa regarding the Court's involvement in the continent?

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5. How do you evaluate the debate over immunity of sitting heads of state?

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6. What is your take on the peace v Security debate?

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